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Article

Fiduciary-Based Standards for Bailout Contractors: What the Treasury Got Right and Wrong in TARP

Kathleen Clark[†]

INTRODUCTION

In 2008 the United States faced a financial crisis of epic proportions.¹ The federal government responded by bailing out many of the largest financial services companies.² The bailouts began in the spring of 2008 and expanded later that year with the passage of legislation authorizing the Troubled Asset Relief

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1. See HENRY M. PAULSON, JR., ON THE BRINK: INSIDE THE RACE TO STOP THE COLLAPSE OF THE GLOBAL FINANCIAL SYSTEM 250–62 (2010) (giving a personal account of some important events in the financial crisis).

2. Steven M. Davidoff & David Zaring, *Regulation by Deal: The Government's Response to the Financial Crisis*, 61 ADMIN. L. REV. 463, 508–25 (2009) (providing an overview of the financial crisis and the government's sprawling series of bailouts).

[T]he government forced the sales of one of the five largest investment banks, the largest thrift in the country, and a number of consumer banks. . . . [It] took over the country's largest insurer and nationalized the two government-sponsored enterprises that mortally suffered from the popping of the housing bubble. . . . [It] forc[ed] the nation's nine largest remaining financial institutions to accept \$125 billion of government equity It flooded the global markets with liquidity and entered the commercial paper market on a massive scale. . . . [a]nd . . . rescue[d] . . . Citigroup and Bank of America, two of the nation's largest financial institutions.

Id. at 465; see also Karen Weise & Dan Nguyen, *Interactive: Which Banks Got Emergency Loans from the Fed During the Financial Meltdown?*, PROPUBLICA (Dec. 1, 2010, 6:45 PM), <http://projects.propublica.org/tables/treasury-facilities-loans>.

Program (TARP).³ Rather than examining *whether* the government should have bailed out these companies, this Article examines one aspect of *how* the government bailed them out: its reliance on outsiders—instead of government employees—to implement the bailout program.⁴ In particular, this Article focuses on the imposition of fiduciary standards on the outsiders who implemented the bailout.

Part I of this Article shows that the Treasury Department (Treasury) delegated primary responsibility for implementing the bailout to outsiders, and explains that this kind of outsourcing is common in the federal government. Part II describes how Treasury imposed fiduciary-based ethics standards on these outsiders, and identifies both restrictions that are worth emulating and those that are troubling. Part III puts Treasury's actions into a broader context, showing that while the government imposes fiduciary-based ethics standards on its own employees, it generally does not impose them on its service contractor personnel. Finally, this Article argues that the Treasury's actual experience with bailout contractors should be studied more closely to assess the costs and benefits of imposing ethics standards on outsiders who do the government's work.

I. OUTSIDERS' RESPONSIBILITY FOR IMPLEMENTING THE BAILOUT

The TARP legislation recognized that Treasury would need not only financial resources for bailout recipients but also additional personnel so Treasury could administer the bailout program.⁵ It therefore authorized Treasury to hire additional employees.⁶ In light of the need to act quickly during the financial

3. Emergency Economic Stabilization Act of 2008, Pub. L. No. 110-343, § 101(a)(1), 122 Stat. 3765, 3767.

4. Davidoff & Zaring, *supra* note 2, at 469 n.10 (“The government . . . hire[d] a team of sophisticated investment bankers, lawyers, and asset managers to assist it in implementing the [bailout]. [I]t also contributed to the privatization of government functions . . .”). As of September 30, 2010, the Treasury had spent \$436.7 million on fifteen financial agency agreements and eighty-one contracts. CONG. OVERSIGHT PANEL, OCTOBER OVERSIGHT REPORT: EXAMINING TREASURY'S USE OF FINANCIAL CRISIS CONTRACTING AUTHORITY 5 (2010) [hereinafter CONG. OVERSIGHT PANEL, OCTOBER REPORT]; *see also* CONG. OVERSIGHT PANEL, MARCH OVERSIGHT REPORT: THE FINAL REPORT OF THE CONGRESSIONAL OVERSIGHT PANEL 130 (2011) [hereinafter CONG. OVERSIGHT PANEL, MARCH REPORT].

5. Emergency Economic Stabilization Act § 101(a)(1).

6. *Id.* (“The Secretary shall have direct hiring authority with respect to the appointment of employees to administer this Act.”).

crisis and the long delays often involved in hiring new federal employees, Congress authorized Treasury to hire outsiders to administer the bailout programs.⁷ The TARP legislation specified two different types of outsiders: contractors and financial agents.⁸

Much scholarly and other attention has been paid to government contractors (particularly in the wake of privatization efforts during the 1990s and the extensive use of contractors in the wars in Iraq and Afghanistan).⁹ Government contractors are private sector entities from whom the government purchases products or services.¹⁰ Less attention has been paid to the government's financial agents.¹¹ Financial agents are private-sector entities to whom the government delegates particular tasks, giving them governmental power or access to a government asset so that they can perform those tasks.¹² The Treasury's use of financial agency agreements dates back to the National Bank Act of 1864, which granted Treasury the authority to appoint banks as financial agents of the government.¹³

Several features of financial agents made them key to the Treasury's ability to outsource the TARP program. First, financial agents can act on behalf of the sovereign and have deci-

7. *Id.*

8. The legislation authorized the Treasury to "[d]esignat[e] financial institutions as financial agents" and "enter[] into contracts," including contracts for the temporary or intermittent services of experts and consultants under 5 U.S.C. § 3109. *See id.* § 101(a)(3)(B)(ii).

9. *See, e.g.*, PRATAP CHATTERJEE, HALLIBURTON'S ARMY: HOW A WELL-CONNECTED TEXAS OIL COMPANY REVOLUTIONIZED THE WAY AMERICA MAKES WAR, at xv–xvi (2009); ALLISON STANGER, ONE NATION UNDER CONTRACT: THE OUTSOURCING OF AMERICAN POWER AND THE FUTURE OF FOREIGN POLICY 2–7 (2009); PAUL R. VERKUIL, OUTSOURCING SOVEREIGNTY: WHY PRIVATIZATION OF GOVERNMENT FUNCTIONS THREATENS DEMOCRACY AND WHAT WE CAN DO ABOUT IT 147–50 (2007).

10. *See* 4 U.S.C. § 441c(a)(1) (2006).

11. The focus of much of the available literature is on traditional contractors. *See generally* CHATTERJEE, *supra* note 9; STANGER, *supra* note 9; VERKUIL, *supra* note 9.

12. 12 U.S.C. § 90 (2006) (authorizing government to employ national banking associations as financial agents); *United States v. Citizens & S. Nat'l Bank*, 889 F.2d 1067, 1069 (Fed. Cir. 1989) ("[T]he government as principal and in its sovereign capacity delegates to its financial agents some of the sovereign functions that the government itself would otherwise perform."); 31 C.F.R. §§ 202.1–.7 (2010); Bruce Shirk, *The Financial Crisis: Addressing Troubled Assets, Teapot Dome, Tainted Contracts and False Claims 1* (Oct. 9, 2008) (unpublished manuscript) (on file with author) ("The legislation provides for award of contracts to financial institutions to acquire, manage, and dispose of assets . . .").

13. *Citizens & S. Nat'l Bank*, 889 F.2d at 1069.

sionmaking authority that, at least in theory, cannot be outsourced to ordinary government contractors.¹⁴

Second, the government's agreements with financial agents are different from regular government contracts in that agreements with financial agents are not subject to the extensive set of statutes and regulations limiting the government's discretion in awarding and administering contracts.¹⁵ The process of choosing financial agents is more streamlined than that of choosing government contractors, enabling Treasury to avoid lengthy delays.¹⁶

Finally—and most important for the purposes of this Article—financial agents are *agents* in the eyes of the law.¹⁷ They stand in a principal-agent relationship with the government. By reason of their status as agents, they owe fiduciary duties to the government.¹⁸

Treasury embraced the statutory authority to use outsiders. It entered into agreements with fifteen financial agents and fifty-three contractors.¹⁹ Financial agents manage TARP investments.²⁰ Contractors perform others services, including auditing and legal services.²¹ Treasury has paid these contractors and financial agents more than \$400 million to administer TARP.²²

14. *Id.* at 1069–70; Policy Letter on Inherently Governmental Functions, 57 Fed. Reg. 45,096 (Sept. 30, 1992), available at <http://www.census.gov/procur/www/fssp/att10a.html>.

15. *Citizens & S. Nat'l Bank*, 889 F.2d at 1069 (holding that financial agency agreements are not subject to the federal procurement law which governs ordinary contracts).

16. See *Treasury's Use of Emergency Contracting Authority: Hearing Before the Cong. Oversight Panel*, 111 Cong. 17 (2010) (testimony of Gary Grippo, Deputy Assistant Secretary for Fiscal Operations and Policy, United States Department of the Treasury), available at <http://www.gpo.gov/fdsys/pkg/CHRG-111shrg65080/html/CHRG-111shrg65080.htm> (describing the differences between the process of selecting contractors and the process of selecting agents).

17. See *id.* at 2.

18. See *Citizens & S. Nat'l Bank*, 889 F.2d at 1069; cf. *Transactive Corp. v. United States*, 91 F.3d 232, 239–41 (D.C. Cir. 1996) (finding that financial institutions that administer an Electronic Benefits Transfer (EBT) system are not financial agents of the government).

19. CONG. OVERSIGHT PANEL, OCTOBER REPORT, *supra* note 4, at 5; see also CONG. OVERSIGHT PANEL, MARCH REPORT, *supra* note 4, at 130.

20. CONG. OVERSIGHT PANEL, OCTOBER REPORT, *supra* note 4, at 5.

21. *Id.* at 2 (“The largest TARP contracts have gone to law firms, investment management firms, and audit firms.”).

22. *Id.* at 5.

These outsiders performed “many of the TARP’s most critical functions.”²³ Most of the individuals who administer TARP are not government employees, but instead are employed by these outside organizations.²⁴ According to the Congressional Oversight Panel, Treasury engaged in “the wholesale delegation of the administration of [these] multi-billion dollar programs to outside entities.”²⁵

This “wholesale delegation” of the government’s work put the government at risk for abuse by those outsiders. As the next section explains, Congress and Treasury recognized that risk and put in place fiduciary-based ethics standards for those outsiders to prevent or deter such abuse.

II. IMPOSITION OF FIDUCIARY DUTIES ON OUTSIDERS ADMINISTERING THE BAILOUT

The TARP legislation itself, the regulations implementing that legislation, and the specific contracts between Treasury and outsiders all reflect the fiduciary nature of the relationship between the government and the outsiders administering the TARP program.²⁶ This Part describes the law of fiduciary relationships and shows how the TARP program explicitly and implicitly adopts fiduciary standards for the outsiders administering the bailout.

A. THE FIDUCIARY OBLIGATION

In most relationships between two parties, the law presumes that each party is equal to the other.²⁷ The parties themselves can define the contours of their relationship

23. *Id.*; see also U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-10-16, TROUBLED ASSET RELIEF PROGRAM: ONE YEAR LATER, ACTIONS ARE NEEDED TO ADDRESS REMAINING TRANSPARENCY AND ACCOUNTABILITY CHALLENGES 28 (2009), available at <http://www.gao.gov/new.items/d1016.pdf> (noting that the Treasury had fifty-two contractors and financial agents supporting TARP administration and operations).

24. See CONG. OVERSIGHT PANEL, OCTOBER REPORT, *supra* note 4, at 3 (“Treasury has only 220 staffers working on the TARP [while Fannie Mae] has 600 employees working to fulfill its TARP commitments.”).

25. *Id.* at 5.

26. See *infra* notes 51–59 and accompanying text. The government uses the term “contract” to refer to an arrangement with a contractor, the term “agreement” to refer to an arrangement with a financial agent, and the term “arrangement” to refer to both contracts and agreements. See CONG. OVERSIGHT PANEL, OCTOBER REPORT, *supra* note 4, at 5–6. This Article refers to all of these arrangements as contracts.

27. See Robert Flannigan, *The Fiduciary Obligation*, 9 OXFORD J. LEGAL STUD. 285, 287 n.20 (1989) (explaining the principal/principal relationship).

through contractual agreement.²⁸ Any agreement between them is presumed to reflect their intentions, and courts will enforce that agreement.²⁹

But the law treats differently certain types of relationships: those in which one party stands in a position of trust relative to the other.³⁰ In a relationship of trust, the trusted party is expected to act for the benefit of the other, and the law imposes a fiduciary obligation on the *trusted* party to ensure that she acts solely in the interest of the *trusting* party.³¹ These are called fiduciary relationships, and the trusted party is called a fiduciary.³² These relationships are governed not just by the explicit terms of any agreement between the parties, but by ad-

28. Robert Flannigan characterizes this as a “principal/principal relationship” and states that in such relationships “[n]o fiduciary obligation is presumed to exist.” *Id.* at 287. Flannigan asserts that “[a] principal/principal relationship exists, for example, between arm’s length buyers and sellers.” *Id.* at 287 n.20. This assertion is certainly accurate with regard to “buyers and sellers” of goods. Whether it is also true for “buyers and sellers” of services would depend on the nature of the services at issue. If the service involves one party giving advice to the other or one party gaining access to the other’s assets, then it would be a fiduciary relationship even if entered into through arm’s-length bargaining. For an example of this concept, see *United States v. Citizens & S. Nat’l Bank*, 889 F.2d 1067, 1068–69 (Fed. Cir. 1989) (noting that certain banks which placed bids in order to administer a reporting system entered an agency relationship).

29. See Deborah A. DeMott, *Beyond Metaphor: An Analysis of Fiduciary Obligation*, 1988 DUKE L.J. 879, 887 (“[T]hese creatures of contract law are controlled by the parties’ manifest intention . . .”). *But see* RESTATEMENT (SECOND) OF CONTRACTS § 208 (1981) (discussing when a contract is unenforceable because it is unconscionable).

30. See Kathleen Clark, *Do We Have Enough Ethics in Government Yet? An Answer from Fiduciary Theory*, 1996 U. ILL. L. REV. 57, 69; Flannigan, *supra* note 27, at 285; Tamar Frankel, *Fiduciary Law*, 71 CALIF. L. REV. 795, 800 (1983); Austin W. Scott, *The Fiduciary Principle*, 37 CALIF. L. REV. 539, 540 (1949); J.C. Shepherd, *Towards a Unified Concept of Fiduciary Relationships*, 97 L.Q. REV. 51, 75 (1981).

31. Flannigan, *supra* note 27, at 306 (“The critical feature of these relationships is that the fiduciary undertakes or agrees to act for or on behalf of or in the interests of another person in the exercise of a power or discretion which will affect the interests of that other person in a legal or practical sense.” (quoting *Hosp. Prods. Ltd. v U.S. Surgical Corp.* (1984) 156 CLR 41, 96–97 (Austl.))); *see also id.* at 307 (“[W]here by statute, agreement, or perhaps by unilateral undertaking, one party has an obligation to act for the benefit of another, and that obligation carries with it a discretionary power, the party thus empowered becomes a fiduciary.” (quoting *Guerin v. The Queen*, [1984] 2 S.C.R. 335, 384 (Can.))).

32. See BLACK’S LAW DICTIONARY 702 (9th ed. 2009) (“[A fiduciary is a] person who is required to act for the benefit of another person on all matters within the scope of their [fiduciary] relationship.”).

ditional terms imposed by the common law.³³ The law sees these relationships as valuable and will prevent fiduciaries from abusing their position of trust.³⁴

Fiduciary relationships arise in two distinct factual settings.³⁵ In the first, an influence-based trust relationship, a person trusts a fiduciary to influence her decision or action.³⁶ In the second, an access-based trust relationship, a person entrusts a fiduciary with access to an asset.³⁷ The asset could be tangible property, a financial instrument, or confidential information instead of an “influence” over the trusted party.³⁸

But the mere existence of influence or access is not enough to create a fiduciary relationship.³⁹ The influence or access must be coupled with an expectation (either subjectively intended or imposed by operation of law) that the party providing the influence or being given access will act in the interest of the trusting party.⁴⁰ If one party gives another access to her assets but there is no expectation that the other will use that access

33. See DeMott, *supra* note 29, at 887 (“[O]nce a court concludes that a particular relationship has a fiduciary character, the parties’ manifest intention does not control their obligations to each other as dispositively as it does under a contract analysis.”).

34. See, e.g., Michelle M. Harner, *Corporate Control and the Need for Meaningful Board Accountability*, 94 MINN. L. REV. 541, 542 (2010) (discussing how courts have used fiduciary law to curb corporate abuse).

35. Flannigan, *supra* note 27, at 309 (“There are . . . two kinds of trusts that will attract fiduciary status. They are, firstly, the trust which gives the trusted party the ability to exercise ‘influence’ over the trusting party and, secondly, the trust which allows the trusted party to acquire ‘access’ to the employment of assets.”).

36. Flannigan refers to this type as a “deferential trust.” *Id.*

37. Flannigan refers to this as a “vigilant trust.” *Id.*

38. The fiduciary obligation deters the fiduciary from acting in a way that would “have the effect of diverting or not maintaining the asset value.” *Id.* at 292. This is commonly referred to as “agency costs,” but Flannigan refers to them as “intermediary costs.” *Id.* at 289. Flannigan further explains:

Both types of trust in fact result in the trusted party acquiring “access” to the employment of assets. In the case of deferential trust, however, the access is indirect because it occurs through “influence” exerted by the trusted party. But in either case, and to the same extent, the “access” to assets may be turned to mischievous ends.

Id. at 309.

39. See *Peterson v. H & R Block Tax Servs., Inc.*, 971 F. Supp. 1204, 1214 (N.D. Ill. 1997) (finding that a client’s isolated transaction for basic tax preparation and advice was not enough to create a fiduciary relationship).

40. See, e.g., *Pommier v. Peoples Bank Marycrest*, 967 F.2d 1115, 1119 (7th Cir. 1992) (“The fact that one party trusts the other is insufficient. We trust most people with whom we choose to do business. The dominant party must accept the responsibility, accept the trust of the other party before a court can find a fiduciary relationship.” (citations omitted)).

for her benefit, then she has merely given the other a gift and no fiduciary obligation arises.⁴¹ Similarly, if someone is in a position to influence the actions of another, but there is no expectation that she should act on the other's behalf, then no fiduciary duty arises.⁴²

Courts have recognized the fiduciary nature of many different types of relationships, including those between trustees and beneficiaries, agents and principals, lawyers and clients, and employees and employers.⁴³ The precise contours of a fiduciary's obligation vary depending on the kinds of tasks the fiduciary is asked to perform.⁴⁴ Robert Flannigan has explained that the fiduciary obligation has four components: conflict, influence, partiality, and avoidance.⁴⁵ The *conflict* component of fiduciary obligation prohibits a fiduciary from putting herself in a position where her own interest conflicts with her duty toward the beneficiary.⁴⁶ More concretely, it prohibits a fiduciary from making a recommendation or using government property (including information) in a way that provides a benefit to herself or to others close to her rather than to the beneficiary.⁴⁷ The *influence* component subjects transactions between certain fiduciaries and their beneficiaries to heightened scrutiny to ensure that the fiduciary has not unduly influenced the beneficiary's decision to enter the transaction.⁴⁸ The *partiality* component requires fiduciaries given responsibility for allocating benefits among beneficiaries to treat beneficiaries of the same class equally and beneficiaries of different classes fairly.⁴⁹ The *avoidance* component prohibits certain fiduciaries from delegat-

41. Flannigan, *supra* note 27, at 308 ("Not every kind of access will be of a fiduciary character. A person may acquire access as a gift.").

42. See, e.g., KATHLEEN CLARK, ETHICS FOR AN OUTSOURCED GOVERNMENT: REVISED DRAFT 10 n.83 (2011), available at <http://www.acus.gov/wp-content/uploads/downloads/2011/03/Clark-Report-v.2.pdf> (noting that the fiduciary norm against conflicts of interest does not apply to "representative" members of federal advisory committees because they "represent particular industries or interest groups").

43. Clark, *supra* note 30. The common law has recognized that government employees owe the government fiduciary duties, and the extensive set of government ethics statutes and regulations largely reflect fiduciary obligations of government employees. See CLARK, *supra* note 42, at 18–19.

44. Clark, *supra* note 30, at 70 (discussing the task of defining the content of a fiduciary obligation by its component parts).

45. Flannigan, *supra* note 27, at 311–12.

46. See *id.* at 311.

47. See *id.*

48. See *id.*

49. See *id.* at 312.

ing their duties to others or putting themselves in a position where, because of conflict or other concerns, they could not act on behalf of the beneficiary.⁵⁰

As the following discussion demonstrates, the TARP legislation, regulations, and contracts all express the conflict component of the fiduciary duty owed by the outsiders who administer the TARP program. To a lesser degree, they also reflect the avoidance component of fiduciary duty obligations.

B. EXPLICIT AND IMPLICIT RECOGNITION THAT OUTSIDERS ADMINISTERING THE BAILOUT OWE FIDUCIARY OBLIGATIONS

This section discusses how the TARP legislation, its implementing regulations, and the TARP contracts themselves recognize the fiduciary position of the outsiders implementing the bailout program.

The TARP legislation implicitly recognized that outsiders implementing the TARP program would stand in a fiduciary position.⁵¹ This recognition appears in two different ways in the statute. First, the statute classified some of the outsiders who would implement the program as “agents,” a technical legal term that carries with it the fiduciary responsibilities of agency law.⁵² The statute authorized Treasury to “[d]esignate financial institutions as financial agents of the Federal Government.”⁵³ Financial agents owe the government fiduciary duties.⁵⁴

50. *See id.*

51. In addition to this *implicit* recognition of the fiduciary status of outsiders implementing the TARP, the statute *explicitly* imposed fiduciary duties on managers of any public-private investment funds by requiring that they acknowledge in writing their fiduciary duty to public investors. Emergency Economic Stabilization Act of 2008, Pub. L. No. 110-343, § 125, 122 Stat. 3765, 3791. The statute also invokes another term, “unjust enrichment,” that is sometimes associated with the fiduciary duty. *Id.* § 101(e). It requires the Treasury to “prevent unjust enrichment of financial institutions participating in [the] program . . . including by preventing the sale of a troubled asset to the Secretary at a higher price than what the seller paid to purchase the asset.” *Id.* But this provision addresses the financial institutions that would be recipients of TARP aid, not the outsiders (financial agents and contractors) that would implement the TARP program. *See id.* § 101(a). Here, the term “unjust enrichment” does not imply that these recipient financial institutions owe the government a fiduciary duty, but merely that they should not benefit unduly from government largesse by selling a “troubled asset” at a higher price than they paid for it. *See id.* § 101(e).

52. *See id.* § 101(c)(3).

53. *Id.*

54. *Id.*; *see also* U.S. DEP’T OF THE TREASURY, PROCESS FOR SELECTING ASSET MANAGERS PURSUANT TO THE EMERGENCY ECONOMIC STABILIZATION ACT OF 2008, at 1 (2008), *available at* <http://www.treasury.gov/press-center/>

The second way that the TARP legislation implicitly recognized the fiduciary position of those outsiders was its requirement that Treasury “address and manage [and] prohibit conflicts of interest that may arise in connection with . . . the selection or hiring of contractors or advisors, including asset managers,” the purchase and management of troubled assets, and “any other potential conflict of interest, as the Secretary deems necessary or appropriate in the public interest.”⁵⁵ This statutory attention to outsiders’ conflicts of interest is implicit recognition that those outsiders owe fiduciary duties. As discussed above, in most relationships, each party is considered to be equal and is not required to have any particular regard for the interests of the other party.⁵⁶ The very premise of contract law is that both parties will have conflicting interests and will protect those interests in negotiating an agreement between them.⁵⁷ It is only where one party is supposed to act to benefit the other that conflicts of interest are at issue.⁵⁸ One of the components of the fiduciary duty is that the trusted party must not put herself in a position where her interests conflict with her duty to the beneficiary.⁵⁹

Congress mandated that Treasury issue conflict-of-interest “[r]egulations or guidelines . . . as soon as practicable after the date of enactment.”⁶⁰ Treasury did so by issuing Interim Guidelines for Conflicts of Interest just three days after passage of TARP in October 2008⁶¹ and issuing regulations three months later.⁶² Treasury’s regulations are a thorough expression of the conflict component of the fiduciary duty—the prohibition on making decisions or giving advice where the decision or advice could advance the fiduciary’s interest rather than (or in addi-

press-releases/Documents/assetmanagers.pdf (“As financial agents, asset managers will have a fiduciary agent-principal relationship with the Treasury with a responsibility for protecting the interests of the United States.”).

55. Emergency Economic Stabilization Act § 108(a).

56. See Flannigan, *supra* note 27, at 287 n.20.

57. See DeMott, *supra* note 29, at 887 (“[T]hese creatures of common law are controlled by the parties manifest intention . . .”).

58. See, e.g., RESTATEMENT (SECOND) OF TORTS § 874 cmt. a (1977) (stating that a fiduciary duty arises when one party must act for the benefit of another).

59. See Flannigan, *supra* note 27, at 311.

60. Emergency Economic Stabilization Act § 108(b).

61. *Interim Guidelines for Conflicts of Interest*, U.S. DEPARTMENT OF TREASURY (Oct. 6, 2008), <http://www.treasury.gov/press-center/press-releases/Pages/hp1180.aspx>; see also CONG. OVERSIGHT PANEL, OCTOBER REPORT, *supra* note 4, at 8 (“Interim Final Rule [issued] on January 21, 2009.”).

62. See 31 C.F.R. §§ 31.200–.218 (2010).

tion to) that of the beneficiary.⁶³ The regulations impose comprehensive ethics standards on the contractors who perform services to implement TARP.⁶⁴ They address both the organizational conflicts of interest of the bailout contracting firms⁶⁵ and the personal conflicts of interest of those firms' employees.⁶⁶ They regulate the financial interests of contractor personnel,⁶⁷ their receipt of gifts,⁶⁸ outside employment,⁶⁹ and use of government resources.⁷⁰

The conflict component is implicated whenever a fiduciary has the responsibility to make or influence a decision that could affect her own interests as well as that of the beneficiary. The standard course is to prohibit a fiduciary from putting herself in a position where her decisions or advice could affect her own interests (or those of someone close to her).⁷¹ Alternatively, a fiduciary can disclose the conflict and give the beneficiary the opportunity to waive it.⁷²

The TARP regulations include both a narrow and a broad expression of the conflict component. The narrow provision prohibits contractor personnel who are responsible for giving advice about the purchase of troubled assets from selling such assets,⁷³ and it prohibits those who are responsible for valuing, managing, or disposing of troubled assets from purchasing them.⁷⁴ The broad provision prohibits certain contractor personnel from having "a personal, business, or financial interest . . . that could adversely affect [her] ability to perform[,] . . . her objectivity or judgment in such performance, or . . . her ability

63. See generally Flannigan, *supra* note 27, at 311 (discussing the "conflict" component of the fiduciary obligation).

64. See 31 C.F.R. § 31.200 ("This regulation addresses actual and potential conflicts of interest that may arise from contracts and financial agency agreements between private sector entities and the Treasury for services under TARP . . .").

65. *Id.* § 31.211.

66. *Id.* § 31.212; see also CLARK, *supra* note 42, at 23–24 (distinguishing between personal and organizational conflicts).

67. *Id.* § 31.201. The TARP regulation does not impose restrictions directly on contractor personnel. Instead, it mandates that contractors ensure that their employees "have no personal conflicts of interest." *Id.* § 31.212(a).

68. *Id.* § 31.213(a)(1).

69. *Id.* § 31.214.

70. *Id.* § 31.213(a)(2) ("Treasury property"); *id.* § 31.217 ("nonpublic information").

71. Clark, *supra* note 30, at 85.

72. An additional option is for the fiduciary to find ways to mitigate the conflict of interest. 48 C.F.R. § 9.506(b)(1) (2010).

73. 31 C.F.R. § 31.214(b).

74. *Id.* § 31.214(a).

to represent the interest of the Treasury.”⁷⁵ This restriction reaches not just the interests of the individuals performing TARP work, but also the interests of their family members.⁷⁶ This regulatory language is so broad that it is difficult to discern its dimensions. Thus, Treasury requires that these contractor personnel disclose any such interests to the TARP contractor.⁷⁷ After this disclosure, the TARP contractor has three options: (1) certify that the relevant personnel have no conflicts, (2) create a plan to mitigate those conflicts and seek Treasury’s approval of that plan, or (3) seek Treasury’s waiver of the conflicts.⁷⁸

The conflict component is also implicated when a fiduciary accepts a gift from someone who has an interest in the decisions the fiduciary makes or the advice that she gives.⁷⁹ The issue is whether the fiduciary may be influenced in her decisionmaking or advice giving by such a gift. Since it can be difficult or impossible to detect whether a fiduciary is actually influenced in this way, the standard course is to prohibit a fiduciary from accepting such gifts or permit them to accept only gifts of minimal value.⁸⁰ The Treasury regulations take the first approach, prohibiting TARP contractor personnel from accepting and soliciting gifts from anyone whose interests could be substantially affected by the contract.⁸¹

Another aspect of the fiduciary duty reflected in TARP is the prohibition on using for one’s own benefit property that belongs to a beneficiary.⁸² The property may be tangible, or it may be information. The fiduciary duty protects both, as do Treas-

75. *Id.* § 31.201(5). The TARP regulation does not impose restrictions directly on contractor personnel. Instead, it mandates that contractors ensure that their employees “have no personal conflicts of interest.” *Id.* § 31.212(a).

76. *Id.* § 31.212(b) (“[A personal conflict of interest includes an individual’s] personal, business, and financial relationships, as well as those of their spouses, minor children, and other family members with whom the individuals have a close personal relationship that would cause a reasonable person with knowledge of the relevant facts to question the individual’s ability to perform, his or her objectivity or judgment in such performance, or his or her ability to represent the interests of the Treasury.” (emphasis added)).

77. *Id.* The regulation specifies that this disclosure must be at least as detailed as that required of high-level executive branch officials. *Id.* § 31.217(c)(5).

78. *Id.* § 31.212(d).

79. Clark, *supra* note 30, at 79.

80. *See, e.g.*, 5 C.F.R. § 2635.302 (2010) (gift restrictions on government employees).

81. 31 C.F.R. § 31.213(a)(1).

82. *Id.* § 31.213(a)(2).

ury's regulations. TARP contractor personnel are prohibited from "improper use of Treasury property,"⁸³ and are prohibited from both disclosing and using "nonpublic information."⁸⁴ The TARP regulations also require contractors to train any personnel who receive nonpublic information on their duty of confidentiality.⁸⁵

Treasury's approach is not just comprehensive but also flexible. While all bailout services are presumptively covered by the restrictions, Treasury allows the TARP Chief Compliance Officer to exempt contracts for "administrative services" that do not implicate fiduciary concerns.⁸⁶

Fiduciary principles are found not just in the TARP legislation and Treasury's regulations, but also in Treasury's specific contractual agreements with outsiders. In its agreements with financial agents, the financial agents must acknowledge that they "owe[] a fiduciary duty of loyalty and fair dealing to the United States" and "agree[] to act at all times in the best interests of the United States."⁸⁷ In addition to this explicit statement of their fiduciary duties, the agreements also implement the conflict and avoidance components of the fiduciary duty, requiring the disclosure and mitigation of conflicts of interest⁸⁸

83. *Id.*

84. *Id.* § 31.217(b)(1). The TARP regulation defines "nonpublic information" as "[a]ny information that Treasury provides to a [contractor] . . . or that the [contractor] obtains or develops pursuant to the arrangement . . . until the Treasury determines otherwise in writing, or the information becomes part of the body of public information from a source other than the retained entity." *Id.* § 31.217(a).

85. *Id.* § 31.217(c)(3).

86. *See id.* § 31.200(b) (addressing contractual conflicts of interest between the private sector and the Treasury).

87. *See, e.g., Financial Agency Agreement for Custodian, Accounting, Auction Management and Other Infrastructure Services for a Portfolio of Troubled Mortgage-Related Assets*, U.S. DEPARTMENT TREASURY, § 5 (Dec. 29, 2008), http://www.treasury.gov/initiatives/financial-stability/about/procurement/faa/Financial_Agency_Agreements/Bank%20of%20New%20York%20Mellon.pdf [hereinafter *Financial Agency Agreement*]; *see also id.* § 18.C ("[A contractual default occurs when] the Financial Agent breaches a fiduciary duty to the United States with respect to its responsibilities under this FAA.").

88. *See, e.g., id.* § 12.H ("The Financial Agent covenants to disclose all actual or potential organizational conflicts of interest, including conflicts with the interests of any corporate parents, affiliates, and subsidiaries, and to avoid, mitigate, or neutralize to the extent feasible and to the Treasury's satisfaction any personal or organizational conflicts of interest that may be identified by the Treasury or the Financial Institution.").

and prohibiting agents from delegating to others the work to be performed.⁸⁹

These financial agency agreements (FAAs) also protect confidential information. They require financial agents “to use any confidential information or assets of the United States received or developed in connection with this FAA solely for the purposes of fulfilling its duties to Treasury and not for its own commercial purposes or for those of a third party.”⁹⁰ They prohibit financial agents from disclosing confidential information except to Treasury employees and others “who have a legitimate need to know the information to assist in the proper performance of services required by” the agreement.⁹¹ These provisions express a fiduciary’s obligation not to exploit a beneficiary’s asset: the confidential information that belongs to the beneficiary.

Some aspects of these agreements go beyond legitimate protection for a beneficiary’s confidential information. They prohibit financial agents from “mak[ing] statements to the media or issu[ing] press releases regarding their services under this FAA without the prior written consent of the Treasury.”⁹² They prohibit the agent from revealing the agreement to third parties⁹³ (although Treasury eventually posted redacted versions of all TARP FAAs and contracts on the web⁹⁴). But what is most striking is that the agreements implement the confidentiality obligation in a particularly strict way. They require that “prior to any submission for publication, any book, article, column or other written work for general publication that is based upon any knowledge . . . obtain[ed] during the course of . . . work in connection with the Treasury,” financial agent personnel must submit such manuscripts to the government for

89. *See, e.g., id.* § 13 (“The Financial Agent shall use only its own employees and employees of corporate affiliates to perform services under this FAA, unless the Financial Agent obtains the prior written consent of the Treasury to use contractors to perform such services.”).

90. *Id.* § 5.

91. *Id.* § 6.D.

92. *Id.* § 25.B.

93. *Id.* § 25.C.

94. *See About Financial Stability*, U.S. DEPARTMENT TREASURY, <http://www.treasury.gov/initiatives/financial-stability/about/procurement/faa/pages/faa.aspx> (last visited Apr. 10, 2011) (listing the financial agency agreements); *see also* OFFICE OF THE SPECIAL INSPECTOR GEN. FOR THE TROUBLED ASSET RELIEF PROGRAM [SIGTARP], INITIAL REPORT TO THE CONGRESS 22 (Feb. 6, 2009), *available at* http://www.sigtar.gov/reports/congress/2009/SIGTARP_Initial_Report_to_the_Congress.pdf (noting that on December 2008 SIGTARP asked that all TARP agreements be posted on the web, and that on January 28, 2009, the Treasury announced that it would do so).

review.⁹⁵ The personnel also “assign to the Federal Government all rights, royalties, remunerations and emoluments that have resulted or will result or may result from any disclosure, publication, or revelation of confidential information not consistent with the terms of this Agreement.”⁹⁶ These prepublication review requirements apply not just to TARP financial agents, but also to TARP contractors.⁹⁷ They exceed a mere prohibition on the disclosure of confidential information, imposing a prior restraint. They also require outsider personnel to check with Treasury before publishing anything related to the TARP work. While the government can and should protect the confidentiality of some TARP-related information, not every aspect of TARP work is confidential. Treasury’s TARP regulations do not mention prepublication review, and its decision to include this provision in its contracts has escaped the scrutiny of the TARP oversight bodies and the press.

Prepublication review agreements are not entirely unprecedented. The government has imposed them in at least one other context: intelligence. While most government employees and contractor personnel who are given access to classified information are subject to confidentiality agreements, intelligence personnel also sign prepublication review agreements.⁹⁸ When a former Central Intelligence Agency (CIA) employee published a book without going through prepublication review, the government sought a constructive trust on his earnings from the book.⁹⁹ The Supreme Court sustained the constitutionality of his prepublication review agreement, recognizing the acute sensitivity of the information entrusted to CIA personnel.¹⁰⁰ It imposed a constructive trust on this former employee’s royalties, noting his fiduciary status.¹⁰¹ But it is by no means clear that the information entrusted to TARP contractors is of similar sensitivity to that entrusted to intelligence personnel or that it justifies the extreme measure of a prior restraint.

95. Financial Agency Agreement, *supra* note 87, exhibit D, ¶ 7.

96. *Id.*

97. *E.g.*, Contract No. TOFS-09-0009 with Simpson Thacher & Bartlett for legal services, Attachment J-1 Non-Disclosure Agreement, ¶ 7 (“I will submit to the Treasury for security review, prior to any submission for publication, any book, article, column or other written work for general publication that is based upon any knowledge I obtain during the course of my work in connection with the Treasury.”).

98. *Snepp v. United States*, 444 U.S. 507, 507–08 (1980).

99. *Id.* at 508.

100. *Id.* at 515–16.

101. *Id.*

III. FIDUCIARY DUTIES: ATYPICAL FOR CONTRACTORS, BUT TYPICAL FOR EMPLOYEES

While government bailouts may be exceptional events,¹⁰² the government's decision to rely on contractors to implement the bailout was far from exceptional. The government routinely relies on contractors to perform nearly all of its functions.¹⁰³ If you pick almost any government task and examine who is actually performing it, you are likely to find that contractor employees—rather than or in addition to government employees—are performing that task.¹⁰⁴

This reliance on contractors is true throughout the federal government, but some agencies rely more heavily on contractors than others.¹⁰⁵ In some agencies, more than half of the

102. See Cheryl D. Block, *Measuring the True Cost of Government Bailout*, 88 WASH. U. L. REV. 149, 152 (2010) (“[T]he extent and variety of recent government bailouts have been extraordinary . . .”).

103. See PHILLIP J. COOPER, GOVERNING BY CONTRACT: CHALLENGES AND OPPORTUNITIES FOR PUBLIC MANAGERS 11 (2003) (“[A]gencies do not have the capacity to deliver directly the services and perform the tasks with which they are charged by law . . . [and] are forced to depend on contractors.”); Donald F. Kettl, *After the Reforms*, GOV'T. EXECUTIVE, Apr. 1988, at 38 (“The federal government . . . does relatively little itself. [I]t does most of its work through contracts with the for-profit and not-for-profit sectors, grants to state and local governments, special provisions in the tax code, and regulations on corporate and individual behavior.”).

104. See PAUL C. LIGHT, THE TRUE SIZE OF GOVERNMENT 197–98 (1999) (demonstrating the general decrease in civil service jobs and increase in contract jobs across a variety of government agencies); Dan Guttman, *Governance By Contract: Constitutional Visions*, 33 PUB. CONT. L.J. 321, 322–23 (2004) (“In the global transformation from Government to governance . . . the United States pioneered in the renewed deployment of private contractors to perform the basic work of Government.”). See generally VERKUIL, *supra* note 9, at 2–3, 31–33, 47, (describing how federal contracting spans military, environmental, natural disaster relief, homeland security, and transportation concerns).

105. The Department of Energy relies heavily on their contractors, prompting one analyst to say that the “Energy Department is little more than a hollow shell over a vast network of contractors.” Kettl, *supra* note 103, at 38. Similarly, much of NASA's work is done by contractors. Lodge 1858, Am. Fed'n of Gov't Emps. v. Webb, 580 F.2d 496, 502 (D.C. Cir. 1978) (“[C]ongress directed reductions in NASA's *civil service* work force at the same time that it continued to approve its budget requests for funds to meet its obligations under its support service contracts . . .”); U.S. GEN. ACCOUNTING OFFICE, GAO-03-119, HIGH RISK SERIES: AN UPDATE, NATIONAL AERONAUTICS AND SPACE ADMINISTRATION CONTRACT MANAGEMENT (2003) (“Much of NASA's success depends on the work of its contractors . . .”); Guttman, *supra* note 104, at 333 (“NASA . . . was created with a fundamental dependence on contractors.”); Ariana Eunjung Cha, *At NASA, Concerns on Contractors*, WASH. POST, Feb. 17, 2003, at A1, available at 2003 WLNR 18648342 (indicating that contractors train crew, draw up flight plans, “dominate mission control,” and perform shuttle maintenance and upgrades all with little or no oversight).

“workforce” consists of individuals who are actually employed by contractors.¹⁰⁶ The tasks that contractor personnel perform are sometimes mundane, such as mowing lawns. But in other cases, the tasks are more sensitive or sophisticated, such as giving advice about how to structure or implement particular programs.¹⁰⁷

An extensive array of ethics statutes and rules regulate the ethics of government employees,¹⁰⁸ and these restrictions largely reflect employees’ fiduciary duties.¹⁰⁹ They restrict employees’ financial interests, acceptance of gifts, outside activities, use of government resources (including information), and the kinds of work permissible after leaving the government.¹¹⁰ These restrictions generally help to ensure that employees make decisions in the interest of the government rather than a private interest.¹¹¹

On the other hand, the government generally does not impose ethics restrictions on the personnel of government contractors.¹¹² It does not even have any systematic way of monitoring whether contractor personnel have conflicts of interest. The government has imposed restrictions based on the financial interests of the companies that have government contracts, but

106. See Press Release, Senate Homeland Sec. & Gov’t Affairs Comm., Lieberman, Collins Astounded DHS Contract Workers Exceed Number of Civilian Employees (Feb. 24, 2010), available at http://hsgac.senate.gov/public/index.cfm?FuseAction=Press.MajorityNews&ContentRecord_id=01a96af1-5056-8059-7687-4190c852b289 (presenting a letter sent by senators to Secretary Janet Napolitano expressing surprise that the DHS has more contractor personnel than civilian employees). Similarly, “the vast majority of people working on the TARP today receive their paychecks from private companies, not the federal government.” CONG. OVERSIGHT PANEL, OCTOBER REPORT, *supra* note 4, at 3. The number of Treasury Department employees working on all TARP programs totals only 220, while a single TARP contractor has over 600 employees working on TARP. *Id.*

107. See Kathleen Clark, *Financial Conflicts of Interest in and out of Government*, 62 ALA. L. REV. (forthcoming 2011) (manuscript at 4), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1785520 (describing the work of Treasury contractor Dan Jester in connection with the bailout of AIG).

108. See Clark, *supra* note 30, at 58, 63–67 (describing the expansion of ethics regulation).

109. See CLARK, *supra* note 42, at 13 (“Congress and the executive branch have also recognized the fiduciary nature of government power by enacting statutes and regulations that reflect employee’s fiduciary duties.”); Clark, *supra* note 30, at 73–77 (explaining why the fiduciary obligation is an appropriate foundation for government ethics regulation).

110. CLARK, *supra* note 42, at 5–7.

111. *Id.* at 12–14.

112. *Id.* at 23 (“Most of the government ethics statutes and regulations described [in the report] do not apply to government contractor personnel . . .”).

they generally do not reach the interests of individual employees of those contractors.¹¹³ With these TARP regulations, Treasury became only the seventh federal agency to adopt ethics regulations for contractor personnel.¹¹⁴

CONCLUSION

Some commentators criticize the government's extensive reliance on contractors.¹¹⁵ But the government has legitimate reasons for outsourcing some services to contractors rather than having its own employees perform these tasks. First, outsourcing enables the government to obtain expertise and skills not found among government employees.¹¹⁶ Second, it enables the government to respond quickly and flexibly to a sudden crisis, giving it a surge capacity to temporarily increase its workforce for tasks lasting months or a few years rather than decades.¹¹⁷

113. Some have argued that these organizational conflicts of interest are actually aimed at protecting the interests of other government contractors more than the interests of the government itself. *See, e.g.*, Daniel Guttman, *Organizational Conflicts of Interest and the Growth of Big Government*, 15 HARV. J. ON LEGIS. 297, 312–13, 316–17 (1978).

114. *See* CLARK, *supra* note 42, at 28 (indicating the Treasury as one of seven agencies with regulations).

115. *See, e.g.*, Dan Guttman, *The United States Enrichment Corporation: A Failing Privatisation*, 23 ASIAN J. PUB. ADMIN. 247, 265–67 (2001) (concluding that the U. S. Enrichment Corporation failed and proposing reasons for its failure).

116. *See* ASS'N OF THE BAR OF THE CITY OF N.Y., CONFLICT OF INTEREST AND FEDERAL SERVICE 148–49 (1960) (indicating the government can get expertise from individuals they could not otherwise employ); BAYLESS MANNING, FEDERAL CONFLICT OF INTEREST LAW 31 (1964) (“[Contracting has] made it possible to turn to government use and public advantage the talents of many . . . who would not have been willing to become regular government employees.”).

117. *See, e.g.*, DEP'T OF HOMELAND SEC. OFFICE OF INSPECTOR GEN., HURRICANE KATRINA TEMPORARY HOUSING TECHNICAL ASSISTANCE CONTRACTS 2 (2008), available at http://www.dhs.gov/xoig/assets/mgmtrpts/OIG_08-88_Aug08.pdf (“FEMA human capital resources were not sufficient to coordinate the massive and urgent logistical response effort without substantial assistance. FEMA awarded contracts to four contractors . . .”). Ironically, the Inspector General investigation previously cited was itself outsourced to an accounting firm, and the Inspector General's office merely added a three-paragraph preface and a coversheet. *See* Letter from Jocelyn Hill, Partner, Williams, Adley & Company, LLP, to Mathew Jadacki, Deputy Inspector Gen., Office of Inspector Gen., Dep't of Homeland Sec. (Mar. 20, 2008), in HURRICANE KATRINA TEMPORARY HOUSING TECHNICAL ASSISTANCE CONTRACTS, *supra* (available prior to the table of contents of the Inspector General investigation). Some argue that outsourcing saves the government money, see Steven J. Kelman, *Achieving Contracting Goals and Recognizing*

Both of these factors played a role in the government's decision to rely on contractors in connection with its bailout of financial institutions. The government enlisted contractors to perform a wide range of services: legal services, the valuation of assets to be sold, the management of assets whose ownership would be maintained, and auditing.¹¹⁸

When the government decides to rely on outsiders rather than its own employees to perform a task, it needs to determine whether those outsiders should be subject to fiduciary-based standards. Not all contractors should be. But contractors who can influence government decisions or have access to government resources (including confidential information) should be subjected to fiduciary-based ethics standards.

Congress and Treasury have imposed a comprehensive set of ethics restrictions on the outsiders implementing the TARP program. These restrictions reflect the fiduciary nature of the outsiders' role: the government has entrusted them with access to government assets, and is trusting them to influence government action. Several aspects of the ethics standards for TARP contractors are relatively unusual, including: reaching not just the individual interests of contractor personnel, but also the interests of their family members; requiring contractor personnel to disclose their financial interests; and providing the flexibility to exempt "administrative services" from enhanced ethics standards. Another unusual feature of Treasury's contracts with outsiders was its imposition of prepublication review agreements—something that appears to be unprecedented outside the intelligence field.

Treasury's decision to rely on outsiders was not unusual, but its decision to impose fiduciary-based ethics restrictions on the outsiders implementing TARP was. Its actual experience in imposing these standards should be studied more closely to as-

Public Law Concerns: A Contracting Management Perspective, in GOVERNMENT BY CONTRACT: OUTSOURCING AND AMERICAN DEMOCRACY 153, 180 (Jody Freeman & Martha Minow eds., 2009) (suggesting government jobs do not pay enough to keep some of the talent in the private sector). But there is no consensus on this issue. Compare Chris Edwards, *Public Sector Unions and the Rising Costs of Employee Compensation*, 30 CATO J. 87, 90 tbl.1 (2010) (indicating that compensation for state and local workers is higher than private sector employees), with Jeffrey Keefe, *Debunking the Myth of the Over-compensated Public Employee: The Evidence* (EPI Briefing, Paper No. 276, 2010), available at http://epi.3cdn.net/8808ae41b085032c0b_8um6bh5ty.pdf (detailing the controversy surrounding public sector compensation).

118. See CONG. OVERSIGHT PANEL, OCTOBER REPORT, *supra* note 4, at 23 fig.3.

sess the costs and benefits of imposing fiduciary-based ethics standards on outsiders who do the government's work. The government is currently considering imposing some of these features, including financial disclosure requirements, on a broader set of contractor personnel: those who assist the government in contracting.¹¹⁹ The costs involved in implementing this kind of financial disclosure regime and the First Amendment concerns raised by the imposition of prepublication review should be examined more closely before the government expands these approaches to protecting the public trust.

119. Preventing Personal Conflicts of Interest for Contractor Employees Performing Acquisition Functions, 74 Fed. Reg. 58,584–89 (Nov. 13, 2009) (to be codified at 48 C.F.R. pts. 3, 52).

APPENDIX: ETHICS RESTRICTIONS ON EMPLOYEES OF
BAILOUT CONTRACTORS

ETHICS RESTRICTIONS ON BAILOUT CONTRACTOR PERSONNEL

Issue	Contracts Affected	Personnel Affected	Prohibition
financial interests	all	“key individuals” ^a & “management officials performing work under the” contract ^b	“a personal, business, or financial interest of an individual, his or her spouse, minor child, or other family member with whom the individual has a close personal relationship, that could adversely affect the individual’s ability to perform under the arrangement, his or her objectivity or judgment in such performance, or his or her ability to represent the interests of the Treasury” ^c
gifts	all	officers, partners, & employees	accept / solicit favors / gifts / items of monetary value from any individual or entity whom the retained entity / officer / partner / employee knows is seeking official action from Treasury in connection with the arrangement or has interests which may be substantially affected by the performance or nonperformance of duties to Treasury under the arrangement ^d
conflicting employment	involving acquisition / valuation / management / disposition of specific troubled assets	management officials performing work under the arrangement & key individuals	purchase / offer to purchase / assist anyone in purchasing / offering to purchase assets ^e
	involving giving advice re: purchase of troubled assets		sell / offer to sell / act on behalf of any with respect to sale of asset to Treasury ^f
government information	all	management officials performing work under the arrangement & key individuals ^g	“Disclose nonpublic information to anyone” “Use or allow the use of any nonpublic information to further any private interest” ^h
government property	all	officers, partners, & employees	“Improperly use or allow the improper use of Treasury property for the personal benefit of any individual or entity other than the Treasury” ⁱ

IMPLEMENTATION MECHANISMS

Contractor Must Obtain Disclosures / Certifications from Its Personnel

Personnel Affected	Required Disclosure / Certification
“key individuals” & “management officials performing work under the” contract	<p>“information . . . in writing about their personal, business, and financial relationships, as well as those of their spouses, minor children, and other family members with whom the individuals have a close personal relationship that would cause a reasonable person with knowledge of the relevant facts to question the individual’s ability to perform, his or her objectivity or judgment in such performance, or his or her ability to represent the interests of the Treasury”^j</p> <p>certification that they will not disclose nonpublic information, or use or allow the use of nonpublic information to further any private interest^k</p> <p>the information described above at a level of detail at least as extensive as the public financial disclosures required of high-level officials (Office of Government Ethics Form 278)^l</p>

Disclosure of Financial Interests / Certification of No Conflicting Interests to Agency

Personnel Affected	Required Disclosure / Certification
“key individuals” & “management officials performing work under the” contract	certify that these individuals have no personal conflicts of interest, or are subject to a mitigation plan or waiver approved by Treasury ^m

Train Employees About Ethics Standards

Employees Affected	Provision
all “persons receiving nonpublic information”	must provide “[p]eriodic training to ensure that [they] know their obligation to maintain its confidentiality and to use it only for purposes contemplated by the arrangement” ⁿ

Agency Official Charged with Evaluating Conflicts

Official	Responsibilities
TARP Chief Compliance Officer	identifies “administrative services” that are exempt from COI regulations ^o receives contractors’ written notification of OCIs ^p & disclosure / use of nonpublic information ^q evaluates whether proposed measures adequately mitigate PCIs ^r can waive PCIs ^s can waive any regulatory requirement “that is not otherwise imposed by law when it is clear from the totality of the circumstances that a waiver is in the government’s interest” ^t

a. A “key individual” is “an individual providing services to a private sector entity who *participates personally and substantially*, through decision, approval, disapproval, recommendation, or the rendering of advice, in the negotiation or performance of, or monitoring for compliance under” the contract. 31 C.F.R. § 31.201 (2010) (emphasis added).

b. *Id.* § 31.212(a). A “management official” is “an individual within a retained entity’s organization who has substantial responsibility for the direction and control of the retained entity’s policies and operations,” including members of a management committee or executive committee or (in entities without such a committee) general partners. *See id.* § 31.201.

c. *Id.* § 31.201. The TARP regulation does not impose restrictions directly on contractor personnel. Instead, it mandates that contractors ensure that their employees have no personal conflicts of interest. *Id.*

d. *Id.* § 31.213(a)(1).

e. *Id.* § 31.214(a).

f. *Id.* § 31.214(b).

g. *Id.* § 31.217(c)(5). The TARP regulation does not impose confidentiality requirements directly on contractor personnel. Instead, it imposes these confidentiality restrictions on the contracting entity and requires that the entity obtain from these individuals nondisclosure agreements. *Id.*

h. *Id.* § 31.217(b). The TARP regulation defines “nonpublic information” as “[a]ny information that Treasury provides to a [contractor] . . . or that the [contractor] obtains or develops pursuant to the arrangement . . . until the Treasury determines otherwise in writing, or the information becomes part of the body of public information from a source other than the retained entity.” *Id.* § 31.217(a).

i. *Id.* § 31.213(a)(2).

j. *Id.* § 31.212(b).

k. *Id.* § 31.217(c)(5).

l. *Id.* § 31.212(b).

m. *Id.* § 31.212(d).

n. *Id.* § 31.217(c)(3).

o. *Id.* § 31.200(b).

p. *Id.* § 31.211(f).

q. *Id.* § 31.217(c).

r. *Id.* § 31.212(c).

s. *Id.* § 31.212(c).

t. *Id.* § 31.215.