



# Legal Fees Paid Under the Troubled Asset Relief Program: An Expanded Report

Special Inspector General for the Troubled Asset Relief Program



**OFFICE OF THE SPECIAL INSPECTOR GENERAL**  
**FOR THE TROUBLED ASSET RELIEF PROGRAM**  
1801 L STREET, NW, 4<sup>TH</sup> FLOOR  
WASHINGTON, D.C. 20220

September 28, 2011

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

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

**SUBJECT:** Legal Fees Paid Under the Troubled Asset Relief Program: An Expanded Report (SIGTARP 11-004)

We are providing this audit report for your information and use. It is our expanded report on legal fees paid under the Troubled Asset Relief Program, which was created by the Emergency Economic Stabilization Act of 2008. The Office of the Special Inspector General for the Troubled Asset Relief Program conducted this audit under the authority of Public Law 110-343, as amended, which also incorporates the duties and responsibilities of inspectors general under the Inspector General Act of 1978, as amended.

We considered comments from the Department of the Treasury when preparing the final report. The comments are addressed in the report, where applicable, and a copy of Treasury's response to the audit is included in Appendix K – Management Comments, of this report. Names of individuals and proprietary contractor pricing information have been redacted in this final report.

We appreciate the courtesies extended to our staff. For additional information on this report, please contact Mr. Kurt Hyde, Deputy Special Inspector General for Audit and Evaluation ([Kurt.Hyde@treasury.gov](mailto:Kurt.Hyde@treasury.gov) / 202-622-4633), or Ms. Kimberley A. Caprio, Assistant Deputy Special Inspector General for Audit and Evaluation ([Kimberley.Caprio@treasury.gov](mailto:Kimberley.Caprio@treasury.gov) / 202-927-8978).



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

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

## Introduction

The Department of the Treasury (“Treasury”) has paid law firms millions of dollars for professional services related to the Troubled Asset Relief Program (“TARP”). The Office of the Special Inspector General for the Troubled Asset Relief Program (“SIGTARP”) audited Treasury’s processes for contracting for and payment to five of these law firms. From the inception of TARP to March 31, 2011, Treasury’s Office of Financial Stability (“OFS”), which administers TARP, paid these five law firms more than \$27 million in fees and expenses. SIGTARP began an audit of OFS policies and practices governing OFS contracts with the five law firms in May 2010 as part of SIGTARP’s continuing oversight of TARP and in response to a request from Senator Tom Coburn, M.D. (SIGTARP Engagement Code 021.) Senator Coburn was interested in how OFS awarded contracts for professional services, whether firms’ labor rates were consistent with industry norms, and whether taxpayers were getting the best value for these services. SIGTARP’s reporting objectives were to determine whether OFS contracting processes for legal services ensure:

- contractors submit invoices (“fee bills”) that accurately reflect the work performed; and
- contractors charge fair and reasonable prices.

As SIGTARP conducted its audit, it found weaknesses in the OFS contract for legal services with Venable, LLP (“Venable”), as well as the OFS procedures for review of Venable’s fee bills. Venable’s fee bills to OFS happened to be the first law firm’s bills audited by SIGTARP. SIGTARP’s initial review of other law firms’ contracts and fee bills at the time the Venable report was issued suggested that they too raised similar weaknesses and issues. In light of the magnitude of legal fees that continue to be paid by OFS under TARP, SIGTARP decided to issue a report based on its findings on Venable’s bills and made four recommendations designed to provide OFS an opportunity to quickly strengthen its policies, controls, and contracts to better protect taxpayers. OFS agreed to implement SIGTARP’s recommendations. That report – “Treasury’s Process for Contracting for Professional Services under TARP,” SIGTARP 11-003 (the “Venable report”) – was issued April 14, 2011, and is available at [www.SIGTARP.gov](http://www.SIGTARP.gov).

This report presents the results of SIGTARP’s audit of the remaining four law firms’ contracts and fee bills. The four firms are:

- Simpson Thacher & Bartlett LLP (“Simpson Thacher”);
- Cadwalader Wickersham & Taft LLP (“Cadwalader”);
- Locke Lord Bissell & Liddell LLP (“Locke”); and

- Bingham McCutchen LLP (“Bingham”), formerly McKee Nelson LLP.<sup>1</sup>

As of March 31, 2011, OFS had paid these four law firms more than \$25.5 million in legal fees and expenses that were subject to SIGTARP’s audit. SIGTARP conducted this audit between May 2010 and May 2011, and in accordance with generally accepted government auditing standards prescribed by the Comptroller General of the United States. For a discussion of the audit’s scope and methodology, see Appendix A.

SIGTARP found weaknesses in the OFS contracts with the four firms for legal services and OFS policies for reviewing and paying legal fee bills. The findings were similar to SIGTARP’s previous report. SIGTARP found that the four firms submitted, and OFS paid, bills that contained one or more of the following:

- no descriptions of the work performed;
- vague descriptions of the work performed;
- descriptions of more than one task in the time entry (“block billing”);
- expense charges without adequate support; and
- administrative charges not allowed under the contract.

Because of the lack of adequate detail in the fee bills and lack of support for expenses, in many instances, OFS would not have been able to assess adequately the reasonableness of individual hourly charges and expenses.

SIGTARP likewise was not able to assess the reasonableness of most of the law firms’ fees. SIGTARP questioned \$8.1 million of the \$9.1 million (89%) of legal fee bills reviewed. The most striking example of fees questioned by SIGTARP is from the law firm Simpson Thacher. Simpson Thacher billed OFS \$5.8 million in fees and expenses with bills that provided no detail whatsoever as to the work performed. Further, Simpson Thacher did not provide any receipts, or adequate documentation, for its expenses as required in one of its contracts, and billed for expenses under another contract that did not allow expenses. SIGTARP questioned all \$5.8 million in fees and expenses OFS paid to Simpson Thacher. Without knowing what specific work was included in the charges, OFS could not have determined whether the fees and expenses the firm was paid were properly allocable to the contract, allowable pursuant to financial regulations, and reasonable, which are the requirements of the Federal Acquisition Regulation (“FAR”).

Although SIGTARP questioned fee bills from all of the law firms audited, this does not mean that all the fees and expenses SIGTARP questioned were unreasonable. Instead, it means that the information provided in the bills was

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<sup>1</sup> McKee Nelson LLP merged with Bingham McCutchen LLP in August 2009. The new firm uses the Bingham McCutchen name. In November 2009, OFS accepted the contractor’s request to novate the contract (substitute a new contract for the old one) and recognized Bingham McCutchen as the successor. All terms and conditions of the contract remained the same.

insufficient to allow SIGTARP – or OFS – to fairly assess their reasonableness. Overall, OFS should determine the allowability of \$7,980,215 in unsupported legal fees and expenses paid to the law firms, and disallow and seek recovery from Simpson Thacher for \$91,482 in ineligible fees and expenses paid that were specifically not allowed under the OFS contract. Further, Simpson Thacher billed for staff in unapproved “counsel” and “senior counsel” labor categories not included in its contract or task orders, and OFS was not consistent in its payment for those labor categories – sometimes reimbursing the charges at partner rates and other times at associate rates. Overall, while this may have reduced OFS’ legal fees, the substitution of labor categories and rates after contract award was not documented in contract modifications.

In the Venable report, SIGTARP concluded that OFS contracts and fee bill review practices created an unacceptable risk that Treasury, and therefore the American taxpayer, was overpaying for legal services. Therefore, SIGTARP made four recommendations. OFS agreed to implement SIGTARP’s recommendations and adopted new guidance for law firms on preparation of fee bills. OFS told SIGTARP that it sent that guidance to all of the law firms with which it currently has contracts and provided additional training to OFS staff. SIGTARP will continue to monitor OFS’ progress in implementing SIGTARP’s recommendations.

In determining whether the prices the law firms charged OFS were fair and reasonable, SIGTARP first reviewed the OFS contract award process and found that the process was adequate and in compliance with applicable provisions of the FAR, which governs Federal executive agencies’ acquisition of supplies and services. OFS awarded all contracts with the five firms that SIGTARP reviewed, including Venable, under a provision in the FAR that allows the use of other than full and open competition due to an unusual and compelling urgency, and SIGTARP found that OFS followed multiple established procedures in accordance with the FAR. Although OFS had narrowed the competitive field by selecting firms that would receive a request to submit an offer to the Government (rather than soliciting offers from all interested sources as would be required under a full and open competition), OFS solicited, received, and evaluated multiple offers before awarding these contracts. Further, even though OFS also limited offeror response times and OFS evaluation times so contracts could be awarded quickly, SIGTARP concluded that the OFS process provided adequate price competition.

However, notwithstanding the professional service prices in the contract, SIGTARP found that OFS paid Simpson Thacher the full amount Simpson Thacher billed for its foreign subcontractor, even though the charges were at rates significantly above the ceiling rate in the contract. OFS paid more than \$520 per hour above the maximum allowable partner rate, \$220 above the maximum allowable associate rate, and \$152 more than the maximum legal assistant rate. Notwithstanding the fact that there was no need for OFS to pay more for these

services since Simpson Thacher had already agreed in its contract to provide these services at a lower rate, SIGTARP found no documentation to justify OFS paying the higher rates. In total, OFS overpaid Simpson Thacher \$68,936 for the work of this subcontractor, and OFS should seek reimbursement of the amount paid in excess of the maximum rates provided for in the contract. SIGTARP considers these costs ineligible for reimbursement under OFS contract provisions.

In this report, SIGTARP is making new recommendations for OFS to determine the allowability of unsupported legal fees and expenses and recover ineligible legal fees and expenses paid to the four law firms, as well as all other law firms. To further improve controls over the review and payment of legal fee bills, OFS should also require pre-approval of all contracted legal staff and pre-justification of their billing rates. SIGTARP's specific recommendations are discussed later in this report.

## The OFS Contracts with the Four Law Firms Did Not Include Sufficiently Detailed Billing Requirements or Instructions

Similar to what SIGTARP found in the Venable contract, SIGTARP found that the contracts with these four law firms did not contain detailed billing requirements, instructions regarding the preparation of fee bills, or specific guidance on allowable costs and services. Instead, the contracts incorporated only general payment information by reference to two FAR provisions governing payment. SIGTARP also examined the task orders issued under the contracts, but none included any additional invoice or billing requirements. The task orders did include instructions on how to email fee bills to Treasury's vendor pay system for payment, but did not provide instructions on how the fee bills should be structured or how attorneys and paralegals should document and report their time for each activity.

OFS contracts with the law firms ultimately govern allowable services and costs. As SIGTARP reported previously, if OFS had included specific, detailed provisions regarding billing methods, and allowable services and costs in its contracts, or had more effective internal procedures for reviewing legal fee bills, the billing issues SIGTARP identified should not have been allowed.



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

SIGTARP found weaknesses in OFS' then-existing procedures for reviewing invoices from contractors because the procedures lacked sufficient detail. As previously discussed in more detail in SIGTARP's Venable report, SIGTARP reviewed the OFS "Contracting Officer Technical Representative (COTR) Nomination and File Organization Procedures" ("COTR procedures") and the OFS "Administration Procedures" to determine whether these procedures are sufficient to ensure payments are made only for invoices submitted by contractors that adequately and accurately reflect the work performed and that only include allowable costs. The COTR procedures state, in Section 4.3.1.2, Contract Performance Management, that COTR duties may include, "Reviewing contractor invoices to ensure costs are allocable to the contract, allowable pursuant to financial regulations, and reasonable." However, the procedures do not provide specifics on allowable and unallowable costs, services, and charges; nor are COTRs separately provided this information as a guide to perform reviews of the fee bills. The OFS procedures do not provide specific instructions or guidelines that would serve as a basis for COTRs to review and question invoices.

As reported previously, OFS COTRs interviewed by SIGTARP confirmed that there were no written standards for the invoice review process. The OFS COTRs told SIGTARP that they employ informal processes that begin when the contractor submits an invoice and status report that includes hours and dollars spent. The COTRs stated that they review all documentation for accuracy and reasonableness and typically communicate with the various OFS business teams and others receiving a contractor's work to determine whether the time and information reported are accurate. They also review invoices submitted by other vendors for similar tasks and compare them to the invoice they are examining. The COTRs informed SIGTARP that when conducting their reviews of legal contracts in particular, they look for issues such as unauthorized attorneys working on the contract, double billing, or "other direct costs"<sup>2</sup> not covered by the contract such as automated legal research, long-distance telephone calls, and commercial messenger and delivery services. According to the COTRs, unless the contract states that other direct costs are reimbursable, they are not paid. The COTRs told SIGTARP they employed all of these informal processes when reviewing the fee bills that were the subject of this audit.

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<sup>2</sup>"Other direct costs" are contract-related expenses for anything other than direct labor charges.

## SIGTARP's Criteria for Reviewing Fee Bills Paid by OFS Were Based on the FAR and Best Practices of Other Federal Entities

Without the benefit of detailed guidance to law firms in the OFS contracts or detailed OFS internal procedures for its staff to review the bills, SIGTARP looked to the following guidance (which is more extensively explained in SIGTARP's Venable report):

- FAR clauses expressly incorporated in the OFS legal service contracts; and
- general provisions in the FAR governing labor-hour contracts.

In addition, SIGTARP looked to best practices of other Federal entities, particularly the Federal Deposit Insurance Corporation ("FDIC"), which has a long history of contracting with law firms to provide legal representation and advice to the agency to assist it in the management and liquidation of assets and liabilities from closed, insured banks.<sup>3</sup> The FDIC *Outside Counsel Deskbook* directs, among other things, the billing practices of law firms working with FDIC. It includes:

- requirements for outside counsel to prepare a budget at the commencement of a matter and submit detailed fee bills on a regular basis in accordance with the budget;
- submission instructions, including requirements for monthly billing and for billing within 30 days of the last day of the contractor's billing cycle;
- descriptions and lists of billable and non-billable fees and expenses, including documented approval and retention of receipts for non-overhead expenses; and
- invoice format, including requirements and examples for:
  - detail and description of services or activities (time billed for each activity should be identified separately; block billing – the combination of different types of activities in one entry on the invoice – is prohibited, even if the same individual performed the activities, unless the total time charged is no more than 30 minutes);
  - time increments (billing in increments of greater than 0.1 hour – 6 minutes – is unacceptable);
  - itemization of expenses; and

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<sup>3</sup> Outside counsel under contract to FDIC provide a broad range of services, including liquidation of failed insured depository institutions; bankruptcy and creditors' rights; collections; foreclosures; real estate and financial transactions including debt restructuring; general business and corporate law advice; professional, director, and officer liability issues; and other litigation. As of July 31, 2010, FDIC's website ([www.FDIC.gov](http://www.FDIC.gov)) listed more than 900 law firms on its "List of Counsel Available."

- travel reimbursements, similar to requirements in Government travel regulations.

SIGTARP also reviewed practices used by the Department of Justice's United States Trustee Guidelines,<sup>4</sup> and local rules of court established by the Delaware Bankruptcy Court.<sup>5</sup>

Using the FAR and best practices of these Federal entities, SIGTARP prepared a list of potential billing issues and then evaluated a sample of legal fee bills paid by OFS by comparing each individual hourly labor charge in the fee bills to the list of potential billing issues.<sup>6</sup> All potential billing issues SIGTARP assessed are listed in Appendix B.

The sampled fee bills represent about \$9.1 million of the total \$25.5 million OFS paid the four law firms that were subject to SIGTARP's audit in this report, or 36% of total billings. The value of each of the law firms' legal fees that SIGTARP audited is shown in Table 2 of Appendix A.

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<sup>4</sup>The Bankruptcy Reform Act of 1994 amended the responsibilities of the United States Trustees under 28 U.S.C. 586(a)(3)(A) to provide that, whenever they deem appropriate, United States Trustees will review applications for compensation and reimbursement of expenses under section 330 of the Bankruptcy Code, 11 U.S.C. 101, et seq., in accordance with procedural guidelines adopted by the Executive Office for United States Trustees. The guidelines are available at [http://www.justice.gov/ust/eo/rules\\_regulations/guidelines/docs/feeguide.htm](http://www.justice.gov/ust/eo/rules_regulations/guidelines/docs/feeguide.htm).

<sup>5</sup>Although SIGTARP assessed Rule 2016-2 (d) from the Local Rules for the United States Bankruptcy Court, District of Delaware, which became effective February 1, 2009, all bankruptcy courts have similar standards for fees, whether contained in local rules or not. The Delaware Bankruptcy Court is considered a leading bankruptcy court for standards because of the number of corporations registered in the state. The rule is available at <http://www.deb.uscourts.gov/LocalRules/LOCAL%20RULES%202009.pdf>.

<sup>6</sup>SIGTARP selected the largest fee bills submitted by the four law firms.

## For the Four Law Firms, SIGTARP Found Block Billing, Either No Descriptions of Work or Vague Descriptions of Work, and Administrative Charges – All of Which OFS Should Have Questioned Before Payment

In an effort to assess the reasonableness of the \$9.1 million sample of fee bills, SIGTARP compared descriptions of work performed by each contracted attorney or paralegal (collectively “timekeepers”) in each individual time charge on the sampled fee bills to the list of potential billing issues in Appendix B. SIGTARP questioned any item that:

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

After reviewing each charge, SIGTARP classified it as:

- “allowable,”<sup>7</sup> when no exception to the FAR or SIGTARP’s list of potential billing issues was noted;
- “unallowable,” when the cost was not allowed as prescribed by FAR 31.201-2, or fit the description of a charge included in SIGTARP’s list of potential billing issues in Appendix B; or
- “unsupported,” when the description of work did not contain enough information for SIGTARP to determine whether the task met the five FAR 31.201-2 requirements<sup>8</sup> to be “allowable” or whether it fit the description of a charge included in SIGTARP’s list of potential billing issues.

Where there were no descriptions of the specific work performed, SIGTARP questioned all of the fees. Where there were descriptions of the work, SIGTARP assessed the description of work performed in each individual time charge.

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<sup>7</sup> FAR Subpart 31.2, Contracts with Commercial Organizations, prescribes the determination and proper treatment of costs in Government contracts with commercial organizations. Specifically, subsection 31.201-1 describes the composition of total cost, and subsections 31.201-2 through 31.201-4, respectively, describe the principles used to determine whether costs are properly *allowable*, *reasonable*, and *allocable* to Government contracts.

<sup>8</sup> Under FAR 31.201-2, a cost is allowable only when it complies with all of the following five requirements. The cost must: (1) be reasonable (not exceed that which would be incurred by a prudent person in the conduct of a competitive business), (2) be allocable (incurred specifically for the contract), (3) meet standards promulgated by the Cost Accounting Standards Board or generally accepted accounting principles, (4) be within the terms of the contract, and (5) be within any limitations set forth by FAR Subpart 31.2, which prescribes the determination and proper treatment of costs in Government contracts with commercial organizations.

SIGTARP questioned \$8.1 million, or 89%, of the fee bills reviewed. Including the amounts questioned for Venable in SIGTARP's previous report, SIGTARP questioned \$8.7 million of \$10.1 million in legal fees audited, or 86%. Table 1 identifies the costs SIGTARP questioned for each sampled law firm. The fact that SIGTARP questioned these costs does not mean that all of the money paid should be recovered from the law firms. Instead, it means that OFS should request and receive additional information from the law firms to justify payment under the FAR as being properly allocable to the contract, allowable, and reasonable, and in accordance with the best practices of other Federal entities.

TABLE 1

<b>QUESTIONED LEGAL FEES</b>			
<b>Law Firm</b>	<b>Audited Fees and Expenses</b>	<b>Questioned Fees and Expenses</b>	<b>Percent of Audited Fees Questioned</b>
Simpson Thacher & Bartlett LLP <sup>1</sup>	\$5,883,206	\$5,883,206	100%
Cadwalader Wickersham & Taft LLP <sup>2</sup>	2,869,998	1,983,685	69%
Locke Lord Bissell & Liddell LLP	272,243	146,867	54%
Bingham McCutchen LLP (novated from McKee Nelson LLP)	67,383	57,939	86%
<b>Subtotal Related to This Report</b>	<b>\$9,092,830</b>	<b>\$8,071,697</b>	<b>89%</b>
Venable LLP <sup>3</sup>	1,027,049	676,840	66%
<b>Total for This Audit</b>	<b>\$10,119,879</b>	<b>\$8,748,537</b>	<b>86%</b>

Notes: Numbers affected by rounding.

<sup>1</sup> Simpson Thacher's contract number TOFS-09-0009 is still active. Between 02/04/2011, when OFS provided SIGTARP fee bills for audit, and 03/31/2011, OFS paid additional Simpson Thacher fee bills totaling \$83,824. The additional fee bills were not subject to SIGTARP's audit.

<sup>2</sup> OFS awarded contract number TOFS-10-D-0006 to Cadwalader Wickersham & Taft after SIGTARP's audit began. It was, therefore, not subject to audit. As of 03/31/2011, \$3,789,815 had been obligated and \$992,237 was expended under the contract.

<sup>3</sup> All amounts shown for Venable LLP were previously reported in audit report number SIGTARP 11-003, "Treasury's Process for Contracting for Professional Services under TARP," issued April 14, 2011, and are shown here for comparative purposes only.

Source: SIGTARP analysis of data provided by OFS.

SIGTARP questioned the largest percentage of costs because law firms provided inadequate detail to support charges for hourly fees and related expenses.<sup>9</sup> Then, SIGTARP questioned most of the remaining costs because they were block billed, meaning that a single charge included descriptions of several different tasks without specifying the time required to complete each task, and together the tasks totaled more than 30 minutes.<sup>10</sup> While OFS' legal service contracts did not specifically prohibit block billing, the COTRs had the authority to reject invoices containing such billing based on FAR standards. Reasonableness of individual

<sup>9</sup> Appendix C presents all questioned and unsupported legal fees and expenses that SIGTARP identified, categorized by type of billing issue.

<sup>10</sup> Consistent with the FDIC *Outside Counsel Deskbook*, SIGTARP did not question block-billed charges totaling 30 minutes or less.

tasks, and, therefore, allowability under the FAR guidelines, cannot be determined when charges are block billed. That OFS COTRs did not use this authority under the FAR guidelines may have been a product of the lack of sufficiently detailed OFS procedures on reviewing fee bills. SIGTARP, however, questioned all block-billed charges. SIGTARP questioned fee bills from all four firms audited, as discussed in the sections below.

### SIGTARP Questioned All \$5.8 Million of Simpson Thacher's Legal Fees Because Simpson Thacher Did Not Provide Any Description of Work Performed or Any Receipts for Expenses

From the inception of TARP in October 2008, through March 31, 2011, OFS paid Simpson Thacher more than \$5.8 million in legal fees and expenses under three contracts. The first, contract TOS-09-007, was awarded on October 10, 2008. While containing a Statement of Work broad enough to include legal advice and services on any of the TARP programs, it focused on the Public-Private Investment Program ("PPIP"). Simpson Thacher also provided corporate law advice for such matters as disposing of the warrants issued under the Capital Purchase Program ("CPP"), and the sale of shares of Citigroup common stock received as part of CPP. The contract had a maximum value of \$500,000, which OFS increased to \$1,025,000 through a series of modifications.<sup>11</sup> In total, Simpson Thacher was paid \$931,090 for its services under this contract. The second contract, TOFS-09-D-0001, was awarded to Simpson Thacher on February 20, 2009, to provide legal services related to Treasury investments under CPP and the Capital Assistance Program ("CAP"). This contract had a maximum value of \$5,000,000.<sup>12</sup> In total, Simpson Thacher was paid \$1,530,023 for its services under this contract. The third contract, TOFS-09-D-0009, was awarded on May 26, 2009, and contained the same Statement of Work as Simpson Thacher's first OFS contract. This contract had a maximum value of \$15,000,000, and is still active.<sup>13</sup> As of March 31, 2011, Simpson Thacher had received \$3,505,917 for its services under this contract.

SIGTARP questioned all \$5.8 million in fees and expenses OFS paid to Simpson Thacher because Simpson Thacher provided no detail of work performed in its fee bills, and did not provide receipts or proper documentation for expenses. Because no descriptions of individual tasks performed were included in any of the 43 fee bills submitted under the 11 task orders of the three contracts, SIGTARP could not determine whether, as required by the FAR, any fees or costs submitted by Simpson Thacher and paid by OFS were allocable to the contract, allowable pursuant to financial regulations, and reasonable. OFS COTRs should not have paid any of Simpson Thacher's fee bills without additional information.

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<sup>11</sup> On October 10, 2008, OFS awarded the only task order for this contract for work performed through April 9, 2009.

<sup>12</sup> Between February 20, 2009, and July 10, 2009, six task orders were awarded under the Simpson Thacher contract for work performed through October 31, 2009.

<sup>13</sup> Four task orders have been issued under this contract.

OFS COTRs did initially reject some invoices and reduced payments on others, then later approved them for payment after receiving corrected fee bills. Based on emails and documentation in the contract file, COTRs rejected invoices or questioned charges for reasons such as:

- billing for other direct costs under a contract that did not allow for them;
- billing for unapproved labor categories;
- billing at rates above the contract's maximum allowable labor rates;
- billing amounts above the task order maximum ceiling value;
- billing for work performed under an incorrect task order; and
- submitting vendor backup documentation that did not match source materials.

However, despite raising these issues, OFS still paid more than \$5.8 million in fees and expenses for fee bills that contained no description of work whatsoever. It is unclear, however, why the COTRs allowed Simpson Thacher to continue to bill in the manner it did.

The following is an example of a typical Simpson Thacher fee bill provided to SIGTARP by OFS:

U.S. DEPARTMENT OF THE TREASURY

Invoice No. 257565

October 14, 2009

**SIMPSON THACHER & BARTLETT LLP**  
425 LEXINGTON AVENUE, NEW YORK, NEW YORK 10017-3954

For all professional services rendered in connection with Treasury/TO Obligation Document No. TOFS-09-D-0001 TO 0005 through June 26, 2009, based on time recorded through October 1, 2009.

Hours and Dollars Spent \*

	<u>Hours</u>	<u>Dollars</u>
<b><u>Partners</u></b>		
[name redacted-(b)(6)]	[hours redacted-(b)(4)]	\$756.88
[name redacted-(b)(6)]	[hours redacted-(b)(4)]	\$41,175.00
[name redacted-(b)(6)]	[hours redacted-(b)(4)]	\$24,745.00
[name redacted-(b)(6)]	[hours redacted-(b)(4)]	\$2,850.00
[name redacted-(b)(6)]	[hours redacted-(b)(4)]	\$14,488.75
<b><u>Senior Counsel</u></b>		
[name redacted-(b)(6)]	[hours redacted-(b)(4)]	\$3,155.63
<b><u>Associates</u></b>		
[name redacted-(b)(6)]	[hours redacted-(b)(4)]	\$5,573.75
[name redacted-(b)(6)]	[hours redacted-(b)(4)]	\$914.38
[name redacted-(b)(6)]	[hours redacted-(b)(4)]	\$16,032.50
[name redacted-(b)(6)]	[hours redacted-(b)(4)]	\$16,948.75
[name redacted-(b)(6)]	[hours redacted-(b)(4)]	\$29,375.00
[name redacted-(b)(6)]	[hours redacted-(b)(4)]	\$481.25
[name redacted-(b)(6)]	[hours redacted-(b)(4)]	\$1,856.25
[name redacted-(b)(6)]	[hours redacted-(b)(4)]	\$4,143.75
[name redacted-(b)(6)]	[hours redacted-(b)(4)]	\$19,617.50
[name redacted-(b)(6)]	[hours redacted-(b)(4)]	\$18,335.63
[name redacted-(b)(6)]	[hours redacted-(b)(4)]	\$700.63
<b><u>Legal Assistants</u></b>		
[name redacted-(b)(6)]	[hours redacted-(b)(4)]	\$50.00
[name redacted-(b)(6)]	[hours redacted-(b)(4)]	\$350.00
[name redacted-(b)(6)]	[hours redacted-(b)(4)]	\$281.25
[name redacted-(b)(6)]	[hours redacted-(b)(4)]	\$58.75
[name redacted-(b)(6)]	[hours redacted-(b)(4)]	\$56.25
<b>Total</b>	[hours redacted-(b)(4)]	\$201,946.88

\* Hours reflect entries recorded in the Firm's computer system as of October 1, 2009 and may not reflect all hours for services rendered during the period.

**In This Invoice,  
SIGTARP Was  
Looking For:**

- **Task Descriptions and Completion Times** – Detailed descriptions of each service or activity, and the time billed for each.
  - Without task descriptions, the reviewer cannot tell whether the work was necessary or related to this contract.
  - Without completion times, the reviewer cannot tell whether the time billed to do the work was reasonable.
  - Each task description and the time charged to complete that task should be presented separately – tasks should not be combined, and times should not be combined.
- **Hourly Rate** – If the hourly rate for each timekeeper is not shown, the reviewer must recalculate each line to determine whether the rate is correct.
- **Receipts for Expenses** – Although expenses were not included in this bill, when other direct costs are billed, receipts need to be provided so the reviewer can see that the expenses were necessary and properly related to the contract.

Narrative task descriptions were not included in any of the Simpson Thacher invoices. In fact, two of Simpson Thacher's early fee bills paid by OFS contained only the total dollar amount owed for professional services rendered. Both were submitted on the same day – one was for \$200,000 and the other, for \$300,000. Neither contained any detail of work performed, the number of hours worked, labor rates, names of attorneys and paralegals performing the work, or even the billing period. At SIGTARP's request during the course of this audit, OFS



obtained from Simpson Thacher hourly breakdown information for these two invoices, but descriptions of specific tasks performed were not provided.

Other fee bills included only the total number of hours charged, while still others contained only the total number of hours broken out by timekeeper (as shown in the previous example) without any detail as to the tasks the timekeeper was performing. No invoice contained enough information to justify OFS paying Simpson Thacher.

Other billing issues identified by SIGTARP in the review of Simpson Thacher fee bills include the following:

- **Simpson Thacher billed for foreign subcontractor costs (for a United Kingdom firm) without obtaining prior consent from Treasury for subcontracting, and billed at rates significantly above the contract's maximum allowable rate for each labor category** – Simpson Thacher used a subcontractor in the United Kingdom for legal services under its contract (TOFS-09-0001, task order 1). This task order was subject to the terms of the original contract, which incorporates FAR 52.244-2, Subcontracts, and, among other things, requires pre-approval of any labor-hour subcontracts. In other words, Simpson Thacher was not authorized to enter into a subcontract with any firm because Simpson Thacher did not obtain prior consent from the contracting officer to do so. Nonetheless, significantly after the fact, the contracting officer approved Simpson Thacher's use of the subcontractor.

OFS also reimbursed Simpson Thacher for this subcontractor at rates significantly above the ceiling rate in Simpson Thacher's contract. Simpson billed more than \$520 per hour above the maximum allowable partner rate, \$220 above the maximum allowable associate rate, and \$152 more than the maximum legal assistant rate. SIGTARP found no justification in the contract file for OFS paying the higher rates. Simpson Thacher had already agreed in its contract to provide these services at a lower rate. In total, OFS overpaid Simpson Thacher \$68,936 for the work of this subcontractor, and OFS should seek reimbursement of the amount paid in excess of the maximum rates provided for in the contract. SIGTARP considers these costs ineligible under OFS contract provisions.

- **Simpson Thacher billed for unauthorized expenses and did not provide receipts for authorized expenses** – Although reimbursed by OFS, "other direct costs," which are contract-related expenses for anything other than direct labor charges, were not allowed unless specifically authorized. However, OFS reimbursed other direct costs for Simpson Thacher, even when those expenses were not authorized under Simpson Thacher's contract and task order. According to the OFS COTRs whom SIGTARP interviewed, and confirmed later by OFS, in order for other direct costs to be properly reimbursed an "Other Direct Costs" clause must be included in the contract, or

an express allowance for other direct costs must be included in the specific task order. Neither Simpson Thacher's contract TOS-09-007 nor its underlying task order included an Other Direct Costs clause. Nonetheless, \$22,546 in other direct costs were submitted by Simpson Thacher and reimbursed by OFS. SIGTARP questioned all \$22,546 in other direct costs billed under this contract because the other direct costs provision was not included in the contract and those expenses should not have been reimbursed under OFS' current practices. Accordingly, SIGTARP considers these costs ineligible for reimbursement under OFS contract provisions.

In another Simpson Thacher contract, other direct costs were authorized. However, Simpson Thacher did not provide receipts or adequate documentation for those other direct costs that Simpson Thacher was allowed to bill to OFS. Specifically, in contract TOFS-09-D-0009, other direct costs were allowed, and Simpson Thacher was reimbursed for such costs totaling \$5,286. As stated in the contract: "All invoices shall be fully documented by including receipts evidencing payment by the contractor and shall identify the action with which the expenditure is connected." However, except for one instance when information regarding a telephone call was provided, receipts, or adequate documentation, were not provided for other direct costs as part of the invoice. In the one instance when more information was provided to document telephone calls, the matter being discussed was not clearly identified, nor were the individuals participating in the call. Other expense descriptions for telephone calls did not state whether they were local or long-distance, which determines whether or not they were properly reimbursable. After SIGTARP questioned OFS about these charges, OFS obtained additional receipts and documentation from Simpson Thacher and provided them to SIGTARP. However, OFS did not obtain receipts and documentation from Simpson Thacher for these charges prior to SIGTARP raising the issue in this audit. Also, the additional receipts and documentation did not include the topics researched or the subject matter discussed in telephone calls and, therefore, it is not possible to determine whether these charges are properly reimbursable.

- **Invoices did not clearly identify the beginning and ending dates of the billing period covered, and invoices were not submitted timely or on a regular basis** – Combined, these two factors would have inhibited the ability of OFS to assess the reasonableness of the charges in any given month. For example, because Simpson Thacher did not have fixed cutoff and billing periods, it continued to collect time charges from previous billing periods and then billed them to OFS with current period charges. This process also allowed timekeepers to continue documenting their time after the end of the billing period during which they provided services to OFS. For example, the Simpson Thacher invoice above – dated October 14, 2009 – stated that it was "For all professional services rendered...through June 26, 2009, based on time recorded through October 1, 2009." In other words, in this instance Simpson

Thacher's staff was three months late not only in reporting their time but also in recording the time. As such, the COTR would not have had the opportunity to even review the invoice until months after the work had been performed and could not have reasonably determined whether the hours charged for the tasks were appropriate. For example, on one invoice, Simpson Thacher billed 514 hours for one of its attorneys and 459 for another. This would be excessive for a month's billing – an average of 128 hours and 114 hours per week, respectively – but without knowing the billing period, reasonableness cannot be determined.

- **Simpson Thacher billed for staff in unapproved “counsel” and “senior counsel” labor categories not included in its contract or task orders, and OFS was not consistent in its payment for those labor categories** – Only “partner,” “associate,” and “legal assistant” labor categories were included in Simpson Thacher contracts TOFS-09-D-0001 and TOFS-09-D-0009. As such, the various “counsel” labor categories were not included in the “Maximum Labor Rate Table,” and OFS told SIGTARP that neither of the two contracts was modified to include them.

For contract TOFS-09-D-0001, Simpson Thacher billed for attorneys in “counsel” and “senior counsel” labor categories at varying rates and OFS paid for the counsel labor categories by sometimes reimbursing the charges at partner rates and other times at associate rates – but there was no justification for any of the rates Simpson Thacher charged or the OFS reimbursement rates. OFS told SIGTARP that an agreement on reimbursement rates for counsel for this contract was based on conversations between the contracting officer and the COTR in early 2009, and that it was the COTR's understanding that counsel rates – billed below the maximum rate for partner – were allowable. Under contract TOFS-09-D-0009, Simpson Thacher again billed, and OFS paid, for some attorneys in counsel labor categories, even though there was no documentation that OFS had agreed to the use of counsel labor categories.

Because a rate category for counsel did not exist in either contract, there were no standards in the contracts that delineated the experience required for this labor category. Thus, a more junior attorney could have been billed at a partner-equivalent rate. The inconsistencies allowed by the OFS COTRs could have been avoided by: (a) the use of multiple rate categories within each labor category based on justifiable, previously agreed-upon standards such as the attorneys' years of experience; and (b) OFS requiring pre-approval, in specified labor categories and at specified rates, of all contracted legal staff before they are allowed to work on and charge time to OFS projects.

- **Some Simpson Thacher individual attorneys and other staff billed at different rates** – For example, on one invoice the same attorney appears four

times and billed at two different rates. OFS told SIGTARP that it was not notified in advance of any changes to individual billing rates. SIGTARP found no evidence of contractor staff being preapproved to work on the contract or identification of any specific labor category or rate for contractor staff before fee bills were submitted. Simpson Thacher did not provide documentation to explain why some attorneys and staff in the same labor category could bill at a higher rate than others. However, OFS informed SIGTARP that specific contractor employee rates were not approved or disapproved as long as their billing rate was within the labor category range and the employee met the requirements of the labor category description.

### SIGTARP Questioned \$1,983,685 of Cadwalader's Legal Fees

On March 30, 2009, OFS entered into a contract with Cadwalader to provide legal services related to Treasury's TARP investment in the auto industry. The contract initially had an \$8,590,000 maximum value that was raised to \$26,756,322 through a contract modification.<sup>14</sup> In total, OFS paid Cadwalader \$17,392,786 for its services under this contract.

Of the \$2,869,998 sample of Cadwalader's legal fees and expenses SIGTARP reviewed, SIGTARP questioned \$1,983,685 that OFS paid to Cadwalader, primarily based on block billing. In addition, in some instances Cadwalader did not provide enough detail for SIGTARP to determine whether charges were reasonable, and in other instances, paralegals or clerical staff could have performed tasks performed by attorneys. These billing issues are illustrated in the following examples:

- Block billing –

05/01/09 [*Timekeeper name redacted–(b)(6)*]: EMAIL EXCHANGE AMONG LAW FIRMS PLOTTING DOL CONF CALL RE VEBA. STUDY DEAL DOCS FOR SAME. LONG CONF CALL DOL RE ERISA & VEBA. TCS AND EMAILS RE SAME WITH [*name redacted–(b)(6)*], [*name redacted–(b)(6)*], ETC. DRAFT SUMMARY OF CONF CALL FOR UST. (6.00 HOURS)

05/01/09 [*Timekeeper name redacted–(b)(6)*]: TELEPHONE CALLS WITH [*name redacted–(b)(6)*], [*name redacted–(b)(6)*]; CONFERENCE RE: TAX ISSUES WITH [*name redacted–(b)(6)*]; [*name redacted–(b)(6)*]; [*name redacted–(b)(6)*]; [*name redacted–(b)(6)*]; [*name redacted–(b)(6)*]; REVIEW AND REVISE DOCUMENTS; RESEARCH RE: TAX ISSUES. (6.84 HOURS)

- Inadequate detail –

05/01/09 [*Timekeeper name redacted–(b)(6)*]: REVISE AGREEMENTS, SCHEDULES; CALLS; E-MAILS. (5.00 HOURS)

05/03/09 [*Timekeeper name redacted–(b)(6)*]: REVIEW SCHEDULES; E-MAILS. (2.50 HOURS)

<sup>14</sup> Between April 2, 2009, and July 8, 2009, four task orders were awarded under the contract for work performed through July 31, 2010.

- Tasks not requiring attorneys –
  - 05/01/09 [*Timekeeper name redacted*–(b)(6)]: PREPARED SIGNING DOCUMENT ROOM. (13.84 HOURS)
  - 05/01/09 [*Timekeeper name redacted*–(b)(6)]: SCANNED PDFs OF TERM SHEETS, SUBSCRIPTION AGREEMENTS, AND ADDITIONAL PURCHASE AGREEMENT AND LETTERS TO [*name redacted*–(b)(6)], [*name redacted*–(b)(6)] AND [*name redacted*–(b)(6)]. (1.34 HOURS)
  - 05/01/09 [*Timekeeper name redacted*–(b)(6)]: MONITOR SIGNING ROOM; UPDATE FOLDERS FOR SIGNING DOCUMENTS; UPDATE INDEX OF SIGNING DOCUMENTS. (6.17 HOURS)

Because multiple tasks were included in block billed charges without actual completion times, SIGTARP was not able to determine which portions of these charges are appropriate and so questioned the entire amount. Cadwalader would need to provide additional information for OFS to determine whether these charges were reasonable and therefore allowable.

Further, in reviewing the descriptions in Cadwalader’s fee bills, there was inadequate detail to determine whether the charge was reasonable. In the example above, the COTR could not have reasonably determined with whom the conference calls and conferences were held and for what purpose, and whether the conferences and calls were necessary for the level of persons involved, and not longer than necessary.

### SIGTARP Questioned \$146,867 of Locke’s Legal Fees

On February 12, 2009, OFS entered into a contract with Locke to provide legal services in support of certain of Treasury’s TARP investments in S-Corporations as well as other certain investments in TARP’s Capital Purchase Program.<sup>15</sup> The contract had a \$2,000,000 maximum value. In total, the firm was paid \$272,243 for its services under this contract.<sup>16</sup>

Of the \$272,243 of Locke’s legal fees and expenses OFS paid, SIGTARP questioned approximately half (\$146,867). Most of the charges were questioned because they were block billed. In some cases, Locke’s descriptions of tasks performed did not contain enough detail for SIGTARP to determine whether charges were reasonable. These billing issues are illustrated in the following examples:

<sup>15</sup> Under the Capital Purchase Program, Treasury directly purchased preferred stock or subordinated debentures in qualifying financial institutions. CPP was intended to provide funds to “stabilize and strengthen the U.S. financial system by increasing the capital base of an array of healthy, viable institutions, enabling them [to] lend to consumers and business[es].” Treasury invested \$204.9 billion in 707 institutions through CPP.

<sup>16</sup> On February 12, 2009, OFS awarded the only task order under the contract and work was performed through May 5, 2009.

- Block billing –
  - 03/09/09 [Timekeeper name redacted–(b)(6)]: CONFERENCE WITH [name redacted–(b)(6)] AND [name redacted–(b)(6)]; REVIEW DOCUMENTS. (4.00 HOURS)
  - 03/10/09 [Timekeeper name redacted–(b)(6)]: CIRCULATION OF CORRESPONDENCE TO TREASURY AND [bank name redacted–(b)(4)] WITH APPLICABLE DOCUMENTS; REVIEWS OF RECEIVABLES AND INTERNAL DISCUSSION WITH REGARD THERETO; PREPARATION OF FURTHER REQUIRED CORRESPONDENCE; REVIEW OF PACKAGE OF SIGNATURE PAGES; CALL WITH COUNSEL TO [bank name redacted–(b)(4)]. (6.70 HOURS)
- Inadequate detail –
  - 03/11/09 [Timekeeper name redacted–(b)(6)]: CLOSING FOR [bank name redacted–(b)(4)]; CONFERENCES. (1.60 HOURS)
  - 03/09/09 [Timekeeper name redacted–(b)(6)]: REVIEW DOCUMENTS WITH [name redacted–(b)(6)]. (4.00 HOURS)
  - 03/18/09 [Timekeeper name redacted–(b)(6)]: REVISE DOCUMENTS. (1.70 HOURS)
- Administrative –
  - 03/05/09 [Timekeeper name redacted–(b)(6)]: REVIEW AND ANALYZE INFORMATION RELATED TO PROVISION OF SERVICES TO THE DEPARTMENT OF TREASURY AND GOVERNMENT CONTRACTS ISSUES RELATED TO SAME; ATTENTION TO STRATEGY REGARDING SAME. (2.00 HOURS)
  - 03/11/09 [Timekeeper name redacted–(b)(6)]: (TREASURY\GENERAL) EMAILS TO TEAM REGARDING STATUS. BEGIN PREPARATION OF WEEKLY REPORT TEMPLATE; CONFERENCE WITH [name redacted–(b)(6)] AND [name redacted–(b)(6)] REGARDING SAME. (2.00 HOURS)

Of the amounts questioned by SIGTARP, \$3,971 were for administrative expenses and fees, such as word processing, preparing fee bills, reviewing the OFS contract and task orders, and addressing conflicts of interest issues. As specified in the FAR, under labor-hour contracts, hourly rates already include wages, indirect costs, and general and administrative expenses. The FDIC *Outside Counsel Deskbook* expressly prohibits fees for invoice preparation or review. OFS should have denied these types of administrative charges.

### SIGTARP Questioned \$57,939 of Bingham's Legal Fees

On March 30, 2009, OFS entered into a contract with this law firm to provide legal services related to Treasury's TARP investments related to Small Business Administration ("SBA") loans and securities backed by SBA loans. The contract had a \$2,000,000 maximum value.<sup>17</sup> In total, OFS paid Bingham \$270,524 for its services under this contract.

Of the sample of \$67,383 of Bingham's legal fees and expenses SIGTARP reviewed, SIGTARP questioned \$57,939 that OFS paid to Bingham. At the time

<sup>17</sup> Between January 25, 2010, and January 28, 2010, two task orders were awarded under the contract for work performed through August 31, 2010.

of the audit, these charges were not supported by adequate documentation because they either were block billed, or did not contain enough detail for SIGTARP to determine whether the charges were reasonable, as illustrated in the following examples:

- Block Billing –

- 06/23/09 [*Timekeeper name redacted–(b)(6)*]: CONFERENCE WITH [*Timekeeper name redacted–(b)(6)*] AND [*Timekeeper name redacted–(b)(6)*] REGARDING REVISING MPA FOR SENIOR NOTE PROVISIONS; REVISE DRAFT, INCORPORATING CPP TERMS. (11.75 HOURS)

- 06/24/09 [*Timekeeper name redacted–(b)(6)*]: CALL WITH TREASURY REGARDING MPA AND TERM SHEET; INTERNAL DISCUSSIONS REGARDING SAME; REVISE AND CIRCULATE MPA AND TERM SHEET. (8.00 HOURS)

- Inadequate Detail –

- 06/15/09 [*Timekeeper name redacted–(b)(6)*]: CONFERENCE CALL WITH [*name redacted–(b)(6)*]; SECOND CALL WITH [*name redacted–(b)(6)*] AND TREASURY; MEET WITH DEAL TEAM. (1.75 HOURS)

- 06/15/09 [*Timekeeper name redacted–(b)(6)*]: TELEPHONE CONFERENCE WITH [*name redacted–(b)(6)*]; TELEPHONE CONFERENCE WITH [*name redacted–(b)(6)*] AND TREASURY. (1.25 HOURS)

## The OFS Process for Awarding Legal Service Contracts Provided Adequate Price Competition

In order to determine whether OFS received fair prices for legal services, it was necessary to review Treasury's contracting process with the law firms. As of March 31, 2011, OFS had entered into 35 legal service contracts with 21 different law firms.<sup>18</sup> OFS awarded 15 legal service contracts using a narrowed competitive field and compressed timeframes (by citing an unusual and compelling urgency as allowed under the FAR); 14 through full and open competitions; five using the General Services Administration's ("GSA") Federal Supply Schedule; and one through simplified acquisition procedures for contracts under \$100,000. A list of all legal service contracts awarded by OFS is shown in Appendix E.

The Emergency Economic Stabilization Act of 2008 ("EESA") allowed the Secretary of the Treasury to waive any provision of the FAR if the Secretary determined that "urgent and compelling circumstances make compliance with such provisions contrary to the public interest." Treasury has not, however, made use of this waiver authority in its contracting for legal services. The FAR therefore governs OFS' contracting procedures.

According to OFS, because of the length of time required to issue contracts using full and open competitions,<sup>19</sup> OFS awarded contracts for legal services using a narrowed competitive field and compressed timeframes as an interim measure. The OFS contract files that SIGTARP reviewed showed that at the time the contracts in SIGTARP's sample were being processed in January 2009, OFS was also working on an omnibus procurement for legal services. The goal of the omnibus procurement was to pre-qualify law firms to provide legal services in particular areas so that when a project arose in one of those areas, OFS could move quickly to retain one of the prequalified firms. However, because that procurement was expected to take three to five months, the omnibus procurement would not eliminate the need for other legal procurements awarded based on an unusual and compelling urgency. As shown in Appendix E, OFS awarded contracts under its omnibus procurement for legal services in August 2010.

For the contracts SIGTARP reviewed, OFS justified the competitions by citing an unusual and compelling urgency, as allowed under FAR 6.302-2.<sup>20</sup> In reviewing

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<sup>18</sup> Additional information on services provided to OFS by other Treasury offices and the responsibilities of Treasury's contracting officer and OFS COTRs is shown in Appendix D.

<sup>19</sup> According to OFS, under normal circumstances: for a large commercial acquisition the requested response time is approximately 30 days; for a non-commercial acquisition, approximately six weeks; for a GSA schedule acquisition, approximately two weeks; and for a competitive task order from a multiple award indefinite-delivery, indefinite-quantity contract the requested response time is approximately 10 days, unless the need is urgent.

<sup>20</sup> FAR 6.302-2, Unusual and Compelling Urgency, provides the authority, describes the proper application, and defines the limitations of contracts issued using other than full and open competitions justified under this provision.



the sample of competitions conducted by OFS, SIGTARP found that they were in compliance with FAR requirements, and were consistent with the OFS acquisition procedures that became effective in November 2009. Under the FAR and the 2009 OFS procedures, OFS was allowed to limit the number of offerors, offeror response times, and OFS evaluation times so that contracts could be awarded more quickly. Nonetheless, the procedures OFS used for these simplified acquisitions included all the key steps in a normal acquisition.

SIGTARP reviewed the statements of work in contracts awarded to the sampled firms to determine whether they were unusually narrow, specific, or otherwise appeared to have been steered to a particular contractor. SIGTARP concluded that they were sufficiently general and objectively described the tasks required, and did not appear to favor any particular contractor.

Under FAR 6.302-2, Unusual and Compelling Urgency, agencies are required to request offers from as many potential sources as practicable under the circumstances. When reviewing the solicitations in SIGTARP's sample, SIGTARP found that OFS issued requests for proposals to five to eight law firms for each solicitation. SIGTARP's review of these solicitations showed that OFS received from two to six proposals for each solicitation. OFS evaluated each firm based on the criteria outlined in its source selection plan, and rated each firm on the scale identified in Appendix F to determine which would provide the "best value"<sup>21</sup> to the Government.

As described in FAR 8.405-1(c), in addition to price, when determining best value, many other factors may be considered. OFS evaluated legal expertise, management and staffing approach, mitigation of conflicts of interest, past performance, and small business participation. OFS determined that, for each solicitation, at least one and up to three of the proposals were technically acceptable in all areas evaluated. SIGTARP concluded that OFS adequately evaluated all qualified proposals and awarded contracts based on the best value.

For all proposals received, OFS also evaluated the contractors' proposed pricing to determine whether costs were reasonable. OFS compared the firms' rates, by labor category, to the independent Government cost estimate. OFS then compared the total proposed price for all competing law firms with the total estimated costs. SIGTARP concluded that OFS had created adequate price competition in accordance with FAR 15.403-3(b).<sup>22</sup>

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<sup>21</sup> As defined in the FAR, "best value" means the expected outcome of an acquisition that, in the Government's estimation, provides the greatest overall benefit in response to the requirement.

<sup>22</sup> FAR 15.403-3(b), *Adequate price competition*, states that "When adequate price competition exists (see [FAR] 15.403-1(c)(1)), generally no additional information is necessary to determine the reasonableness of price." Under FAR 15.403-1(c)(1), *Adequate price competition*, in general, a price is based on adequate price competition if (i) two or more responsible offerors, competing independently, submit priced offers that satisfy the Government's expressed requirement, or (ii) there was a reasonable expectation, based on market research or other assessment, that two or more responsible offerors, competing independently, would submit priced offers in response to the solicitation's expressed requirement, even though only one offer is received from a responsible offeror.

SIGTARP also reviewed the justifications for each sampled contract and found OFS to be in compliance with the provisions of FAR 6.303, Justifications, which prescribes the required content of such justifications. The justifications were also approved by the Treasury competition advocate as required by FAR 6.304, Approval of the Justification. Overall, SIGTARP found that OFS followed its procedures and FAR requirements and that OFS' actions were sufficient, given the urgent nature related to the need for legal services. Further, once the limited competition contracts expired, OFS began awarding contracts using full and open competition.

Finally, SIGTARP compared the hourly rates OFS paid the five law firms to rates paid by other Federal entities. Two law firms in SIGTARP's original sample had legal service agreements with FDIC, and one had a GSA Federal Supply Schedule.<sup>23</sup> SIGTARP contacted FDIC and obtained information regarding rates those firms charged FDIC. Although not directly comparable to other law firms performing different tasks, the rates were similar and in some cases the rates charged OFS were slightly less when compared to rates paid by FDIC and those on the GSA Federal Supply Schedule. In addition, SIGTARP compared rates published in a *National Law Journal* article<sup>24</sup> to the law firms' rates charged to OFS. Of the firms in SIGTARP's sample, three had rates published in this article. All three firms provided OFS with a discount from those rates, ranging from 31% to 44%, when compared to rates published in the article.

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<sup>23</sup> The Federal Supply Schedule program, also known as the GSA Schedules Program or the Multiple Award Schedule Program, is directed and managed by GSA and provides Federal agencies with a simplified process for obtaining commercial supplies and services at prices associated with volume buying. Federal Supply Schedules and pricing are publically available.

<sup>24</sup> Jones, Leigh, "Law Firm Fees Defy Gravity," *The National Law Journal*, 12/08/2008, <http://www.law.com/jsp/nlj/PubArticleNLJ.jsp?id=1202426491654&slreturn=1&hbxlogin>, accessed 06/10/2010.

## Update on SIGTARP's Recommendations Made in the Venable Report

In the Venable report, SIGTARP recommended that OFS adopt the legal fee bill submission standards contained in FDIC's *Outside Counsel Deskbook*, or establish similarly detailed requirements for how law firms should prepare legal fee bills and include the new requirements in its open legal service contracts. In response, OFS did not specifically adopt FDIC or U.S. Bankruptcy Trustee standards, but instead adopted a one-page guidance, which is contained in Appendix H, that contains some FDIC or Trustee guidance but is not as detailed. Although OFS has not incorporated this guidance into its formal policies, this guidance addresses many of the issues in the Venable report as well as in this report. For example, the new guidance provides that activities should not be block billed, but instead should be billed in six-minute increments, which is an important change. The new guidance also requires that there be detailed activity descriptions and that any charges for meetings must include key attendees, the subject of the meetings, and the participant's role. It is not clear who is a key attendee and why OFS is requiring only that key attendees be listed as opposed to any attorney or paralegal. The new guidance also provides that the type of activity (such as a phone call or research) be included. Although the type of activity is important, as set forth in the Venable report, the FDIC *Outside Counsel Deskbook* contrasts between a description of a time charge for "research," which lacks detail, and one for "legal research on statute of limitations issues," which provides more detail.

In the Venable report, SIGTARP recommended that OFS develop and incorporate into its written policies specific instructions and guidance for OFS COTRs to use when reviewing legal fee bills. OFS told SIGTARP that it has held training for its COTRs and other staff on its new guidance to law firms and that it will work to incorporate relevant portions of its training into written procedures. Because the new guidance is one page and is not as detailed as other Federal entities' best practices, the procedures and training for OFS staff in implementing these guidelines will be critical. SIGTARP will continue to monitor OFS' implementation of written procedures and its modification of open contracts to include the new guidance.

Finally, SIGTARP recommended in the Venable report that OFS review previously paid legal fee bills to identify unreasonable or unallowable charges and seek reimbursement for those charges as appropriate. OFS agreed to adopt this recommendation, but stated that it would review paid invoices in connection with contract closeout procedures. OFS recently told SIGTARP that a Treasury contracting officer has been assigned to review Venable's invoices. In addition, OFS stated that Treasury is engaged in discussions with Venable regarding questioned invoice amounts. However, OFS has not yet sought reimbursement of any amounts from Venable.

## Conclusions and Recommendations

For the four law firms reviewed in this report, SIGTARP found weaknesses in Treasury's contracts and payment for legal services under TARP that were similar to SIGTARP's previous report on Venable. The Office of Financial Stability, the office within Treasury that administers TARP, has paid the five law firms that SIGTARP audited more than \$27 million in legal fees and expenses. In SIGTARP's Venable report, SIGTARP questioned \$676,840 in legal fees paid by OFS because the bills contained block billing, inadequate description of services, and administrative tasks being performed by attorneys. To an even greater extent, SIGTARP found the same problems in its audit of Treasury's contracting and payment of legal services for four other law firms. The law firms were Simpson Thacher & Bartlett LLP, Cadwalader Wickersham & Taft LLP, Locke Lord Bissell & Liddell LLP, and Bingham McCutchen LLP.

SIGTARP audited a judgmental sample of \$9.1 million in legal fee bills from these four firms paid by OFS under TARP and questioned \$8.1 million (89%). SIGTARP found that the fee bills contained either no descriptions or vague descriptions of work performed, block billing, unsupported expense charges, and administrative charges that were not allowed under the contract. As a result, OFS would not have been able to assess adequately the reasonableness of the fees it paid. Although SIGTARP questioned fee bills from all of the law firms audited, this does not mean that all the fees and expenses SIGTARP questioned were unreasonable.

The most striking examples of problematic fee bills were from Simpson Thacher, which charged OFS \$5.8 million in fees and expenses without providing any description of the work performed and without providing any receipts, or adequate documentation, for expenses. Although OFS questioned some charges, resulting in resubmitted bills, it still paid \$5.8 million for original and resubmitted bills that had no description of work and no contractually required receipts. OFS had no way of knowing whether these fees and expenses were allocable to the contract and reasonable and allowable (the requirements for payment under FAR). In addition, OFS overpaid Simpson Thacher \$68,936 for its foreign subcontractor, even though the subcontractor was not preapproved and Simpson Thacher charged as much as \$520 per hour more than the maximum hourly rate under the contract.

SIGTARP found that OFS' then-existing legal service contracts and review procedures caused it to fall short in comparison to the best practices identified by SIGTARP and used by other Federal entities. Although SIGTARP concluded that the OFS process for awarding legal service contracts provided adequate price competition and that the process complied with FAR requirements, SIGTARP found weaknesses in both the OFS contracts with the law firms and OFS policies for reviewing legal fee bills. Similar to SIGTARP's findings in the Venable report, the OFS contracts for legal services with these law firms do not contain

sufficiently detailed requirements or instructions on how law firms should prepare fee bills or how they should describe discrete tasks within each fee bill. In addition, as stated previously in the Venable report, the OFS COTRs were not given specific standards or instructions on how to review legal fee bills for accuracy and reasonableness. As a result, in some instances OFS overpaid for legal services.

The lack of specific, documented invoice review procedures also meant that all invoices were not subject to the same level or consistency of review. For example, in reviewing fee bills from the law firms, some COTRs rejected fee bills that included labor categories such as “counsel” not included in the contract, while other COTRs approved and paid them. One OFS COTR paid counsel at partner rates and another OFS COTR paid them at associate rates. SIGTARP also noted that OFS paid for attorneys billed in labor categories other than those agreed to in the contract and task orders. While this may have reduced OFS legal fees, the substitution of labor categories and rates after contract award was not properly documented in contract modifications. In response to the Venable report, OFS agreed to adopt new guidance for law firms on submission of fee bills.

SIGTARP reiterates the recommendations that it made in the Venable report. In response to SIGTARP’s recommendation made in the Venable report that OFS review previously paid legal fee bills to identify unreasonable or unallowable charges, and seek reimbursement for those charges, OFS replied that it would review contracts for questionable invoice amounts during contract closeout. However, OFS should initiate reviews now and not wait until the close of a contract to question paid invoices.

Regarding OFS’ process for awarding legal service contracts, SIGTARP found that OFS followed its procedures and FAR requirements and that OFS’ actions were sufficient, given the urgent nature related to the need for legal services. In addition, although not directly comparable to other law firms performing different tasks, the rates were similar and in some cases the rates charged OFS were slightly less when compared to rates paid by FDIC and those on the GSA Federal Supply Schedule.

OFS’ legal contracting practices and fee bill review practices in place up to the time of our Venable report created an unacceptable risk that Treasury was overpaying for legal services. If SIGTARP questioned \$8.1 million out of a \$9.1 million sample, it is highly likely that these billing problems exist outside of SIGTARP’s sample. As such, SIGTARP makes the following recommendations:

1. Treasury should specifically determine the allowability of \$7,980,215 in questioned, unsupported legal fees and expenses paid to the following law firms:

- |   |             |
|---|-------------|
| ▪ Simpson Thacher & Bartlett LLP                        | \$5,791,724 |
| ▪ Cadwalader Wickersham & Taft LLP                      | \$1,983,685 |
| ▪ Locke Lord Bissell & Liddell LLP                      | \$146,867   |
| ▪ Bingham McCutchen LLP (novated from McKee Nelson LLP) | \$57,939    |
2. The Treasury contracting officer should disallow and seek recovery from Simpson Thacher & Bartlett LLP for \$91,482 in questioned, ineligible fees and expenses paid that were not allowed under the OFS contract. Specifically, those are \$68,936 for labor hours billed at rates in excess of the allowable maximums set in contract TOFS-09-0001, task order 1, and \$22,546 in other direct costs not allowed under contract TOS-09-007, task order 1.
  3. Treasury should promptly review all previously paid legal fee bills from all law firms with which it has a closed or open contract to identify unreasonable or unallowable charges and seek reimbursement for those charges, as appropriate.
  4. Treasury should require in any future solicitation for legal services multiple rate categories within the various partner, counsel, and associate labor categories. The additional labor rate categories should be based on the number of years the attorneys have practiced law.
  5. Treasury should preapprove specified labor categories and rates of all contracted legal staff before they are allowed to work on and charge time to OFS projects.

## Management Comments and SIGTARP's Response

Treasury provided comments on a draft of this report in a memorandum dated September 28, 2011. Treasury's memorandum is reproduced in full in Appendix K.

In its response, Treasury neither agreed nor disagreed with the five recommendations regarding OFS' review and payment of legal fees and related costs, but stated that it is committed to working with SIGTARP to address the recommendations. SIGTARP will follow up on Treasury's specific actions to address the recommendations. Treasury also stated in its response that it was well positioned to judge the quality and value of assistance provided by its contracted legal staff and to ensure that taxpayer funds were used wisely. SIGTARP disagrees with Treasury's position on the value it received – OFS received legal fee bills that contained block-billed charges, vague and inadequate descriptions of work performed, and charges for administrative functions not allowed under the contracts. Because OFS did not question these legal fee bills and request more detailed information, it could not have determined that amounts billed and paid were reasonable.

## Appendix A – Scope and Methodology

SIGTARP performed this audit under authority of Public Law 110-343, as amended, which also incorporates the duties and responsibilities of inspectors general under the Inspector General Act of 1978, as amended. SIGTARP initiated this audit at the request of Senator Tom Coburn, M.D. The audit's objectives were to examine the processes used to ensure that (1) professional services contract prices are fair and reasonable; and (2) invoices submitted by the contractors accurately reflect the work performed. For one law firm, Venable LLP, SIGTARP reported results on April 14, 2011, related to the second objective in audit report number [SIGTARP-11-003, "Treasury's Process for Contracting for Professional Services under the Troubled Asset Relief Program."](#)

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

To determine whether OFS policies and procedures were effective, SIGTARP audited a sample of invoices paid by OFS for legal services ("fee bills") submitted by a sample of law firms and paid by OFS. Five law firms were judgmentally selected, based on Congressional interest and the dollar value of awarded contracts. SIGTARP selected the following five law firms for audit:

- Simpson Thacher & Bartlett LLP;
- Cadwalader Wickersham & Taft LLP;
- Locke Lord Bissell & Liddell LLP;
- Bingham McCutchen LLP (which merged with McKee Nelson LLP); and
- Venable LLP.

Audit fieldwork included tests of transactions and interviews conducted at OFS offices in Washington, D.C. Additional tests and interviews, including a walk-through of billing practices and procedures and reviews of timekeeping and billing policies, were conducted in the law offices of Locke Lord Bissell & Liddell in Washington, D.C., and Venable LLP in Baltimore, Maryland. As shown in Table 2, the scope of the audit covered all \$26.9 million in payments to the five law firms made between October 3, 2008 – the inception of TARP – and March 31, 2011. For that period, SIGTARP selected for audit \$10.1 million in payments OFS made to the five law firms.



TABLE 2

<b>AUDITED PAYMENTS TO LAW FIRMS</b>				
<b>Law Firm</b>	<b>Contract Number</b>	<b>Paid Legal Fees and Expenses as of 3/31/2011</b>	<b>Audited</b>	<b>Percent Audited</b>
Simpson Thacher & Bartlett LLP	TOFS-09-0001	\$1,530,023	\$1,530,023	100%
	TOFS-09-0009	3,422,093 <sup>1</sup>	3,422,093	100%
	TOS-09-007	931,090	931,090	100%
Cadwalader Wickersham & Taft LLP <sup>2</sup>	TOFS-09-D-0006	17,392,786	2,869,998	17%
	TOFS-09-D-0011	1,278,696	0	0%
	TOS-09-020	409,955	0	0%
Locke Lord Bissell & Liddell LLP	TOS-09-022	272,243	272,243	100%
Bingham McCutchen LLP (novated from McKee Nelson LLP)	TOFS-09-D-0005	270,524	67,383	25%
<b>Subtotal Related to This Report</b>		<b>\$25,507,410</b>	<b>\$9,092,830</b>	<b>36%</b>
Venable LLP <sup>3</sup>	TOFS-09-D-0002	1,394,723	1,027,049	74%
<b>Total for This Audit</b>		<b>\$26,902,133</b>	<b>\$10,119,879</b>	<b>38%</b>

Notes: Numbers affected by rounding.

<sup>1</sup> Simpson Thacher's contract number TOFS-09-0009 is still active. Between 02/04/2011, when OFS provided SIGTARP fee bills for audit, and 03/31/2011, OFS paid additional Simpson Thacher fee bills totaling \$83,824. The additional fee bills were not subject to SIGTARP's audit.

<sup>2</sup> OFS awarded contract number TOFS-10-D-0006 to Cadwalader Wickersham & Taft after SIGTARP's audit began. It was, therefore, not subject to audit. As of 03/31/2011, \$3,789,815 had been obligated and \$992,237 was expended under this contract.

<sup>3</sup> All amounts shown for Venable LLP were previously reported in audit report number SIGTARP 11-003, "Treasury's Process for Contracting for Professional Services under TARP," issued April 14, 2011, and are shown here for comparative purposes only.

Source: SIGTARP analysis of data provided by OFS.

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

### Limitations on Data

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

### Use of Computer-Processed Data

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

### Internal Controls

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

### Prior Coverage

As stated above, SIGTARP issued an earlier report as part of this audit. No other audits with the same or similar audit objectives have been performed on OFS' process for contracting for professional services under the Troubled Asset Relief Program.

## Appendix B – Potential Billing Issues

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

Note: Not all potential billing issues were identified during SIGTARP's review of fee bills.

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

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

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

## Appendix C – Questioned Legal Fees by Category

Category							
Fee or Cost Billing Issue	Simpson Thacher & Bartlett LLP	Cadwalader Wickersham & Taft LLP	Locke Lord Bissell & Liddell LLP	Bingham McCutchen LLP (novated from McKee Nelson LLP)	Subtotal Related to This Report	Venable LLP <sup>1</sup>	Total for This Audit
Block Billed	\$0	\$1,841,336	\$107,955	\$40,724	<b>\$1,990,015</b>	\$416,797	<b>\$2,406,812</b>
Administrative Tasks	0	0	3,971	0	<b>3,971</b>	20,638	<b>24,609</b>
Inadequate Detail	5,855,374	33,058	10,717	863	<b>5,900,012</b>	12,265	<b>5,912,277</b>
Labor Category	0	14,304	0	0	<b>14,304</b>	0	<b>14,304</b>
Travel (50% of full hourly rate)	0	3,091	0	0	<b>3,091</b>	0	<b>3,091</b>
Block Billed and Administrative Tasks	0	0	14,726	0	<b>14,726</b>	34,086	<b>48,812</b>
Block Billed and Inadequate Detail	0	15,394	9,498	16,352	<b>41,244</b>	191,638	<b>232,882</b>
Block Billed and Labor Category	0	21,574	0	0	<b>21,574</b>	0	<b>21,574</b>
Block Billed and Travel	0	44,825	0	0	<b>44,825</b>	0	<b>44,825</b>
Inadequate Detail and Labor Category	0	3,979	0	0	<b>3,979</b>	0	<b>3,979</b>
Block Billed, Administrative Tasks, and Inadequate Detail	0	0	0	0	<b>0</b>	1,416	<b>1,416</b>
Block Billed, Inadequate Detail, and Travel	0	2,013	0	0	<b>2,013</b>	0	<b>2,013</b>
Copying Costs (over 8¢ per copy)	0	1,493	0	0	<b>1,493</b>	0	<b>1,493</b>
No Receipts Provided for Other Costs	5,286	0	0	0	<b>5,286</b>	0	<b>5,286</b>
Other Costs Not Allowed Under the Contract	22,546	0	0	0	<b>22,546</b>	0	<b>22,546</b>
Research Costs	0	2,618	0	0	<b>2,618</b>	0	<b>2,618</b>
<b>Total</b>	<b>\$5,883,206</b>	<b>\$1,983,685</b>	<b>\$146,867</b>	<b>\$57,939</b>	<b>\$8,071,697</b>	<b>\$676,840</b>	<b>\$8,748,537</b>

## Appendix D – Contracting Services Provided to OFS by Other Treasury Offices and Responsibilities of Contracting Officers and Contracting Officer's Technical Representatives

OFS manages TARP, with key support services provided by other Treasury offices. For example, the Procurement Services Division solicits, negotiates, and awards contracts on behalf of OFS. Under FAR 1.602, Contracting Officers, only contracting officers are granted the authority to enter into, administer, and terminate contracts on behalf of the Government. Contracting officers are also responsible for ensuring performance of all necessary actions for effective contracting, ensuring compliance with the terms of the contract, and safeguarding the interests of the United States in its contractual relationships.

Within the Procurement Services Division, Treasury's contracting officers are delegated the authority to administer and/or terminate contracts on behalf of Treasury. The Department of the Treasury Acquisition Regulation, which supplements the FAR, allows the contracting officer to delegate certain responsibilities to a COTR.<sup>25</sup> Accordingly, for each contract, the contracting officer appoints a COTR through a letter of designation, after the COTR is nominated by the program office.<sup>26</sup> The letter of designation describes the authority as well as specific responsibilities of the COTR. Each contract identifies the responsible COTR.

The contracting officer maintains the official contract file for all OFS procurements. However, while the contract is active, the COTR also creates and maintains working files to facilitate the contract management process. When the contract is complete, the COTR files are sent to the contracting officer and become part of the official contract file. The COTR also:

- monitors contractor performance to ensure that products and services conform to contract requirements;
- provides “technical direction” to the contractor within the scope of the contract’s specifications or work statements, such as instructions that direct or redirect work, shift the work between work areas or locations, fill in details regarding the work, and ensure tasks outlined in work statements are accomplished satisfactorily;
- assesses and reports on the contractor’s performance;
- authorizes payments to the contractor; and
- creates and maintains records of the administration of each contract.

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<sup>25</sup> The Department of the Treasury Acquisition Regulation states: “Requisitioning offices must nominate to the contracting officer an individual to act as the contracting officer’s technical representative in the administration and monitoring of a contract. Selection is to be based on the technical expertise and experience of the individual...” The COTRs’ authorities and responsibilities are communicated to them in their COTR Designation Memorandum, which is prepared for each contract.

<sup>26</sup> Treasury program offices receiving support services through contracts are required to nominate a COTR in accordance with the Department of the Treasury Acquisition Regulation, which supplements the FAR.

Until September 2009, OFS used procedures issued by Treasury's Procurement Services Division ("Treasury's procedures"). Treasury's procedures state that the COTR is responsible for, among other items, "Reviewing contractor invoices and supporting documentation for certification," but include no specific instructions beyond that requirement. Moreover, while Treasury's procedures address a broad array of procurement functions, such as tracking invoices and vouchers, they do not address precise activities required of COTRs in conducting reviews of legal fee bills or similar bills.

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

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

Treasury's standard operating procedure for invoice control, dated February 28, 1994, state that a COTR's responsibilities include, "Reviewing contractor invoices and supporting documentation for certification." Section IV, Responsibilities of a COTR, also lists other responsibilities:

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

- a. Controlling all Government technical interface with contractor personnel;
- b. Assuring that appropriate action is taken on technical correspondence pertaining to contract/delivery orders and ensuring that adequate files are maintained;
- c. Furnishing documentation on any request for change, deviation, or waiver to the contracting officer for action;
- d. Reviewing contractor invoices and supporting documentation for certification;

- e. Notifying the contracting officer of performance problems and recommending corrective action;
- f. Reviewing contract deliverables and accepting/rejecting them;
- g. Evaluating contractor proposals and developing Government estimates;
- h. Preparing contractor performance evaluations; and
- i. Accounting [for] and monitoring any Government furnished property.

OFS "Contracting Officer Technical Representative (COTR) Nomination and File Organization Procedures," dated November 30, 2009, state, in Section 4.3.1.2, Contract Performance Management, that COTR duties may include, "Reviewing contractor invoices to ensure costs are allocable to the contract, allowable pursuant to financial regulations, and reasonable." Specifically, the section 4.3, COTR Duties, states in part:

- 4.3.1. COTR's duties can be categorized as acquisition planning; proposal evaluation and negotiation; and performance management. Specific COTR responsibilities may include:
  - 1. Acquisition planning
    - a. Gathering requirements and drafting statements of work or related documents
    - b. Conducting market research to identify qualified sources
    - c. Preparing documentation to support Program and contract determinations and
    - d. Evaluating contractor proposals for technical and performance
  - 2. Contract performance management
    - a. Hosting post-award orientations
    - b. Conducting regular meetings and maintain[ing] effective communications with contractor management
    - c. Preparing periodic cost accrual and contract performance reports
    - d. Reviewing contractor invoices to ensure costs are allocable to the contract, allowable pursuant to financial regulation, and reasonable
    - e. Coordinating audits of contractor records as required
    - f. Providing technical direction and work authorization
    - g. Performing quality assurance reviews of contractor products or services to ensure compliance with contract terms and conditions
    - h. Managing COTR files
    - i. Overseeing contract logistics requirements, such as information technology, security, facilities, and government furnished property

## Appendix E – OFS Legal Service Contracts

(Issued October 3, 2008, through March 31, 2011)

Date of Award	Contract Number	Vendor	Purpose	Obligated Value	Expended Value
<b>Contracts Awarded through Limited Competition Citing Unusual and Compelling Urgency</b>					
10/10/08	TOS-09-007	Simpson Thacher & Bartlett MNP LLP	Legal services for the implementation of TARP	\$931,090	\$931,090
11/07/08	TOS-09-010A	Sonnenschein Nath & Rosenthal LLP	Legal services related to auto industry loans	\$2,722,326	\$2,702,441
01/27/09	TOS-09-020	Cadwalader Wickersham & Taft LLP	Bankruptcy legal services	\$409,955	\$409,955
02/12/09	TOS-09-022	Locke Lord Bissell & Liddell LLP	Initiate interim legal services in support of Treasury investments under EESA	\$272,243	\$272,243
02/20/09	TOFS-09-D-0001	Simpson Thacher & Bartlett MNP LLP	Capital Assistance Program (I)	\$2,047,872	\$1,530,023
02/20/09	TOFS-09-D-0002	Venable LLP	Capital Assistance Program (II) Legal Services	\$1,394,724	\$1,394,724
03/30/09	TOFS-09-D-0005	Bingham McCutchen LLP	Small Business Administration initiative, legal services – contract novated from McKee Nelson LLP	\$422,355	\$270,524
03/30/09	TOFS-09-D-0006	Cadwalader Wickersham & Taft LLP	Auto investment legal services	\$17,392,786	\$17,392,786
03/30/09	TOFS-09-D-0007	Haynes and Boone LLP	Auto investment legal services	\$345,746	\$345,746
03/30/09	TOFS-09-D-0004	Sonnenschein Nath & Rosenthal LLP	Auto investment legal services	\$1,834,193	\$1,834,193
05/26/09	TOFS-09-D-0010	Anderson, McCoy & Orta	Legal services for work under Treasury's Public-Private Investment Fund (PPIF) program	\$4,068,834	\$2,286,996
05/26/09	TOFS-09-D-0009	Simpson Thacher & Bartlett MNP LLP	Legal services for work under Treasury's Public-Private Investment Fund (PPIF) program	\$7,849,026	\$3,505,917
07/30/09	TOFS-09-D-0011	Cadwalader Wickersham & Taft LLP <sup>1</sup>	Restructuring legal services	\$2,049,979	\$1,278,696
07/30/09	TOFS-09-D-0012	Debevoise & Plimpton LLP	Restructuring legal services	\$159,175	\$1,650
07/30/09	TOFS-09-D-0013	Fox, Hefter, Swibel, Levin & Carol, LLP	Restructuring legal services	\$84,125	\$26,493
<b>Subtotals</b>				<b>\$41,984,429</b>	<b>\$34,183,477</b>
<b>Contracts Awarded Using Simplified Acquisition Procedures for Contracts under \$100,000</b>					
09/17/10	TOFS-10-O-0021	Bingham McCutchen LLP	Small Business Administration Section 7(a) Security Purchase Program	\$19,975	\$11,177



Contracts Awarded through Full and Open Competition					
12/10/08	TOS-09-014C	Sonnenschein Nath & Rosenthal LLP	Legal services for the purchase of asset-backed securities	\$249,999	\$102,769
08/06/10	TOFS-10-D-0005	Alston & Bird LLP	Omnibus procurement for legal services	\$1,285,416	\$2,277
08/06/10	TOFS-10-D-0006	Cadwalader Wickersham & Taft LLP	Omnibus procurement for legal services	\$3,789,815	\$992,237
08/06/10	TOFS-10-D-0007	Fox, Hefter, Swibel, Levin & Carol, LLP	Omnibus procurement for legal services	\$181,200	\$660
08/06/10	TOFS-10-D-0008	Haynes and Boone, LLP	Omnibus procurement for legal services	— <sup>2</sup>	—
08/06/10	TOFS-10-D-0009	Hughes Hubbard & Reed LLP	Omnibus procurement for legal services	\$113,655	\$107,301
08/06/10	TOFS-10-D-0010	Love & Long LLP	Omnibus procurement for legal services	— <sup>2</sup>	—
08/06/10	TOFS-10-D-0011	Orrick Herrington Sutcliffe LLP	Omnibus procurement for legal services	— <sup>2</sup>	—
08/06/10	TOFS-10-D-0012	Paul, Weiss, Rifkind, Wharton & Garrison LLP	Omnibus procurement for legal services	\$3,565,041	\$294,118
08/06/10	TOFS-10-D-0013	Perkins Coie LLP	Omnibus procurement for legal services	— <sup>2</sup>	—
08/06/10	TOFS-10-D-0014	Seyfarth Shaw LLP	Omnibus procurement for legal services	— <sup>2</sup>	—
08/06/10	TOFS-10-D-0015	Shulman, Rogers, Gandal, Pordy & Ecker, PA	Omnibus procurement for legal services	\$313,725	—
08/06/10	TOFS-10-D-0016	Sullivan Cove Reign Enterprises JV	Omnibus procurement for legal services	— <sup>2</sup>	—
08/06/10	TOFS-10-D-0017	Venable LLP	Omnibus procurement for legal services	\$498,100	\$190
<b>Subtotals</b>				<b>\$9,996,951</b>	<b>\$1,499,552</b>
Contracts Awarded through General Services Administration Federal Supply Schedule					
10/29/08	T09BPA-002	Hughes Hubbard & Reed LLP	Legal services for the Capital Purchase Program	\$3,060,921	\$2,835,357
10/29/08	T09BPA-001	Squire, Sanders & Dempsey LLP	Legal services for the Capital Purchase Program	\$5,787,939	\$2,687,999
12/22/09	TOFS-10-B-0001	Hughes Hubbard & Reed LLP	Document production services and litigation support	\$1,097,205	\$699,683
04/08/10	TOFS-10-B-0002	Squire, Sanders & Dempsey LLP	Housing legal services	\$1,229,350	\$774,012
07/22/10	TOFS-10-G-0007	Schiff Hardin LLP	Housing legal services	\$537,375	\$97,526
<b>Subtotals</b>				<b>\$11,712,790</b>	<b>\$7,094,577</b>
<b>Total Obligations and Expenditures</b>				<b>\$63,714,145</b>	<b>\$42,788,782</b>

Notes: Numbers may not total due to rounding.

<sup>1</sup> \$1.4 million deobligation submitted on 09/30/2010.

<sup>2</sup> If no task orders have been awarded, no funds are obligated.

Source: OFS.

## Appendix F – OFS Proposal Evaluation Rating Scale and Definition of Rating Terms

### Evaluation Rating Scale

OFS Technical Evaluation Panels evaluated all non-price factors in legal service contract proposals by providing adjectival ratings using the following evaluation rating scale:

**Outstanding (O)** – Meets all requirements of the Request for Proposal (“RFP”) and provides significant advantages to the Government. A rating of outstanding is consistent with a judgment that the proposal presents an extremely low risk of poor performance to the Government.

**Good (G)** – Meets all requirements of the RFP and provides advantages to the Government. A rating of good is consistent with a judgment that the proposal presents a low risk of poor performance to the Government.

**Satisfactory (S)** – Meets all requirements of the RFP. A rating of satisfactory is consistent with the judgment that the proposal presents an average risk of poor performance to the Government.

**Marginal (M)** – Meets most or some requirements of the RFP, but is either significantly weak on an RFP requirement, weak on a high number of RFP requirements, or vague with respect to the firm’s ability to meet certain RFP requirements. A rating of marginal is consistent with the judgment that the proposal presents an above average risk of poor performance to the Government.

**Unsatisfactory (U)** – Does not meet the requirements of the RFP. A rating of unsatisfactory is consistent with one or more significant weaknesses, a deficiency, or a non-responsive proposal. This rating is consistent with the judgment that the proposal presents a high risk of poor performance to the Government.

### Identification of Strengths, Weaknesses, Significant Weaknesses and Deficiencies

The following are the definitions of these terms:

<b>Term</b>	<b>Definition</b>
Strength	A quality element in the proposal that appreciably (measurably, perceptibly) increases the chances of successful contract performance or provides an advantage to the Government.
Weaknesses	A flaw in the proposal that increases the risk of unsuccessful contract performance.
Significant Weakness	A flaw in the proposal that significantly increases the risk of unsuccessful contract performance.
Deficiency	A flaw in the proposal that calls into question the ability of the contractor to perform the work in the Statement of Work.

## Appendix G – Payment-Related FAR Clauses Incorporated into OFS Contracts

In the contracts audited by SIGTARP, the Federal Acquisition Regulation (“FAR”) was referenced in the contracts, which stated: “This contract incorporates one or more [FAR] clauses by reference, with the same force and effect as if they were given in full text.” The following two FAR clauses dealing with payments to contractors were incorporated by reference into the contracts:

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

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

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

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

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

- (a) *Hourly rate.*

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

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

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

Dear OFS Contractor:

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

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

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

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

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

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

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

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

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

## Appendix I – Acronyms and Abbreviations

<b>Acronym</b>	<b>Definition</b>
CAP	Capital Assistance Program
CO	Contracting Officer
COTR	Contracting Officer's Technical Representative
CPP	Capital Purchase Program
EESA	Emergency Economic Stabilization Act of 2008
FAR	Federal Acquisition Regulation
FDIC	Federal Deposit Insurance Corporation
GSA	General Services Administration
OFS	Office of Financial Stability
PPIF	Public-Private Investment Fund
PPIP	Public-Private Investment Program
RFP	Request for Proposal
SBA	Small Business Administration
SIGTARP	Office of the Special Inspector General for the Troubled Asset Relief Program
TARP	Troubled Asset Relief Program

## Appendix J – Audit Team Members

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

## Appendix K – Management Comments



DEPARTMENT OF THE TREASURY  
WASHINGTON, D.C. 20220

ASSISTANT SECRETARY

September 28, 2011

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

RE: Response to SIGTARP's Final Audit Report on Legal Fees Paid Under the Troubled Asset Relief Program

Dear Ms. Romero:

I am writing in response to your draft final audit report entitled, *Legal Fees Paid Under the Troubled Asset Relief Program: An Expanded Report*, dated September 19, 2011 (the "Final Report"). The Final Report reiterates earlier findings contained in your interim report entitled, *Treasury's Process for Contracting for Professional Services under the Troubled Asset Relief Program*, dated April 14, 2011 (the "Interim Report"), and it presents results regarding the four additional law firms that were the subject of your original review. The Department of the Treasury appreciates the efforts of the Office of the Special Inspector General ("SIGTARP"), and this letter provides our official response to the Final Report.

In reviewing the Final Report, we believe it is important to highlight the unusual and historic time period during which the legal services were rendered. Our entire economy was on the verge of a catastrophic collapse, markets had ceased to function, and almost every major financial institution was at risk of failure. During this period, Treasury staff worked day and night with outside legal counsel, who provided invaluable advice regarding complex financial transactions in connection with Treasury's Capital Purchase Program, our efforts to restructure the U.S. automobile industry, and other TARP programs. Treasury's actions were successful, due in part to the quality of our legal support. For example, Treasury's banking programs provided assistance to over 700 institutions, helped to stabilize the financial system, and are expected to result in a profit of approximately \$20 billion to the taxpayers. And our assistance to the auto industry facilitated restructurings that were completed in record time and that have enabled the industry to begin a dramatic turnaround. We appreciate the important role that our outside legal advisors played in achieving these results.

We also believe it is important to highlight the important steps that Treasury took to ensure that taxpayers received good value in regard to legal services. As the Final Report concludes, Treasury followed a process that included adequate price competition and complied with the Federal Acquisition Regulations ("FAR"), even though Congress expressly allowed Treasury to contract for its TARP needs without complying with the FAR in view of the emergency nature

of the program. Moreover, the Final Report concludes that Treasury negotiated billing rates that were equal to or lower than those obtained by other federal agencies, and were substantially lower than the respective law firms' standard rates. Finally, because of the gravity and urgency of the issues we faced, Treasury staff was in frequent communication with outside counsel and closely monitored their work. Accordingly, we were well positioned to judge the quality and value of their assistance and to ensure that taxpayer funds were used wisely.

For these reasons—and as we stated in our response to the Interim Report (attached) Treasury continues to believe that the Office of Financial Stability (“OFS”) has implemented strong and effective processes for all of its contracts, including those for legal services. As such, we disagree with the Final Report’s suggestion that our past practices created an unacceptable risk that Treasury overpaid for legal services. Nonetheless, we also recognize that every internal process can be improved, and we are firmly committed to developing the best possible internal controls to protect limited taxpayer resources. Accordingly, OFS agreed to implement each of the recommendations contained in the Interim Report and has since adopted new guidance for outside law firms as well as updated OFS internal procedures.

The Final Report provides five additional, similar recommendations regarding OFS’s review and payment of legal fees and related costs. We have reviewed these additional recommendations carefully, and we are committed to working with you to address your concerns in accordance with our updated guidance and contract procedures. Of course, in doing so, we must remain mindful of the expected return from these efforts and the cost of undertaking them. We will continue to update you on our progress.

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

Sincerely,



Timothy G. Massad  
Assistant Secretary for Financial Stability





ASSISTANT SECRETARY

DEPARTMENT OF THE TREASURY  
WASHINGTON, D.C. 20220

April 7, 2011

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

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

Dear Ms. Romero:

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

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

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

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

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

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

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

#### Recommendations

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

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

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

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

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

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

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

Sincerely,



Timothy G. Massad  
Assistant Secretary for Financial Stability

## SIGTARP Hotline

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

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

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

By *Fax*: (202) 622-4559

By *Mail*:

**Hotline: Office of the Special Inspector General  
for the Troubled Asset Relief Program**  
1801 L Street., NW, 3<sup>rd</sup> Floor  
Washington, D.C. 20220

## Press Inquiries

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

Julie Vorman  
Acting Director of Communications  
[Julie.Vorman@treasury.gov](mailto:Julie.Vorman@treasury.gov)  
202-927-1310

## Legislative Affairs

For Congressional inquiries, please contact our Legislative Affairs Office:

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

## Obtaining Copies of Testimony and Reports

To obtain copies of testimony and reports, please log on to our website at [www.sig tarp.gov](http://www.sig tarp.gov).

