

WHITE-COLLAR CRIME

Expert Analysis

Prosecutions Arising Out of Troubled Asset Relief Program

In October 2008, in response to what many economists believe to be the worst financial crisis since the Great Depression,¹ Congress passed the Emergency Economic Stabilization Act (EESA).² In turn, the EESA created the Troubled Asset Relief Program (TARP) which authorized the Department of Treasury to spend up to \$700 billion to provide funds to qualified financial institutions and purchase or insure “troubled assets,” such as mortgages, to stabilize and strengthen the nation’s financial system. Testifying before the Senate Judiciary Committee, Special Inspector General for TARP Neil Barofsky stated, “[W]e stand on the precipice of the largest infusion of Government funds over the shortest period of time in our Nation’s history. Unfortunately, history teaches us that an outlay of so much money in such a short period of time will inevitably draw those seeking to profit criminally.”³

Noting that federal programs historically lose 5 to 10 percent of their budgets to fraud, the Obama administration estimated that upwards of \$50 billion of TARP funds may be at risk. The director of the FBI opined that the funds are “inherently vulnerable to bribery, fraud, conflicts of interest, and collusion.” This is especially true of the TARP stimulus package because almost all of the money is transferred electronically.⁴

Hence, the Office of Special Inspector General for TARP was created in part to investigate the purchase, management, and sale of TARP assets by the Treasury Department in order to prevent such losses. SIGTARP, as the office is known, and



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its Special Inspector General has subpoena power as well as the authority to obtain documents and information from other government agencies and has been a key player in cross-agency investigations into questionable conduct related to the economic stimulus package.

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Anti-Fraud Enforcement

To ensure that SIGTARP and other government agencies had the resources needed to root out and punish fraud in this context, Congress passed the Fraud Enforcement and Recovery Act (FERA),⁵ which was signed into law by President Barack Obama in May 2009. FERA provided for the injection of funds for federal anti-fraud enforcement⁶ and strengthened several financial fraud statutes to expand already existing weapons in the government’s arsenal.

For instance, FERA amends the definition of “financial institution” in the criminal code to include mortgage-lending businesses not directly regulated or insured by the federal government, thereby applying the federal fraud laws to private mortgage businesses.⁷ In addition, the money laundering statutes, set forth in 18 U.S.C. §§1956

and 1957, were amended to broaden the definition of “proceeds” to include not just the profits from the illegal activity, but also the “gross receipts” of such activity.⁸

Further, the major fraud statute, set forth in 18 U.S.C. §1031, was amended to explicitly include transactions and activities that fall under TARP. Testifying before Senate Judiciary Committee to advocate for the passage of FERA, Acting Assistant Attorney General Rita Glavin urged its members to keep this provision, stating that the amendment to §1031 “would ensure that federal prosecutors are able to use one of our most potent fraud statutes to protect government assistance provided during this economic crisis.”

Investigations, Prosecutions

Despite Ms. Glavin’s testimony regarding the significance of specifically including TARP in the major fraud statute, the authors could not find a case brought under the major frauds statute for fraud in connection with TARP. That does not mean, however, that those charged with overseeing TARP have been sitting on their hands. Rather, Mr. Barofsky and others at SIGTARP, in conjunction with the Justice Department, FDIC, and other agencies, have been active. In its Quarterly Report to Congress, dated Oct. 26, 2010, SIGTARP states that its Investigative Division “has developed into a leading white-collar investigative agency” with 130 ongoing criminal and civil investigations.

Further, the Report provides that since its inception, SIGTARP investigations have “contributed to the recovery of \$155.8 million and saved an estimated \$555.2 million through fraud prevention.” Although SIGTARP notes that much of its investigative activity remains confidential, both the Report to Congress and the agency’s Web site publicize a number of “significant public developments.” Indeed, these sources recount the myriad ways and statutes pursuant to which an individual may be held criminally liable for activities related to TARP.

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Fraud in Obtaining or Seeking TARP Money.

Statements made by both recipients of and applicants for TARP and other federal funds may result in criminal charges. On March 15, 2010, SIGTARP, in conjunction with the Justice Department, the Department of Homeland Security, the Superintendent of the Banks of New York, the FBI, and the Inspector General of the FDIC, announced the arrest and indictment of the “first defendant ever charged with attempting to defraud the Troubled Asset Relief Program.”⁹ Charles J. Antonucci, Sr., was the president and chief executive officer of The Park Avenue Bank and was alleged to have attempted to fraudulently obtain more than \$11 million worth of taxpayer rescue funds from TARP.

According to the charges, recognizing that only financial institutions with a sufficient capital base qualify for TARP funds, Mr. Antonucci engaged in fraudulent transactions to bolster that bank’s TARP application and give the appearance that The Park Avenue Bank was in a sound financial position. The “round-trip” transaction worked as follows: The Park Avenue bank loaned funds totaling \$6.5 million to entities with which Mr. Antonucci had relationships; these entities transferred the money to accounts controlled by Mr. Antonucci; Mr. Antonucci re-deposited the \$6.5 million into the bank, claiming it was an investment of his personal funds intended to recapitalize the bank. As articulated by the government, the structure of this transaction only served to mask the fact that the purported investment was actually made with the bank’s own funds.

Once the FDIC informed Mr. Antonucci that it would not recommend approval of The Park Avenue Bank’s TARP application, Mr. Antonucci voluntarily withdrew the application, but not before the government had enough evidence to charge Mr. Antonucci. Specifically, Mr. Antonucci was charged with securities fraud related to the TARP application, in addition to fraud on the FDIC, bank bribery, and embezzlement and misappropriation of bank funds.¹⁰ On Oct. 8, 2010, Mr. Antonucci pled guilty to all counts against him, agreeing to forfeit numerous properties as well as more than \$11 million.¹¹ Special Inspector General Barofsky commented that the *Antonucci* case “should stand as a stark warning to would-be wrongdoers that if you attempt to profit criminally from this historic program, SIGTARP and its law enforcement partners will work tirelessly to ensure that you will be caught, you will be charged, and you will be brought to justice.”¹²

In another example, on June 15, 2010, Lee Bentley Farkas, the former chairman of the mortgage company Taylor Bean & Whitaker (TBW) was arrested in the Eastern District

of Virginia and charged with conspiracy and substantive counts of bank, wire, and securities fraud. TBW was one of the largest privately held mortgage lending companies in the United States, originating and purchasing billions of dollars in new residential loans every year. Those mortgages were funded, in part, by lines of credit and accounts held by TBW with Colonial Bank.

When TBW began to experience cash flow problems in early 2002, Mr. Farkas, along with other executives and employees of TBW and Colonial Bank, is alleged to have devised a scheme to misappropriate funds to cover the shortfall. The scheme involved the transfer of funds between TBW and Colonial Bank through the sale of fictitious loans and assets. Eventually, the co-conspirators are alleged to have sought to acquire a stake in Colonial Bank’s parent company, Colonial BancGroup, in order to profit from that company’s anticipated TARP funding.

In late 2008, Colonial BancGroup’s application for TARP funding in the amount of \$553 million was conditionally approved by the Treasury Department pending Colonial BancGroup’s ability to raise \$300 million in private capital. Mr. Farkas is alleged to have spearheaded an effort to raise these funds from a group of investors which included TBW, ultimately misrepresenting that the funds had been collected, thereby causing Colonial BancGroup to file inaccurate forms with the SEC. Colonial BancGroup never received the TARP funding sought.¹³ The case against Mr. Farkas is pending.

Fraud in Using TARP’s Name. Improper or fraudulent use of the TARP name also may result in criminal liability. For instance, on Aug. 6, 2009, a financial adviser and owner of a financial services company pled guilty to mail and wire fraud in the Middle District of Tennessee, admitting that he operated an elaborate Ponzi scheme designed to defraud investors who deposited more than \$11 million in funds with his company. As part of his scheme, Gordon B. Grigg solicited funds by falsely representing that he had access to “government-guaranteed commercial paper and bank debt” available under TARP. Mr. Grigg was sentenced to 10 years in prison and \$6 million in restitution.¹⁴

On June 1, 2010, Glenn Steven Rosofsky pled guilty to one count of conspiracy to commit wire fraud and money laundering, one count of money laundering, and one count of filing a false tax return in connection with his operation of a telemarketing firm, which advertised that it would assist delinquent homeowners with loan modification services. Taking “criminal advantage of the publicity surrounding the administration’s mortgage modification efforts under the TARP-

related Making Home Affordable program, [Rosofsky] us[ed] fraudulent statements to induce customers to pay \$2,500-3,000 each to purchase loan modification services.” The fraud grossed more than \$1 million although no such services were provided.¹⁵ Sentencing in the Southern District of California is pending.

Conclusion

Motivated by concerns about the vulnerability of federal funds to be issued under TARP, Congress has passed more legislation to further expand the government’s already formidable array of options in seeking to punish fraud committed in connection with the economic stimulus package. The extent to which SIGTARP will use these resources remains to be seen. To date, SIGTARP has been active in investigating and prosecuting TARP-related fraud, and the young agency will continue to make itself a force in the ever-expanding universe of federal criminal law.

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1. Reuters, “Three Top Economists Agree 2009 Worst Financial Crisis Since Great Depression; Risks Increase If Right Steps Are Not Taken” (Feb. 27, 2009).

2. Pub. L. No. 110-343, 122 Stat. 3765 (2008).

3. Neil Barofsky, Statement Before the U.S. Senate Committee on the Judiciary, Feb. 11, 2009 at 5 (available at <http://www.sig tarp.gov>).

4. Greg Morcroft, “Fraudsters eye huge stimulus pie, consultant says,” Wall Street Journal (June 12, 2009).

5. Pub. L. No. 111-21, 123 Stat. 1617 (2009) (codified at 18 U.S.C. §27).

6. FERA §§3(a)-(f) (appropriating \$165 million for each of the fiscal years 2010 and 2011 to the attorney general for “investigations and prosecutions and civil and administrative proceedings involving Federal assistance programs and financial institutions”). This was in addition to the \$250 million appropriated for inspectors general of all government agencies to hire additional auditors and investigators to guard against wasteful spending under the American Recovery and Reinvestment Act of 2009. Pub. L. No. 111-5, 123 Stat. 115 (2009).

7. 18 U.S.C. §20.

8. 128 S. Ct. 2020 (2008).

9. Press Release, United States Attorney Southern District of New York, “Manhattan U.S. Attorney Charges Former President of The Park Avenue Bank with Self-Dealing, Bank Bribery, Embezzlement of Bank Funds, and Fraud” (March 15, 2010).

10. Information, *United States v. Antonucci*, 10 Crim. 922 (NRB) (S.D.N.Y. Oct. 8, 2010).

11. Consent Preliminary Order of Forfeiture, *United States v. Antonucci*, 10 Cr. 922 (NRB) (S.D.N.Y. Oct. 15, 2010).

12. Press Release, United States Attorney Southern District of New York, “Manhattan U.S. Attorney Charges Former President of The Park Avenue Bank with Self-Dealing, Bank Bribery, Embezzlement of Bank Funds, and Fraud” (March 15, 2010).

13. Indictment, *United States v. Farkas*, 1:10-CR-200 (E.D.Va. June 15, 2010).

14. Press Release, United States Attorney Middle District of Tennessee, “Franklin Financial Advisor Gordon B. Grigg Sentenced to 10 Years in Prison for Investment Fraud in Ponzi Scheme” (Aug. 6, 2009).

15. SIGTARP Quarterly Report to Congress, July 21, 2010 at 12.