



CRS Report for Congress

The Special Inspector General for the Troubled Asset Relief Program (SIG TARP)

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Summary

This report discusses the Special Inspector General provisions in the Emergency Economic Stabilization Act of 2008, H.R. 1424, which was enacted as P.L. 110-343 on October 3, 2008. This Act created a Special Inspector General (SIG) for the Troubled Asset Relief Program (TARP). This report will compare the duties and authorities of the SIG TARP to those of the Special Inspector General for Iraq Reconstruction (SIGIR) and the Special Inspector General for Afghanistan Reconstruction (SIGAR), as well as statutory IGs under the Inspector General Act of 1978, as amended (IG Act).

Congress has established statutory offices of inspectors general (IGs) in many executive and legislative branch agencies, as well as two special IGs for programs and operations funded with amounts appropriated for the reconstruction of Iraq and Afghanistan.¹ The four principal responsibilities of IGs are: (1) conducting and supervising audits and investigations; (2) providing coordination and recommending policies for activities designed to promote economy and efficiency in agency programs and operations; (3) preventing and detecting fraud, waste, and abuse; and (4) keeping the agency head and Congress fully and currently informed about problems and deficiencies relating to such programs and recommending corrective actions.² P.L. 110-343 established an additional special IG for the Troubled Asset Relief Program (SIG TARP), which will address the purchase and insurance of troubled assets.

The provisions in P.L. 110-343 establishing the SIG TARP are similar to the IG provisions for SIGIR and SIGAR in many respects. However, there are important substantive distinctions between these three IGs, which this report will refer to collectively as the “special IGs,” as well as between the SIG TARP and statutory IGs

¹ Provisions establishing SIGIR and SIGAR are located at 5 U.S.C. App. § 8G note. Provisions establishing statutory IGs are codified at 5 U.S.C. App.

² 5 U.S.C. App. § 4(a).

created under the IG Act.³ Due to the ambiguous nature of the statutory language in P.L. 110-343, the scope of the powers and authorities of the SIG TARP is not clear, as discussed below.

Appointment and Removal. The SIG TARP will be a presidentially appointed and Senate confirmed IG, selected “on the basis of integrity and demonstrated ability in accounting, auditing, financial analysis, law, management analysis, public administration, or investigations.”⁴ Unlike statutory IGs under § 3 of the IG Act, who are also presidentially appointed and Senate confirmed, there is no provision in P.L. 110-343 that requires the SIG TARP to be appointed “without regard to political affiliation and solely” on the basis of the skills listed above. Although the absence of the additional IG Act language regarding political affiliation and appointment based only on job qualification skills does not change the legal protections that the IG Act and P.L. 110-343 afford to the SIG TARP, the SIG TARP may be less independent than other IGs as a practical matter, given that the SIG TARP is not subject to the same appointment constraints.

The nomination of a SIG TARP is required “as soon as practicable” after the establishment of the TARP and the Troubled Assets Insurance Financing Fund.⁵ Like other presidentially appointed and Senate-confirmed IGs, the SIG TARP can be removed only by the President, and the President must notify Congress of the reasons for the IG’s removal.⁶ The President’s reasons need not be given in writing and no time limit is set.

Supervision. Unlike IGs in other agencies, who “shall report to and be under the general supervision” of the agency head,⁷ the SIG TARP will not be required to report to, or be supervised by, the head of any agency, including the Secretary of the Treasury. The IG Act does not explicitly define the meaning of “general supervision” and its legislative history does not appear to address the scope of the agency head’s supervisory role. A court case relying on the legislative history of the IG Act described the agency head’s supervisory authority over the IG as “nominal.”⁸ Instead, under one interpretation of the SIG TARP’s duties and responsibilities, discussed below, the SIG TARP will report only to Congress and not the agency head, as specified in § 121(f)(1). This reporting arrangement would be unique among statutory IGs. Additionally, the SIG TARP will

³ The Treasury Inspector General for Tax Administration (TIGTA), which was carved out of the Treasury IG and covers a distinct entity within the Treasury Department — the Internal Revenue Service (IRS) — is another comparable, though not identical, IG. TIGTA is currently the only statutory IG that exists within an establishment or entity that also has an agency-wide IG in place.

⁴ P.L. 110-343, § 121(b)(2). For comparison, SIGAR is the only presidentially appointed, but not Senate confirmed, IG, while SIGIR is “appointed by the Secretary of Defense, in consultation with the Secretary of State.” 5 U.S.C. App. § 8G note. However, “[t]he President may appoint the [SIGIR] to serve as the [SIGAR], in which case the [SIGAR] shall have all of the duties, responsibilities, and authorities set forth ... with respect to such appointed position.” *Id.*

⁵ P.L. 110-343, § 121(b)(3). SIGIR and SIGAR were required to be appointed “not later than 30 days after the date of the enactment” of their respective acts. *See, e.g.*, P.L. 110-181, § 1229(c).

⁶ P.L. 110-343, § 121(b)(4).

⁷ IG Act, §§ 3(a), 8G(d).

⁸ *United States Nuclear Regulatory Commission v. Federal Labor Relations Authority*, 25 F.3d 229, 235 (4th Cir. 1994).

have complete discretion in pursuing audits and investigations, and in issuing subpoenas.⁹ The absence of such supervision provisions does not mean that the TARP itself will be without an administrator — the Treasury Secretary will be responsible for implementing the TARP through a newly created Office of Financial Stability.¹⁰

The SIG TARP appears to possess greater latitude in pursuing audits and investigations than the Treasury IG, as the Treasury IG is one of six IGs that may be prevented by an agency head from initiating, carrying out, or completing an audit or investigation, or from issuing a subpoena, for specified reasons such as preventing disclosure of national security matters.¹¹

In contrast to the SIG TARP, the other special IGs report to, and are supervised by, the Secretary of State and the Secretary of Defense. SIGIR and SIGAR are also required to keep the Secretaries of State and Defense “fully and currently informed about problems and deficiencies” in program administration and the need for and progress on corrective action.¹² Additionally, SIGIR and SIGAR must coordinate with the IGs for the Departments of State and Defense, and the United States Agency for International Development IG “in carrying out the duties, responsibilities, and authorities of the Inspector General.” The provisions for the SIG TARP do not require coordination with the Treasury IG or other IGs.

Duties and Responsibilities. Section 121(c)(3) of P.L. 110-343 provides that the SIG TARP “shall also have the duties and responsibilities of inspectors general under the Inspector General Act of 1978.” On one hand, this provision could mean that the SIG TARP would be responsible for all of the IG duties outlined in the IG Act, presumably as amended, even those that reference interaction with the head of an establishment or those that reference responsibilities not specifically delineated in P.L. 110-343. However, it appears more likely that § 121(c)(3)’s reference to duties and responsibilities may be limited to those under § 4 of the IG Act, which is entitled “Duties and responsibilities; report of criminal violations to Attorney General.”

⁹ It is conceivable that the executive branch would raise constitutional objections to the direct reporting requirement for the Inspector General. However, Congress has imposed direct reporting requirements on executive branch officials since the first Congress. CRS Report RL 33667, *Presidential Signing Statements: Constitutional and Institutional Implications*, by T.J. Halstead. Additionally, in *Morrison v. Olson*, 487 U.S. 654 (1988), the Supreme Court established a two-step balancing test for addressing separation of powers concerns in such situations. First, the President must establish that the congressional action interferes with a core power. If so, Congress must show a necessity for its action to overcome the interference. Ultimately, given that removal power remains within the executive branch, the President will be able to perform its constitutional duty to “take care that the laws be faithfully executed.” *Morrison*, 487 U.S. at 686, 694-95; U.S. CONST. art. II, § 3. In the IG context, the executive branch would “retain[] ample authority to assure that the [IG] is competently performing his or her statutory responsibilities.” *Morrison*, 487 U.S. at 692.

¹⁰ P.L. 110-343, § 101(a)(3).

¹¹ IG Act § 8D. If the Treasury Secretary were to exercise this power over the Treasury IG, the Secretary must notify the Treasury IG in writing of the reasons for exercising such power. The Treasury IG, in turn, must send this notification to congressional committees within 30 days.

¹² See, e.g., P.L. 110-181, § 1229(a)(3).

The provision that grants the SIG TARP the same duties and responsibilities as those of IGs under the IG Act also appears in the acts that created SIGIR and SIGAR. This provision seems to bridge some, but not all, of the differences between the authorities of the special IGs and IGs created under the IG Act. If interpreted broadly, this provision will likely encompass the powers, duties, and responsibilities in certain sections of the IG Act, including, but not limited to

- §§ 4(a)(2) - (a)(5), which encompass general IG duties and the responsibility to “keep the head of such establishment and the Congress fully and currently informed, by means of the reports required by section 5 and otherwise, concerning fraud and other serious problems, abuses, and deficiencies relating to the administration of programs and operations”; and
- § 4(d), which requires IGs to report expeditiously to the Attorney General when there exist “reasonable grounds to believe there has been a violation of Federal criminal law.”

The “and otherwise” language in the requirement that IGs keep Congress “fully and currently informed” has come to be understood in practice to include testifying at congressional hearings, direct communications with Members and staff, various selective or specialized reporting techniques, and responses to congressional inquiries for information, audits, and reports (both verbal and written).

Depending on how § 121(c)(3) is interpreted, it is possible that the SIG TARP’s responsibilities will not encompass § 4(a)(1) of the IG Act. That section provides that IGs are “to provide policy direction for and to conduct, supervise, and coordinate audits and investigations relating to the programs and operations of such establishment.” Since the provisions creating the SIG TARP contain specific language with regard to conducting, supervising, and coordinating audits and investigations, and this specific language does not mention “policy direction,” this provision of the IG Act would not seem to be included in the duties mentioned in § 121(c)(3).

Also, § 121(c)(3) of P.L. 110-343 will not necessarily encompass the whistleblower protections in § 7 of the IG Act. These provisions address complaints or information provided by a whistleblowing employee, the disclosure of a whistleblower’s identity, and reprisals threatened or taken against a whistleblower. Under the IG Act, not every complaint must be investigated, and the IG has discretion in accepting complaints from individuals other than employees. However, it appears that IGs are willing to accept complaints from anyone, not just employees, and the legislative history of the IG Act does not prohibit IGs from receiving and acting on information or complaints from any source. On a related note, P.L. 110-343 provides that the Financial Stability Oversight Board, as established by the legislation, will be responsible for “reporting any suspected fraud, misrepresentation, or malfeasance” to the SIG TARP or the Attorney General.¹³

¹³ P.L. 110-343, § 104(a)(3). Additionally, the Comptroller General must submit reports on “the activities and performance of the TARP and of any agents or representatives of the TARP” to the SIG TARP at least every 60 days. P.L. 110-343, § 116(a)(3).

However, a whistleblower with information concerning the possible existence of illegal activities or mismanagement regarding the purchase or insurance of troubled assets could conceivably be covered by the IG Act § 7 protections if he or she reported the information to the Treasury IG, as opposed to the SIG TARP. The acts that created SIGIR and SIGAR do not contain whistleblower protections either.

SIG TARP Reports. If the SIG TARP's duties and responsibilities are interpreted to be confined to those in § 4 of the IG Act, the above cross reference to "the reports required by section 5" in § 4(a)(5) of the IG Act appears to subject the SIG TARP to the IG Act § 5 reporting requirements as well. However, it is not clear as to whether the SIG TARP would need to submit the reports in § 5 of the IG Act in addition to the reports required in P.L. 110-343 or whether the SIG TARP would only be responsible for the required reports set forth in P.L. 110-343.

For example, § 5(d) of the IG Act requires establishment IGs to immediately report "particularly serious or flagrant problems, abuses, or deficiencies" to the head of the establishment whenever the IG becomes aware of such issues. The head of the establishment then must send the report to the appropriate congressional committees within seven days, along with the establishment head's comments in his or her own report. Since P.L. 110-343 requires the SIG TARP to report to Congress only, and not to an establishment head, it is not clear if the SIG TARP would be required to comply with those reporting requirements in § 5(d) of the IG Act. If P.L. 110-343 is interpreted to include the reporting requirements in § 5 of the IG Act, then the SIG TARP could be required to submit certain reports to the establishment head, which would appear to be the Secretary of the Treasury, as TARP itself has not been designated an establishment.

Section 121(f) of P.L. 110-343 specifies certain reporting requirements for the SIG TARP, including a report 60 days after the SIG's confirmation by the Senate and every quarter thereafter. The report must include "a detailed statement of all purchases, obligations, expenditures, and revenues associated with" the TARP. The specificity of the language of this report provision could be interpreted to imply that the "duties and responsibilities" provision in § 121(c)(3) would not extend to the reporting requirements set out in § 5 of the IG Act, which provides that the IG office must prepare semiannual reports and submit them to the head of the establishment, who in turn must transmit them to appropriate congressional committees with his or her own report.¹⁴ Alternatively, the IG Act § 5 reports could be required in addition to the reports set out in P.L. 110-343.

There is no explicit requirement in P.L. 110-343 that the Treasury Secretary (or anyone else) be allowed to comment on the reports that the SIG TARP submits to Congress. Although there may be other reporting requirements with respect to TARP, they would not be intended to respond to SIG concerns or criticisms. SIGAR and SIGIR have such requirements enabling the Secretaries of State and Defense to submit comments to the appropriate congressional committees, as well as requirements that the reports be made public, and even published on a website.¹⁵ The IG Act also provides that the head of the establishment must make the semiannual IG reports and the semiannual

¹⁴ 5 U.S.C. §§ 5(a)-(b).

¹⁵ See, e.g., P.L. 110-181, §§ 1229(i)-(k). The President can waive the public availability requirement of the SIGIR and SIGAR reports for national security reasons.

establishment head reports available to the public, on request, within 60 days of the establishment head's transmission of the reports to the appropriate congressional committees.¹⁶

Resources. Section 121(d) of P.L. 110-343 states that the SIG TARP will have the authorities of § 6 of the IG Act, which provides in subsection (c) that the head of an establishment must give the IG office within the establishment adequate office space, equipment, supplies, and other services. It could be argued that the Secretary of the Treasury is the head of the establishment in which the TARP is located, as § 11(2) of the IG Act defines “establishment” to include the Treasury. In addition, § 6(a)(3) of the IG Act provides that the IG is authorized “to request information or assistance as may be necessary for carrying out the duties and responsibilities provided by the IG Act from any Federal, State, or local government agency or unit thereof.” It is not clear if “assistance” would cover office space, however, if it does, the SIG TARP would appear to be able to request facilities and resources from the Treasury Department. In contrast, P.L. 110-343 specifically provides that “[t]he Secretary shall provide the Comptroller General with appropriate space and facilities in the Department of the Treasury as necessary to facilitate oversight of the TARP until the termination date established in section 120.”¹⁷

The provisions in the act creating SIGAR enabled that special IG to rely on the personnel, facilities, and resources of another special IG, SIGIR.¹⁸ SIGIR, in turn, could rely on the Department of State or the Department of Defense for equipment, office supplies, and communications facilities and services within either agency, including at appropriate locations of the Department of State in Iraq.¹⁹

Termination. Section 121(h) establishes that the office of the SIG TARP “shall terminate on the later of — (1) the date that the last troubled asset acquired by the Secretary under section 101 has been sold or transferred out of ownership or control of the Federal Government; or (2) the date of expiration of the last insurance contract issued under section 102.”²⁰ In contrast, SIGIR and SIGAR “shall terminate 180 days after the date on which amounts appropriated or otherwise made available for the reconstruction of Iraq [or Afghanistan] that are unexpended are less than \$250,000,000.”²¹ The continuation of the SIG TARP appears fundamentally different than that of the other special IGs, as the reconstruction of Iraq and Afghanistan accounts are expected to be limited in time and amount. The SIG TARP may be a continuing necessity to audit the purchase, transfer, sale, and insurance of troubled assets.

¹⁶ 5 U.S.C. App. § 5(c).

¹⁷ P.L. 110-343, § 116(a)(2)(A).

¹⁸ P.L. 110-181, §§ 1229(h)(4), (6).

¹⁹ *See, e.g.*, P.L. 108-106, § 3001(h)(5).

²⁰ P.L. 110-343, § 121(h).

²¹ P.L. 110-181, § 1221(h), § 1229(o).