

The TARP Lobbying Rules: What They Say And What They Mean For Transparency

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In September, the Treasury Department released its [TARP lobbying disclosure rules](#), nearly eight months after a [press release](#) heralding their creation, and a month after an [Inspector General report](#) bluntly urged Treasury to promulgate the rules. The rules require that the Treasury Department document communications through which companies lobby for TARP funds. Commonsense rules that increase transparency regarding lobbying communications can have the beneficial effect of reducing the likelihood and appearance of corruption, fostering better dialog, and enhancing the public's faith in the political process.

The rules promulgated by the Treasury Department attempt to meet the great challenge of improved transparency, but fall short of their potential. They are hard to understand, difficult to apply, and full of contradictions and omissions that undermine stated policy objectives. The rules should be clarified, rewritten, simplified, and broadened.

My [initial review of the rules](#) identified some key differences between the TARP lobbying rules and the [stimulus lobbying rules](#), which were issued over the summer and document lobbying over recovery dollars. In the following sections, I analyze the TARP lobbying rules in considerable detail. Before doing so, here are two measures the Treasury Department should consider. First, Treasury should implement an online searchable lobbying database of all disclosures required under the rules, which is updated in real-time. The public database should be searchable by date, communicant, subject matter of the conversation, and so on. The burden of collecting that data could be reduced by allowing staff to submit reports online.

Regardless of whether this database is built, all of the documents that the lobbying rules require be disclosed should be available in an easy-to-find place online. So far, I have been unable to find the lobbying communication reports on Treasury's website. The rules require that those reports be made available online within 3 days of a disclosable communication taking place. A phone call to Treasury seeking assistance with finding the disclosures has not yet been returned.

Second, Treasury (and the administration generally) should reconsider the format it uses to promulgate rules. Short, terse, lawyerly language, such as that contained in the TARP lobbying rules memo, is difficult for most people to follow. Treasury should use straightforward language, and define all key terms. Moreover, linguistic sign posts, such as improved headings and sub-headings, would

provide a welcome roadmap. Furthermore, adding charts and decision trees to help explain the rules would provide a welcome complement to dense prose.

Overview of TARP Lobbying Rules

TARP, the Troubled Asset Relief Program, was created by the [Emergency Economic Stabilization Act of 2008](#) to stabilize the financial markets via a Wall Street bailout. The TARP lobbying disclosure rules seek to “limit the influence of lobbyists and special interest[s]” regarding how the \$700+ billion in TARP money is awarded, and “ensure that [government] investment decisions are guided by objective assessments” in promoting the “health and stability of the financial system.” The lobbying rules apply only to communications with Treasury officials regarding TARP funds. In doing so, they break down communications into two categories, oral and written, and impose different transparency requirements on each.

Presumably, oral and written communications are regulated differently because of the varying ease and comprehensiveness with which federal employees can report the contents of communications. As to oral communications, it is impractical (and probably unwise) for federal employees to transcribe or tape record conversations and place them online. Thus, the rules require that certain oral communications be reduced into written form, with a summary of the communication placed online. This reductive process raises the spectre of improper communications uncaptured by a written report, and likely led to the administration's ban on certain oral communications. By contrast, written communications (i.e., documents) submitted for consideration by Treasury officials can be readily published online in their entirety. As a result, there is less concern about incompletely recorded communications, as all of the information is available for public inspection.

The TARP lobbying disclosure rules can have one of three effects on lobbying communications. They can permit a communication to occur without restriction, prohibit a communication, or allow a communication to occur but impose public reporting requirements.

Unrestricted TARP-related Communications

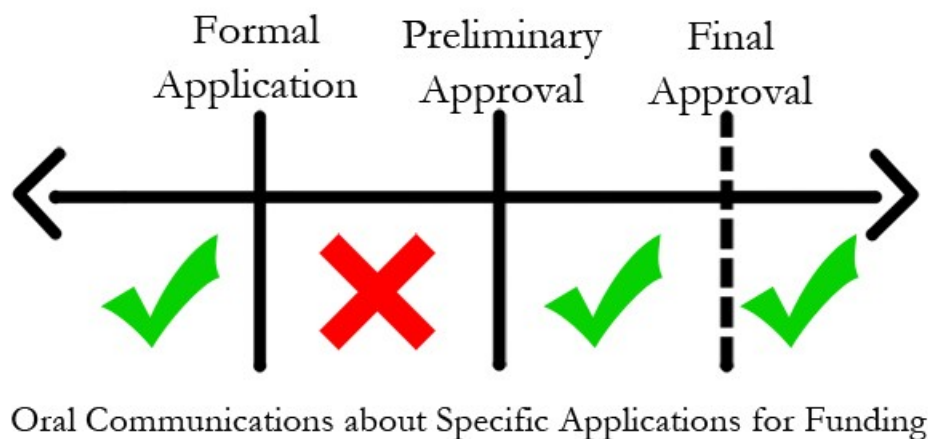
Any person may ask a Treasury official a logistical question regarding TARP funding or implementation without hindrance. Oral and written communications are allowed, and do not trigger rules requiring Treasury employees to report the communication. Logistical questions include inquires concerning (1) the application process for TARP funding, (2) deadlines for making funding requests, (3) to whom an application should be submitted, and (4) Treasury practices or program requirements.

In addition, the lobbying rules do not impose limitations on oral communications with Treasury officials at “widely attended gatherings,” which is [precisely defined](#) in the Code of Federal Regulations. The reasoning behind this rule, presumably, is that airing the communication in public gives those persons holding contrary points of view the opportunity to respond, and also reduces the likelihood of improper influence exerted through the communication.

Bans on TARP-related Communication

At the opposite end of the spectrum, the TARP lobbying disclosure rules ban oral communications regarding specific applications for funds in certain circumstances. It is likely they do so because it is difficult to fully capture and report the contents of oral communications. Specifically, the absence of transparency raises questions about the integrity of agency deliberations.

The rules break down the process of awarding TARP funds into three time periods, summarized in the timeline below. First is the period of time leading up to submission of a “formal application for financial assistance.” Second is the period of time from the submission of a formal application for funds until their “preliminary approval.” Third is the time after granting approval of preliminary funding. It seems to me that there should be a fourth time period demarcated by when the Treasury Department grants “final approval” to the expenditure of funds.



The lobbying rules ban all oral communications between Treasury employees and anyone else (with exceptions discussed shortly) regarding applications for TARP funds during the period between a “formal application” for funds and “preliminary approval” of funding.

What exactly is a “formal application” for assistance, or the granting of “preliminary approval?” The rules don't define those terms. It is also unclear why the ban on oral communications is limited only to the time period between formal application and preliminary approval.

Presumably, an applicant could draft an application for funds with the assistance of a Treasury official, only after which, once the application is “formally” handed in, would the applicant be prohibited from speaking with that official. Moreover, the communications ban would be lifted once the application is preliminarily approved. After preliminary approval, the same applicant could then speak with Treasury officials to advocate for additional funds. Perhaps the ban ends early because an agency may wish to speak with an applicant regarding refining an application. Even if so, as discussed later, there is an exception to the ban that specifically permits conversations initiated by Treasury officials, thus weakening that argument.

Of course, Treasury may have wished to make the oral communications ban as narrow as possible in light of the burdensome nature of such a rule. If so, then requirements to disclose the contents of oral communications, which are discussed in the section on reporting requirements, logically should apply to all other oral communications along these lines. They do not.

Exceptions to the Ban

Before examining the rules regarding reporting communications, we should identify the exceptions to the oral communications ban. As mentioned before, both logistical communications and communications made at widely attended gatherings are not subject to the ban. The TARP lobbying rules carve out two additional exceptions: communications initiated by Treasury officials, and communications between a federal executive agency official and a Treasury employee.

The first exception to the ban, which permits communications between Treasury officials and any person, so long as the communication is initiated by a Treasury official, is relatively straightforward. The FAQ accompanying the lobbying rules provides some context. It explains that Treasury officials may initiate communications to obtain information about pending applications for the purpose of evaluating the applications, among other (unidentified) reasons. It clarifies that agency officials “should not receive, be willing to receive[,] or respond to communications concerning pending applications unless the official affirmatively seeks or requires information about the application.”

The second exception, for communications between a federal executive agency official and a Treasury employee, is also relatively straightforward. The FAQ provides minimal additional insight into the rule, explaining merely that oral communications are permissible at any time. Presumably,

the purpose underlying this rule is that members of the executive branch need to be able to speak about pending applications, and their need to do so outweighs any risk of improper influence or inadequate disclosure.

Notable here is that this second exception is narrower than that which exists in the stimulus lobbying rules, which allows communications by federal agency officials. The addition of the word “executive,” as [Mike Stern ably explains](#), cuts Congress out from being able to lobby decisions-makers regarding the awarding of these funds. The White House is not similarly limited.

Overview: Reporting Requirements for TARP-Related Communications

The TARP lobbying rules impose reporting requirements on certain communications. Those rules depend upon whether a communication is oral or written. As a general rule, communications must be reported on the Treasury Department's website within three days. Presumably, those reports will appear at <http://financialstability.gov/latest/reportsanddocs.html>, although I have not been able to find them to date.

Reporting Requirements for TARP-Related Oral Communications

Although, in the vast majority of instances, oral communications are permitted with Treasury officials regarding TARP funds, those communications will often trigger public reporting requirements. Those requirements vary based upon whether the communication is with a registered federal lobbyist or someone else. This creates a large reporting gap.

Oral Communications		Disclose?	
		Yes	No
General	Logistical		✗
	Widely Attended		✗
Policy	Lobbyist*	✓	
	All Others		✗
Specific Application	Lobbyist*	✓	
	All Others		✗

*Registered federal lobbyist on behalf of a client.

Note: No one may communicate with regard to specific applications between the “formal application” and “pending approval” periods unless the question is (1) logistical, (2) asked at a widely attended event, (3) initiated by Treasury, or (4) is between a federal executive official and a Treasury official.

Communications with federally registered lobbyists, regardless of whether the communication concerns general policy matters or a specific application for funding, must be summarized and publicly posted on the Treasury Department's website within 3 days. (Note that communications regarding logistical information or that take place at widely attended gatherings need not be summarized and reported.) That summary must include the date of the contact, identify the parties to the conversation, the names of the lobbyist's clients, and a "general, one-sentence description of the subject of the conversation." In addition, any written materials submitted in connection with the meeting must also be posted online.

By contrast, Treasury officials do not need to report oral communications if the person they are speaking with is not currently a federally registered lobbyist.

Registered lobbyists comprise only a portion of the people who lobby on specific matters. To have to register as a lobbyist, a person must spend at least 20% of his or her total time on "lobbying activities" over a six-month period, and make at least one "lobbying contact." (See this [CRS Report](#) for more details as to who must register as a lobbyist.) Consequently, many persons these rules would seemingly intend to cover, such as corporate CEOs and communications directors, who have substantial but not frequent communications with government officials, are not covered. Smart lobbyists will be able to easily navigate around this disclosure requirement via their colleagues.

Reporting Requirements for TARP-Related Written Communications

Certain written communications must be posted on the Treasury Department's website within 3 business days of the communication. This publication requirement is riddled with qualifications and exceptions that make it hard to understand and fail to capture relevant communications.

The rules recognize three broad categories of communications: general communications, communications regarding policy matters, and communications regarding specific applications for funds. General communications include communications on logistical matters, and are never required to be publicly disclosed. Communications on policy matters and specific applications for money must be disclosed in some circumstances.

Written Communications		Disclose?	
		Yes	No
General	Logistical		X
	Federal Lobbyists	✓	
Policy	EESA Applicant or their Reps		X
	All Others		X
Specific Application	Federal Lobbyists	✓	
	EESA Applicant or their Reps	✓*	
	All Others		X

*Only while application is “pending”

Communications on Policy Matters

Only some written communications regarding policy matters must be disclosed. The key factor in determining whether disclosure is required is identifying whether the person making the communication is a lobbyist. When the person is a lobbyist, the communication must be disclosed; otherwise, the communication need not be disclosed.

It is unclear why the rule requires Treasury officials to disclose policy communications with lobbyists, but not the people these lobbyists represent. An easy work-around for those who wish to avoid the disclosure rules would be for the lobbyists to draft communications, but have a CEO, or other person who is not required to register as a lobbyist, send the letter.

Communications Regarding Specific Applications for Funds

Communications regarding specific applications for funds is slightly more tricky to understand, mostly because it creates a third class of people to whom the rules apply. The three groups of people are: federal lobbyists, TARP applicants or their representatives, and all other people.

All written communications by federally registered lobbyists regarding specific applicants for TARP funds must be publicly disclosed. There's a qualifying requirement, namely that the lobbyist must be writing on “behalf” of a client or employer. The word “behalf” is ambiguous, as it be [defined](#) “as a representative of or a proxy for” or “in the interest or aid of (someone).” Using the former definition, a lobbyist could be directed to ask for funds for someone other than his employer, and thus the Treasury employee would not be required to report that communication. However, that strikes me as

an unreasonable interpretation, as one main purpose of the rules is to limit the (undue) influence of lobbyists and special interests through public disclosure.

It is worth emphasizing that the TARP lobbying disclosure rules have created a new class of people, TARP applicants or their representatives, for the purpose of disclosing certain types of written communications. Some, but not all, written communications from TARP applicants or their representatives regarding specific applications for funds must be disclosed. This category of people is significantly broader than federal lobbyists, and would likely cover the corporate CEOs, communications directors, and many others who have a vested interest in directing how TARP funds are used. It is unclear why this category of communicant was not used to help refine the ban on oral communications or rules requiring disclosure of oral communications. Doing so would have contributed significantly towards closing many of the loopholes identified above.

Regardless, Treasury employees must publicly disclose written communications from TARP applicants or their representatives, but only in limited circumstances. Specifically, written communications must be disclosed only when an application for funds is pending. This likely mirrors the ban on oral communications, which prevents some oral communications while an application is pending. As a result, it seems likely that written communications prior to a “formal application” for funding need not be disclosed. In addition, it is unclear whether applications are still considered “pending” after the agency gives preliminary approval to a funding request, or whether an application ceases being pending once an agency gives it final approval. The text provides no hint as to when the “pending” period ends. The disclosure rule would be more logical were it to apply all the way through final approval, although either interpretation is valid.

Even so, this discussion of “lobbyists” and TARP “applicants or their representatives” leaves out additional people who have an interest in swaying Treasury administrators to disburse funds (or change policy). These financial regulations omit business partners with companies that stand to receive government funds, or that are partially controlled by likely beneficiaries, and other persons with financial interests. Moreover, agents of foreign governments, who often lobby on behalf of companies based in their countries and who are registered under the [Foreign Agents Registration Act](#), are ignored entirely. It is unclear why the rules would skip business partners and others that have pecuniary or political motivations with regard to influencing whether specific applications for funds are granted, or general policy matters that will affect future funding.

What's Next?

After the administration promulgated the stimulus lobbying rules, it reconsidered whether the rules worked as intended. During that rethinking process, the administration met with public interest organizations and others, and ultimately revised the rules. The Treasury Department should engage

in a similar public process and reconsider whether its lobbying disclosure rules fully meet the transparency standards articulated by President Obama.