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Public-Private Investment Program Update

On March 23rd, the U.S. Department of the Treasury ("Treasury") and the Federal Deposit Insurance Corporation ("FDIC") jointly announced a new program under the Troubled Assets Relief Program ("TARP") called the Public-Private Investment Program ("PPIP"). The program is divided into two components, one for "Legacy Loans" (the "Legacy Loans Program") and another for "Legacy Securities" (the "Legacy Securities Program"), and provides for Treasury to co-invest with, and in the case of the Legacy Securities Program, provide debt financing to, private investors to establish public-private investment funds ("PPIFs"). Although PPIP is not yet up and running, we thought we would share with you some recent developments. See [here](#) for our March 30, 2009 Plain & Simple newsletter with respect to the PPIP.

The Legacy Loans Program

On March 26th, the FDIC posted a series of questions on their website, inviting comment on the questions posted for consideration as well as all other aspects of the Legacy Loans Program and hosted a conference call for bankers. During that call and on a subsequent call on April 9, 2009, Chairman Sheila Bair made it clear that the terms of the Legacy Loans Program would not be finalized until the public comment period expired. The comment period ended on April 10th and the FDIC has posted comments on its [website](#). To date, the FDIC has not announced any additional guidance.

Also on the FDIC website is an investor questionnaire, whereby a prospective investor can inform the FDIC of its interest in participating in the Legacy Loans Program. The questionnaire asks for (i) contact information for the interested organization, (ii) the name and structure of the investor group, (iii) the types of assets the investor group is interested in acquiring, by size of pool and geographic region, (iv) whether the potential investor holds or represents an organization that has a controlling interest in an FDIC-insured institution and (v) whether the potential investor is predominantly a non-bank financial services company (for example, mortgage banking, securities or an insurance company).

The FDIC has expressly stated that the information contained in the questionnaire will not be used to determine eligibility for participation in the program.

The Legacy Securities Program

On April 6, 2009, the Treasury issued new guidance for its Legacy Securities Program that provided information on a number of important issues.

The original guidelines proposed that Treasury would initially pre-qualify five fund managers that

would manage the public-private investment funds purchasing legacy securities. In addition, each fund manager was required to satisfy five criteria, including having the ability to raise at least \$500 million in private capital and having at least \$10 billion in legacy securities under management.

The new guidance provides:

- Following the initial pre-qualification, Treasury will consider reducing the \$10 billion asset requirement as well as other requirements to open the PPIF to additional fund managers.
- Treasury will review satisfaction of its criteria on a “holistic basis”, and the failure to meet any one criterion will not necessarily disqualify an applicant.
- To accommodate increased participation in the Legacy Securities Program, the deadline for prospective fund managers to submit applications was extended from April 10, 2009 to 5 p.m ET on Friday, April 24, 2009. Treasury has indicated that it expects to inform applicants of their preliminary qualification no later than Friday, May 15, 2009.
- Treasury is encouraging small, veteran, minority- and women-owned businesses to partner with private asset managers. These firms can partner with fund managers by acting as an asset manager, an equity partner, a fund raising partner or as a provider of services such as trade execution, valuation and other financial services. Treasury will allow these firms to partner prior to or after the application deadline, including after the selection of the initial group of fund managers.
- The amount of equity and debt the Treasury provides to the PPIF will be determined on a case-by-case basis.
- Treasury clarified that although the Term Asset-Backed Securities Loan Facility (“TALF”) and the Legacy Securities Program are independent programs, a Legacy Securities Program PPIF may utilize leverage under TALF on the same terms and conditions as qualified investors under TALF.
- The Legacy Securities Program is limited to eligible assets that include non-agency commercial-backed and residential mortgage-backed securities issued prior to 2009, originally with a AAA or equivalent rating from at least two rating agencies.

TALF has its own terms and conditions that should be reviewed by interested participants. Among other things, TALF does not provide the opportunity to receive equity financing from Treasury. In addition, the Federal Reserve has yet to issue revised guidelines that would permit TALF financing of eligible assets under the Legacy Securities Program.

The new guidance contains additional information regarding the Legacy Securities Program, which can be found [here](#). In addition, information regarding TALF, including terms and conditions, FAQs, lists of primary dealers and operative documents, can be found [here](#).

Report by the Special Inspector General for the TARP

On April 21st, Neil M. Barofsky, the special inspector general charged with monitoring the 12 TARP programs, issued his second report to the U.S. Congress and warned that the partnerships between the government and private investors backed by the Federal Reserve are inherently vulnerable to fraud and

should not be started unless stronger safeguards are in place. The report expressed a concern that participating fund managers could take advantage of the program at taxpayers' expense as the government-financed leverage provides a great incentive for collusion between the buyer and seller of the asset, or the buyer and other buyers, with the potential of leaving taxpayers with significant losses.

Among other things, the report advised Treasury to impose strict conflict-of-interest rules on fund managers participating in the PPIF that address whether and to what extent the managers can (i) invest PPIF funds in legacy assets that they hold or manage on behalf of themselves or their clients or (ii) conduct PPIF transactions with entities in which they invested on behalf of themselves or others. The report recognizes that some of the conflicts of interest may not be resolvable but requests Treasury to consider whether the current rules adequately address the various conflicts issues. The report also recommended that information about a PPIF's beneficial owners and a PPIF's transactions be disclosed, in keeping with the mandate of transparency to ensure that taxpayers know how their money is being used. Finally, the report indicated that participants in these programs could be subject to executive compensation limitations, to the extent that they are active rather than passive investors. Although executive compensation regulations have not yet been published by Treasury, [additional guidance released by Treasury on April 21st](#) relating to the Legacy Securities Program expressly states that executive compensation restrictions will not apply to passive investors in the PPIF or to asset managers or their employees so long as the structure of the PPIF is such that the asset managers and their employees are not employees of, or controlling investors in, the PPIF. The report can be found [here](#).

Many questions regarding the Legacy Loans Program and the Legacy Securities Program remain to be addressed. As the FDIC and Treasury release additional guidance, it will affect the business and legal strategies of asset sellers and investors. We welcome the opportunity to help you navigate this process.

If you have a need for legal advice on any of the above matters, please contact any of the following partners in our [Distressed Real Estate](#) and [Structured Finance Strategies](#) Practice Groups:

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