

May 2009

Public-Private Investment Program Oversight Legislation Passed by Senate

On May 6, 2009, the Senate approved S. 896, the “Helping Families Save Their Homes Act of 2009” by a margin of 95–1. The legislation includes amendments by Senators Barbara Boxer (D-CA) and John Ensign (R-NV) (collectively, the “Amendments”) to provide additional oversight over the Public-Private Investment Program (“PPIP”) announced by the U.S. Department of the Treasury (“Treasury”). The Amendments impose significant duties on PPIP fund managers, including an obligation to acknowledge fiduciary duties to investors, which may limit managers’ interest in participating in the PPIP. A copy of S.896 is available [here](#).

Overview

The Amendments, collectively titled the “Public Private Investment Program Improvement and Oversight Act of 2009,” follow the release of the Special Inspector General of the Troubled Asset Relief Program’s (“SIGTARP”) April 21, 2009 Quarterly Report to Congress, in which SIGTARP highlighted several vulnerabilities in the PPIP, including risks of conflicts of interest, collusion and money laundering, and provided several recommendations for improvements in PPIP and its relationship with the Term Asset-Backed Securities Loan Facility (“TALF”).

The Amendments provide that any program established by the Federal government to create a public-private investment fund (“PPIF”) shall:

- in consultation with SIGTARP, impose strict conflict of interest rules on managers of PPIFs to ensure that securities bought by the PPIFs are purchased in arm’s-length transactions, that fiduciary duties to public and private investors in the fund are not violated, and that there is full disclosure of relevant facts and financial interests (which conflict of interest rules shall be implemented by the manager of a PPIF prior to the PPIF receiving any Federal government financing);
- require each manager of a PPIF to acknowledge, in writing, a fiduciary duty to both the public and private investors in such PPIF;
- require each manager of a PPIF to develop a robust ethics policy that includes methods to ensure compliance with such policy;
- require strict investor screening procedures for PPIFs;
- require each manager of a PPIF to identify for Treasury each investor

that, individually or together with its affiliates, directly or indirectly holds equity interests in the PPIF acquired as a result of:

- any investment by such investor or any of its affiliates in a vehicle formed for the purpose of directly or indirectly investing in the PPIF (such as feeder funds); or
- any other investment decision by such investor or any of its affiliates to directly or indirectly invest in the PPIF an amount that, in the aggregate, equals at least 10 percent of the equity interests in such PPIF;
- require each PPIF to make a quarterly report to Treasury that discloses the 10 largest positions of the PPIF (which reports shall be publicly disclosed at such time as Treasury determines that such disclosure will not harm the ongoing business operations of the PPIF);
- allow SIGTARP access to all books and records of a PPIF, including all records of financial transactions in machine readable form, while requiring SIGTARP to protect the confidentiality of all such information; and

→ require each manager of a PPIF to retain all books, documents and records relating to such PPIF, including electronic messages.

Acknowledging a fiduciary duty to both public and private investors is contrary to the partnership agreements for many private investment funds, which expressly state that no fiduciary duty is owed by the manager to investors. Imposing such a duty on managers of PPIFs to investors, coupled with the additional information and disclosure requirements and the access to information by SIGTARP, may serve as a disincentive for private investment fund managers to participate in PPIF. In addition, it is not clear why the investor identification requirements apply to all investors in feeder funds, but only to 10 percent investors if they invest directly in the PPIF.

The Amendments require Treasury to consult with SIGTARP and issue regulations governing the interaction

of PPIF, TALF and other similar public-private investment programs. These regulations will be designed to address concerns regarding excessive leverage that could result from interactions between such programs.

The Amendments also require SIGTARP to submit a report to Congress not later than 60 days after the date of the establishment of the oversight program and appropriate an additional \$15 million to SIGTARP to prioritize the performance of audits or investigations of recipients of non-recourse Federal loans made under PPIF or TALF to determine the existence of any collusion between the loan recipient and the seller or originator of the asset used as loan collateral, or any other conflict of interest that may have led the loan recipient deliberately to overstate the value of the asset used as loan collateral.

Conclusion

Although S.896 passed the Senate on May 6, 2009, the prospect of the PPIF provisions becoming law remains unclear. The House of Representatives approved mortgage legislation (H.R. 1106 and H.R. 1728) on March 5 and May 7, 2009, respectively, but neither House bill included provisions relating to additional oversight of PPIFs. If similar legislation ultimately is passed by the House of Representatives or included in a compromise bill, and the legislation is enacted, private sector participants in both the Legacy Securities Program and the Legacy Loan Program of PPIF will be subject to significant additional oversight and duties. This additional oversight, including the express obligation to acknowledge fiduciary duties to both public and private investors in a PPIF and the additional information and disclosure requirements, may limit interest in participating in these programs.



Visit the Financial Industry Recovery Center at www.huntonfinancialindustryrecovery.com

A Resource for Clients and Colleagues Concerning the Financial Crisis

Contacts

For more information, please contact:

Asset Securitization

Amy McDaniel Williams

(804) 788-7388
(212) 309-1369
awilliams@hunton.com

Michael Nedzbala

(704) 378-4703
mnedzbala@hunton.com

Financial Institutions Corporate & Regulatory

Charles E. “Stormy” Greef

(214) 468-3331
cgreef@hunton.com

Peter G. Weinstock

(214) 468-3395
pweinstock@hunton.com

Employee Benefits

L. Scott Austin

(214) 979-3002
(404) 888-4088
saustin@hunton.com

Leslie Okinaka

(212) 309-1276
lokinaka@hunton.com

Lending Services

J. Waverly Pulley, III

(804) 788-8783
wpulley@hunton.com

John R. Schneider

(404) 888-4148
jschneider@hunton.com

Private Investment Funds

James S. Seevers, Jr.

(804) 788-8573
jseevers@hunton.com

Cyane B. Crump

(804) 788-8214
ccrump@hunton.com

Real Estate Capital Markets

David C. Wright

(804) 788-8638
dwright@hunton.com

Daniel M. LeBey

(804) 788-7366
dlebey@hunton.com

Real Estate Finance & Development

William A. Walsh, Jr.

(804) 788-8378
wwalsh@hunton.com

Thomas F. Kaufman

(202) 955-1604
tkaufman@hunton.com

Taxation

Cecelia Philipps Horner

(804) 788-7394
chorner@hunton.com

George C. Howell, III

(804) 788-8793
ghowell@hunton.com

Hunton & Williams Offices

Atlanta

Bank of America Plaza
Suite 4100
600 Peachtree Street, NE
Atlanta, Georgia 30308-2216
Phone (404) 888-4000
Fax (404) 888-4190

Austin

111 Congress Avenue
Suite 1800
Austin, Texas 78701-4068
Phone (512) 542-5000
Fax (512) 542-5049

Bangkok

34th Floor, Q.House Lumpini Building
1 South Sathorn Road
Thungmahamek, Sathorn
Bangkok 10120
Thailand
Phone +66 2 645 88 00
Fax +66 2 645 88 80

Beijing

517- 520 South Office Tower
Beijing Kerry Centre
No. 1 Guanghai Road
Chaoyang District
Beijing, 100020
PRC
Phone +86 10 5863 7500
Fax +86 10 5863 7591

Brussels

Park Atrium
Rue des Colonies 11
1000 Brussels, Belgium
Phone +32 (0)2 643 58 00
Fax +32 (0)2 643 58 22

Charlotte

Bank of America Plaza
Suite 3500
101 South Tryon Street
Charlotte, North Carolina 28280
Phone (704) 378-4700
Fax (704) 378-4890

Dallas

1445 Ross Avenue
Suite 3700
Dallas, Texas 75202-2799
Phone (214) 979-3000
Fax (214) 880-0011

Houston

Bank of America Center
Suite 4200
700 Louisiana Street
Houston, Texas 77002
Phone (713) 229-5700
Fax (713) 229-5750

London

30 St Mary Axe
London EC3A 8EP
United Kingdom
Phone +44 (0)20 7220 5700
Fax +44 (0)20 7220 5772

Los Angeles

550 South Hope Street
Suite 2000
Los Angeles, California 90071-2627
Phone (213) 532-2000
Fax (213) 532-2020

McLean

1751 Pinnacle Drive
Suite 1700
McLean, Virginia 22102
Phone (703) 714-7400
Fax (703) 714-7410

Miami

1111 Brickell Avenue
Suite 2500
Miami, Florida 33131
Phone (305) 810-2500
Fax (305) 810-2460

New York

200 Park Avenue
New York, New York 10166-0091
Phone (212) 309-1000
Fax (212) 309-1100

Norfolk

500 East Main Street
Suite 1000
Norfolk, Virginia 23510-3889
Phone (757) 640-5300
Fax (757) 625-7720

Raleigh

One Bank of America Plaza
Suite 1400
421 Fayetteville Street
Raleigh, North Carolina 27601
Phone (919) 899-3000
Fax (919) 833-6352

Richmond

Riverfront Plaza, East Tower
951 East Byrd Street
Richmond, Virginia 23219-4074
Phone (804) 788-8200
Fax (804) 788-8218

San Francisco

575 Market Street, Suite 3700
San Francisco, California 94105
Phone (415) 975-3700
Fax (415) 975-3701

Singapore

Samsung Hub
#29-04, 3 Church Street
Singapore 049483
Phone +65 6876 6700
Fax +65 6876 6741

Washington

1900 K Street, NW
Washington, DC 20006-1109
Phone (202) 955-1500
Fax (202) 778-2201

© 2009 Hunton & Williams LLP. Attorney advertising materials. These materials have been prepared for informational purposes only and are not legal advice. This information is not intended to create an attorney-client or similar relationship. Please do not send us confidential information. Past successes cannot be an assurance of future success. Whether you need legal services and which lawyer you select are important decisions that should not be based solely upon these materials.