

May 2009

Public-Private Investment Program Oversight Legislation Enacted

On May 19, 2009, the House of Representatives approved S.896 (the "Helping Families Save Their Homes Act of 2009") by a margin of 367–54 and, on May 20, 2009, President Obama signed the bill into law. The bill includes legislation known as the "Public-Private Investment Program Improvement and Oversight Act of 2009" (the "Act"), which will impose significant duties on fund managers under the Public-Private Investment Program ("PPIP") announced by the U.S. Department of the Treasury ("Treasury"). These provisions may limit managers' interest in participating in the PPIP. A copy of S.896 is available [here](#).

Overview

The Act follows the release of the Special Inspector General of the Trouble 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. The SIGTARP report also recommended several improvements for PPIP and its relationship with the Term Asset-Backed Securities Loan Facility ("TALF"). Senators Barbara Boxer (D-CA) and John Ensign (R-NV) proposed the legislation and attached it to the Senate

version of the bill, which was passed on May 6, 2009. The House version of the bill, which was ultimately enacted, included additional amendments to the Senate version described in our prior memorandum available [here](#).

The Act provides that any program established by the Federal government to create a public-private investment fund ("PPIF") shall:

- 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 equal to at least 10 percent of the equity interest of the PPIF including if such interests are held in a vehicle formed for the purpose of directly or indirectly investing in the PPIF (such as a feeder fund);
- 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.

The Act requires Treasury to consult with SIGTARP and issue regulations

governing the interaction of PPIP, TALF, and other similar public-private investment programs. The Act also includes a provision, added in the House version, expressly authorizing Treasury to prescribe such regulations or other guidance as may be necessary or appropriate to define terms or carry out the purposes of the Act. These regulations will be designed to address concerns regarding excessive leverage that could result from interactions between such programs.

The Act also requires SIGTARP to submit a report to Congress not later than 60 days after the date of the establishment of the oversight program and appropriates an additional \$15 million to SIGTARP to prioritize the performance of audits or investigations of recipients of non-recourse Federal loans made under any program that is funded in whole or in part by funds appropriated under the Emergency Economic Stabilization Act of 2008 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.

Takeaways

The Act imposes some significant regulatory requirements on PPIF managers not typically associated with the management of private investment funds, especially for fund managers today regulated only as investment advisers under the Investment Advisers Act. In particular, the books and records access and SIGTARP inspection rights, especially when viewed in light of the SIGTARP report and public statements, suggests a high degree of governmental regulation and scrutiny, the details and scope of which are not presently well defined.

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 fiduciary duty on PPIF managers 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 PPIP.

In addition, although the House version clarified that the investor identification requirement extended to 10 percent investors (rather than to all investors in a feeder fund and 10 percent direct investors, as reflected in the Senate version), the investor identification requirement may chill interest from private investors contemplating investment in a PPIF.

Conclusion

As a result of the Act, private sector participants in both the Legacy Securities Program and the Legacy Loan Program of PPIP 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, disclosure and access rights, may limit interest in participating in these programs.



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