AKIN GUMP
STRAUSS HAUER & FELD LLP

March 26, 2009

CLIENT ALERT

U.S. TREASURY ANNOUNCES NEW PUBLIC-PRIVATE INVESTMENT PROGRAM

The Public-Private Investment Program (PPIP) is the new program established jointly by the U.S. Treasury Department, the U.S. Federal Reserve and the Federal Deposit Insurance Corporation (FDIC) to provide financing for the purchase by private investors of (i) whole loans and other assets held by depository institutions and (ii) certain residential and commercial mortgage-backed securities issued before 2009 that were originally rated "AAA." The PPIP is comprised of two parts: a Legacy Loan Program and a Legacy Securities Program. This alert discusses both of these programs, as well as certain tax consequences in connection with the Legacy Loan Program.

The Treasury has proposed to make available to the PPIP $75 to $100 billion from Troubled Asset Relief Program (TARP) funds, with the goal of generating between $500 billion to $1 trillion in purchases of these legacy assets. Although the Treasury and the FDIC recognize the urgency of implementing the PPIP, some time will be required for the FDIC to propose guidelines and/or regulations, including a period for public comment, before sales of loans and securities may begin.

THE LEGACY LOANS PROGRAM

ELIGIBLE ASSET POOLS

Insured depository institutions desiring to participate in the PPIP will select Legacy Loans for sale through an auction process, in consultation with their primary regulators. "Legacy Loans" are whole loans or pools of loans secured by collateral located primarily in the U.S. that satisfy the requirements set by the FDIC and the Treasury.

ELIGIBLE PARTICIPANTS

Legacy Loans may be purchased by public-private investment funds (PPIFs) to be owned in part by private investors approved by the FDIC, including individuals, pension funds, insurance companies, financial institutions, mutual funds, publicly managed investment funds, foreign investors with headquarters in the United States, private equity funds and hedge funds. Cooperation between separately bidding private investor groups will be prohibited once the auction process begins. The Treasury and the FDIC will encourage participation by small firms owned by veterans, minorities and/or women. The FDIC will pre-qualify private investors for participation in Legacy Loan auctions.

A private investor may not participate in any PPIF that purchases Legacy Loans from a participating bank if the bank is an affiliate of the private investor or represents 10 percent or more of the aggregate private capital in the PPIF.

THE AUCTION PROCESS

The FDIC will work with participant banks, the Treasury, private investors desiring to purchase particular Legacy Loans and valuation firms selected by the FDIC to administer auctions. The participating bank will make information on the Legacy Loans, including proposed marketing materials, available to the FDIC and, following FDIC review, to pre-qualified private investors.

Each bid must be accompanied by a refundable cash deposit equal to 5 percent of the bid value. The FDIC will review all bids, select the winning bid and price the offer to purchase the applicable participation in Legacy Loans based on such winning bid. Subject to adherence to the material auction procedures, the FDIC will return deposits to unsuccessful bidders and, if the participant bank rejects the winning bid, to the winning bidder. Participating banks will have the option of accepting or rejecting a winning bid within a pre-established time period. The Treasury's summary of terms states that the FDIC will be reimbursed for auction expenses without specifying who is responsible for the reimbursement.

EQUITY AND DEBT FINANCING

The winning bidder will form a PPIF to purchase the Legacy Loans. The Treasury will provide up to 50 percent of the equity of each PPIF. Private investors may elect to take less equity from the Treasury, subject to a minimum amount to be determined, provided that the collateral protection securing the FDIC's debt guarantee is not diminished. The balance of the equity will be provided by the private investors. The PPIF will issue senior non-recourse debt for the balance of the purchase price. The debt will be guaranteed by the FDIC in exchange for a fee, and such guarantee will be collateralized by the purchased assets and will initially be placed at the participant bank. The participant bank will be able to resell this debt into the market if it chooses. The FDIC will engage private valuation firms to analyze Legacy Loans submitted by participating banks for purchase, based on expected cash flows, type of interest rate, underlying asset risks, expected lifetime losses, geographic location of assets and loan maturity profiles. The FDIC will use such analyses to assist in determining the amount of purchase money debt it is willing to guarantee in connection with the sale of the Legacy Loans. The FDIC anticipates that the debt to equity ratio will not exceed 6 to 1. The FDIC is expected to issue a term sheet shortly, setting forth the other terms of such debt and its guarantee.

An example of the equity and debt investments for the purchase of a pool of Legacy Loans having a face value of $100 is attached to this alert.

As required by Section 113(d) of the Emergency Economic Stabilization Act of 2008, the Treasury will also receive warrants in each PPIF.

SERVICING AND ASSET MANAGEMENT

Participating banks may continue servicing the Legacy Loans after purchase by PPIFs. Subject to relevant agreements, however, PPIFs will retain ultimate control of the servicing. The Treasury and private investors will share in the net profits and losses of PPIFs in proportion to their respective equity investments.

Each PPIF will be required to maintain a debt service coverage account to ensure that its working capital will be sufficient to meet anticipated debt servicing obligations, interest expense and operating expenses. The FDIC will retain a portion of the cash proceeds from the sale of the Legacy Loans until cash flow from such Loans has fully funded the debt service coverage account. Details regarding these accounts will be provided by the FDIC in a term sheet to be issued shortly.

GOVERNANCE REQUIREMENTS

PPIFs will be managed within parameters pre-established by the FDIC and the Treasury, with reporting to the FDIC and oversight by the FDIC. The FDIC and the Treasury will establish requirements for the management, servicing, financial and operating reports for all Legacy Loans held by PPIFs. Standard documentation provided by the FDIC and the Treasury will be used to the extent practicable for this purpose. The FDIC will be responsible for providing required information from the PPIF to the Treasury. PPIFs must also agree to provide access to information required by the Special Inspector General of TARP and the Government Accountability Office.

PPIFs must agree to abide by waste, fraud and abuse protections. The FDIC and the Treasury will define such protections. PPIFs must also make certain representations, warranties and covenants regarding the conduct of their business and to comply with applicable law. Executive compensation restrictions will not apply to passive private investors participating in the PPIP.

TAX CONSIDERATIONS

Non-U.S. investors that invest in Legacy Loans through certain PPIFs will likely face significant U.S. tax issues, depending on the structure and operations of the particular PPIF. In general, non-U.S. investors in PPIFs that invest in U.S. loans secured by mortgages could be subject to U.S. federal and state net taxation on all or part of their shares of income and gains from the PPIF in the event that the PPIF is actively involved in a mortgage modification program, or if the PPIF takes ownership of real estate following a mortgage foreclosure. Also, a PPIF will need to be structured carefully to ensure that non-U.S. investors are not subject to U.S. withholding tax on interest received in respect of the PPIF's U.S. loans secured by mortgages. U.S. tax-exempt investors that invest in PPIFs through foreign "feeder" corporations to avoid unrelated business taxable income will also be adversely affected by the imposition of U.S. federal and state taxes on the feeder corporation.

Because we believe that it will be crucial to the success of the PPIP that there be significant participation by non-U.S. and tax-exempt investors, we anticipate that there will be active legislative and regulatory efforts over the coming weeks designed to change or clarify current law to ensure that non-U.S. and tax-exempt participants in the PPIP are not unduly affected by high U.S. taxes on their share of income earned from their PPIF investments.

A foreign feeder corporation or other non-U.S. investor that participates in PPIFs that acquire Legacy Securities (as opposed to Legacy Loans) is unlikely to suffer U.S. income or withholding tax as a result of such participation.

THE LEGACY SECURITIES PROGRAM

PURCHASE OF LEGACY SECURITIES

The Treasury's program to purchase certain Legacy Securities (as defined below) uses a combination of public and private capital, as well as leverage from the Term Asset-Backed Securities Loan Facility (TALF). The program to purchase Legacy Securities consists of two parts: (i) an expansion of TALF to provide market participants with loans to purchase Legacy Securities, and (ii) the creation of PPIFs, which will receive debt financing from TALF and in which the government will co-invest with private investors on a dollar-for-dollar basis.

"Legacy Securities" will initially consist of either commercial mortgage-backed securities or residential mortgage-backed securities that were issued prior to 2009 and originally rated "AAA" by two or more nationally recognized statistical rating organizations without ratings enhancement and that are secured directly by loans, leases or other assets. The loans and other assets underlying the Legacy Securities must be situated predominantly in the United States, subject to further clarification from the Treasury.

EXPANSION OF TALF

The Treasury and the Federal Reserve have announced their intention to create a lending program, which will likely be incorporated into TALF. The program will provide leverage to investors who meet certain eligibility criteria, for the purpose of allowing such investors to purchase "Eligible Securities." The eligibility criteria for borrowers have yet to be determined. The Federal Reserve has, however, issued a press release stating that haircuts will be determined at a later date and will reflect the risk of the assets provided as collateral for the loans. The terms of the loans—including lending rates, minimum loan sizes and loan durations—also have yet to be determined.

CREATION OF PUBLIC-PRIVATE INVESTMENT FUNDS

The Treasury also announced a program pursuant to which private fund managers will be selected to raise private capital for the purpose of purchasing Legacy Securities. Private asset managers are being given the opportunity to apply to the Treasury for qualification as managers of Legacy Securities Public-Private Investment Funds. Following their acceptance, such fund managers will have a short period of time to raise capital and begin purchasing Legacy Securities. Private capital will likely be raised in funds that are exempt from registration under the Investment Company Act of 1940. However, subject to compliance with federal securities laws, including registration under the Securities Act of 1933 and the Investment Company Act of 1940, vehicles for participation by retail investors may be formed.

It is currently intended that five fund managers will be selected, but additional managers could be selected in the future, depending on the quality of the applications received. The application can be found at http://www.financialstability.gov. Applications must be submitted by April 10, 2009, and the Treasury expects to inform applicants of preliminary approval by May 1, 2009.

SELECTION OF MANAGERS

The Treasury's selection of fund managers will be determined based on the following criteria—

- demonstrated ability to raise at least $500 million of private capital
- demonstrated experience investing in Legacy Securities, including through performance track records

a minimum of $10 billion (market value) of Legacy Securities under management

demonstrated operational capacity to manage the PPIFs in a manner consistent with Treasury's stated investment objective, while also protecting taxpayers; and

headquartered in the United States.

FUNDING OF PPIFS

The Treasury will commit to contribute equity to each PPIF in an amount equal to the private capital raised by the fund managers. In addition, the PPIF will have the option to draw upon secured non-recourse loans in an amount equal to 50 percent of the total equity raised from private investors and the Treasury. In certain cases, the Treasury will consider providing secured non-recourse loans in an amount up to 100 percent of the total equity raised from private investors and the Treasury, depending on whether the PPIF has restrictions on asset level leverage, withdrawal rights, disposition priorities and other factors that the Treasury deems relevant. Debt financing will not be available to any PPIF that provides private investors the right to voluntarily withdraw from the PPIF.

An example of an investment under the Legacy Securities program is attached to this alert.

In addition, as required by Section 113(d) of the Emergency Economic Stabilization Act of 2008, the Treasury will receive warrants in the PPIF in order to provide further protection to taxpayers. The terms of such warrants will be determined in part based upon the amount of secured non-recourse loans to be received by the PPIF.

MANAGEMENT AND GOVERNANCE

The fund managers will control the process of asset selection and pricing, and will generally manage the PPIFs. The Treasury will maintain certain special rights, including the right to cease funding uncalled capital or debt financing in its sole discretion. The fund managers will also be required to provide financial reports and access to records to the Treasury in order to ensure proper oversight and additional taxpayer protections. Executive compensation restrictions will not apply to passive private investors participating in the PPIP.

FEES

Fund managers will be permitted, in their discretion, to charge fees to private investors. However, the Treasury will consider such fees when evaluating applications by private asset managers to manage PPIFs. With respect to the Treasury's equity capital, the Treasury will accept proposals for fixed management fees, which will apply as a percentage of equity capital contributions for invested equity. The Treasury will pay such fees, however, only out of its share of PPIF distributions. The Treasury has reserved the right to impose fee restrictions by regulation.

DURATION OF FUNDS

Funds may have a term of up to 10 years, as proposed by the fund manager. Private investors may be provided with withdrawal rights from the PPIFs, subject to limitations as agreed to by the Treasury, including a three-year lock-up starting with the first investment by the PPIF. However, PPIFs with withdrawal rights will not be eligible for debt financing, as noted above. The Treasury will request suggestions from the public as to whether to allow the reinvestment of returns derived from PPIFs.

CONTACT INFORMATION

If you have any questions concerning this alert, please contact:

Corporate

Kerry E. Berchem	kberchem@akingump.com	212.872.1095	New York
Patrick J. Hurley	phurley@akingump.com	713.220.8132	Houston
C.N. Franklin Reddick III	freddick@akingump.com	310.728.3204	Los Angeles
William D. Morris	wmorris@akingump.com	713.220.5804	Houston
Rosa A. Testani	rtestani@akingump.com	212.872.8115	New York
Trey M. Muldrow III	tmuldrow@akingump.com	212.872.1064	New York
Jena Q. Watson	jqwatson@akingump.com	202.887.4380	Washington, D.C.
Adam K. Weinstein	aweinstein@akingump.com	212.872.8112	New York

Investment Funds

Mark H. Barth	mbarth@akingump.com	212.872.1065	New York
Burke A. McDavid	bmcdavid@akingump.com	212.872.1083	New York
Prakash H. Mehta	pmehta@akingump.com	202.887.4248	Washington, D.C.
Eliot D. Raffkind	eraffkind@akingump.com	214.969.4667	Dallas
Stephen M. Vine	svine@akingump.com	212.872.1030	New York

Government Contracts

Scott M. Heimberg	sheimberg@akingump.com	202.887.4085	Washington, D.C.
Robert K. Huffman	rhuffman@akingump.com	202.887.4530	Washington, D.C.

Public Law and Policy

J. David Carlin	dcarlin@akingump.com	202.887.4133	Washington, D.C.
Robert J. Leonard	rleonard@akingump.com	202.887.4040	Washington, D.C.

Real Estate and Finance

Carl B. Lee	clee@akingump.com	214.969.2726	Dallas
Michael S. Mandel	mmandel@akingump.com	202.887.4196	Washington, D.C.
Peter A. Miller	pamiller@akingump.com	212.872.1004	New York
Hushmand Sohaili	hsohaili@akingump.com	310.229.1060	Los Angeles

Tax

Patrick B. Fenn	pfenn@akingump.com	212.872.1040	New York
Stuart E. Leblang	sleblang@akingump.com	212.872.1017	New York