

The Public-Private Investment Program

April 1, 2009

On Monday, March 23, Secretary Geithner announced the Public-Private Investment Program (the “Program”) as part of Treasury’s strategy to repair the balance sheets of lending institutions and address the loss of liquidity that has impaired the credit markets, including the secondary markets for mortgage loans and mortgage-backed securities. The Program consists of two separate plans, one designed for real estate loans held directly on the books of banks (“Legacy Loans”) and the other for certain mortgage-backed and asset-backed securities (“Legacy Securities”). Treasury estimates that, by employing \$75 to \$100 billion of Troubled Asset Relief Program (“TARP”) funds with private investment and government guaranteed credit, the Program will initially generate up to \$500 billion in buying power to purchase these “Legacy Assets,” with the potential to expand the Program up to \$1 trillion over time.

The two plans that make up the Program are briefly described as follows:

- (i) Legacy Loans Program. Multiple public-private investment funds, managed by private investors (each, a “PPIF”), will purchase, through auction, loans and pools of loans from US banks or savings associations with equity capital supplied by private investors and Treasury and with debt issued by the PPIFs and guaranteed by the FDIC.
- (ii) Legacy Securities Program. Multiple PPIFs, each managed by one of approximately five private sector fund managers (“Fund Managers”) to be selected by Treasury, will purchase eligible residential mortgage-backed securities and/or commercial mortgage-backed securities from “financial institutions” (as defined in the Emergency Economic Stabilization Act of 2008 (“EESA”)). These purchases will be financed by matching 50-50 equity investments of private investors and Treasury in the PPIF, as well as debt provided by Treasury or loans from the Term Asset-Backed Securities Loan Facility (“TALF”), announced by the Federal Reserve in November 2008.

The Program has three fundamental objectives: (i) maximizing the impact of each taxpayer dollar by employing \$75 to \$100 billion of TARP capital

to generate significantly greater purchasing power, (ii) allocating the investment risks and rewards between the government and the private sector participants and (iii) establishing the value of Legacy Assets through private sector price discovery, thereby reducing the likelihood that the government will overpay for them. It should be noted that Secretary Geithner's announcement sets forth only a general description of the Program, and over the coming weeks the FDIC and Treasury are expected to provide greater specificity to the major open and unresolved terms of the Program.

The first section of this memorandum describes the basic framework of the Legacy Loans Program, the second section of this memorandum describes the basic framework of the Legacy Securities Program and the final section of this memorandum highlights certain outstanding questions. For convenience, attached as Appendix A is an easy-to-read "split-screen" chart comparing certain significant terms of the Legacy Loans Program and the Legacy Securities Program, respectively.

Legacy Loans Program

An eligible seller bank under the Legacy Loans Program will initiate the sale process with the FDIC by identifying assets, typically a pool of loans, that it desires to sell. Upon determination by the FDIC that an asset pool is deemed eligible, the FDIC will hire a third-party valuation firm selected by the FDIC to prepare a valuation of such eligible asset pool, which valuation will be used by the FDIC to inform its initial views on the level of debt to be issued by a PPIF that the FDIC is willing to guarantee. The FDIC will not guarantee debt that exceeds a 6-to-1 debt-to-equity ratio.

Under the Legacy Loans Program, the FDIC will oversee the formation of PPIFs, each of which will be capitalized with both equity contributions from private investors and from Treasury and debt guaranteed by the FDIC to be issued by the particular PPIF. Private investors placed in the Legacy Loans Program must be pre-approved by the FDIC. These investors are expected by Treasury to include an array of different investors, including, without limitation, financial institutions, individuals, insurance companies, mutual funds, publicly managed investment funds, pension funds, foreign investors with a headquarters in the US, private equity funds and hedge funds. Eligible selling banks are limited to US banks or savings associations (accordingly foreign-owned or -controlled banks or savings associations are ineligible to be sellers in the Program). Eligible assets for the Legacy Loans Program include, without limitation, loans and pools of loans in the residential and commercial mortgage

sectors that, together with any collateral supporting these assets, must be situated predominantly in the US. In addition, Treasury notes that, to qualify for the Program, contemplated loan pools must satisfy certain “minimum requirements” agreed to by Treasury and the FDIC, which requirements currently remain unspecified.

An auction will then be conducted by the FDIC, giving private investors the opportunity to bid on the asset pool using yet undescribed “pre-established criteria.” Private investors will bid for at least 50 percent of the equity in the applicable PPIF with Treasury contributing the remainder of the equity. The winning bid for the equity stake, together with the predetermined amount of PPIF-issued debt the FDIC is willing to guarantee (based upon a predetermined debt-to-equity ratio) will define the price offered to the seller. The selling bank will then have the opportunity to decide whether to accept or decline the offer within a pre-established, as yet unspecified, time frame.

Although it is unclear, it appears that a private investor may not participate in any PPIF that purchases assets from sellers (i) affiliated with such private investor or (ii) that represent 10 percent or more of the aggregate private capital in such PPIF. After the purchase and sale of assets, the private capital partners will control and manage the assets until final liquidation, subject, according to Treasury, to “strict” FDIC oversight. The FDIC will perform an ongoing oversight, reporting and accounting role on behalf of the FDIC and Treasury.

Legacy Securities Program

The Legacy Securities Program is designed to restart the market for Legacy Securities by freeing up capital and stimulating the extension of new credit. Under the Legacy Securities Program, approximately five Fund Managers will establish PPIFs, which will be capitalized with private and public equity, as well as debt financing from Treasury and/or TALF. It is contemplated that the PPIFs for Legacy Securities will purchase certain commercial mortgage-backed securities and residential mortgage-backed securities from “financial institutions” (as defined in EESA).¹ Eligible assets under the Legacy Securities Program are expected to include residential mortgage-backed securities and commercial mortgage-backed securities that were originally rated AAA and were issued prior to 2009.

¹ EESA defines “financial institutions” to include, without limitation, US banks, savings associations, credit unions, security brokers or dealers, and insurance companies that all have significant operations in the US, but excluding any central bank or institution owned by a foreign government.

The loans and other assets underlying any eligible asset must be situated predominantly in the US.

Fund Managers will be selected by Treasury based upon applications submitted by April 10, 2009. The selection process is unclear; however, Fund Managers will qualify based upon certain criteria expected to include (i) a historical track record in the targeted asset classes, (ii) a “demonstrated capacity” to raise at least \$500 million of private capital, (iii) a minimum of \$10 billion (market value) of eligible assets currently under management, (iv) a “demonstrated operational capacity” to manage the PPIFs so as to generate attractive returns through long-term opportunistic investments and (v) being headquartered in the US. In addition, potential Fund Managers must disclose their fee structure and anticipated fund raising period for consideration by Treasury.

Each PPIF for Legacy Securities will be made up of two equity investors, Treasury and a private vehicle (a “Private Vehicle”) created and managed by a Fund Manager, and such PPIF will be controlled by such Fund Manager. The equity contributed by Treasury and the Private Vehicle will be invested on a 50-50 side-by-side basis. In addition, Treasury debt financing may be obtained in an aggregate amount of up to 50 percent of the total equity capital of a PPIF, and in some situations Treasury will consider debt financing in an amount of up to 100 percent of total equity capital of a PPIF. This debt financing will not be available where private investors have voluntary withdrawal rights. Treasury debt financing will (a) be secured by the assets underlying the Legacy Securities held by the PPIF, (b) accrue interest at an annual rate determined by Treasury, (c) generally have a maximum term of ten years and (d) be payable at the end of the term. It should be noted that according to the summary of terms circulated by Treasury, “Treasury will retain the right to cease funding of committed but undrawn Treasury equity capital and debt financing in its sole discretion.”

The Legacy Securities Program will also expand TALF to extend non-recourse loans to certain investors that meet specific eligibility criteria, yet to be determined. In addition to being used for asset-backed securities that are currently rated AAA, such funds may also now be used to purchase certain AAA-rated mortgage-backed securities. The terms of the TALF loans have not yet been determined.

Although it is unclear, it appears that a Fund Manager may not purchase Legacy Securities from a seller that is (i) an affiliate of such Fund Manager, (ii) another Fund Manager or an affiliate of any other Fund

Manager or (iii) a private investor that has committed 10 percent or more of the “aggregate private capital raised by such Fund Manager.” Fund Managers are intended to have full discretion over the investment decisions of a PPIF's long-term buy-and-hold strategy, which should not be greater than ten years, subject to an extension of the term with Treasury's consent.

Outstanding Questions

The framework provided by Secretary Geithner on March 23 is helpful information, and the positive reaction of the stock markets indicated that investors are generally optimistic about the potential for the TARP plans to provide some relief to banks and other financial institutions. Much information is still needed from the government, however, in order to form a complete picture of how the Program will operate and how successful it will be. The FDIC and Treasury understand the need for greater specificity, and they are welcoming questions and comments in order to add more substance to the Program. In addition to some of the questions and issues noted above, the following are some initial concerns:

- Compensation. The Frequently Asked Questions pages for the Program indicate that executive compensation restrictions will not apply to passive private investors. It is unclear what “passive” means in this context, and the statement implies that the restrictions could apply to “active” private investors, including perhaps the Fund Managers and the leaders of any syndicates purchasing Legacy Loans. The application of such restrictions (or the fear of future governmental action, especially if the investments prove quite successful) could greatly suppress investor appetite for the Program.
- Timing. Both Treasury and the FDIC have stated its desire to begin their respective plans as soon as possible. Given the time required to collect and respond to comments and questions, to prepare all necessary documentation and (in the case of Legacy Loans) to assemble the loan portfolios and bid packages, it is unclear when the first assets will be able to be removed from the sellers’ books.
- Warrants. The Program indicates that Treasury will be taking warrants “as required by EESA.” The government has not explained how those warrants would be structured or how dilutive they would be to the private investors.
- Structure and Size of PPIFs for Legacy Securities. Will a Fund Manager form a new PPIF for each portfolio of Legacy Securities?

Will a Fund Manager form a new Private Vehicle for private investors in each such PPIF? Or will Private Vehicles invest in multiple PPIFs, and/or will PPIFs invest in multiple portfolios of Legacy Securities? There will be difficult structural issues whether or not Fund Managers seek to minimize the number of vehicles directly or indirectly investing in Legacy Securities.

- Treasury Withdrawal Right. The Legacy Securities term sheet indicates that Treasury will retain the right to cease funding of committed but undrawn Treasury equity capital and debt financing at any time. If Treasury were to cease funding a Legacy Securities PPIF that had outstanding commitments (either to an existing portfolio or relating to the acquisition of additional portfolios), it could create liquidity issues for that PPIF, as well as uncertainties about how future returns should be distributed.
- Joint Venture Agreement. If the amount reserved by a PPIF or escrowed from the seller proved to be insufficient to meet the working capital needs of the underlying assets, would Treasury be required to make additional contributions? In view of Treasury's significant equity stake in the PPIF, Treasury would be expected to require certain major decision approval rights. There are many similar questions related to the terms on which the joint venture between Treasury and the private investors would be governed.
- Impact on Banks and Other Financial Institutions. What effect would an accepted bid have on the balance sheet and reserve requirements of the selling bank? What effect would it have (under mark-to-market rules), if any, on the balance sheets and reserve requirements of other financial institutions?
- Role of Foreign Entities. The term sheets and Frequently Asked Questions pages for the Program reflect some uncertainty about the appropriate role of foreign entities in the Program. While the underlying assets are appropriately limited to predominantly US assets, should foreign-owned US banks or branches of non-US banks be able to sell assets in either Program? From a policy perspective one might expect non-US individuals and institutions to be encouraged to participate as private investors (though existing tax rules may limit their interest in doing so).
- Loan Terms. The terms of the loans to be made by the government to the Legacy Securities Funds and the terms of the debt to be issued

This memorandum is intended only as a general discussion of these issues. It is not considered to be legal advice. We would be pleased to provide additional details or advice about specific situations. For additional information on this important topic, please feel free to call upon your Dewey & LeBoeuf relationship partner.

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under the Legacy Loans Program have expressly not been provided and will obviously have significant influence on investor appetite.

- Exact Nature of Loan Securities. The exact boundaries of the universe of eligible assets under the Legacy Securities Program is a bit unclear, and, though substantial, should arguably be expanded to include additional assets.

As noted above, it is expected that these and other open questions and issues will be addressed by the FDIC, Treasury and others in the coming weeks.

For more information, please contact Joseph A. Smith at + 1 212 259 7268 or jsmith@dl.com, Bradford J. Race at + 1 212 259 7060 or brace@dl.com, Marshall S. Brozost at + 1 212 259 7379 or mbrozost@dl.com, Russel G. Perkins at + 1 212 259 7719 or rperkins@dl.com, or your Dewey & LeBoeuf relationship attorney.

APPENDIX A

PUBLIC-PRIVATE INVESTMENT PROGRAM

| <u>Legacy Loans Program</u> | <u>Legacy Securities Program</u> |
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| ASSETS | |
| <ul style="list-style-type: none">• Loans and pools of loans in the residential and commercial mortgage sectors, which, together with any collateral supporting these assets, must be situated predominantly in the US.• Loan pools must qualify based upon minimum requirements set out by Treasury and the FDIC. | <ul style="list-style-type: none">• Initially, the eligible assets will include commercial mortgage-backed securities and residential mortgage-backed securities issued prior to 2009 that were originally rated AAA or equivalent by two or more nationally recognized statistical rating organizations, without ratings enhancement and secured by the mortgage loans, leases or assets (not other securities, with the exception of certain swap positions as determined by Treasury). Subject to clarification by Treasury, loans and other assets underlying any eligible asset must be situated predominantly in the US. |
| SELLERS | |
| <ul style="list-style-type: none">• Seller banks include any insured US bank or savings association.• Non-bank institutions and foreign-owned or-controlled companies or banks are not eligible sellers under the Program. | <ul style="list-style-type: none">• Sellers are financial institutions as defined in EESA, which include, but are not limited to, US banks, savings associations, credit unions, security brokers or dealers, and insurance companies that all have significant operations in the US, but exclude any central bank or institution owned by a foreign government. |
| INVESTORS | |
| <ul style="list-style-type: none">• Private investors are expected to include, but are not limited to, financial institutions, individuals, insurance companies, mutual funds, publicly managed investment funds, pension funds, private equity funds and hedge funds.• Private investor groups must be approved by the FDIC, and cooperation between private investor groups will be prohibited once the auction process begins. | <ul style="list-style-type: none">• Fund Managers will apply to be prequalified to raise private capital of at least \$500 million to invest in PPIFs. Treasury initially will select approximately five Fund Managers.• Fund Managers will qualify based upon criteria that is expected to include (i) a historical track record in the targeted asset classes, (ii) demonstrated capacity to raise at least \$500 million of private capital, (iii) a minimum of \$10 billion (market value) of eligible assets currently under management, (iv) demonstrated operational capacity to manage the PPIF in a manner consistent with Treasury's stated investment objective and (v) headquarters in the US.• Fund Manager applications must be submitted by April 10, 2009. |

| <u>Legacy Loans Program</u> | <u>Legacy Securities Program</u> |
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| ASSET PRICING | |
| <ul style="list-style-type: none"> • A seller bank will make information available to the FDIC and private investors to facilitate the bidding process. • A third-party valuation firm selected by the FDIC will provide independent valuation advice, which will be used by the FDIC to determine the valuation of eligible asset pools, inform initial views on leverage, and provide information about the structure and value of bids. • Eligible asset pools will be purchased from seller banks at prices determined through the auction process for the private capital component of the PPIF. • Upon the selection of a bid by the FDIC, the seller bank will have the option of accepting or rejecting the bid within a specified time frame. | <ul style="list-style-type: none"> • Fund Managers will control the process of asset selection and pricing. • Fund Managers will control the process of asset liquidation, trading and disposition. • Prices of eligible assets for reporting purposes, as described below, must be tracked using third-party sources and annual audited valuations by a nationally recognized accounting firm. |
| FINANCING | |
| <ul style="list-style-type: none"> • Proposed financing terms and leverage ratios for each PPIF will be established by the FDIC and disclosed to potential investors prior to the submission of bids in the auction process. • <u>Equity</u>. At least 50 percent of the equity of each PPIF will be provided by private investors and the remaining equity will be provided by Treasury. • <u>Debt</u>. PPIF-issued debt will be guaranteed by the FDIC and collateralized by assets purchased by each PPIF. Debt and equity funding for each PPIF will occur at the closing of each asset pool purchase. The FDIC will not guarantee debt in excess of a 6-to-1 debt-to-equity ratio. | <ul style="list-style-type: none"> • <u>Equity</u>. Treasury will match private investors' equity investment in each PPIF and the PPIF will invest Treasury equity and the private equity at the same time and on the same terms and conditions. • <u>Debt</u>. Fund Managers will be able to subscribe for Treasury non-recourse loans secured by eligible assets up to an aggregate amount of 50 percent of the total equity capital of the PPIF (or possibly 100 percent of the total equity capital subject to certain restrictions). Any loans made by Treasury to the PPIF will accrue interest at an annual rate determined by Treasury. • <u>Illustration of Debt-to-Equity-Ratio</u>. If \$100 of equity is put up (\$50 private investment equity and \$50 Treasury equity) then, <u>in addition</u>, Treasury may loan another \$50 and in some situations up to another \$100. Therefore, debt-to-equity will be 0.5-to-1 or up to 1-to-1. • <u>TALF</u>. Fund Managers also may choose to finance the purchase of eligible assets through TALF. • <u>Cessation of Funding</u>. Treasury will retain the right to cease funding of committed but undrawn Treasury equity capital and debt financing in its sole discretion. |

| <u>Legacy Loans Program</u> | <u>Legacy Securities Program</u> |
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| GUARANTEE | |
| <ul style="list-style-type: none"> • The FDIC guarantee will be senior to equity provided by private investors and Treasury. • FDIC-guaranteed debt will initially be placed at the seller bank which may choose to resell the debt into the market. • PPIFs will be required to maintain a Debt Service Coverage Account (“DSCA”) to ensure that working capital can cover anticipated debt servicing obligations, interest expenses and operating expenses. A portion of cash proceeds from the sale of eligible asset pools will be retained in an escrow account until cash flow from the asset pool has fully funded the DSCA, at which time the escrowed account will be released to the seller bank. • The FDIC will charge the PPIF a guarantee fee, payable annually, based on outstanding debt balances and a portion of this fee will be allocated to the FDIC’s Deposit Insurance Fund. | <ul style="list-style-type: none"> • Debt service will not be guaranteed by the FDIC under the Legacy Securities Program. • Treasury-debt financing will be secured by the eligible assets held by the PPIF. |
| INVESTMENT COSTS/FEES | |
| <ul style="list-style-type: none"> • In addition to any costs associated with participation in the auction process by a private investor, a bid must be accompanied by a cash deposit of 5 percent of the bid value, which will be returned to unsuccessful bidders, subject to their adherence to material terms of the auction procedures. • The FDIC and Treasury will enter into an agreement governing allocation of costs and responsibilities for the functions provided. The FDIC will be reimbursed for expenses incurred in the auction process. It is unclear which party is responsible for the reimbursement of such expenses. • Administration Fees will be paid to the FDIC by PPIFs for the oversight functions performed. | <ul style="list-style-type: none"> • Fund Managers may charge private investors fees in their discretion and such proposed fees will be considered by Treasury when reviewing a potential Fund Managers application. • Treasury may be charged a fixed management fee based on a percentage of invested Treasury equity capital (“Treasury Fees”). Treasury Fees and Treasury’s share of expenses related to the PPIF will be paid solely out of distributions with respect to Treasury equity capital. • Any other fees paid to a Fund Manager will accrue to the benefit of Treasury and private investors on a <i>pari passu</i> basis in proportion to their equity commitments. |

| <u>Legacy Loans Program</u> | <u>Legacy Securities Program</u> |
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| STRUCTURE | |
| <ul style="list-style-type: none"> • The capital provided by Treasury and the capital provided by private investors will be invested proportionately at the same time in the PPIF. • Treasury will be issued warrants in PPIFs as required by EESA. • Treasury and private investors will share profits and losses <i>pro rata</i> in proportion to equity invested, subject to Treasury's right to receive warrants. • Financing terms will be as set forth in the "FDIC Guaranteed Secured Debt for PPIF" term sheet, yet to be drafted. • Terms and governance procedures, including the management, servicing agreements, financial and operating reporting requirements, exit timing and alternatives for each PPIF will be established by the FDIC and Treasury. | <ul style="list-style-type: none"> • Treasury equity capital will be drawn down in tranches to provide for anticipated investments, provided that Treasury equity may only be drawn down at the same time and in the same proportion as private capital is drawn down, unless otherwise agreed to by Treasury. • Treasury will be issued warrants in PPIFs as required by EESA. • Treasury and private investors will generally share profits and losses <i>pro rata</i> in proportion to equity invested, subject to Treasury's right to receive warrants. • Debt financing will be funded concurrently with drawdowns of equity commitments. • Private investors may be given voluntary withdrawal rights, provided that no private investor will have the right to exercise a voluntary withdrawal right prior to the third anniversary of the first investment by such PPIF. |
| CONFLICTS OF INTEREST | |
| <ul style="list-style-type: none"> • Private investors in a PPIF may not be affiliates of the seller bank or any private investor that has committed at least 10 percent of the aggregate private capital in the PPIF. • Each PPIF must agree to waste, fraud, and abuse provisions defined by Treasury and the FDIC and will be required to make certain representations, warranties, and covenants regarding the conduct of their business and compliance with applicable law. | <ul style="list-style-type: none"> • Fund Managers may not purchase eligible assets from sellers that are (i) affiliates of such Fund Manager, (ii) another Fund Manager or an affiliate of any other Fund Manager and (iii) from any private investor that has committed 10 percent or more of the aggregate private capital raised by the Fund Manager. • Fund Managers must agree to waste, fraud and abuse provisions defined by Treasury. |
| REPORTING | |
| <ul style="list-style-type: none"> • PPIFs will be required to provide information to the FDIC. • PPIFs will be required to provide access, as needed, to information required by the Special Inspector General of the TARP and the Government Accountability Office. | <ul style="list-style-type: none"> • Fund Managers will be required to present monthly reports to Treasury on eligible assets purchased and disposed of, as well as current valuations of eligible assets and profits/losses on eligible assets included in each PPIF. • Fund Managers must agree to provide access to relevant books and records of a PPIF for Treasury, the Special Inspector General of the TARP, the Government Accountability Office and their respective advisors and representatives. |