

Client Alert

# Economic Crisis Response Group

MAY 2009

Economic Crisis  
Response Group

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## **New Disclosure and Oversight Requirements Affecting TARP Recipients and Investors in Legacy Assets Under PPIP**

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Two of the provisions of the Helping Families Save Their Homes Act of 2009, signed into law on May 20, 2009, have significant impact on investors seeking to purchase legacy loans or legacy securities under the Public-Private Investment Program, as well as any entities which receive funding under TARP. These changes are intended to address transparency, conflicts of interest and to ensure that fiduciary duties are not violated. Investors considering investments under the public-private investment programs and recipients of TARP funds, including accountants, financial advisors and agents to such recipients, are now required to make certain disclosures in respect of their books and records (including all electronic communications).

## **Changes Specific to PPIP Investment Funds**

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Section 402 (also known as the “Public-Private Investment Program Improvement and Oversight Act of 2009”) imposes strict conflict of interest rules on managers of funds created to purchase legacy assets under PPIP, to ensure that:

- i. securities are purchased pursuant to arms-length transactions;
- ii. fiduciary duties of the manager of a fund to both the public and private investors in the fund are not violated; and
- iii. full disclosure is made of all relevant facts and financial interests.

Rules must be in place to address such conflicts before any financing is made available to the fund. In addition, funds are required to submit quarterly reports to the Secretary of the Treasury disclosing the ten largest investors in such fund. Public disclosure of this information is mandated, unless the Secretary determines that such disclosure would harm the ongoing business operations of the fund.

In addition, Section 402 gives the TARP Special Inspector General access to all books and records of a fund (and managers are required to retain all books and records, including all electronic messages).

## Changes Specific to TARP Beneficiaries

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Similarly, Section 601, which amends Section 116 of the Emergency Economic Stabilization Act of 2008 (12 U.S.C. 5226), also known as the Troubled Asset Relief Program, gives the Comptroller General access, upon request, to “any information, data, schedules, books, accounts, financial records, reports, files, electronic communications or other papers, things or property . . . of any entity (other than a governmental unit) participating in a program established under the authority of [TARP].” This extends to officers, employees, directors, independent public accountants, financial advisors and any other agents or representatives of such entities.

As for public access to the information obtained by the Comptroller General, Section 402 states that the CG may not publicly disclose proprietary or trade secret information, other than to Congressional subcommittees or members thereof having jurisdiction over a public or private entity which receives funding from TARP.

Similar to the executive compensation and bonus limitations, these changes are likely to have a chilling effect on investor enthusiasm and may reduce participation in government-sponsored programs intended to facilitate the removal of toxic assets from bank balance sheets.

Proskauer's Economic Crisis Response Group includes lawyers with extensive experience representing private and public companies, institutional investors, financial services companies, private equity and hedge funds, lenders, commercial banks and individuals in the complex and interrelated areas impacted by the current financial situation. Our multidisciplinary group brings together the talents of our business and transactional lawyers with our litigation capabilities, particularly as they pertain to acquiring, managing or disposing of distressed assets; issues concerning investments in financial services companies; and complex financial instruments and transactions, including structured finance products, as well as a broad range of other areas such as corporate governance and defense, insurance coverage, reductions in force and other employment and benefit-related issues, securities regulation, and bankruptcy and restructuring matters.

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