

October 10, 2014



# Public Health Law

Office for State, Tribal, Local and Territorial Support  
Centers for Disease Control and Prevention

## Federal Participation in Innovative Public Health Financing: The Social Impact Bond Act (HR 4885) and the Pay for Performance Act (S.2691)

Social impact bonds (SIBs) are relatively new financing mechanisms that can be used to finance public health initiatives addressing issues such as asthma and infant mortality.<sup>1</sup> Since 2010, when the world's first SIB launched in the United Kingdom, several states and local governments in the United States have either launched SIBs or taken steps toward launching one.<sup>2</sup>

Legislation has recently been introduced in both chambers of Congress that would allow for a greater role in these arrangements. A bill introduced on June 18, 2014, to the US House of Representatives with bipartisan support would assist the efforts of state, tribal, local, and territorial (STLT) governments exploring SIBs.<sup>3</sup> That bill, House Bill 4885, would authorize the federal government to enter in SIB arrangements with STLT governments.<sup>4</sup> A similar bill, also with bipartisan support, was introduced in the

---

<sup>1</sup> Although a social impact bond is technically a financing mechanism that can be used to raise upfront funding, this issue brief will use the term "SIB" to refer to the financing mechanism, the intervention financed by the social impact bond, and the arrangement between the relevant parties collectively.

<sup>2</sup> For background information, see Cason Schmit, Matthew Penn, and Tara Ramanathan, *Public Health Law and Policy Innovations: Social Impact Bonds*, OFFICE FOR STATE, TRIBAL, LOCAL AND TERRITORIAL SUPPORT, CENTERS FOR DISEASE CONTROL AND PREVENTION, <http://www.cdc.gov/php/docs/sib-brief.pdf> (last visited July 16, 2014); Cason Schmit, *Social Impact Bonds: A Research Anthology*, OFFICE FOR STATE, TRIBAL, LOCAL AND TERRITORIAL SUPPORT, CENTERS FOR DISEASE CONTROL AND PREVENTION, <http://www.cdc.gov/php/docs/sib-researchanthology.pdf> (last visited July 16, 2014).

<sup>3</sup> As of October 10, 2014, the 23 sponsors (12 Republicans and 11 Democrats) are Reps. Todd Young [R-IN-9], John Delaney [D-MD-6], Tim Griffin [R-AR-2], John Larson [D-CT-1], Tom Reed [R-NY-23], Jared Polis [D-CO-2], Dennis Ross [R-FL-15], Joseph Kennedy III [D-MA-4], Aaron Schock [R-IL-18], James McGovern [D-MA-2], Patrick Tiberi [R-OH-12], Ami Bera [D-CA-7], David Cicilline [D-RI-1], David Reichert [R-WA-8], Mike Kelly [R-PA-3], Jim Matheson [D-UT-4], Thomas Petri [R-WI-6], Reid Ribble [R-WI-8], Dina Titus [D-NV-1], Devin Nunes [R-CA-22], Derek Kilmer [D-WA-6], Michael Fitzpatrick [R-PA-8], John Carney, Jr. [D-DE-At Large], Gregory Meeks [D-NY-5], James Renacci [R-OH-16], Ann Kuster [D-NH-2], and Diane Black [R-TN-6].

<sup>4</sup> Social Impact Bond Act, H.R. 4885, 113th Cong. (2014).



Senate on July 30, 2014.<sup>5</sup> The Senate bill, S.2691, mirrors the House bill to a large extent but contains some notable differences.<sup>6</sup>

In line with the Public Health Law Program’s ongoing efforts to track developments in SIB implementation, policy, and law, this issue brief outlines the similarities and differences of H.R. 4885 and S.2691.

## Federal Participation in STLT SIBs

Under both bills, a STLT government can submit proposals to the Secretary of the Treasury for federal participation in a STLT SIB.<sup>7</sup> The bills would allow the federal government to participate in a STLT SIB by authorizing federal contribution 1) to success payments<sup>8</sup> of a SIB up to the projected savings of the SIB to the federal government; 2) up to 50 percent of the cost of a feasibility study for a proposed SIB; and 3) for SIB evaluation.<sup>9</sup>

## SIBs Eligible for Federal Participation

Both bills would allow the Secretary of the Treasury to consider federal participation in the proposed SIBs with certain objectives or expected outcomes.<sup>10</sup> The House and Senate bills enumerate 12 and 13 specific outcomes of a STLT SIB, respectively, that would be eligible for federal participation. While each of the enumerated outcomes is at least indirectly related to public health, four of the eligible outcomes in each bill are directly related to public health:<sup>11</sup>

- “Reducing teen and unplanned pregnancies.”
- “Improving birth outcomes among low-income families and individuals.”
- “Reducing rates of asthma, diabetes, or other preventable diseases among low-income families and individuals.”
- “Reducing the dependence of low-income families on Federal means-tested benefits” (e.g., Medicaid).

---

<sup>5</sup> Pay for Performance Act, S.2691, 113th Cong. (2014). As of September 4, 2014, the Senate Bill has two sponsors, Sens. Michael Bennet, [D-CO] and Orrin Hatch [R-UT].

<sup>6</sup> One difference of note is that the two bills refer to the SIB arrangement differently. The House bill uses the term “Social Impact Bond”; in contrast, the Senate bill uses the term “Social Impact Pay for Performance Contract.” This issue brief will refer to both as SIBs for ease of understanding. Many of the other differences will be noted subsequently.

<sup>7</sup> H.R. 4885 §§ 2052, 2055; S.2691 §§ 2052, 2055.

<sup>8</sup> The phrase “success payments” refers to the amount due to SIB investors if and only if the SIB intervention is evaluated to have met predetermined benchmarks indicating that the SIB has successfully achieved program objectives.

<sup>9</sup> H.R. 4885 §§ 2053(c)(1)(B), 2054, 2055, 2057; S.2691 §§ 2053(c)(1)(B), 2054, 2055, 2057.

<sup>10</sup> H.R. 4885 § 2052(b); S.2691 § 2052(b).

<sup>11</sup> The language of these outcomes is identical in both versions of the bill. See H.R. 4885 § 2052(b)(4), (6)–(8); S.2691 § 2052(b)(4), (6)–(8).

The eligible outcomes for both bills are not limited to the 12 or 13 listed. In both bills, the Secretary of the Treasury has discretion to consider any “measurable outcomes defined by [STLT governments] that result in positive social outcomes and federal savings.”<sup>12</sup>

### Considerations for Federal Acceptance of STLT SIB Proposals

Both bills outline five considerations for federal acceptance of STLT SIB proposals:<sup>13</sup>

1. Value of the expected outcome, if achieved, to the federal government
2. Ability of the STLT government, in collaboration with the intermediary and service providers, to achieve the outcomes
3. Potential savings to the federal government
4. Potential savings to the STLT government
5. Expected quality of the evaluation of the SIB

### Federal SIB Contract Authority

Both House and Senate versions contain several limitations to contracts formed under the new authority:<sup>14</sup>

- As with most SIBs, the federal government would not make payments unless the specified outcomes are achieved
- Federal payments for achieving SIB outcomes would not be permitted to exceed the expected federal savings, so, under both bills, any payments made for achieving an outcome must be expected to have a neutral or net-savings effect on the federal budget
- The STLT government must demonstrate, through rigorous experimental or quasi-experimental studies, that the intervention funded by the SIB is expected to achieve the specified outcomes
- The bills require the intermediary and service providers to have necessary experience to execute the SIB
- The bills place a 10-year limit on any SIB with federal participation.<sup>15</sup>

### Appropriations

Both bills would make \$300 million available for 10 years after enactment to carry out the authorized SIB activities.<sup>16</sup> However, funding for the review, approval, and oversight of SIB projects would be limited to \$1 million per year in the House bill and \$3 million in the Senate bill.<sup>17</sup>

In addition to the appropriations for potential payments to STLT partners for successful SIBs and SIB review, approval, and oversight, the bills would authorize limited federal funds to help STLT

---

<sup>12</sup> Other eligible outcomes for SIB programs include increasing employment among select populations, improving high school graduation rates, increasing the proportion of two-parent families, reducing child abuse and neglect, reducing foster care populations, and reducing recidivism. H.R. 4885 § 2052(b); S.2691 § 2052(b). The Senate version of the bill contains two outcomes related to foster care in comparison to the House bill, which has one. *Id.*

<sup>13</sup> H.R. 4885 § 2053(b); S.2691 § 2053(b).

<sup>14</sup> H.R. 4885 § 2053(c); S.2691 § 2053(c).

<sup>15</sup> H.R. 4885 § 2053(c); S.2691 § 2053(c).

<sup>16</sup> H.R. 4885 § 2057; S.2691 § 2057.

<sup>17</sup> H.R. 4885 § 2057; S.2691 § 2057.

governments launch SIBs.<sup>18</sup> For example, the bills would allow the federal government to provide funding for the development of the feasibility studies required in applications for federal participation.<sup>19</sup> However, federal funding for each feasibility study is limited to 50 percent of the study's total cost and capped at \$10 million for all STLT feasibility studies cumulatively.<sup>20</sup>

The bills would also authorize the federal government to help fund evaluation of a STLT SIB.<sup>21</sup> However, the Secretary of the Treasury and agencies relevant to the SIB outcome would not be able to spend more than 15 percent of all money appropriated for a SIB to evaluate implementation and outcome of a STLT SIB.<sup>22</sup>

### Creation of a Federal Interagency Council on SIBs

The bills would create a Federal Interagency Council on SIBs (FIC),<sup>23</sup> to provide advice, coordination, and subject matter expertise for SIB projects, in addition to other duties.<sup>24</sup> The Secretary of the Treasury would consult with the FIC when issuing regulations to carry out the law.<sup>25</sup>

The House and Senate bills take somewhat different approaches to the FIC. For example, the bills take slightly different approaches to the composition of the FIC. In the House bill, the FIC would have representatives from 10 federal agencies, including the Department of Health and Human Services, and be chaired by a representative from the National Economic Council or the Domestic Policy Council, and each federal agency would designate its own representative to the council.<sup>26</sup> Meanwhile, the Senate bill allows the President to appoint three qualified members of the council (including the FIC chair) and to select eight other qualified members from lists provided by leaders in Congress.<sup>27</sup> In the Senate version of the bill none of the appointments are subject to Senate confirmation.<sup>28</sup>

The Senate bill contains additional provisions related to the FIC. It gives the FIC expanded powers to review SIB applications, certify that proposed projects are projected to produce savings, work with agencies involved with SIB projects, provide after-the-fact accountings for actual federal savings produced by a SIB, and provide oversight of the actions of the Secretary of the Treasury and other

---

<sup>18</sup> H.R. 4885 §§ 2054, 2055; S.2691 §§ 2054, 2055.

<sup>19</sup> H.R. 4885 § 2054; S.2691 § 2054.

<sup>20</sup> H.R. 4885 § 2054(d); S.2691 § 2054(d).

<sup>21</sup> H.R. 4885 § 2055(a), (f); S.2691 § 2055(a), (f).

<sup>22</sup> H.R. 4885 § 2055(a), (f); S.2691 § 2055(a), (f).

<sup>23</sup> Called the Federal Interagency Council on Social Impact Bonds in the House Bill and the Federal Interagency Council on Social Impact Pay for Performance Contracts in the Senate bill.

<sup>24</sup> H.R. 4885 § 2056(a).

<sup>25</sup> H.R. 4885 § 2060; S.2691 § 2059.

<sup>26</sup> Each of 10 members the FICSIB would be appointed by their respective agencies, specifically 1) Office of Management and Budget, 2) Department of Labor, 3) Department of Health and Human Services, 4) Social Security Administration, 5) Department of Agriculture, 6) Department of Justice, 7) Department of Housing and Urban Development, 8) Department of Education, 9) Department of Veterans Affairs, and 10) Department of the Treasury. H.R. 4885 § 2056(b).

<sup>27</sup> S.2691 §2056(b).

<sup>28</sup> Qualifications for the Senate version of the FIC include experience in finance, economics, pay-for-performance arrangements, professional experience in a field related to potential target outcomes of SIBs, and competency in evaluating proposed projects, metrics, and methodologies. *Id.*

federal officials authorized by the bill.<sup>29</sup> The Senate version also contains provisions to increase transparency, such as posting the FIC charter to the public FIC website.

### **Government Accountability Office (GAO) Audits**

The Senate bill differs from the House bill by including a section authorizing the GAO to audit parties to SIB arrangements that receive federal funds.<sup>30</sup> This audit authority includes STLT governments, as well as nongovernmental entities participating in an SIB that receive federal funding.<sup>31</sup>

*This document was developed by Cason Schmit, JD, Oak Ridge Institute for Science and Education Fellow, with the assistance of Matthew Penn, JD, MLIS, director of the Public Health Law Program (PHLP) within the Centers for Disease Control and Prevention's Office for State, Tribal, Local and Territorial Support. PHLP provides technical assistance and public health law resources to advance the use of law as a public health tool. PHLP cannot provide legal advice on any issue and cannot represent any individual or entity in any matter. PHLP recommends seeking the advice of an attorney or other qualified professional with questions regarding the application of law to a specific circumstance.*

---

<sup>29</sup> S.2691 § 2056(a)(7)–(9), (d).

<sup>30</sup> S.2691 § 2060.

<sup>31</sup> *Id.*