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August 10, 2009

Mr. Robert E. Feldman
Executive Secretary
Attention: Comments
Federal Deposit Insurance Corporation
550 17th Street, N.W.
Washington, DC 20429

Re: Comments on the Proposed Statement of Policy on Qualifications for Failed Bank Acquisitions

Dear Mr. Feldman:

Goodwin Procter LLP is pleased to submit comments in response to the Request for Comment by the Federal Deposit Insurance Corporation (the "**FDIC**") on the Proposed Statement of Policy on Qualifications for Failed Bank Acquisitions (the "**Proposed Policy Statement**"), which provides guidance to private capital investors interested in acquiring or investing in the assets and liabilities of failed insured depository institutions.[1] We represent private equity funds, registered investment advisers, and other institutional investors that regularly invest in financial institutions on behalf of themselves and/or their clients. While we have solicited and considered input from a number of our clients, the following comments are our own and are not made on behalf of particular clients. Our objective is to offer constructive input to assist the FDIC in creating a policy that encourages Investors to invest capital in the banking system while also addressing safety and soundness considerations.

We appreciate the opportunity to comment on the Proposed Policy Statement. Section I of this comment letter addresses certain of the specific questions posed by the FDIC in its

[1] 74 Fed. Reg. 32931 (July 9, 2009). By its terms, the Proposed Policy Statement would be applied to (a) private capital investors in a company (other than a bank or thrift holding company that has come into existence or has been acquired by an investor subject to the Proposed Policy Statement at least three years prior to the date of the Proposed Policy Statement) proposing to acquire assets and/or assume deposit liabilities from a failed insured depository institution in receivership and (b) applicants for insurance in the case of de novo charters issued in connection with the resolution of failed insured depository institutions ("**Investors**"). The Proposed Policy Statement does not define private capital investors. However, as reflected in our comments below, we do not believe that many aspects of the Proposed Policy Statement should be applied to persons or companies who do not possess direct or indirect control over an insured depository institution under applicable law.

Request for Comment. For your convenience, we have restated the applicable questions from the Proposed Policy Statement in bold, followed by our comments. Section II addresses other issues we identified in our review of the Proposed Policy Statement.

I. FDIC Questions

A. Silo Structure. The Proposed Policy Statement indicates that so-called "silo" structures would not be considered to be eligible bidders for failed bank assets and liabilities since under these structures beneficial ownership cannot be ascertained, the responsible parties for making decisions are not clearly identified, and/or ownership and control are separated. Are there any reasons why they should be considered to be eligible bidders?

We believe that a blanket prohibition on the use of "silo" structures to invest in assets of failed institutions would reduce the number of Investors willing and able to participate in the bidding process for failed bank assets and, thereby, potentially increase the costs to the public of resolving failed banks.

As a threshold matter, we note that there are various types of organizational structures that can be referred to as "silo" structures. To provide certainty for Investors, we believe that the Proposed Policy Statement should provide greater specificity on what types of organizational structures would be treated as "silo" structures for these purposes.

In addition, the Proposed Policy Statement asserts that silo structures create opaque ownership in which "beneficial ownership cannot be ascertained, the responsible parties for making decisions are not clearly identified and/or ownership and control are separated" and states that such an ownership structure is inconsistent with the safe and sound ownership of insured depository institutions. We believe that these stated concerns, especially with regard to ascertaining beneficial ownership and identifying the responsible parties for making decisions, are not applicable to many forms of "silo" structures. Existing laws and regulations provide a mechanism for the federal banking regulators to obtain information about ownership structure and control. The particular entities that directly or indirectly acquire control of a bank or savings association are subject to regulation under the Bank Holding Company Act of 1956, as amended (the "**BHC Act**"), or the Home Owners' Loan Act of 1933, as amended, and the individuals who control these entities are subject to review by the federal bank regulatory agencies in the context of a holding company application or pursuant to the Change in Bank Control Act. Furthermore, it is important to note that Investors may have valid business reasons for structuring investments under a "silo" structure, including preserving limited liability and seeking tax efficiency. In this regard, we note that the Office of Thrift Supervision (the "**OTS**") has permitted the use of "silo" structures in connection with the acquisition of control of savings associations. By reducing the

number of Investors willing to participate in the bidding process for failed bank assets, the prohibition on silo structures would impair the competitiveness of the bidding process for those assets, potentially increasing costs for the Deposit Insurance Fund and the FDIC in its capacity as a receiver.

B. Capital Requirements. The Proposed Policy Statement requires an initial Tier 1 leverage ratio of 15 percent, that this ratio be maintained for a period of at least 3 years, and thereafter that the capital of the insured depository institution remain at a "well capitalized" level. The FDIC seeks the views of commenters on the appropriate level of initial capital that will satisfy safety and soundness concerns without making investments in the assets and liabilities of failed banks and thrifts uncompetitive and uneconomic. Should there be a further requirement that if capital declines below the required capital level, the institution would be treated as "undercapitalized" for purposes of Prompt Corrective Action and the institution's regulator would have available all the measures that would be available in such a situation?

We believe this requirement would create competitive inequality among potential bidders for failed bank assets by subjecting a specific class of bidders to significantly higher capital requirements and, as a result, reduce the competitiveness of the bidding process and raise costs for the Deposit Insurance Fund and the FDIC in its capacity as a receiver. Under the Prompt Corrective Action guidelines of the FDIC and the other federal bank regulatory agencies, an institution may qualify as "well capitalized" with a leverage ratio of at least five percent.[2] We recognize the FDIC's legitimate concern that newly established banks, as a general matter, have not established a record of performance in the early years of activity. Accordingly, a modestly higher capital level for the first three years after an acquisition by an Investor may be reasonable depending on the circumstances. For example, the FDIC Statement of Policy on Applications for Deposit Insurance currently requires organizers of a *de novo* institution to provide initial capital sufficient to maintain a Tier 1 leverage ratio of eight percent during the first three years of operations.[3] However, the minimum 15 percent ratio proposed in the Proposed Policy Statement is much higher than required by the Prompt Corrective Action guidelines and nearly double that required by the FDIC's Statement of Policy on Applications for Deposit Insurance. We submit that, to the extent an acquirer has competent management, a well-defined business plan and a satisfactory financial structure, the mere fact that some or all of its capital comes from Investors should not subject it to significantly higher capital requirements.

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2 *See, e.g.*, 12 C.F.R. § 325.103(b)(1)(iii).

3 *See* 70 Fed. Reg. 60523 (Oct. 18, 2005).

C. Source of Strength. Should the Source of Strength commitment included in the Proposed Policy Statement be retained in the final policy statement? Should the commitment be enhanced to require from the shell holding company and/or the Investors a broader obligation than only a commitment to raise additional equity or engage in capital qualifying borrowing?

The proposed expansion of the Source of Strength commitment would discourage Investors from participating in the acquisition of failed depository institutions and failed depository institution assets, as it would subject an Investor to virtually limitless liability on an investment that the Investor does not control. The Proposed Policy Statement would require the organizational structures of Investors subject to the Proposed Policy Statement to agree to serve as a source of strength for their subsidiary depository institutions even if no Investor has "control" of such subsidiary depository institution. This requirement in many cases is unnecessary because bank holding companies are already required by the Board of Governors of the Federal Reserve System (the "**Federal Reserve Board**") to serve as a source of financial and managerial strength to their subsidiary depository institutions. This commitment should not be enhanced to require broader obligations from Investors in a bank holding company that do not have the ability to control the company or its subsidiary depository institutions. Instead, the FDIC should simply ensure that the company is free of legal or practical restrictions on its ability to seek additional capital. We also note that, as a practical matter, many private capital investors are limited by the terms of their fund documents from providing capital support or making follow-on investments in their portfolio companies.

D. Cross Guarantee. Should the Cross Guarantee commitment included in the Proposed Policy Statement be retained in the final policy statement? Should the commitment contained in the Proposed Policy Statement be enhanced by requiring a direct obligation of the Investors?

The Proposed Policy Statement would require Investors whose investments constitute a majority investment (collectively or individually) in more than one insured depository institution to pledge to the FDIC their proportionate interest in each such institution for the failure of any other such institution in which they have an ownership interest. We submit that this proposal would effectively prevent many Investors from participating in the bidding process for failed bank assets, as many Investors are subject to restrictions on their use of capital, including prohibitions on guarantees and follow-on investments in portfolio companies. It would be unfair to subject Investors to this type of requirement when the Investors are not acting together as a group, do not control the institutions involved and, thus, are not in a position to manage the risks

associated with providing this type of cross-guarantee.[4] Furthermore, by subjecting non-controlling Investors to cross-guarantee liability, the Proposed Policy Statement would prevent Investors from understanding the full cost of their prospective investment, which could discourage Investors from participating in the resolution of failed institutions, thereby reducing the competitiveness of the bidding process and raising costs for the Deposit Insurance Fund and the FDIC in its capacity as a receiver.

E. Bank Secrecy Jurisdictions. The Proposed Policy Statement limits the use of entities in an ownership structure that are domiciled in bank secrecy jurisdictions unless the Investors are subsidiaries of companies that are subject to comprehensive consolidated supervision as recognized by the Federal Reserve Board. Should entities established in bank secrecy jurisdictions be considered to be eligible bidders even without being subject to comprehensive consolidated supervision?

The Proposed Policy Statement should clarify which jurisdictions would currently be covered by this restriction and the criteria by which a jurisdiction would be considered a bank secrecy jurisdiction. The Proposed Policy Statement should also clarify whether this restriction would apply if any entity in an Investor's ownership structure is domiciled in a bank secrecy jurisdiction. We note that Investors may make investments through an entity organized or domiciled in an offshore jurisdiction (which may be a bank secrecy jurisdiction) for valid reasons, including facilitating investment by U.S. tax-exempt entities and non-U.S. persons in a tax efficient manner. Such Investors may be able to implement measures that would mitigate the FDIC's concerns, such as by maintaining books and records in the United States and committing to make them available to U.S. regulators.

F. Holding Period. Under the Proposed Policy Statement, Investors would be prohibited from selling or otherwise transferring securities of the Investors' holding company or depository institution for a three year period of time following the acquisition absent the FDIC's prior approval. Is three years the correct period of time for limiting sales, or should the period be shorter or longer?

We respectfully submit that the holding period should be shorter than provided for in the Proposed Policy Statement. A three year time horizon would likely discourage many Investors from participating in the bidding process for failed bank assets and deposit liabilities. We recognize the FDIC's legitimate goals of discouraging short-term investments and maintaining continuity of ownership. In this regard, we note that most Investors have an initial expected time

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[4] If the Investors were acting collectively as a group, they would likely be regarded as having "control" of the institutions involved for purposes of the BHC Act, and the existing cross-guarantee provisions in the Federal Deposit Insurance Act would then apply.

horizon longer than three years. However, markets can change rapidly and it is important to preserve an Investor's ability to sell after a shorter time period than three years. Furthermore, a shorter time horizon would be consistent with past practice for acquirers of failed depository institutions. For example, the Investors who acquired the assets and liabilities of BankUnited, FSB were only prohibited from selling or otherwise transferring their securities for 18 months.

G. Lifting of Limitations. Should the limitations in this Proposed Policy Statement be lifted after a certain number of years of successful operation of a bank or thrift holding company? If so, what would be the appropriate timeframe for lifting the conditions? What other criteria should apply? Should all or only some of the conditions be lifted?

We believe it would be reasonable to lift all restrictions after the required holding period (as modified pursuant to our comment in Section I. F. above) has expired. This approach would prevent a situation where Investors are indefinitely operating at a competitive disadvantage and, as a result, would encourage Investors to retain their investments beyond the applicable holding period and thereby help maintain continuity of ownership of the financial institution.

II. Other Considerations

A. Affiliate Transaction Rules.

The Proposed Policy Statement would prohibit all extensions of credit by an institution acquired or controlled by Investors to Investors, their investment funds, their respective affiliates, and their portfolio companies. We respectfully submit that, as proposed, this limitation is discriminatory and overly broad. Extensions of credit to Investors and their affiliates are already subject to existing prudential limitations imposed by Sections 23A and 23B of the Federal Reserve Act with respect to transactions with affiliates and by Sections 22 and 22(h) of the Federal Reserve Act with respect to loans to insiders. We believe that these long-standing limitations are sufficiently robust to adequately protect an acquired depository institution.

B. Disclosure.

Under the Proposed Policy Statement, Investors would be expected to submit to the FDIC information about the Investors and all entities in the ownership chain including such information as the size of the capital fund or funds, its diversification, the return profile, the marketing documents, the management team, the business model, and any other information the FDIC deems necessary to assure compliance with the Proposed Policy Statement. We respectfully submit that this requirement is overly broad. If Investors form an entity that would acquire control of a bank or savings association, that entity would be required to submit detailed

information to the Federal Reserve Board or the OTS. We do not believe that the requirement to furnish information should extend to non-controlling investors.

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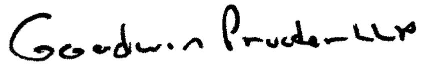
We would be pleased to discuss any of these comments with FDIC staff in greater detail. Please feel free to contact William E. Stern at (212) 813-8890 or Thomas J. LaFond at (617) 570-1990.

Sincerely,



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