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J. CHRISTOPHER FLOWERS

August 10, 2009

Via E-mail

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

Attention: Comments

Re: Proposed Policy Statement on Qualifications for Failed Bank Acquisitions – RIN# 3064–AD47

Dear Mr. Feldman:

J.C. Flowers & Co. LLC ("JCF")[1] welcomes the opportunity to comment on the Federal Deposit Insurance Corporation's ("FDIC") Proposed Statement of Policy on Qualifications for Failed Bank Acquisitions (the "Proposed Statement").

JCF is a global private investment advisory firm that specializes in the financial services industry. Since its formation in 1998, JCF and its affiliates have completed over 20 investments, all of which are in the financial services sector. Such investments include direct and indirect investments in nine depository institutions, of which two are in the US. Most recently, JCF participated in the acquisition of the assets and assumption of the liabilities of IndyMac Bank, FSB by OneWest Bank, FSB alongside several other accomplished investment firms.

JCF believes that private capital investors, including private equity, can play a significant role in restoring and maintaining the health and stability of the U.S.

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1 In December 2008, JCF registered as an investment adviser under the Investment Advisers Act of 1940, as amended. The registration was declared effective by the U.S. Securities and Exchange Commission on January 14, 2009.

banking system. First, there is a significant amount of private capital that is ready to be deployed in the system. Second, private capital investors have demonstrated that they are willing and able to invest in or acquire failed depository institutions, often when traditional sources of capital are unwilling or unable to make such investments. Third, a number of private equity firms, including their principals, have extensive experience in rehabilitating troubled companies and managing and "working out" troubled assets. In particular, a number of private equity firms and/or their principals, including at JCF, have substantial experience with depository institutions as advisors and investors, and have successfully assisted in managing institutions with large volumes of both performing and distressed loans and other credit products, distressed real estate (both commercial and residential) and securities portfolios – experience that is directly relevant to resolving the many problems facing U.S. depository institutions today. Finally, once invested, private capital investors have demonstrated their commitment to maintaining the health and stability of their investee institutions, including in cases where additional capital is required. For example, during the financial crisis in 2008, JCF implemented over $2 billion in follow-on investments of private capital in order to support four depository institutions in which the firm or its affiliates had substantial pre-existing direct or indirect interests.

For these reasons, among others, we see the FDIC's proposal of guidelines to facilitate private capital participation in the resolution process as a significant step towards the restoration of the health and stability of the U.S. banking system. Having reviewed the Proposed Statement, we respectfully suggest that the FDIC consider the clarifications and modifications outlined below, which we believe would enable private investor capital to participate in the resolutions process, while at the same time permitting the FDIC to achieve its policy goals.

Several elements of the Proposed Statement appropriately address issues that are largely unique to private capital investors, are consonant with the need for safety and soundness and would serve to strengthen the health and safety of acquired depository institutions to the benefit of the institutions themselves, the government and the taxpayers. The need for sufficient disclosure of ownership interests in depository institutions is clear. We are also not opposed to a minimum holding period to prevent so-called "flipping" of failed depository institutions acquired from the FDIC; we typically hold our investments for longer than three years because our goal in making an investment is to apply our knowledge and experience to improving the operations and performance of a portfolio company – a process that often takes considerable time. In addition, it is our expectation – even in the absence of the Proposed Statement – that investments in depository institutions will be subject to limitations on transactions with affiliates; such limitations are clearly appropriate in this context.

We believe, however, that certain other elements of the Proposed Statement could benefit from additional clarification or modification and we offer the following comments.

First, we suggest the definition of "Investor" be clarified in any final policy statement clearly to specify (1) what level of investment by private capital investors in a bank or bank holding company would trigger application of the final policy statement, (2) how investments by different private capital investors would be aggregated for purposes of the relevant calculation, and (3) how or whether the application of the final policy statement would differ as between private equity investors and other investors in *de novo* depository institutions. We further suggest that the Proposed Statement should not apply to a private capital investor in an existing depository institution (or the investee depository institutions themselves) unless the private capital investor acquired "control" of the institution after the date the Proposed Statement becomes effective. "Control" could be defined by adopting the definition in the Bank Holding Company Act of 1956 (the "BHC Act"), as interpreted by the Board of Governors of the Federal Reserve System. Such a definition would provide a clearer guideline for the FDIC, investors and depository institutions, with well-established interpretations and guidance.

In addition, while it appears that that the Proposed Statement would not apply to "*de minimis* investments" regardless of the nature or age of the investee company, it would be helpful for the FDIC to provide a clear definition of this term. We suggest that any investment that does not require the filing of a notice with the appropriate regulator under the Change of Bank Control Act of 1978 constitute a *de minimis* investment for these purposes. Like the control standard under the BHC Act described above, such a definition would provide a clearer guideline for the FDIC, investors and depository institutions, with well-established interpretations and guidance.

Second, the Proposed Statement provides that so-called "silo" structures would not be eligible bidders because "beneficial ownership cannot be ascertained, the responsible parties for making decisions are not clearly identified, and/or ownership and control are separated." We agree that structures exhibiting those features are not appropriate for depository institution investments. However, the Proposed Statement does not define what is intended by the term "silo structure," to our knowledge there is no agreed-upon definition of the term, and there is a danger that it could cover legitimate transactions in which the undesirable features are not present. As such, we suggest that a categorical prohibition of silo structures not be implemented as part of the final policy statement.

The FDIC could address its concerns with respect to silo structures by expressly requiring full and complete disclosure by bidders of certain information regarding the direct or indirect owners of 10% or more of the voting securities of the

bidder and the persons responsible for decision-making at the bidder. If the proposed bidder cannot provide sufficient or satisfactory information to satisfy the FDIC, then the proposed bidder would not be qualified for bidding. As noted above, we agree with the disclosure element of the Proposed Statement, and believe that clearly establishing disclosure requirements would benefit both the FDIC and private capital investors.

Third, we understand the "source of strength" proposal to mean that bank holding companies controlled by private capital investors would be required to agree that, should the FDIC determine that the subsidiary depository institutions require additional capital, the holding companies will take steps to support the subsidiary depository institution, including through the issuance of equity and other capital instruments. This approach is consistent with agreements required by bank regulators in certain circumstances currently and we believe that it is appropriate in this context.

However, we do not believe it is necessary or practicable to require that private capital investors themselves contribute such capital. The degree of risk and uncertainty surrounding the possibility that private capital investors would be required to contribute capital in unquantifiable and possibly unlimited amounts will, we believe, have a substantial chilling effect on the desirability and capability of private capital investors to invest in depository institutions. Such a requirement is not imposed on any other bank investors, and we suggest that it should not be applied to private capital investors here.

Of course, as noted above, we believe that private capital investors' interests are aligned with those of their investee depository institutions and that such investors would be committed to ensuring the ongoing strength and stability of their investee depository institutions. There are many examples of private investors supporting their investee companies, including the three banking investments our firm implemented in 2008.

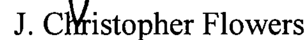
Lastly, we understand the "cross-guarantee" proposal to mean that a private capital investor's interests in commonly controlled depository institutions would be pledged to the FDIC to support losses suffered by any one of those institutions, rather than a cross-guarantee by commonly owned depository institutions themselves, as currently exists under the Federal Deposit Insurance Act. This obligation would arise where an investor, or a group of investors collectively, "constitute a majority of the direct or indirect investments in more than one insured depository institution."

The cross-guarantee proposal presents challenges in a number of respects. First, the parties comprising an "investor" for these purposes may be substantially different from one investment to another; i.e., the limited partners and/or co-investors in one investment transaction may be quite different from those that participate in the later investment transaction(s). This would have the effect of unfairly penalizing investors in

one institution if the pledge is called upon to shore up the capital of the other institution if those investors did not invest in the troubled institution. Second, it seems inherently unfair to require minority, non-controlling investors to bear the burden of controlling investors, without having the benefits of control. The non-controlling investors do not have the power to cause an investee institution to take action to prevent it from ending up in a troubled state or to rectify problems that could lead it to a troubled state. An appropriate basis for a cross-guarantee obligation is common control; if a group of investors is acting together in multiple investments in a way that suggests they should be aggregated for control purposes, then those investors could be deemed to be acting in concert or a "company" under the BHC Act, which would then subject the investee institutions to the cross-guarantee obligations under the Federal Deposit Insurance Act. Lastly, it is not clear precisely how the cross-guarantee obligation would work, and more clarification as to coverage would be necessary. Ultimately, for these reasons, among others, it is our belief that this proposal could have the effect of deterring private capital investment.

We appreciate the FDIC's attention to this comment letter. If you have any questions about this letter, or if JCF can be of any further assistance, please do not hesitate to contact me.

Sincerely,



J. Christopher Flowers