[6714-01-P]

FEDERAL DEPOSIT INSURANCE CORPORATION

RIN 3064-XXX

Final Statement of Policy on Qualifications for Failed Bank Acquisitions

AGENCY: Federal Deposit Insurance Corporation (FDIC).

ACTION: **Final statement of policy.**

SUMMARY: The FDIC is issuing a Final Statement of Policy on Qualifications for Failed Bank Acquisitions (Final Statement). This Final Statement provides guidance to private capital investors interested in acquiring or investing in failed insured depository institutions regarding the terms and conditions for such investments or acquisitions.

DATES: Effective Date:

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SUPPLEMENTARY INFORMATION

I. BACKGROUND

On July 9, 2009, the FDIC published for comment a Proposed Statement of Policy on Qualifications for Failed Bank Acquisitions (Proposed Policy Statement) with a 30-day comment period to provide guidance to private capital investors interested in acquiring the deposit liabilities, or both such liabilities and assets, of failed insured depository institutions regarding the terms and conditions for such investments or acquisitions.[1] After carefully reviewing and considering all comments, the FDIC has adopted certain revisions and clarifications to the Proposed Policy Statement (as discussed in Part III) in the Final Statement.

The FDIC is aware of the need for additional capital in the banking system and the contribution that private equity capital could make to meeting this need provided this contribution is consistent with basic concepts applicable to the ownership of insured depository institutions that are contained in the established banking laws and regulations. The preamble to the Proposed Policy Statement explained that in view of the increased number of bank and thrift failures and the increase in interest by private capital investors in acquiring insured depository institutions in receivership, the FDIC determined to issue, in proposed form, guidance to potential acquirers. In developing the Proposed Policy Statement, the FDIC sought to establish the proper balance in a number of important areas including the level of capital required for these de novo institutions and whether these owners would be a source of strength to the banks and thrifts in which they have invested. The FDIC also considered the important policy issues raised by the structure of

[1] 74 Fed. Reg. 32931 (Jul. 9, 2009)

investments in insured depository institutions, particularly with respect to their compliance with the requirements applied by the FDIC in its decision on the granting of deposit insurance and with the statutes and regulations aimed at assuring the safety and soundness of insured depository institutions and protecting the Deposit Insurance Fund ("DIF").

The Proposed Policy Statement described the terms and conditions that private capital investors would be expected to satisfy to obtain bidding eligibility for a proposed acquisition structure. These standards would apply to (1) private capital investors in certain companies that sought to assume deposit liabilities or both such deposit liabilities and assets from a failed insured depository institution and (2) private capital investors involved in applications for deposit insurance in conjunction with de novo charters issued in connection with the resolution of failed insured depository institutions (hereinafter "Investors"). As more fully summarized below, the Proposed Policy Statement provided, among other measures, standards for capital support of an acquired depository institution; an agreement to a cross guarantee over substantially commonly-owned depository institutions; limits on transactions with affiliates; maintenance of continuity of ownership; and avoidance of secrecy law jurisdictions as investment channels, absent consolidated home country supervision.

Capital Commitment:

The Proposed Policy Statement required private investors to agree to cause an insured depository institution acquiring a failed bank's deposit liabilities, or both such deposit liabilities and assets, to have a Tier 1 leverage ratio of 15 percent for the first

three years of operation, subject to further extensions by the FDIC. Thereafter, such investors would be required to cause the insured depository institution's capital to remain at "well capitalized" levels for the duration of their ownership. The FDIC explained that failing to meet those standards could cause the insured depository institution to be considered "undercapitalized" for purposes of Prompt Corrective Action and other supervisory measures.

Source of Strength:

The FDIC would require Investors covered by its Proposed Policy Statement to agree to serve as a source of strength for subsidiary depository institutions. As necessary, the Proposed Policy Statement required depository institution holding companies in which such Investors held interests to sell equity or to engage in capital qualifying borrowing.

Cross Guarantees:

If Investors had an individual or collective investment that constituted a majority interest in more than one insured depository institution, the Proposed Policy Statement required them to pledge to the FDIC their interest in each institution to cover losses to the Deposit Insurance Fund caused by the failure of such insured depository institution(s) or by the FDIC's provision of assistance to such institutions.

Transactions with Affiliates:

The Proposed Policy Statement prohibited extensions of credit to an Investor by an insured depository institution acquired or controlled by the Investor. According to the Proposed Policy Statement, this prohibition also applied to related investment funds, any affiliates (that is, any company in which an Investor owns 10 percent or more), and to any companies in which the Investor or its affiliates invested.

Secrecy Law Jurisdictions:

The Proposed Policy Statement prohibited investors in entities domiciled in bank secrecy jurisdictions from making a direct or indirect investment in an insured depository institution unless the investors are subsidiaries of companies subject to comprehensive consolidated supervision, as recognized by the Board of Governors of the Federal Reserve System. Among other things, such investors also would be required to agree to provide information to their primary Federal regulator, abide by statutes and regulations administered by U.S. banking agencies, consent to U.S. jurisdiction, and cooperate with the FDIC.

Continuity of Ownership:

Absent the FDIC's prior approval, the Proposed Policy Statement would prohibit covered Investors from selling or transferring securities of their holding company or insured depository institution for three years following acquisition. The FDIC indicated that it did not expect to approve such transfers within the initial three-year period unless the buyer agreed to be bound by the same conditions of the Proposed Policy Statement that were applicable to the Investor.

Disclosures:

The Proposed Policy Statement provided for disclosures of certain specified information (and other non specified information deemed necessary by the FDIC) from Investors and other entities in their ownership chains.

II. OVERVIEW OF THE COMMENTS

The FDIC requested public comment on all aspects of the Proposed Policy Statement and set forth nine specific questions for consideration by commenters. The issues presented by the specific questions included the definition of the "investors" to whom the policies would apply; the bidding eligibility of so-called "silo" structures; the appropriate capital levels for failed insured depository institutions acquired by private capital investors; whether source of strength commitments should be required and the scope of such commitments; whether cross guarantee commitments should be required and the scope of such commitments; the bidding eligibility of entities established in bank secrecy jurisdictions; whether a three-year continuity of ownership rule is the appropriate period of time; the bidding eligibility of investors that directly or indirectly hold 10 percent or more of the equity of a bank or thrift in receivership; and whether the proposed limitations should be lifted after a certain number of years of successful operation of a bank or thrift holding company.

The FDIC received 61 individual comment letters.[2] The comment letters were sent by private investment firms, investment advisory firms, law firms, insured

[2] *See* http://www.fdic.gov/regulations/laws/federal/2009/09comAD47.html.

depository institutions, advocacy organizations, financial services trade associations, 4 United States Senators, a labor union, research organizations, academics, and 6 individuals. Most of the commenters were private capital firms or their representatives that would be affected by the Proposed Policy Statement. The FDIC also received 3,190 form letter comments in support of the Proposed Policy Statement.

Many commenters expressed the general view that limitations and restrictions contained in the Proposed Policy Statement would deter many private capital investors and inhibit the flow of capital into failed banks, resulting in greater costs to the DIF. On the other hand, some commenters stated that they did not have confidence in the motives of private equity investors because of their short-term investment objectives and limited regulatory oversight. These commenters argued that private capital firms should be subject to strict regulation or excluded altogether from participating in the ownership of insured depository institutions. The form letter comments strongly supported the FDIC's Proposed Policy Statement on grounds that private equity firms engage in inherently risky behavior in order to extract large profits in short periods of time.

Three specific areas of the Proposed Policy Statement – the 15 percent Tier 1 leverage ratio, the source of strength commitment, and the cross guarantee provision – generated considerable comment. Commenters opposed to the 15 percent Tier 1 leverage ratio argued that setting the required initial capitalization level at such a high level would place private capital investors at a competitive disadvantage relative to strategic acquirers, make it difficult for private capital investors to realize a reasonable return on investment, and encourage risky post-acquisition investments and business strategies.

These commenters noted that the 15 percent Tier 1 leverage level was three times the high-end range for "well-capitalized" depository institutions and double the industry average. With respect to source of strength commitments and cross guarantees, these commenters were opposed to any direct financial commitment or support obligations beyond an investor's initial contribution. The commenters argued that the imposition of source of strength commitments would introduce substantial uncertainty for investors and potentially expose them to unlimited liability. Commenters also stated that the cross guarantee requirement would deter private capital investment in failed insured depository institutions because private capital investors in unrelated banks would not agree to a cross guarantee commitment that places their legally separate investments at risk. Lastly, the commenters contended that source of strength and cross guarantee commitments were generally prohibited by private equity fund agreements. A summary of the comments by issue follows.

Summary of the Comments by Issue

1. Bidding Eligibility of "Silo" Structures

In the Proposed Policy Statement, the FDIC noted that, because of their often complex and opaque organizational arrangements, so-called "silo" ownership structures would be considered inappropriate vehicles for acquiring insured depository institutions. Some commenters, including a few private equity firms, endorsed the proposed prohibition of "silo" structures, citing the FDIC's need to ascertain beneficial ownership,

clearly identify the parties responsible for making management decisions, and ensure that ownership and control are not separated.

Other commenters stated that they recognized the FDIC's need for transparency, but opposed a blanket prohibition of "silo" structures as acquisition vehicles. These commenters believe that the FDIC would eliminate many otherwise suitable investors who would be willing to provide full disclosures with respect to beneficial ownership, decision making responsibility, and ownership and control issues, and to provide additional disclosures as necessary – even submitting to regulation as a bank holding company under the Bank Holding Company Act – in order to be eligible to bid on failed insured depository institutions. They did not view an absolute prohibition of "silo" structures as necessary for the advancement of the FDIC's important interest in transparency. Some private investors involved in "silo" organizations indicated that they had been part of acquisitions approved pursuant to existing legal standards through the application processes of the Office of Thrift Supervision and the Board of Governors of the Federal Reserve System.

One group of private equity investors noted that separation of ownership and control is characteristic of many categories of institutional investors, including mutual funds, pension plans, and endowments, and argued that bifurcated ownership and control is not a reason to disqualify a potential bidder for a failed bank or thrift. Other commenters, including several law firms, argued against the categorical prohibition in part because "there is no agreed-upon definition in the private equity industry or elsewhere on what constitutes a 'silo' structure."

2. Definition of "Investors"/Applicability of Standards

The limitations and restrictions contained in the Proposed Policy Statement would apply to more than *de minimis* investments by: "(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 at least 3 years prior to the date of this policy statement), that is proposing to directly or indirectly assume deposit liabilities, or such liabilities and assets, from a failed insured depository institution in receivership, and to (b) applicants for insurance in the case of de novo charters issued in connection with the resolution of failed insured depository institutions." The FDIC asked commenters whether some other definition of applicability was more appropriate.

Many of the comments received from representatives of private investment firms indicated that the limitations and restrictions contained in the Proposed Policy Statement should be imposed only when an investor or group of investors would exercise control over the failed institution. Some proposed that investors owning 9.9 percent or less of a failed institution should not be subject to the limitations contained in the Proposed Policy Statement. Other private equity firms argued that private investment funds should not be treated differently from other passive investors.

Some commenters argued that the proposed definition of "investor" is ambiguous and that a clearer definition of applicability is needed. These commenters, which include both law firms and representatives of private equity firms, believed that the scope of the definition was unclear because the term "private capital investor" does not have any generally understood meaning and the Proposed Policy Statement fails to define it. They

noted that if the Proposed Policy Statement primarily is concerned with private equity funds, the FDIC should clarify that fact.

Several private investment firm commenters disagreed with that part of the definition that would make the Proposed Policy Statement applicable to private investors in bank or thrift holding companies that came into existence or were acquired by the investor within the three years prior to the date of the Proposed Policy Statement. Some of these commenters proposed that the three-year period be measured prior to the date of the bid for a failed depository institution rather than from the date of issuance of the Proposed Policy Statement. A number of commenters mistakenly asserted that this provision is retroactive in nature and viewed it as arbitrary.

One commenter looked to the definition of control contained in the Bank Holding Company Act and Regulation Y to determine to whom the Proposed Policy Statement might apply. Using that definition, the commenter suggested that the Proposed Policy Statement should apply to private capital investors and applicants for insurance in cases of *de novo* charters who seek to act as a controlling company or influence over a failed insured depository institution in receivership.

3. Capital Commitment

Several commenters supported a Tier 1 leverage ratio requirement of at least 15 percent (as provided in the Proposed Policy Statement) because of the higher risk profile of the failed institutions investors would be buying, the higher risk appetite of private eqyity investors, and the financial challenges facing banking institutions today. Another

commenter encouraged the FDIC to maintain a Tier 1 leverage ratio requirement of at least 12 percent.

A majority of the commenters objected to the proposed capital requirements, arguing that such requirements would disadvantage private capital firms relative to other bidders and publicly-owned institutions; discourage private capital investment in failed institutions; result in less competitive bids for failing institutions from private equity investors; and create a separate Prompt Corrective Action framework for institutions acquired by private capital investors.

Several commenters in opposition to the proposal expressed concern that the capital requirement would result in excessive risk-taking to realize a sufficient return on the investment, with one commenter noting that the proposed capital requirement also could hinder an institution's ability to lend. A number of commenters opposed the proposed capital requirement because they believe it disregards other factors that are determinative of an institution's financial condition, such as the proposed business plan, the risk of on-balance sheet assets, and the qualifications of the management team.

Comments varied with respect to recommendations on an appropriate capital requirement. One commenter was of the view that a 7.5 percent Tier 1 leverage ratio is appropriate because the assets of a resolved bank are marked-to-market and the riskiest assets are subject to loss-sharing agreements with the FDIC. Another commenter supported an 8 percent Tier 1 leverage ratio requirement, as well as a 15 percent total risk-based capital ratio or a lower capital requirement for assets covered in loss-sharing agreements. Another commenter proposed a 10 percent Tier 1 leverage ratio or, alternatively, an incremental reduction in the 15 percent requirement to between 7 and 8

percent over the first three years following the acquisition, while other commenters suggested various ranges between 5 and 10 percent, with 8 percent being the most frequently suggested level. Several other commenters supported a case-by-case approach based on the risk profile of the institution.

One commenter took the position that the capital requirement should be based on the Tier 1 risk-based capital ratio rather than the Tier 1 leverage ratio to avoid penalizing institutions holding low-risk, highly-liquid assets. Under this proposal, private investment firms would have to meet a "common" Tier 1 risk-based capital ratio requirement of 8 percent. Two commenters recommended moving to a tangible common equity measure, with a minimum requirement of 6 percent.

4. Source of Strength

Four commenters generally supported the proposed source of strength requirement, with one supporting an enhanced source of strength requirement that explicitly requires individual private capital investors or beneficial fund managers to ensure the financial strength of the depository institution through direct capital injections. Another commenter expressed limited support for the source of strength requirement to the extent that it would require investors to serve as a source of managerial strength for the institution.

Many commenters expressed general opposition to the proposed source of strength requirement. Specifically, seven commenters criticized the proposal as potentially creating unlimited liability for private capital investors. Although the Proposed Policy

Statement limited the source of strength requirement to raising new capital by selling new shares or engaging in capital qualifying borrowing by the bank's or thrift's holding company, several commenters indicated that the proposed source of strength requirement is not feasible because, 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. Several other commenters indicated that the proposed source of strength requirement would likely discourage investments by private capital investors in failing institutions, with a number of them viewing the requirement as unnecessary given the FRB and OTS holding company requirements. Two commenters viewed the source of strength requirement as altogether unnecessary because the interests of private capital investors are aligned with those of the insured depository institutions in their investment portfolios, and that sufficient financial incentives exist for investors to protect such investments. Other commenters noted that the source of strength requirement for bank and savings and loan holding companies was not effective in preventing bank failures, and another commenter objected to making individual investors responsible for the actions of the institution, absent the ability to influence policies or decision-making.

At least ten commenters supported the imposition of a "control" threshold for purposes of the source of strength requirement, and another commenter suggested that parties with "substantial ownership stakes" and board representation should either be required to provide capital under source of strength commitments or not use their limited corporate governance rights to block capital from other sources. One commenter expressed concern that the imposition of a source of strength requirement on a non-

controlling investor could be perceived by the FRB and OTS as an indication of control, potentially making the investor subject to holding company supervision.

A number of these commenters presented alternatives to the source of strength requirement. These commenters suggested that a more appropriate alternative would be for regulators to obtain commitments from investors that, under certain circumstances, they will not use whatever limited corporate governance rights they have to block capital raising efforts. One commenter suggested an alternative under which the investor is required to hold as a reserve at the partnership level a percentage of the transaction value for future capital investment in the bank. Still another commenter proposed making private equity investors capitalize failed insured depository institutions with all common stock equity, leaving available the option of issuing hybrid securities and thereby providing financial flexibility. One more commenter supported applying the source of strength requirement selectively, and only to the banking silo of a private fund.

5. Cross guarantees

Ten commenters supported the cross guarantee provision as a means of limiting risk to the DIF, noting that, without it, private capital investors would have no exposure beyond their initial investment in the failed bank or thrift if the institution later experienced difficulties and the investors owned another bank or thrift.

In contrast, a majority of the commenters opposed the proposed cross guarantee provision in that it would deter private capital investment in failed insured depository institutions; place the other investments of private capital investors at risk; result in less

competitive bids for failing institutions; and inhibit a private equity manager from investing in two different depository institutions through two different funds with two distinct groups of private capital investors.

Other commenters objected to imposing a cross guarantee requirement on non-controlling investors. Specifically, a number of law firms argued that the FDI Act does not authorize the FDIC to impose cross-guarantee liability on institutions that are not commonly controlled, as their owners are not in a position to control the management or policies of both institutions and should not be held responsible, directly or indirectly, if a non-controlled depository institution fails. Other commenters expressed similar concerns that the proposal goes beyond long-standing principles of corporate law and existing federal statutes by imposing obligations on a class of shareholder, without regard to whether they actually control the underlying institution. Two commenters requested clarification that a non-controlling investor would not be subject to the cross guarantee requirement.

Several commenters contended that the cross guarantee requirement is inconsistent with the realities of private equity investments, which are generally passive in nature, and will only complicate club investments in failed institutions. Other commenters noted that this provision would limit diversification of private equity portfolios and questioned the FDIC's intentions with respect to its pledged ownership interest in the event it acquired a majority interest in an institution, and what effect this would have on minority investors. Other commenters took the position that an investor would not make an investment where they have all the risks that come with accountability but neither the ability to affect nor control those risks.

A number of commenters suggested providing an 80 percent ownership threshold for purposes of the cross guarantee provision. To encourage capital investments in failed institutions, one commenter proposed a "special dispensation" approach for private capital investors holding only one bank investment in which the ownership limit would be increased from 24.9 percent to a level of controlling interest, encouraging the investor to strengthen the bank for future growth. For investors holding multiple bank investments, however, the commenter proposed adhering to existing regulations.

6. Transactions with Affiliates

The Proposed Policy Statement proposed a prohibition of certain extensions of credit by an insured depository institution to certain related parties. Several private investment firms, a few law professors, some legislators, and a banking trade association supported the proposed prohibition on all extensions of credit to affiliates. The professors suggested that the FDIC strengthen its stance by prohibiting an insured depository institution from engaging with an affiliate in any "covered transaction" as defined in the Federal Reserve Act and its implementing regulations.

Most of the commenters who registered opinions about this section offered alternatives for dealing with transactions with affiliates. Some commenters noted that the absolute prohibition went farther than the limitations contained in Sections 23A and 23B of the Federal Reserve Act and their implementing regulations. Rather than proposing a new standard, many of the commenters recommended that the Proposed Policy Statement instead rely on the current restrictions on transactions with affiliates contained in sections 23A and 23B of the Federal Reserve Act and the FRB's Regulation W.

Some suggested other alternatives. For example, one group of private investors suggested that all extensions of credit by an insured depository institution to related parties be subject to regulatory approval for a period of three years concurrent with that of the capital requirement under the Proposed Policy Statement. After that period, the investor group suggested, the restrictions in sections 23A and 23B of the Federal Reserve Act would apply.

One commenter suggested that the FDIC implement a *de minimis* exception for an ownership threshold of at least 10 percent before an investor's affiliates would be covered by the prohibition and that the prohibition on transactions with affiliates should exclude existing extensions of credit. One commenter requested guidance as to how the new test would apply to the lower tier holdings of a 10 percent owned portfolio company. Finally, one commenter urged the FDIC to prohibit or strictly limit the ability of private capital investors to effect dividend recapitalizations – that is, transactions in which a private capital investor borrows money on behalf of a company under its management and uses the proceeds to pay dividends to investors and investment managers.

7. Secrecy Law Jurisdictions

The FDIC received 15 comments addressing secrecy law jurisdictions. A majority of those comments opposed the ban on offshore investment vehicles in secrecy law jurisdictions in the Proposed Policy Statement. A number of comments expressed the belief that the FDIC's concerns in the area of secrecy law jurisdictions can be addressed through the information requests and other aspects of the "Disclosure"

provisions of the Proposed Policy Statement. Similarly, one commenter expressed the belief that verifiable regulatory standards could be developed to assure compliance of offshore entities with basic anti-money laundering policies and practices and to ensure jurisdictional certainty with regard to U.S. enforcement interests. A small number of commenters suggested that the FDIC adopt a review of secrecy law jurisdiction cases on a case-by-case approach.

Other commenters expressed concerns that the Proposed Policy Statement will result in a practical bar on investment by many fund organizations with non-U.S. investors. These commenters suggested that the Proposed Policy Statement would restrict private capital investors bidding on depository institutions from using traditional funding structures that provide tax and other efficiencies.

A number of commenters noted that by prohibiting offshore vehicles from making investments, the Proposed Policy Statement would unintentionally prohibit a parallel domestic vehicle from investing. Commenters also pointed out that the comprehensive consolidated supervision exception would likely not be applicable to fund investors because that concept applies only to regulated banking organizations in other countries. Additionally, the FDIC also received a number of comments requesting clarification of the Proposed Policy Statement on what is meant by "bank secrecy jurisdiction" and what types of specific situations are covered by the Proposed Policy Statement. One comment recommended that offshore funds established prior to the date of the Proposed Policy Statement be exempt from the restrictions.

The FDIC also received comments, including from 3 Senators, supporting the treatment of secrecy jurisdictions in the Proposed Policy Statement. The Senators'

comments urged the FDIC to eliminate the ability of investors domiciled in secrecy jurisdictions to invest in failed U.S. banks and thrifts based on the history of association offshore structures have with financial fraud, money laundering, tax evasion, and other misconduct.

8. Continuity of Ownership

The FDIC received a number of comments supporting the proposed three-year continuity of ownership rule. One commenter pointed out that it would take management at least three years to resolve problem assets and restore the failed insured depository institution to health. Commenters also expressed the belief that a three-year continuity of ownership rule was necessary to prevent speculative investors from "flipping" banks for short-term profits. One commenter opined that the holding period should be longer than three years to protect against private investors focused on short term profits at the expense of long term financial stability.

In contrast, the FDIC also received comments expressing concern that a three-year period is too long. A number of these commenters proposed an 18-month period as an alternative. Commenters opposing the required holding period also pointed out that such a requirement could chill the interest of private equity investors in failed institutions. One commenter expressed concern that the three-year holding period might prevent a private equity investor from conducting a public offering of the stock of a depository institution. Two commenters noted that a three-year time period overstates the time required to stabilize the operations of a failed institution. Another commenter argued that

the sale or transfer of ownership can, in some instances, enhance the overall safety and soundness of an insured depository institution. One commenter recommended that the holding period requirement only pertain to the first acquisition of a failed institution.

Other commenters suggested that the continuity of ownership requirement is not necessary because most private capital investors considering a failed bank acquisition have a long-term investment horizon. One such commenter suggested a *de minimis* exception to the holding period requirement. Two commenters recommended eliminating the holding period requirement and imposing, in its place, a requirement that investors obtain prior approval of acquisitions from the Federal Reserve Board. Another commenter recommended applying the holding period requirement to only "controlling" private equity investors.

The FDIC also received comments expressing concern about the justification of the holding period requirement. Two commenters argued that the three-year continuity period could be viewed as arbitrary and/or ambiguous. Another commenter added that new regulatory burdens and requirements for bank acquisitions were being imposed through the holding period requirement without formal or informal processing timeframes. A number of commenters noted that the required holding period could chill the interest of private equity investors in failed institutions.

Many commenters stated that precluding an initial public offering during the holding period, even where the proceeds of the offering go the bank itself, is counter to the objective of increasing capital of banks. Other commenters suggested that holding companies in which investors invest, or their subsidiaries, should be able to conduct

initial public offerings and follow-on offerings of their own securities without FDIC approval.

9. Special Owner Bid Limitation

The FDIC received a number of comments expressing the opinion that investors that owned 10 percent or more of a failed insured depository institution should not be eligible to bid on the liabilities, or both such liabilities and assets, of that failed institution in receivership. One commenter urged the FDIC to go farther, suggesting that any private capital investor that held a 10 percent or greater equity interest in three or more failed depository institutions be permanently banned from bidding on the deposits, or both such deposits and liabilities, of any failed insured depository institution.

One private equity firm expressed concern about the general ban and instead proposed that such investors be evaluated on a case-by-case basis. A national industry advocacy organization agreed with the case-by-case approach, and suggested that a blanket limitation on 10 percent investors may deprive the FDIC of the ability to effect a least-cost resolution. Similarly, another commenter suggested that investors owning 10 percent or more of a failed insured depository institution should be eligible to bid "in exceptional circumstances."

10. Disclosure

The FDIC received 4 comments addressing the Proposed Policy Statement's disclosure requirements. One comment supporting the disclosure requirement stated that transparency is essential to ensure effective and prudent oversight and regulation by U.S. regulators. Another commenter requested clarification of whether information submitted by private capital investors to the agency as part of a bidding process would be kept confidential. Two law firms commented that the disclosure requirement is overly broad. These commenters noted that any entity formed for the purpose of acquiring control of a bank or savings association would be required to submit detailed information to the FRB or the OTS. They also sought clarification on whether this requirement would apply to all private capital investors without regard to their percentage ownership.

11. Lifting of Restrictions After a Certain Time Period of Successful Operation of a Bank

The FDIC received 10 comments addressing this issue. Commenters generally suggested a three-year period as an appropriate time frame. One commenter noted that the limitations should be removed after three years of successful operation, similar to the practice for de novo institutions. Another commenter recommended that the limitations in the Proposed Policy Statement should be lifted "as the FDIC and the primary regulator increasingly gain comfort with a bank's risks and business plan." Two commenters requested that the FDIC abandon the initiative entirely, but recommended that such a time period not extend beyond three years if adopted. Another commenter defined the term "successful operation" as involving the same criteria as those that are applied to

qualification for and maintenance of financial holding company status under 12 C.F.R. Section 225.81. One law firm recommended lifting the restrictions after 18 months, noting that a shorter holding period would prevent a situation where private equity investors in a failed depository institution are operating at a competitive disadvantage.

One individual commenter suggested that the effective period of the Proposed Policy Statement should be the earlier of either the completion of two examinations that result in satisfactory ratings or three years. Similarly, an insured depository institution suggested that a two-year period would provide the FDIC with the opportunity to evaluate the competency of the management team in place at the acquired institution. One private equity firm supported the notion that an institution, once it has been recapitalized with new management installed, should not be distinguished from any other institution with respect to risk management.

One comment the FDIC received recommended extending the restrictions of the Policy Statement to a four-or-five-year period, with the source of strength, cross guarantee, and bank secrecy restrictions continuing for perpetuity.

III. FINAL STATEMENT

After consideration of the comments described above the FDIC has made various amendments in the text of the Final Statement. These changes are summarized below with the explanation organized around each of the basic elements of the Final Statement.

Definition of "Investors"/Applicability of Standards

Many investors asked for greater precision in the definition of the types of firms to be covered by this policy statement. The FDIC notes that the policy statement is just that – a policy statement and not a statutory provision imposing civil or criminal penalties and that the requirements it imposes on investors only apply to investors that agree to its terms. Moreover, the FDIC finds it exceedingly difficult to use precisely defined terms to deal with the relatively new phenomenon of private capital funds joining together to purchase the assets and liabilities of failed banks and thrifts where the investors all are less than 24.9 percent owners but supply almost all of the capital to capitalize the new depository institution. The FDIC, in only a short period of time, has seen multiple variations in the structures that have been employed by private capital firms to own banks and thrifts. The FDIC also notes that under some structures the investors are not subject to the Bank Holding Company Act, are not subject to the Change in Bank Control Act, not subject to prompt corrective action, are not institution affiliated parties, are not subject to cross guarantees, and are not subject to Section 23A or Section 23B of the Federal Reserve Act. The FDIC Board will review the operation and impact of this Final Statement within 6 months of its approval date and shall make adjustments as it deems necessary.

In the Final Statement, the exclusion for private capital investors in bank or thrift holding companies that were created or acquired by the investor at least three years prior to the date of the Policy Statement has been deleted. In response to comments that the Policy Statement should specify a date after which it would no longer apply, the FDIC has added a provision that that upon application and approval by the FDIC's Board of Directors the Final Statement will no longer apply to an Investor in a bank or thrift, or

bank or thrift holding company of an insured institution that was covered by the Final Statement if the bank or thrift has maintained a Camels 1 or 2 rating continuously for seven years. The Final Statement also makes clear that the Final Statement would not apply to Investors in partnerships or similar ventures with depository institution holding companies (excluding shell holding companies) where the latter have a strong majority interest in the acquired bank or thrift and an established record for successful operation of insured banks or thrifts. Such partnerships are strongly encouraged by the FDIC. In response to comments that the Policy Statement should define "*de minimis* investments", a provision has been added that provides that the Final Statement shall not apply to Investors with 5 percent or less of the total voting power of an acquired depository institution or its bank or thrift holding company provided there is no evidence of concerted action by these Investors. Finally, a provision has been added to make clear that the FDIC Board of Directors may waive one or more provisions of the Final Statement if such exemption is in the best interests of the Deposit Insurance Fund and the goals and objectives of the Final Statement can be accomplished by other means.

Capital

After consideration of the comments presented, the Final Statement revises the capital commitment to provide for a level of initial capitalization sufficient to establish a ratio of Tier 1 common equity to total assets of at least 10 percent throughout the first 3 years. Some commenters suggested that capital requirements should be adjusted based on the facts of individual cases. The FDIC adopted this suggestion in so far as it provides that capital requirements may be increased above 10 percent Tier 1 common equity to total assets ratio if warranted. The specific language in the proposed text authorizing an

extension of the 3-year period has been eliminated. After 3 years, as in the proposed text, the depository institution must remain "well capitalized", as that term is defined in Section 325.103(b)(1) of the FDIC Rules and Regulations, as long as the Investors' ownership continues. In response to comments that a source of strength provision would be difficult for private investors to apply as a practical matter, the FDIC decided to delete the provision. Further, as in the proposed text, if at any time the depository institution fails to meet this standard, immediate action would have to be taken to restore the institution to the 10 percent Tier 1 common equity ratio or the "well capitalized" standard, as applicable.

The FDIC believes that heightened capital levels are necessary in view of the higher risk profile of what are de novo institutions being acquired and for the protection of the DIF from losses. Depository institutions insured less than 7 years are overrepresented in the list of institutions that have failed in 2008 and 2009 with most of the failures occurring between the fourth and seventh years of operation, particularly where they have pursued early changes in business plans and inadequate controls and risk management practices.

Regarding the appropriate method for measuring capital in the Final Statement, staff considered the strong concerns that have been raised about the quality of bank capital (for example, whether banks have sufficient common equity as compared to debt-like or other instruments that qualify as regulatory capital), and the adequacy of the risk-based capital rules. Therefore, in the Final Statement, the FDIC has adopted Tier 1

common equity in the capital ratio because it provides a stronger measure of the capital available to absorb losses than alternative measures.

The FDIC also asked in the Proposed Policy Statement whether there should 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. Commenters argued that depository institutions in which private capital investors have invested should not be subject to the higher capital standards of the Proposed Policy Statement but to the same Prompt Corrective Action standards as other institutions. They argue that a separate and unequal Prompt Corrective Action regime for a bank that is backed directly or indirectly by private capital investors provides no supervisory benefits. As noted above, de novo depository institutions are subject to a considerably higher rate of failure. Accordingly, the FDIC is of the view that the higher capital standards applicable under the Proposed Policy Statement are extremely important in order to preserve the safety and soundness of these de novo institutions and to protect the Deposit Insurance Fund. Therefore, the special PCA requirements have been retained in the Final Statement.

Cross Support

The Proposed Policy Statement provided that Investors that owned two or more depository institutions, including one covered by this policy statement, would have an obligation to commit their bank or thrift investments to support one or more of these institutions if they failed, provided there was sufficient common ownership as provided in the Proposed Policy Statement. Commenters stated that the cross guarantee

requirement would deter private capital investment in failed insured depository institutions because private capital investors in unrelated banks would not agree to a cross guarantee commitment that places their legally separate investments at risk.

The Final Statement scales back the circumstances in which what is now referred to as "cross support" would be required. A cross support obligation would apply if two or more depository institutions are owned by a group of Investors covered by the Final Statement if both depository institutions are at least 80 percent owned by common investors. Further, the FDIC may waive the cross support obligation if enforcing the obligation would not reduce the cost of the bank or thrift failure to the DIF.

Transactions with Affiliates

A number of commenters argued that the restrictions under sections 23A and 23B of the Federal Reserve Act and the Federal Reserve's Regulation W and Regulation O are sufficient to prevent inappropriate affiliate and insider transactions. Under some common private capital investment structures for investments in banks and thrifts, the investors would not meet the standards that trigger the applicability of sections 23A and 23B. The FDIC is of the view that a special situation is presented with respect to transactions with affiliates by private capital investors who are not subject to the activities restrictions of the Bank Holding Company Act with a resultant temptation to cause the de novo bank they have purchased to lend to companies in which they have invested. Moreover, the FDIC notes that the prohibitions on insider lending are among the most crucial requirements for maintaining a safe and sound banking system and for protecting the Deposit Insurance Fund. Accordingly, limited changes were made to the scope of this provision in the Final Statement.

The Final Statement modifies the definition of the term "affiliate" to mean "any company in which the Investor owns, directly or indirectly, at least 10 percent of the equity of such company and has maintained such ownership for at least 30 days." This change is designed to make compliance easier and is based on the assumption that very short term investments do not provide a reason for extensions of credit. Also added is an expectation that Investors will provide regular reports to the insured depository institution identifying all affiliates. Lastly, a provision has been added that exempts from the prohibition existing extensions of credit.

Bidding Eligibility of "Silo" Structures

Commenters acknowledged the FDIC's need to ascertain beneficial ownership, clearly identify the parties responsible for making management decisions, and ensure that ownership and control are not separated but objected to the blanket prohibition on "silo" structures, arguing that such a prohibition would eliminate many investors who would be willing to meet the FDIC's disclosure and transparency requirements. In the Final Statement, the FDIC has clarified that it would not approve ownership structures that typically involve a private equity firm (or its sponsor) that create multiple investment vehicles funded and apparently controlled by the private equity firm (or its sponsor) to acquire ownership of an insured depository institution. The FDIC is concerned that the purpose of these structures is to artificially separate the non-financial activities of the firm from its banking activities so that the private equity firm is not required to become a bank or savings and loan holding company. This type of structure also raises serious concerns about the sufficiency of the financial and managerial support to the acquired

institution, even in those instances where the investing fund(s) agrees to be regulated as a bank or savings and loan holding company.

Secrecy Law Jurisdictions

Many commenters stated that a prohibition on having any offshore entities in an ownership structure could restrict private capital investors from using traditional funding structures that provide tax and other efficiencies, thereby hampering their ability to bid for failed depository institutions.

In evaluating a proposal involving an investment in an insured depository institution, it is important that the FDIC have adequate assurances that it will have access to reliable information on the operations or activities of the investor and its affiliates. Entities organized in secrecy law jurisdictions can make it difficult for the FDIC as a regulator to obtain information about a company's owners and its affiliates. Therefore, the FDIC believes that the Final Statement's provisions requiring transparent ownership and full disclosure are reasonable and prudent and that investors can organize efficient and functional ownership structures in the U.S.

In response to commenters' request that the FDIC clarify the meaning of "bank secrecy jurisdiction" in the Final Statement, the FDIC provides a definition of bank secrecy jurisdiction as "a country that applies a bank secrecy law that limits U.S. bank regulators from determining compliance with U.S. laws or prevents them from obtaining information on the competence, experience and financial condition of applicants and related parties, lacks authorization for exchange of information with U.S. regulatory

authorities, or does not provide for a minimum standard of transparency for financial activities."

Continuity of Ownership

The FDIC received comments questioning the justification for the proposed three-year holding period. The FDIC also received comments that indicated the three-year period was an appropriate amount of time required to stabilize the operations of a failed bank or thrift. The FDIC continues to take the position that it is important to encourage long term investment to promote the stability of a de novo previously failed bank or thrift. In particular, the FDIC has a direct interest in stability of management on which it depends for appropriate management of any agreements it may have with a bank or thrift concerning losses at that bank or thrift. Therefore, the Final Statement has largely left unchanged this prohibition absent prior FDIC approval, but has added a statement that in the case of transfers to affiliates FDIC approval shall not be unreasonably withheld provided the affiliate agrees to be subject to the same requirements that are applicable under this policy statement to the transferring Investor. In the Final Statement, the three-year holding period does not apply to mutual funds defined as an open-ended investment company registered under the Investment Company Act of 1940 that issues redeemable securities that allow investors to redeem on demand.

Disclosures

The FDIC believes that this feature could likely be implemented without significantly deterring private capital investments. In an effort to address commenters' concerns about confidentiality, in the Final Statement the FDIC provides that confidential

business information will be treated as such and not disclosed except in accordance with applicable law.

V. REGULATORY ANALYSIS AND PROCEDURE

Paperwork Reduction Act

In accordance with the requirements of the Paperwork Reduction Act of 1995 (PRA), 44 U.S.C. Ch. 3501 *et seq.*, the FDIC may not conduct or sponsor, and the respondent is not required to respond to, an information collection unless it displays a currently valid Office of Management and Budget (OMB) control number. The Final Policy contains reporting and recordkeeping requirements that constitute a collection of information as contemplated by the PRA. Specifically, the Final Policy sets forth the expectation that investors subject to the policy will provide regular reports that identify all affiliates (as that term is defined in the Final Policy) of the investor; that investors that own an interest in an insured depository institution and that employ ownership structures utilizing entities that are domiciled in bank secrecy jurisdictions (as that term is defined in the Final Policy) will maintain business books and records (or duplicates thereof) in the U.S.; and that investor will submit information to the FDIC regarding the investors and all entities in the ownership chain, including information on the size of capital funds, diversification, return profile, marketing documents, the management team, business model, and such other information required by the FDIC. The FDIC has submitted to OMB a request for approval, by August 28, 2009, of the information collection under emergency clearance procedures. The estimated burden is as follows:

Title: Qualifications for Failed Bank Acquisitions.

OMB Number: 3064– [new].

Estimated Number of Respondents:

Investor Reports on Affiliates: 20

Maintenance of Business Records: 5

Disclosures Regarding Investors
And Entities in Ownership Chain: 20

Frequency of Response:

Investor Reports on Affiliates: 12

Maintenance of Business Records: 4

Disclosures Regarding Investors
And Entities in Ownership Chain: 4

Average hours per response:

Investor Reports on Affiliates: 2

Maintenance of Business Records: 2

Disclosures Regarding Investors
And Entities in Ownership Chain: 4

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Total annual burden— 840 hours

If approved by OMB under emergency authority, the FDIC will proceed with a request for approval under normal clearance procedures, including an initial 60-day request, and subsequent 30-day request, for comments on: (1) Whether this collection of information is necessary for the proper performance of the FDIC's functions, including whether the information has practical utility; (2) the accuracy of the estimates of the

burden of the information collection, including the validity of the methodologies and assumptions used; (3) ways to enhance the quality, utility, and clarity of the information to be collected; and (4) ways to minimize the burden of the information collection on respondents, including through the use of automated collection techniques or other forms of information technology. Pending publication of the initial 60-day notice, interested parties are invited to submit written comments on the estimated burden herein by any of the following methods:

• *http://www.FDIC.gov/regulations/laws/federal/propose.html*.

• *E-mail:* *comments@fdic.gov*.

• *Mail:* Leneta Gregorie (202–898– 3719), Counsel, Federal Deposit Insurance Corporation, 550 17th Street, NW., Washington, DC 20429.

• *Hand Delivery:* Comments may be hand-delivered to the guard station at the rear of the 550 17th Street Building (located on F Street), on business days between 7 a.m. and 5 p.m.

A copy of the comment may also be submitted to the OMB Desk Officer for the FDIC, Office of Information and Regulatory Affairs, Office of Management and Budget, New Executive Office Building, Room 3208, Washington, DC 20503. All comments should refer to the name of the collection.

The text of the Final Statement of Policy on Qualifications for Failed Bank Acquisitions follows:

Final Statement of Policy on Qualifications for Failed Bank Acquisitions

In order to provide guidance about the standards for more than *de minimis* investments in acquirers of deposit liabilities and the operations of failed insured depository institutions, the FDIC has adopted this Statement of Policy ("SOP"). It is the intent of the FDIC Board of Directors that this Statement of Policy applies to investors and is not intended to interfere with or supplant the preexisting regulation of holding companies. The Board of Directors will review the operation and impact of this SOP within 6 months of its approval date and shall make adjustments, as it deems necessary.

Applicability. Except as provided below, this SOP will apply prospectively to:

(a) private investors in a company, including any company acquired to facilitate bidding on failed banks or thrifts that is proposing to, directly or indirectly, (including through a shelf charter) assume deposit liabilities, or such liabilities and assets, from the resolution of a failed insured depository institution; and

(b) applicants for insurance in the case of *de novo* charters issued in connection with the resolution of failed insured depository institutions (hereinafter "Investors").

This SOP shall not apply to acquisitions of failed depository institutions completed prior to its approval date.

Following application to and approval by the FDIC Board of Directors, taking into consideration whether the ownership structure of such bank, thrift or holding company is consistent with the objectives of this SOP, this SOP shall not apply to an Investor in a bank or thrift, or bank or thrift holding company where the bank or thrift has maintained a composite Camels 1 or 2 rating continuously for seven (7) years.

This SOP shall not apply to:

(a) investors in partnerships or similar ventures with bank or thrift holding companies or in such holding companies (excluding shell holding companies) where the holding company has a strong majority interest in the resulting bank or thrift and an established record for successful operation of insured banks or thrifts. Such partnerships are strongly encouraged; or

(b) investors with 5 percent or less of the total voting power of an acquired depository institution or its bank or thrift holding company provided there is no evidence of concerted action by these Investors.

Under expedited procedures established by the Chairman, the FDIC Board of Directors may waive one or more provisions of this SOP if such exemption is in the best interests

of the Deposit Insurance Fund and the goals and objectives of this SOP can be accomplished by other means.

B. Capital Commitment: The resulting depository institution shall maintain a ratio of Tier 1 common equity to total assets of at least 10 percent for a period of 3 years from the time of acquisition. Thereafter, the depository institution shall maintain no lower level of capital adequacy than "well capitalized" during the remaining period of ownership of the Investors.

If at any time the depository institution fails to meet this standard, the institution would have to immediately take action to restore capital to the 10 percent Tier 1 common equity ratio or the "well capitalized" standards, as applicable. Failure to maintain the required capital level will result in the institution being treated as "undercapitalized" for purposes of Prompt Corrective Action triggering all of the measures that would be available to the institution's regulator in such a situation.

Tier 1 common equity is defined as Tier 1 capital minus non-common equity elements. Non-common equity elements are defined as qualifying perpetual preferred stock, plus minority interests and restricted core capital elements not already included.

C. Cross Support: If one or more Investors own 80 percent or more of two or more banks or thrifts, the stock of the banks or thrifts commonly owned by these Investors shall be pledged to the FDIC, and if any one of those owned depository institutions fails, the FDIC may exercise such pledges to the extent necessary to recoup any losses incurred by the FDIC as a result of the bank or thrift failure. The FDIC may waive this pledge requirement where the exercise of the pledge would not result in a decrease in the cost of the bank or thrift failure to the Deposit Insurance Fund.

D. Transactions with Affiliates: All extensions of credit to Investors, their investment funds if any, and any affiliates of either, by an insured depository institution acquired by such Investors under this SOP would be prohibited. Existing extensions of credit by an insured depository institution acquired by such Investors would not be covered by the foregoing prohibitions.

For purposes of this SOP the terms (a) "extension of credit" is as defined in 12 C.F.R. § 223.3(o) and (b) "affiliate" is any company in which the Investor owns, directly or indirectly, at least 10 percent of the equity of such company and has maintained such ownership for at least 30 days. Investor(s) are to provide regular reports to the insured depository institution identifying all affiliates of such Investor(s).

E. Secrecy Law Jurisdictions: Investors employing ownership structures utilizing entities that are domiciled in bank secrecy jurisdictions would not be eligible to own a direct or indirect interest in an insured depository institution unless the Investors are subsidiaries of companies that are subject to comprehensive consolidated supervision ("CCS") as recognized by the Federal Reserve Board and they execute agreements on the provision of information to the primary federal regulator about the non-domestic

Investors' operations and activities; maintain their business books and records (or a duplicate) in the U.S.; consent to the disclosure of information that might be covered by confidentiality or privacy laws and agree to cooperate with the FDIC, if necessary, in obtaining information maintained by foreign government entities; consent to jurisdiction and designation of an agent for service of process; and consent to be bound by the statutes and regulations administered by the appropriate U.S. federal banking agencies.

For the purposes of this paragraph E, a "Secrecy Law Jurisdiction" is defined as a country that applies a bank secrecy law that limits U.S. bank regulators from determining compliance with U.S. laws or prevents them from obtaining information on the competence, experience and financial condition of applicants and related parties, lacks authorization for exchange of information with U.S. regulatory authorities, does not provide for a minimum standard of transparency for financial activities, or permits off shore companies to operate shell companies without substantial activities within the host country.

F. Continuity of Ownership: Investors subject to this policy statement are prohibited from selling or otherwise transferring their securities for a 3 year period of time following the acquisition absent the FDIC's prior approval. Such approval shall not be unreasonably withheld for transfers to affiliates provided the affiliate agrees to be subject to the conditions applicable under this policy statement to the transferring Investor. These provisions shall not apply to mutual funds defined as an open-ended investment company registered under the Investment Company Act of 1940 that issues redeemable securities that allow investors to redeem on demand.

G. Prohibited Structures: Complex and functionally opaque ownership structures in which the beneficial ownership is difficult to ascertain with certainty, the responsible parties for making decisions are not clearly identified, and ownership and control are separated, would be so substantially inconsistent with the principles outlined above as not to be considered as appropriate for approval for ownership of insured depository institutions. Structures of this type that have been proposed for approval have been typified by organizational arrangements involving a single private equity fund that seeks to acquire ownership of a depository institution through creation of multiple investment vehicles, funded and apparently controlled by the parent fund.

H. Special Owner Bid Limitation: Investors that directly or indirectly hold 10 percent or more of the equity of a bank or thrift in receivership will not under any circumstances be considered eligible to be a bidder to become an investor in the deposit liabilities, or both such liabilities and assets, of that failed depository institution.

I. Disclosure: Investors subject to this policy statement 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 and the business model. In addition, Investors and all entities in the ownership chain will be required to provide to the FDIC such other information as is determined to be necessary

to assure compliance with this policy statement. Confidential business information submitted by Investors to the FDIC in compliance with this paragraph I shall be treated as confidential business information and shall not be disclosed except in accordance with law.

J. Limitations: Nothing in this policy statement is intended to replace or substitute for any determination required by a relevant depository institution's primary federal regulator or a federal bank or thrift holding company regulator under any applicable regulation or statute, including, in particular, bank or thrift holding company statutes, or with respect to determinations made and requirements that may be imposed in connection with the general character, fitness and expertise of the management being proposed by the Investors, the need for a thorough and reasonable business plan that addresses business lines and strategic initiatives and includes appropriate contingency planning elements, satisfactory corporate governance structure and representation, and any other supervisory matter.

By order of the Board of Directors.

Dated at Washington, DC, this 26th day of August, 2009.

FEDERAL DEPOSIT INSURANCE CORPORATION

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Robert E. Feldman
Executive Secretary

(SEAL)