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August 7, 2009

Robert E. Feldman, Executive Secretary
Attention: Comments
550 17th Street, NW
Washington DC 20429

Re: RIN #3064-AD47; Proposed Statement of Policy on Qualifications for Failed Bank Acquisitions

Dear Mr. Feldman:

The Independent Community Bankers of America1 (ICBA) welcomes the opportunity to comment on the FDIC's Proposed Statement of Policy on Qualifications for Failed Bank Acquisitions (Proposed Policy Statement) which provides guidance to private capital investors interested in acquiring or investing in failed insured depository institutions.

Summary of Proposal

To address concerns that private equity firms many not have sufficient capital and resources to support and maintain a bank in a prudent manner, the FDIC is proposing standards for bidder eligibility for acquiring (or investing in) failed depository institutions that would be applicable to (1) 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 three years prior to the effective date of the final 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. Since the middle of last year, the two largest banks to be sold by the FDIC out of receivership —IndyMac Federal Bank, FSB in Pasadena, Calif., and BankUnited, FSB in Coral Gables, Fla.—were acquired by private equity firms.

[1] The Independent Community Bankers of America represents nearly 5,000 community banks of all sizes and charter types throughout the United States and is dedicated exclusively to representing the interests of the community banking industry and the communities and customers we serve. ICBA aggregates the power of its members to provide a voice for community banking interests in Washington, resources to enhance community bank education and marketability, and profitability options to help community banks compete in an ever changing marketplace.

With nearly 5,000 members, representing more than 20,000 locations nationwide and employing nearly 300,000 Americans, ICBA members hold $1 trillion in assets, $800 billion in deposits, and $700 billion in loans to consumers, small businesses and the agricultural community. For more information, visit ICBA's website at www.icba.org.

INDEPENDENT COMMUNITY BANKERS of AMERICA *The Nation's Voice for Community Banks®*
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Private equity investors covered by the FDIC Proposed Policy Statement would be subject to a number of requirements. The most important are:

Capital Commitment: The investors would be required to agree to cause the depository institution that they invest in and that acquires deposit liabilities, or both deposit liabilities and assets, from a failed bank or thrift to maintain a Tier 1 leverage ratio of 15% for three years (or longer if required by the FDIC), and then remain well capitalized as long as the investors own it.

Source of Strength: The ownership structures that may be used by investors to acquire a failed bank or thrift would be required to serve as a source of strength for the bank or thrift subsidiary of the holding company. The bank or thrift holding company also would be required to agree to raise equity or debt capital, if necessary, to support the investors' source of strength commitment.

Cross Guarantees: Investors whose investments, individually or collectively, constitute a majority of the direct or indirect investment in more than one insured depository institution would be expected to pledge to the FDIC their proportionate interests in each such institution to pay for any losses to the Deposit Insurance Fund (DIF) resulting from the failure of, or assistance provided to, any other such institution.

Transactions with Affiliates: All extensions of credit to investors, their investment funds if any, any affiliates of either, and any portfolio companies, by an insured depository institution acquired or controlled by such investors under the Proposed Policy Statement would be prohibited.

Continuity of Ownership: Investors subject to the Proposed Policy Statement 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.

ICBA's Position

ICBA generally supports the Proposed Policy Statement and commends the FDIC for issuing specific standards for bidder eligibility for private equity firms that are interested in purchasing insured depository institutions in receivership. We share the FDIC's concerns that some private capital investment structures, particularly those typified by so-called "silo" organization arrangements, raise potential safety and soundness considerations and risks to the Deposit Insurance Fund (DIF) because the beneficial ownership and decision makers are too difficult to determine and/or ownership and control are separated. Other ownership structures also raise concerns about capital and whether the owners can provide an adequate source of financial and managerial strength for the depository institution.

One of the most important elements in the Proposed Policy Statement is the requirement that the acquired depository institution be very well capitalized. The Proposed Policy

Statement requires a Tier 1 leverage ratio of 15%, that the ratio be maintained for a period of at least three years, and thereafter that the capital of the insured depository institution remain at a well capitalized level.

Some have suggested that safety and soundness consideration could be satisfied with a lower Tier 1 capital more in line with the level normally applicable to bank or thrift investors subject to prudential regulation. For instance, the 15% Tier 1 leverage ratio is higher than the minimum 8% Tier 1 leverage ratio that the FDIC requires for new banks to qualify for deposit insurance. Excessive capital levels could have the effect of making investments in the assets and liabilities of failed banks and thrifts uncompetitive and uneconomic.

While some consideration could be given to lowering the Tier 1 leverage ratio from 15%, ICBA urges the FDIC to impose a much higher than normal capital requirement on private equity firms during the first three years following the acquisitions of failed insured depository institutions because of the special risks that these acquisitions pose to the Deposit Insurance Fund. In no event should the Tier 1 leverage ratio requirement be lower than 12%. Private equity firms have much different risk appetite than most bank investors and could force bank management to take much bigger risks. If private equity firms were required to only put 6% in for capital, there would be a lot more risk-taking than if the capital requirement was at 12%.

The experience that the FDIC and the DIF have had with newly established banks also justifies these high capital requirements. During the past year, a higher percentage of newly established banks have failed. Requiring above normal levels of capital for private equity firms are necessary not only to deal with the economic downturn but also to address the other financial challenges that are facing banking institutions today.

Furthermore, since the Federal Reserve Board has liberalized the definition of "control" under the Bank Holding Company Act[2], it is important that private equity firms be subject to more rigorous standards than other entities to preserve as much as possible the separation of banking and commerce. The Federal Reserve's action allows more private equity firms with commercial interests to acquire ownership of banks without being deemed bank holding companies, subject to oversight and supervision by the Federal Reserve and the rules governing BHCs. The FDIC should therefore not only implement rigorous capital standards but also cross guarantees and restrictions on transactions with affiliates to protect the bank and ensure that private equity firms that are significantly owned by commercial interests do not engage in excessive risk-taking that will harm the bank.

[2] On September 22, 2008, the Federal Reserve Board issued a new policy statement on equity investments in banks and BHCs. The Board Policy Statement essentially provides that ownership of up to 33% of a bank's equity – so long as any voting interest is less than 15% – may not be deemed to constitute exercise of a controlling influence over the target bank. The Board Policy Statement also expresses the view that a minority investor should be permitted to have a single representative on the board of a bank without being deemed thereby to have acquired "control."

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ICBA commends the FDIC with regard to its proposals on in the Proposed Policy Statement regarding source of strength, cross guarantees and continuity of ownership. Depository holding companies, for instance, should commit to selling equity or engage in capital qualifying borrowing in an effort to support the acquired depository institution subsidiary. Investors who investments constitute a majority of the direct or indirect investments in more than one insured depository institution should be expected to pledge to the FDIC their proportionate interests in each such institution to pay for any losses to the DIF.

ICBA also agrees with the prohibition from selling or otherwise transferring securities of the investors' holding company or depository institution for a three year period following the acquisition. This would discourage those private equity firms that are interested in making a quick profit from bidding on a failed bank in receivership. We also agree that 10% owners of the bank in receivership should not be considered eligible to be a bidder of that failed depository institution.

Conclusion

ICBA generally supports the Proposed Policy Statement. While some consideration could be given to lowering the Tier 1 leverage ratio from 15 percent, ICBA urges the FDIC to impose a much higher than normal capital requirement on private equity firms during the first three years following the acquisitions of failed insured depository institutions because of the special risks that these acquisitions pose to the Deposit Insurance Fund. Since the definition of "control" under the Bank Holding Company Act has been liberalized by the Federal Reserve, it is important that private equity firms be subject to more rigorous standards than other entities to preserve as much as possible the separation of banking and commerce.

ICBA commends the FDIC with regard to its proposals on in the Proposed Policy Statement regarding source of strength, cross guarantees and continuity of ownership. To discourage the "flipping" of financial institutions, ICBA agrees that investors should be prohibited from selling failed depository institutions for a three year period following the acquisition.

ICBA appreciates the opportunity to comment on the Proposed Policy Statement. If you have any questions or need additional information, please do not hesitate to contact me at my email address (Chris.Cole@icba.org) or at 202-659-8111.

Sincerely,
/s/ Christopher Cole

Christopher Cole
Vice President and Senior Regulatory Counsel