FBR
CAPITAL MARKETS

August 7, 2009

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

Sent via email to comments@fdic.gov
RIN No. 3064-AD47

RE: Comments on Proposed Policy Statement on Qualifications for Failed Bank Acquisitions

Dear Mr. Feldman:

FBR Capital Markets Corporation (Nasdaq: FBCM), through its broker dealer subsidiary FBR Capital Markets & Co. ("FBR"), is pleased to submit comments on the Proposed Policy Statement on Qualifications for Failed Bank Acquisitions (the "Proposed Policy Statement"). FBR, headquartered in Arlington, Virginia, is a leading investment bank serving the middle market and provides investment banking, merger and acquisition advisory, institutional brokerage and research services. FBR focuses capital and financial expertise on seven industry sectors, notably serving small, mid-size and regional banking institutions throughout the United States. FBR is the number three underwriter of U.S. common stock for companies valued at $1 billion and under over the past five years.[1]

Given our firm's active involvement in the banking industry and our recent success in the recapitalization of State Bank & Trust Company ("State Bank") – permitting it to acquire the failed Security Banks located in Georgia – we believe we have unique insights that may be useful to the FDIC as it addresses the sensitive issues raised in the Proposed Policy Statement.

The Proposed Policy Statement promulgates a series of restrictions on "private capital" that would not apply to existing depository institutions to the extent they acquire failed institutions. The restrictions to be applied to private capital include higher than normal capital requirements, source of strength obligations, cross-guarantee liability and other enhanced obligations.

One of the critical challenges in crafting the Proposed Policy Statement is defining precisely to whom the requirements should apply. Without attempting to address every conceivable situation, it is our firm belief that these enhanced obligations, if applicable,[2] should apply only to those investors that are in a position to exercise a controlling influence over the management or operations of the institution. Non-controlling investors, specifically those owning less than 10% of the voting shares of an institution without any special rights to board seats or management representation, are not in a position to exercise control. As passive investors, they must rely on the strength of management to carry out the proposed business plan.

Also, importantly, whatever potential dangers the Policy Statement might be designed to combat, these passive non-controlling investors are not in a position to create them. To the extent a non-

[1] Source: Dealogic; rank eligible common stock offerings (ending 3/31/09).
[2] We do find some of the restrictions, such as the substantially enhanced capital levels, to be counterproductive and contrary to sound public policy. Our comments in this letter do not address our concerns about the proposed restrictions, but rather the types of investors to whom any such restrictions, if ultimately adopted, should apply.

controlling investor sells its shares, such a sale does not affect the institution. Because the non-controlling investor cannot affect the business or operations, attempting to impose "source of strength" obligations is particularly onerous and unfair. As the passive investor has no ability to exercise a controlling influence over either the institution or over other investors, we believe enforcing cross-guarantee liability likewise is inappropriate and unfair.[3]

We believe that the passive, non-controlling investor is precisely the type of investor the FDIC should in fact be encouraging, especially as such investors represent the overwhelming majority of available institutional capital. Further, there are recognized procedures that can be followed that will allow these investors to appropriately participate in the recapitalization of the banking industry. The State Bank transaction is but one useful example where over two dozen individual and institutional investors contributed approximately $300 million into State Bank to permit it to acquire assets and liabilities from the failed Security Banks. No single investor was in a position to exercise control, and there were no arrangements or structural features that would permit groups of investors to exercise control.[4]

In the State Bank transaction, each investor independently decided to invest in the transaction backing the proposed management team and business plan. There are other situations where this structure can be replicated, for example, to help recapitalize an existing institution, back a lead investor in a failed bank where the lead investor has been thoroughly vetted by the regulators, or participate in the recapitalization of a bridge bank or institution in conservatorship. As long as the investors act independently and are not in a position to exercise a controlling influence over management or policies, we strongly believe the FDIC should welcome their capital and support. If the FDIC adopts policies to discourage such investors, we believe this will have a chilling effect on capital raising for failed bank resolutions, as well as private sector transactions. Moreover, passive non-controlling investors may perceive greater regulatory risk in their existing bank investments and divest themselves accordingly.

Furthermore, we respectfully submit that for those investors who should be the subject of enhanced obligations in this area, existing law contains an appropriate threshold and procedural safeguards to address the issues with which the FDIC is concerned. Specifically, whenever an individual or entity seeks to acquire 10% or more of the capital of any insured depository institution or depository holding company,[5] that individual or entity will be required to make a filing with the appropriate federal banking agency pursuant to the Change in Bank Control Act and ultimately that individual or entity may be deemed or become a bank holding company. At that point, the FDIC or other regulator can and should begin an enhanced evaluation of the investor and its intentions.

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[3] We appreciate the FDIC may wish to restrict extensions of credit to investors in failed banks. The institutional investors we anticipate will be interested in passive, non-controlling investments in weakened or failed banks are not investing for the purpose of receiving extensions of credit from such banks, so conceptually we see no objection to imposing a condition precluding extensions of such credit to such investors. If this is desired, however, the FDIC should (i) articulate the statutory basis and (ii) be completely clear so that all investors understand the restriction in advance of bidding.

[4] There were no voting agreements or trusts, no special classes of stock, no special voting rights, no unusual voting requirements and no other features that would allow the investors to exercise a controlling influence over the institution, its management, policies or operations.

[5] In that light, it will be appropriate for the FDIC to clarify that the Change in Bank Control Act does not apply when passive, non-controlling investors, each making independent investment decisions, and with no agreements or understandings that would give them individually or with others, a controlling influence over management or policies of the institution. This position is supported by a substantial body of interpretations made by the various banking agencies administering the Change in Bank Control. Investing in a troubled, failed or failing bank *simultaneously*, by itself, does not amount to "acting in concert" to obtain control. Acting in concert to obtain control requires specific factors that in fact give the several passive, non-controlling investors the collective power to exercise such control following the acquisition.

These statutory thresholds provide the point at which the FDIC (or other appropriate federal banking agency) can inquire as to the business and managerial plans of the particular investors, the source of funds, and other factors that might affect the business and operations of the bank. If the investors have formed a "company," as such term is defined in the Bank Holding Company Act, the FDIC can, in coordination with the Federal Reserve, address source of strength obligations and cross guarantee liability. It may be appropriate to inquire about holding periods, if a potential change in ownership position could adversely affect the bank. Below these thresholds, however, we strongly believe such inquiries and restrictions directed to investors are not appropriate.

By encouraging the involvement of passive, non-controlling investors (and clarifying the inapplicability of restrictions the FDIC determines to impose on larger, active investors that seek to exercise control), the FDIC will have made a strong statement that it encourages private capital to participate in the resolution of failed and failing institutions. Such a policy position will facilitate the use of shelf charters to purchase failed institutions and will further enhance the opportunities for collections of independently acting investors to recapitalize weak institutions. It should likewise enhance the ability of the FDIC to sell "bridge" institutions, formed when no immediate private sector solution exists at the time of failure.

There is no question that the banking industry needs capital, and institutional investors can be an important source of that capital. We appreciate the concerns that led the FDIC to promulgate the Proposed Policy Statement. We strongly suggest, however, that those concerns are not raised by the passive, non-controlling investor and that the economic recovery of the banking industry would be well-served by the FDIC's encouragement of the participation of such investors. Clarifying the applicability of the Proposed Policy Statement would be a critical step in that direction.

Sincerely,

Kenneth P. Slosser[6]
Senior Managing Director

Kevin Stein[7]
Managing Director

[6] Kenneth P. Slosser was Assistant Regional Director of the Office of Thrift Supervision from 1986 to 1996.
[7] Kevin Stein was Associate Director of the FDIC Division of Resolutions from 1991 to 1994.