# JONES DAY

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August 7, 2009

*VIA EXPRESS MAIL AND E-MAIL*

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

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

Dear Mr. Feldman:

We are writing to comment on the FDIC's Proposed Statement of Policy on Qualifications for Failed Bank Acquisitions (the "Proposed Statement"). We applaud the FDIC's work on providing consistent guidance for private equity and other bidders ("Nonbank Bidders") that lack a bank charter to facilitate their bidding for failed institutions from the FDIC, as receiver.

Jones Day is one of the largest law firms in the world. Our clients include banks and other financial institutions, as well as private equity firms and other potential Nonbank Bidders We have prepared this letter to explain our views, as a firm, on the Proposed Statement. In preparing this letter, we have not consulted with any of our clients, and the views set forth herein reflect only the views of our firm and not necessarily those of any of our clients.

We strongly support the adoption of an expedited process for qualifying Nonbank Bidders so that they may participate in the bidding for failed banks. This should increase both the number of bidders and the size of the bids for failed FDIC-insured institutions. We do not believe that much of the Proposed Statement is needed, however. Most concerns intended to be addressed by the Proposed Statement are already addressed in existing federal law, prior FDIC policy statements and other agency pronouncements.

The Deposit Insurance Fund and the industry would be best served by uniform application of this existing law and policy to all potential acquirers, including private equity firms and other Nonbank Bidders, rather than through special, discriminatory rules applicable to only a particular group of potential acquirers whose capital is urgently needed in this industry.

Nonbank Bidders are required to obtain a charter for a federal or state depository institution, along with FDIC approval to insure the new institution's deposits. Approvals are then required under the Bank Merger Act from the new institution's primary federal regulator, plus any state regulator.

**Chartering and Capitalizing a Depository Institution**

Section 6 of the Federal Deposit Insurance Act (the "FDI Act"), together with the FDIC's Statement of Policy on Applications for Deposit Insurance (the "Insurance Policy Statement"), sets forth the factors the FDIC is to consider in acting upon applications for federal deposit insurance, including capital adequacy. The Insurance Policy Statement provides that normally the initial capital of a proposed depository institution should be sufficient with a Tier 1 capital to assets leverage ratio of not less than 8% throughout the first three years of operation. The Insurance Policy Statement provides consistent standards for granting FDIC insurance to a new institution. We believe that new institutions formed to acquire a failed bank generally pose less risks than *de novo* charters.

Failed bank acquisitions will also require federal regulatory approval under the Bank Merger Act, as well as under state law if the acquiring institution is state chartered. As set forth in the FDIC's Policy Statement on Bank Merger Transactions, in approving such transactions, the FDIC will take into consideration "prudential factors," including capital adequacy, with particular attention to the adequacy of loan and lease loss allowances. These are more than adequate to evaluate any proposal by a Nonbank Bidder.

**Cross Guarantees and Source of Strength**

Section 5(e) of the FDI Act already requires an insured depository institution to reimburse the FDIC for losses in connection with the default of, or assistance provided by the FDIC to, another depository institution that is commonly controlled by a "company", as defined in the Bank Holding Company Act of 1956, as amended (the "BHC Act"). The Board of Governors of the Federal Reserve System (the "Federal Reserve") administers the BHC Act and determines whether an entity is a "company" for BHC Act purposes. In our experience, Nonbank Bidders customarily seek Federal Reserve determinations that they are not "companies" in "control" of a depository institution or its parent holding companies.

The "source of strength" proposal appears similar to the Federal Reserve's requirement for bank holding companies that "control" a bank. This concept is inappropriate for any investor that is neither a bank holding company or is not in control of a bank. The FDIC and the newly chartered institution's primary regulators are able to set reasonable capital standards for such institutions. Under existing law and regulations, it is desirable for all (the new institution and its investors and regulators) that the institution remain well-capitalized in accordance with existing standards consistently applied. Requiring more will not attract Nonbank Bidders; instead, it may cause potential investors to avoid becoming Nonbank Bidders. This would not be in the public interest.

The Proposed Statement's cross guarantee requirement is not authorized by statute and presents issues that are problematic to investors, especially in light of fiduciary duties owed by fund managers to investors in their funds, by exposing other bank investors to a cross-guarantee of a new bank chartered to acquire a failed institution.

**Information Requirements**

Investors should provide reasonable information to the FDIC in connection with qualifying to bid on failed depository institutions. In our experience, such information with respect to private equity investors is generally provided confidentially to the Federal Reserve in making determinations as to "control" under the BHC Act. Similar confidential submissions to obtain FDIC insurance should reasonably enable the FDIC to meet its statutory requirements, regardless of where the investors are chartered or located. Imposing additional requirements where investors are located in a "secrecy law jurisdiction" serves no purpose, and such investors are unlikely to be subject to "consolidated home country supervision", since they usually do not operate or control a banking organization in their home jurisdiction.

**Ownership Term**

Private equity funds have a predetermined life (usually 10-12 years) and a limited investment period (usually the first 4-5 years of their funds' lives). These funds typically are required by their organizational documents to exit their investments and distribute the proceeds by the end of the fund's term. Thus, private equity firms typically would not be forced to monetize or exit an investment in an unusually short period to the detriment of a bank or the communities it serves. The imposition of an arbitrary three-year holding period is unnecessary. Such holding period discriminates against, and therefore is likely to unnecessarily limit investments by, Nonbank Bidders. All investors, not just Nonbank Bidders, will want to take advantage of market opportunities to realize their objectives without artificial time constraints. Any proposed time constraints will decrease interest in failed banks and their assets.

**Conclusion**

We urge the FDIC to adopt an expedited process for qualifying Nonbank Bidders to bid on failed depository institutions and to evaluate Nonbank Bidders under existing standards without discriminatory conditions not applicable to other failed bank bidders.

We would be pleased to discuss any aspect of this comment letter with appropriate representatives of the FDIC. Please feel free to contact Chip MacDonald at 404-581-8622 or Brett Barragate at 212-326-3446 for this purpose.

Very truly yours,