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August 10, 2009

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

Re: Federal Deposit Insurance Corporation's Proposed Statement of Policy on Qualifications for Failed Bank Acquisitions (RIN 3064-AD47)

Dear Mr. Feldman:

On behalf of Skadden, Arps, Slate, Meagher & Flom LLP, I am writing in response to the Federal Deposit Insurance Corporation's ("FDIC") request for comments with respect to its Proposed Statement of Policy on Qualifications for Failed Bank Acquisitions (RIN 3064-AD47) (the "Proposed Statement"). We commend the FDIC's stated goal in issuing the Proposed Statement to provide guidance to private capital investors interested in acquiring or investing in failed banking organizations regarding the terms and conditions for such transactions. However, we are concerned that, as proposed, the Proposed Statement will deter, if not preclude, private capital from participating in the bidding process for failed banking institutions, thereby directly increasing the costs of failed bank resolutions for the Deposit Insurance Fund and, ultimately, U.S. taxpayers. In particular, we would like to raise the following key concerns with the Proposed Statement:

Premise of Proposed Statement. The Proposed Statement appears to be based on the premise that private capital investors pose a greater risk to the safety and soundness of insured depository institutions than other investors because private capital investors do not "accept the responsibilities under existing law to serve as responsible custodians of the public interest that is inherent in insured depository institutions."[1] Based on our involvement in a wide range of transactions in the banking industry, including our experience with transactions involving private equity participants, and given the robust regulatory framework already in place, we are not aware of any basis as a factual matter for the premise that banking institutions face greater risks by virtue of the existence of private capital.

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[1] *See* 74 *Fed. Reg.* at 32931-32932.

Capital Requirements. Many of the other comments submitted with respect to the Proposed Statement focus on the elevated capital requirements proffered by the Proposed Statement and we echo the concerns of the great majority of commenters regarding the proposed capital levels and their effect on distorting competition in FDIC auctions. Apart from the debate regarding the "right" level of capital, we respectfully submit that the Proposed Statement's focus on the "source" of capital of an insured depository institution as the determining factor for the imposition of elevated capital requirements ignores well-accepted factors that we believe should be the drivers of appropriate capital levels, including the level of risk inherent in a banking institution's proposed business plan, the nature of the assets on the banking institution's balance sheet and the track-record of the management team of the banking institution. Further, imposing different capital requirements solely on the basis of the "source" of capital discriminates between institutions with "private capital investors" and those not backed by such investors. We are not aware of any credible evidence to justify such disparate treatment.

Source of Strength. The Proposed Statement includes language to the effect that the "organizational structures" of private capital investors could potentially serve as a source of strength for their "subsidiary depository institutions" and the FDIC has sought comment on whether private capital investors themselves should be made subject to source of strength obligations. The imposition of any such source of strength obligation by the FDIC would go beyond the Federal Reserve's source of strength doctrine for bank holding companies without a well-settled statutory basis for such a step. Further, a source of strength obligation directly binding on private capital investors that seeks to override accepted principles of limited liability could preclude further investments in failed banking organizations because, as a practical matter, few, if any, investors would be prepared to place at risk more than the amount of their investment. Agreeing to such a potential liability may also be inconsistent with the governing documents of certain private equity funds and could expose the general partner of any such fund to potential claims for breach of contractual and fiduciary duties.

Cross-Guarantee. The proposed "cross-guarantee" or "cross-pledge" regime would discard settled concepts of corporate affiliation used to determine the applicability of cross-guarantee liability for commonly controlled depository institutions in favor of a standard of modified cross-guarantee liability based on the aggregate ownership overlap between private capital investors. The proposed standard raises significant issues for so-called "consortium" transactions by separate non-control investors, which have presented the least-cost resolution for the FDIC in the two largest resolutions in 2009 to date, IndyMac and BankUnited. The Proposed Statement seems to be premised on the belief that separate non-control investors should be viewed as a "block" for purposes of the proposed cross-guarantee regime. This premise is inconsistent with the requirements of current law, which require that separate non-control investors in "consortium" transactions not "act in concert" with respect to their investments.

Affiliate Lending Restrictions. The Proposed Statement would preclude all extensions of credit by a covered depository institution owned by private capital investors to all such investors, their investment funds, affiliates, and portfolio companies, going beyond the current laws on affiliate restrictions embodied in Sections 23A and 23B of the Federal Reserve Act and

the Federal Reserve's Regulations O and W, as well as the terms of standard passivity commitments and rebuttal of control agreements ordinarily required by federal banking regulators in connection with significant non-controlling investments in banking institutions. There is no evidence that existing laws on affiliate transactions do not adequately protect depository institutions from inappropriate insider transactions, and the FDIC has not articulated a reason why covered depository institutions with private capital investors that acquire or invest in failed banks should be held to a higher standard than all other depository institutions subject to such existing laws.

Secrecy Law Jurisdictions. The Proposed Statement's prohibition on entities in "bank secrecy jurisdictions" would create a prohibition on investment by a significant number of private capital investors. It is common for investment funds with non U.S. investors and U.S. tax exempt investors to use one or more offshore vehicles for legitimate reasons to ensure efficient tax treatment and tax reporting for such investors. These vehicles are often organized in the Cayman Islands, Bermuda, Guernsey or Netherlands Antilles. If applicable to these jurisdictions, the Proposed Statement would apply to the offshore vehicles of many funds. Frequently, funds are structured with offshore and domestic vehicles that invest in parallel. If the offshore vehicle is prohibited from making the investment, the domestic vehicle would also be unable to make the investment. The exception included in the Proposed Statement for companies subject to "comprehensive consolidated supervision" would also likely not be applicable to fund investors because such concept is only applicable to regulated banking organizations in other countries.

"Silo" Vehicles. The Proposed Statement indicates that the FDIC will not approve transactions involving so-called "silo" structures. Although there is no generally accepted definition, a "silo" typically involves the formation of a new investment fund parallel to existing investment funds that can acquire banking organizations without causing existing investment funds to be subject to regulation as bank or thrift holding companies. The articulated supervisory concern regarding silos relates primarily to their perceived opacity. However, rather than disqualifying all silo funds as proposed under the Proposed Statement, we believe that supervisory concerns regarding silo structures would best be addressed through a rigorous regime of disclosure requirements with respect to a silo fund's ownership structure. We would respectfully submit that the silo structures that have been previously approved by the Federal Reserve and the Office of Thrift Supervision and a number of the proposed silo structures with which we are familiar do not involve complex or functionally opaque ownership structures and with the right amount of vetting by regulatory agencies should address supervisory concerns.

Continuity of Ownership. With respect to the proposed three-year holding period, we recognize that the FDIC has a legitimate interest in preventing speculative short-term investments in failed banking institutions that are made without a view towards stabilizing and re-building the banking franchise post-resolution. We would submit, however, that the FDIC may be better served to leave itself greater flexibility to vary the holding period to be applied to any particular resolution, as it has done through the inclusion of particular holding periods in past resolutions. Also, the final FDIC policy statement should clarify that it would not affect a bona fide capital raise through the primary issuance of equity securities by the depository institution or its holding company but would only apply to secondary sales of equity securities by covered private capital investors.

Scope of Proposed Statement. The scope of the Proposed Statement is defined by reference to the term "private capital investor," but such term does not have any generally understood meaning and is not otherwise defined in the Proposed Statement. Further, the Proposed Statement does not specify what percentage of ownership by private capital investors will subject depository institutions and their shareholders to the Proposed Statement. Unless the coverage of the Proposed Statement is clarified, the uncertain scope of the Proposed Statement will not only chill participation in FDIC auctions of failing banking organizations but could negatively affect ordinary capital raising activities of banks and thrifts that wish to participate in FDIC auctions.

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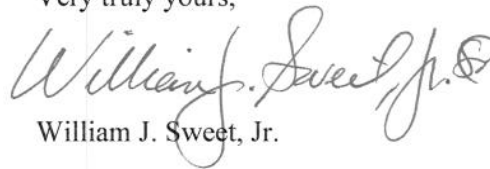
We thank the FDIC for the opportunity to comment on these important matters. Please do not hesitate to contact me at (202) 371-7030 should you have any questions regarding our comments.

Very truly yours,



William J. Sweet, Jr.

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