GREEN BANCORP

August 5, 2009

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

RE: RIN-3064-AD47– Request for Comments on Proposed Statement of Policy on Qualifications for Failed Bank Acquisitions (the "Proposed Policy").

Dear Mr. Feldman:

Thank you for the opportunity to comment on the Proposed Policy. We expect the Federal Deposit Insurance Corporation ("FDIC') will receive comment letters addressing all of the standards contained in the Proposed Policy. We will, therefore, limit the comments contained herein to the definition of the entities to which the standards apply. This is a particular concern to our company for two reasons. First, our ownership structure and the years we have been operating under this structure may result in the standards applying to us in the event we participate in a failed bank acquisition. Second, we are actively in the process of raising additional capital for our company to fund failed bank and other acquisitions from traditional private equity capital firms. We have serious concerns that the Proposed Policy may limit (or eliminate) our ability to raise this capital for our company (and, ultimately, for the banking system).

The Proposed Policy does not specifically define "private capital investors." The intent of the Proposed Policy appears to be directed at private equity funds formed for the purpose of making investments in companies across various industries who form a consortium (i.e., a group of independent firms) to invest in a failed bank through a shell company or the formation of a de novo charter for the specific purpose of accomplishing the purchase of assets and/or assumption of liabilities in a failed bank transaction. As written, the Proposed Policy would appear to apply to a bank holding company that has been in existence for less than three years that has among its ownership group any "private capital investor" (which is not defined) involving more than a *de minimis* (which is also not a defined term) investment in the company.

Green Bancorp, Inc. (RSSD 3474835 – "Bancorp") was formed as a bank holding company on January 1, 2007 and owns 100% of the issued and outstanding stock in Green Bank, N.A. (RSSD 2719427 - "Green Bank"). Belvedere Texas Holdings, L.P. (RSSD 3474826 – "Belvedere Texas") owns approximately 35% of Bancorp. The ultimate top tier holding company in the chain above Green Bank is Belvedere Capital Partners II LLC (RSSD 3437586 – "Belvedere"). Both Belvedere and Belvedere Texas are registered bank holding companies. We are concerned that the Proposed Policy may be interpreted as establishing additional obligations on Bancorp, Green Bank, Belvedere and/or Belvedere Texas in the event Bancorp or Green Bank becomes

the successful bidder on a failed bank acquisition. Bancorp and Green Bank intend to be active participants in the FDIC failed bank resolution process. In fact, Green Bank has directly participated in bidding on two failed bank transactions in the past year. However, since Bancorp has been in existence for less than three years,[1] and given the additional requirements imposed by the Proposed Policy, our board would be forced to reconsider potential involvement in the process of resolving failed (or failing) banks, thus putting us at a serious competitive disadvantage to our peers who have been in existence at least six months longer than our company; this arbitrary "age limit" excludes many of our competitors from the very burdensome requirements imposed by the Proposed Policy.

We would request the Board of Directors of the FDIC consider the following suggestions in crafting the final policy statement:

1. **Limit definition of "private capital investors" and clarify the *de minimis* standard.** The definition of private capital investors should exclude any entity that is registered as a bank holding company under the Bank Holding Company Act of 1956, as amended (the "BHCA"), or thrift holding company under the Savings and Loan Holding Company Act of 1967, as amended (the "SLHCA"). In addition, the *de minimis* standard should be defined. A possible definition would be:

   > *A "private capital investor" is any entity (or a subsidiary or affiliate thereof) that makes investments in operating companies (i.e., companies that engage in activities that are impermissible banking activities under applicable law) as its principal business strategy (a "PE Investor") and that proposes to invest more than $30 million in any existing bank, thrift, bank holding company, thrift holding company or any de novo charter, where such investment is made contemporaneous with or within one year of an investment meeting the same criteria by any other PE Investor. Provided, however, that any such investor registered as a bank holding company under the Bank Holding Company Act of 1956 or thrift holding company under the Savings and Loan Holding Company Act of 1967 shall not be considered a private capital investor for purposes of this Policy Statement.*

2. **Remove the "3-year" standard for applying the Proposed Policy to investors in an existing bank, thrift, bank holding company or thrift holding company.** The three-year standard appears arbitrary and would create a significant gap between potential investments in companies existing for more than three years and less than three years, resulting in a substantial competitive disadvantage for companies existing less than three years. Namely, given the very burdensome restrictions imposed by the Proposed Policy, bank or thrift holding companies that have existed for less than three years will find it much more difficult to raise capital sufficient to participate in failed bank transactions

[1] Green Bank was originally chartered as Redstone Bank, N.A. in February 1999; the bank's name was changed to Green Bank after it was acquired by Bancorp.

and benefit from the returns associated with such transactions. In addition, by relaxing or eliminating the three-year standard, the FDIC would help facilitate the entry of new capital into failed bank transactions, thereby helping it comply with its mandate under the Federal Deposit Insurance Corporation Improvement Act of 1991, as amended,[2] to resolve failed institutions in the manner that results in the least possible cost to the deposit insurance fund.[3] The Proposed Policy is counter to this mandate, as it restricts competition during the failed bank bidding process by excluding those investors that are likely in a materially superior financial position relative to other bidders. A more equitable standard would be to apply the Proposed Policy to investments in bank or thrift holding companies that came into existence as of the proposal date or any date thereafter. A retroactive standard would ignore the evaluation of the depth and experience of the management and board of the company seeking to raise additional capital from private capital sources, which took place during the bank or thrift holding company registration process, applying instead an arbitrary "time in business" standard for that company.

A retroactive standard is also inconsistent with the intent of the Administrative Procedure Act (the "APA"),[4] from which the FDIC derives its power delegated by Congress to, *inter alia*, promulgate rules, including the Proposed Policy. In order to constitutionally exercise this power, the FDIC must act both within the limits established by its enabling legislation and within the procedural limits established by the APA.[5] The procedural provisions of the APA define "rule" to mean:[6]

> [T]he whole or a part of an agency statement of general or particular applicability and *future effect* designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency and includes the approval or prescription for the future of rates, wages, corporate or financial structures or reorganizations thereof, prices, facilities, appliances, services or allowances therefor or of valuations, costs, or accounting, or practices bearing on any of the foregoing.

As Justice Scalia artfully pointed out in his concurring opinion in *Bowen v. Georgetown University Hospital*,[7] "[t]he only plausible reading of the italicized phrase is that rules

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[2] *See* 12 U.S.C. § 1811, et seq. (2001).

[3] *Id.* § 1823(c).

[4] *See* 5 U.S.C. § 551, et seq. (2001).

[5] *Id.* §§ 551-59, 701-06.

[6] *Id.* § 551(4) (emphasis added).

[7] 488 U.S.C. 204 (1988).

have legal consequences *only for the future*."[8] By imposing restrictions on investors in bank and thrift holding companies that have existed less than three years, the FDIC is creating legal consequences for transactions that occurred up to three years in the past. This flies in the face of the APA and the limits of the FDIC's rulemaking authority, particularly given the arbitrary and capricious establishment of a three-year window.

In addition to the change recommended above, a possible change to the application language contained in the Proposed Policy would be:

> *...the FDIC is establishing standards for bidder eligibility that would be applicable to (a) private capital investors in a company (other than a bank, thrift, bank holding company or thrift holding company that was in existence 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 case of de novo charters issued in connection with the resolution of failed depository institutions (herein "Investors").*

Although we have provided comments to improve what we believe is a flawed Proposed Policy, we maintain our belief that the Proposed Policy is wholly unnecessary, as the Federal Reserve and the Office of Thrift Supervision (the "OTS"), through the BHCA and the SLHCA, respectively, have well established standards and practices of qualifying and regulating new entrants into the banking system. The Federal Reserve and the OTS are each already legally empowered to address the concerns the Proposed Policy attempts to address, and have been doing so for decades.

Thank you in advance for your consideration of our comments. We believe clarification of these matters will enhance the overall effectiveness of the Proposed Policy while providing clarity to existing companies and banks seeking to raise much needed capital for the banking industry. Feel free to contact the undersigned directly at 713-275-8201 or by e-mail at mehos@greenbancorp.com.

Very Truly Yours,

Manuel J. Mehos
Chairman and Chief Executive Officer

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[8] *Id.* at 487 (emphasis added).