

August 4, 2009

Via E-mail

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

Attention: Comments

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

Dear Mr. Feldman:

MatlinPatterson Global Advisers LLC, a New York-headquartered private equity firm that invests globally in financially and operationally distressed companies (“MatlinPatterson”), welcomes the opportunity to comment on the Federal Deposit Insurance Corporation’s (“FDIC”) Proposed Statement of Policy on Qualifications for Failed Bank Acquisitions (the “Proposed Statement”).¹ At the outset, it should be noted that MatlinPatterson strongly endorses regulation designed to ensure the safety and soundness of insured depository institutions; indeed, as described below, our affiliates counted on the existing bank regulatory framework – which we view as sufficient to protect such institutions – in making a substantial investment in a depository institution earlier this year. We appreciate the FDIC’s efforts to balance the need for capital to address the large number of depository institutions that have failed and are projected to fail with the need to resolve such institutions in a safe and sound manner, but have some concerns about certain elements of the Proposed Statement.

In particular, MatlinPatterson is very concerned about the application of the Proposed Statement to depository institutions in which private capital investors have

¹ 74 *Fed. Reg.* 32931 (Jul. 9, 2009).

invested prior to the publication of the Proposed Statement, and seeks explicit clarification of its intended coverage. As we understand the Proposed Statement, it would apply to private capital investors in both (i) *de novo* depository institutions chartered for the express purpose of acquiring the assets and assuming the liabilities of a failed depository institution and (ii) established depository institutions unless the ownership interest has been held for at least three years (perhaps subject to a *de minimis* exception).² Unless additional clarification is provided, the second part of this definition could be interpreted in a manner that could severely and negatively impact institutions to which private investors have previously provided capital.

As such, we respectfully request that the final standards adopted by the FDIC for private capital investors expressly provide that they do not apply to depository institutions in which a private capital investor invested prior to their effective date and in the absence of the knowledge of such constraints. To apply them otherwise would have the effect of unfairly and retroactively penalizing such investors (and the investee depository institutions themselves) who, at the time of their investments, were not on notice of the possibility of new standards based on investor identity.³

For example, on January 30, 2009, certain affiliates of MatlinPatterson (the “MP Thrift Investors”) made a substantial investment in Flagstar Bancorp, Inc., a large, publicly traded thrift holding company (“Flagstar”). At the time, Flagstar’s subsidiary bank – Flagstar Bank, FSB – was in dire need of capital. Since then, the MP Thrift Investors have worked extensively and responsibly with the Office of Thrift Supervision (the “OTS”), Flagstar’s Board of Directors, and management to stabilize Flagstar Bank and work through its issues. In making the Flagstar investment, the MP Thrift Investors anticipated that Flagstar would, once its operating and capital issues were resolved, participate in the FDIC resolutions process; indeed such participation was a central element of their investment thesis. The MP Thrift Investors would have had serious reservations about making an investment in Flagstar had the Proposed Statement been proposed prior to their investment. In our view, the value of the MP Thrift Investors’ investment in Flagstar would be significantly diminished if the Proposed Statement becomes applicable retroactively to Flagstar due to their investment. MatlinPatterson and the MP Thrift Investors complied with all relevant law applicable at the time of the investment, and the MP Thrift Investors undertook significant risk in making their investment in Flagstar. Accordingly, we respectfully suggest that it would

² *Id.* at 32933.

³ While we assume that the FDIC has determined that the Proposed Statement is technically not an official rulemaking by the FDIC, we do note, as a general matter, that the Administrative Procedures Act would impose significant restrictions on retroactive provisions if they were included in the rule.

be unfair and prejudicial to apply the standards of the Proposed Statement in a retroactive fashion to Flagstar and the MP Thrift Investors in this context.

Moreover, imposition of the new standards contained in the Proposed Statement due to private capital investments made prior to their effective date may have harsh collateral consequences for other investors in the investee depository institutions. In the case of Flagstar, it is a publicly traded company with shares listed on the New York Stock Exchange. If the new standards are imposed on Flagstar due to the investment by the MP Thrift Investors, the public investors in Flagstar would indirectly be negatively affected without notice or warning, and the value of their investments in Flagstar would be diminished, all without achieving the stated purpose of the Proposed Statement.

The prejudicial effect of imposing new standards on existing investments is even more troublesome where, as in the case of the Flagstar investment, there is nothing to evidence a failure to “accept the responsibilities under existing law to serve as responsible custodians of the public interest that is inherent in insured depository institutions.”⁴ In fact, in the Flagstar case the opposite is true – those responsibilities have been fully embraced by the MP Thrift Investors. Within the legal requirements of the investment structure, the MP Thrift Investors have provided a significant amount of capital to an institution that desperately needed it. The MP Thrift Investors and industry consultants hired by Flagstar at the direction of the MP Thrift Investors have worked tirelessly with Flagstar’s Board and management to improve its operations, substantially enhance its controls, and effectively manage its non-performing assets. Specifically, the following operational improvements have been brought about at Flagstar since January 30, 2009:

- Optimized Flagstar’s products, business units and organizational structure.
- Redesigned product and channel profitability models on single-family residence origination and warehouse lending; rationalized distribution channels and closed unprofitable direct lending offices, branches and business units.
- Created profitability reporting and accountability in all areas to establish a culture of accountability.
- Provided Flagstar Bank with sophisticated loss forecasting tools to create a granular understanding of inherent portfolio risk.

⁴ 74 *Fed. Reg.* at 32931-32932.

- Increased staffing levels in the commercial real estate workout area; initiated appropriate workout and liquidation plans for troubled assets.
- Initiated the process of building infrastructure and capacity needed to successfully manage default and loss mitigation processes in-house and improve results over expected forecasts.
- Improved the composition of the Board of Directors.

The systems for control and reporting implemented since the investment have contributed greatly to Flagstar's overall improvement— as evidenced by Flagstar's now-stable capital adequacy ratios. These improvements have occurred extremely quickly. Further, Flagstar has not yet completed the restructuring plan developed by Flagstar and the MP Thrift Investors to address OTS concerns; Flagstar expects further improvements through the end of 2009 and into 2010 as it completes its plan.

As a result of these efforts, Flagstar's capital adequacy ratios have stabilized:

	<u>December 2008</u>	<u>June 2009</u>
Tier 1 (Core) Capital Ratio	4.95%	7.19%
Total Risk-Based Capital Ratio	9.10%	13.67%

In addition, the delinquency transition trends in Flagstar's first lien single-family residence portfolio have shown significant improvement:

	<u>January 2009</u>	<u>June 2009</u>
0-30 days	2.3%	2.0%
30-60 days	53.7%	37.0%
60-90 days	74.2%	52.8%
90-120 days	90.7%	77.9%

Lastly, one of the primary FDIC concerns that appears either explicitly or implicitly throughout the Proposed Statement is the need for transparency with respect to private capital investment in depository institutions. We could not agree more. We note that in connection with the Flagstar investment, the OTS required the submission of very detailed information regarding the entities and individuals involved, their fee arrangements, terms of equity securities and other relevant matters. We also note that the Flagstar investment is fully compliant with all applicable law. The OTS reviewed

extensive, detailed applications by the MP Thrift Investors in respect of the investment in Flagstar and approved the investment under applicable law and regulation after a full regulatory review. Moreover, contemporaneously with the completion of the Flagstar investment, Flagstar received \$266.6 million from the U.S. Treasury's TARP Capital Purchase Program. The MP Thrift Investors provided extensive information as part of Flagstar's application to obtain approval for TARP funds through the robust interagency review process. Ultimately, the U.S. Treasury determined, after taking into account the MP Thrift Investors' investment in Flagstar, to approve Flagstar's participation in TARP. Indeed, without the MP Thrift Investors' investment, it is unlikely that Flagstar would have been permitted to participate in the TARP.

As such, we respectfully request that the final standards adopted by the FDIC for private capital investors expressly provide that they do not apply to depository institutions in which a private capital investor invested prior to their effective date. We believe that this can be easily implemented through a carveout from the definition of covered investors.⁵

The Proposed Statement also prohibits so-called "silo" organizational arrangements, in which "beneficial ownership cannot be ascertained, the responsible parties for making decisions are not clearly identified, and/or ownership and control are separated."⁶ Although we understand the FDIC's desire to avoid structures with these features, we believe that describing arrangements that exhibit them as "silo" structures is unhelpful and confusing, principally because there is no agreed-upon definition in the private equity industry or elsewhere on what constitutes a "silo" structure. We believe, for example, that several recent private equity-led investments in troubled or failed depository institutions – including the Flagstar investment – used what could be described as "silos", but that none of these transactions exhibited the sort of opacity that is described in the Proposed Statement.

Moreover, the fundamental issue faced by the FDIC with respect to silos appears to be that of disclosure and transparency. The FDIC already has the regulatory tools to require disclosure as part of its process in qualifying bidders, and could address the issues identified with respect to silo structures more directly by requiring bidders for failed banks to identify both beneficial owners of 10% or more of the bidder (or any controlling party of the bidder) and the persons responsible for decision-making at the bidder (or any controlling party of the bidder). The final policy statement could formally require additional disclosure to augment the FDIC's existing disclosure regime to make

⁵ Alternatively, the three-year period referenced in the proposed definition of "Investor" could relate to the length of life of the depository institution, and not the duration of the private capital investor's investment in the depository institution.

⁶ 74 *Fed. Reg.* at 32932.

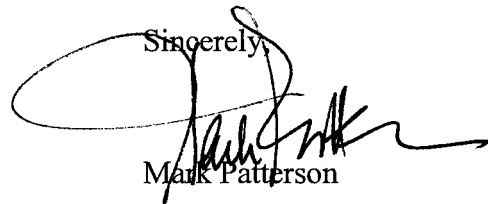
clear to all potential private capital investors that robust disclosure, which we support, is required in order to bid on failed banks.

As such, we respectfully suggest that a categorical prohibition on “silo” type structures is unnecessary, and that the reference to silo structures in the Proposed Statement be deleted.

MatlinPatterson is strongly supportive of the FDIC’s objective to provide clarity to companies and organizations interested in acquiring failed institutions from the FDIC, and we believe that the banking system will benefit from rules that enable private capital to invest in depository institutions in a safe and sound manner. We urge with particular emphasis that investors – like the MP Thrift Investors – who have already answered the call to aid the banking system and have capital at risk not be penalized by application of new standards in the FDIC bidding process.

We appreciate the FDIC’s attention to this comment letter. If you have any questions about this letter, or if MatlinPatterson can be of any further assistance, please do not hesitate to contact me at (212) 651-9500.

Sincerely,

A handwritten signature in black ink, appearing to read 'Mark Patterson', is written over the typed name. The signature is stylized with a large loop at the beginning and a long horizontal stroke at the end.

Mark Patterson