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BY EMAIL TO COMMENTS@FDIC.GOV AND BY HAND

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

RE: Comment on the Proposed Statement of Policy on Qualifications for Failed Bank Acquisitions (RIN 3064-AD47)

Dear Mr. Feldman:

We appreciate the opportunity to submit comments on the Proposed Statement of Policy on Qualifications for Failed Bank Acquisitions (the "Proposal") on behalf of a number of the private equity clients of this firm (the "Commenters").[1] The views expressed in this comment letter reflect the combined views of the Commenters and do not necessarily reflect the views of any single Commenter.

1. Background

The Commenters welcome the FDIC's efforts to address the role of private equity funds ("PE Funds")[2] and the investors in such funds in the acquisition of failed banks from the FDIC. This issue is critical for several reasons, including: (i) the finite resources of the Deposit

[1] This firm has actively represented private equity funds and hedge funds engaged in making financial services and non-financial services investments, as well as investors in such funds, over the last three decades. We have represented private investors in recent transactions involving the recapitalization of operating banks and the acquisition of failed banks from the FDIC.

[2] For the purposes of this comment letter, PE Funds generally include private equity funds and hedge funds of any size that invest capital raised from sophisticated investors into pools of funds which invest in a wide variety of companies and through an array of ownership structures.

Insurance Fund ("DIF") to finance the rising volume of bank and thrift receiverships and conservatorships; (ii) the necessity to augment the DIF either by borrowing taxpayer funds or increasing assessments on the banking industry; and (iii) the apparent reluctance of banks and non-banks to invest in large failed institutions.

The Commenters also recognize the importance of the concerns of the FDIC regarding the long-term safety and soundness of the banking industry. Accordingly, the Commenters urge the FDIC to consider carefully the premises for, and possible consequences of, any changes in the terms on which PE Funds and investors in PE Funds may participate in the recapitalization of the banking industry, in order that well-intentioned safety and soundness concerns do not raise significant obstacles to such recapitalization efforts.

In this regard, the Commenters believe that the interests of PE Funds and the FDIC are aligned in seeking to ensure that banks acquired from the FDIC are operated in a safe and sound manner. While the FDIC is responsible for protecting bank depositors and the DIF by mitigating the risks to which insured depository institutions are exposed, PE Funds are similarly expected by their investors to prudently invest their money, including by mitigating risk. PE Funds are in many instances intermediaries investing funds from Main Street America – private and public pension funds, university endowments and charitable foundations – which are in a position to be an important source of capital for the banking system – and thus should not be treated as a category of disfavored investors.

As a result, the Commenters believe that the Proposal, while well-intentioned and based on sound regulatory goals, appears to misconstrue the role of PE Funds and to rely upon assumptions that are not supported by empirical evidence or the marketplace. In that regard, the Commenters offer the following general principles upon which these comments are based:

(i) The Commenters are not aware of any empirical evidence (nor does the Proposal offer any such evidence) to suggest that a PE Fund investment in a bank or bank holding company ("BHC")[3] results in an increased risk profile of those entities or improper relationships between a PE Fund and such entities.

(ii) PE Funds focus on maximizing value as they invest and manage their investors' funds, but not at the expense of sound operating policies of the entities in which they invest or the financial interests of their investors.

[3] References throughout to "bank" or "BHC" should be read also to include a savings association and its savings and loan holding company ("SLHC"), respectively.

(iii) There appears to be no basis to suggest that traditional legal concepts of bank control might need to be altered to more stringently regulate either passive or controlling investments by PE Funds in failing banks. Indeed, both passive and controlling investments by all types of investors have long been subject to comprehensive regulation by all of the federal banking agencies.

(iv) Where PE Funds have invested on a passive basis, they have done so according to the passivity standards and requirements established by the federal banking agencies, which are intended to ensure that there is a clear understanding of the conduct that will and will not be considered to be consistent with the non-controlling status of a passive investor.

(v) To qualify for passive investment status, PE Funds must execute written agreements or undertakings regarding their absence of control over a bank or BHC that are acceptable to the appropriate federal banking agencies. Such agreements and undertakings are subject to enforcement under civil and criminal law.

2. The Nature of a Passive Investment

It appears to the Commenters that the Proposal suggests that a change is necessary in the fundamental concept of passive investment in BHCs and banks when there are multiple passive investors that hold significant ownership interests in a BHC or bank. In that regard, the Proposal might be interpreted to apply to passive PE Fund investors certain regulatory requirements and financial commitments, such as source of strength obligations and cross guarantee liability, which have traditionally been applied under applicable law only to parties who are deemed to have actual control of the ***management and policies*** of a BHC or bank. It seems fundamentally unfair and inconsistent with regulatory precedents to hold investors responsible for the actions or losses of a BHC or bank when, as passive investors, they are barred by law from influencing the ***management and policies*** that could either avert such actions or avoid such losses.

The concept of a passive investor of a BHC or bank has been developed over time and is reflected in the passivity and rebuttal agreements entered into in connection with BHC and bank investments. Regulatory guidance now permits investments up to as much as 33 1/3% of the total equity of a BHC on a passive basis.[4] Based on the stringent passivity commitments

[4] On September 22, 2008, the Federal Reserve Board ("FRB") adopted a policy statement that expanded the concept of passive investments by increasing the investment limit from 24.9% to 33 1/3% of total equity of a BHC provided that ownership of a class of voting securities is less than 15%, and allowing up to two representatives by a passive investor on the BHC's board of directors (to be codified at 12 C.F.R. § 225.144). This policy statement, as well as the approval of a number of transactions involving multiple passive investors by the federal banking agencies, supports the premise that passive investments work from legal, regulatory and business perspectives.

developed by federal banking agencies, the ability of a passive investor (including PE Funds) to control the management and policies of a BHC or bank is effectively nullified. This is critical to any discussion of the impact of investments in BHCs or banks because federal law measures the ability of an investor – whether a PE Fund, individual shareholder or another company – to control the ***management and policies*** of a BHC or bank. The fact that many individual investors may hold a majority or all of the ***ownership*** interests in a BHC or bank is not determinative of their control of such an entity, unless they act in concert to control that entity's operations, *i.e.*, its management and policies.

Just as multiple individual shareholders of a bank or BHC may hold the ownership interests of that company without controlling it under federal law, so too, multiple passive individual PE Funds may have ownership interests in a BHC or bank without controlling it. Federal law is clear. The mere ownership of the voting interests of a BHC or bank by individual owners, including PE Funds, does not convey control to those individual owners under federal banking law, as long as the owners do not act in concert and their attributed ownership interests remain below the applicable control and BHC thresholds.

The Bank Holding Company Act,[5] the Home Owners' Loan Act,[6] and the Change in Bank Control Act[7] require prior approval for a person or group of persons acting alone or in concert that wish to take action that would cause them to be deemed to have acquired control of a BHC or bank. Control under these laws and their implementing regulations is generally triggered by (i) ownership of voting stock in excess of specified thresholds, (ii) control of the election of a majority of the board of directors, or (iii) the ability to exercise a controlling influence over the management and policies of a BHC or bank. Passive investors must rely on management and the board of directors to operate the BHC or bank in which they have invested: they may not control the operation of a bank or BHC; they cannot act in concert to achieve that result; and they may be required in applicable circumstances to commit to non-controlling conduct under the penalty of civil or criminal actions.[8] If passive investors violate these principles, the federal banking agencies have ample authority to redress such situations. The Commenters are not aware, nor does the Proposal assert, that structures involving multiple PE Funds as passive investors have led to regulatory problems or concerns in this regard.

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[5] 12 U.S.C. § 1841 *et seq.*

[6] 12 U.S.C. § 1461 *et seq.*

[7] 12 U.S.C. § 1817(j).

[8] *See, e.g.*, 18 U.S.C. §§ 1001 and 1007.

3. What Is Private Equity and How Does It Work?

The Commenters believe that the record for this proceeding may benefit from a brief discussion of the nature and operation of PE Funds.

At its most fundamental level, private equity is an ownership structure that enables a PE Fund and its investors to acquire or invest in companies – either public or private – that have potential for growth. The broadest categories of companies in which a PE Fund typically invests are (i) struggling and/or failed businesses, (ii) divisions of large conglomerates, (iii) promising or strong companies in need of venture or growth capital, and (iv) family businesses where the founders are seeking to transition beyond family ownership.

Most PE Funds are structured as private limited partnerships, often with a seven- to ten-year term. The investors in PE Funds are outside parties who become passive limited partners in the PE Fund, while the sponsors of the PE Fund (either individually or through a company) act as the controlling general partner of the partnership. PE Funds are entrusted funds of these outside investors, which typically include large institutional investors, such as pension funds, charities, foundations, and university endowments, which closely monitor the performance of the PE Funds in which they invest. The sponsors of PE Funds generally put their own money at risk with that of their investors by also investing in the fund, underscoring even more a PE Fund's need to identify safe and sound investments.

A common misconception is that PE Funds find companies in which the risk profile is already excessive or can be raised to gamble their investors' money on the chance that they can achieve an extraordinary return and then move on. The reality is that PE Funds are sophisticated analysts of price and risk, and seek out investments that for any number of reasons may be underpriced so that a sound, accountable management of that investment can return value to their investors. When PE Funds agree to become passive investors in a BHC or bank, the need to ensure that the BHC and bank are managed in a safe and sound manner is even more pronounced so that the managers that actually have operational control do not unreasonably and imprudently risk the capital invested by PE Funds. Accordingly, PE Funds will only agree to invest in BHCs or banks where they believe the managers will operate the BHC or bank in a prudent manner.

4. Should PE Funds Be Regulated Differently Than Other Investors?

The Commenters believe that PE Funds should ***not*** be treated differently with regard to investments in financial institutions, since PE Funds are advocates of sound operation of the companies in which they invest and have been willing to conform to all of the regulatory limitations applicable to either a passive investment or a legally controlling investment. In that respect, the Commenters do not believe that there is verifiable empirical data that supports the proposition that PE Funds should be regulated in a way that disadvantages them relative to other prospective investors in, or acquirers of, failed banks.

PE Funds should be regulated in the same manner as every other shareholder of a BHC or bank. Indeed, they represent today the most effective platform to funnel new capital into BHCs or banks and reduce reliance on taxpayer subsidized rescue programs. The transactions involving PE Funds that have been completed in the last 24 months demonstrate that, unlike any other source of non-government capital, PE Funds are willing to invest capital by either assuming control and complying with applicable rules that accompany control or eschewing control over the entities in which they invest and establishing themselves as passive investors, receiving only a single representative on the board of directors. PE Funds have been actively involved in rescuing failed or failing banks and have done so in complete conformity with long-standing applicable laws, rules, and governmental policies. The Proposal has not cited any evidence involving transactions where a number of PE Funds each individually took a passive position, but the overall effect was to acquire control illegally of a BHC or bank for regulatory purposes, or that such a passive investment resulted in an increase in the BHC's or bank's risk profile or gave rise to improper transactions between a PE Fund and a BHC or bank. Accordingly, we suggest, as set forth in more detail below, that there are alternative approaches that the FDIC should consider, including reliance on the laws and regulations currently in effect and enforced by the federal banking agencies, which can achieve the regulatory goals identified by the Proposal. The Commenters believe that if there is some "aggregate" impact derived from the investment by a number of passive PE Funds, it is one that conveys a tone of greater management accountability and the highest standards of risk analysis and management. The establishment of that tone is not inconsistent with the limitations placed on passive investors under the law. The FRB's recent Policy Statement on Equity Investments in Bank and Bank Holding Companies[9] recognizes a non-controlling minority investor's right to advocate positions to bank management.

Based on the foregoing, the Commenters believe the interests of PE Funds, their investors and the FDIC are aligned in seeking to have banks acquired from the FDIC operate in a safe and sound manner, but respectfully submit that there is no justification or support to suggest that PE Funds should be regulated more stringently than any other shareholder of a BHC or bank.

5. Comments on Specific Suggestions in the Proposal

Understanding that the interests of the Commenters and the FDIC appear to be aligned, the Commenters wish to offer constructive ideas and alternatives to several of the regulatory requirements set forth in the Proposal. There are three important points that these comments are based upon:

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[9] To be codified at 12 C.F.R. § 225.144(c)(3)).

(i) The Commenters agree that the capital of a bank should always be adequate to handle the risks inherent in its asset and liability structure, as well as the ups and downs of the economy.[10]

(ii) Each of the federal banking agencies already has extensive regulatory requirements that deal with transactions with affiliates, bank secrecy jurisdiction concerns, and disclosure of information, and supervisory efficiency and the avoidance of redundancy is an important regulatory goal.

(iii) Financial commitments have only applied to parties that are legally deemed to control a BHC or bank.

5.1. Definitions

The Proposal does not contain definitions of many important terms that it employs, such as "private capital investors" and "silo transactions." In that regard, the Commenters suggest that clear definitions would be helpful to the public to better understand the range of investors and transactions that the FDIC is focusing on.

5.2. Capital and Capital Maintenance

The Commenters agree that capital is an important buffer between the potential losses of a bank and the financial interests of investors and the FDIC. There is no dispute that capital should be large enough to properly protect those interests. However, the Commenters believe that capital requirements should be a function of the nature of risks inherent in a bank's asset and liability profile, rather than of the identity of its investors. There is no evidence on the record to suggest that acquisitions of failed banks by a PE Fund or investments by multiple passive PE Funds should require a 15% Tier 1 leverage capital ratio in order to appropriately protect the bank and the FDIC from potential losses. Such a high capital requirement would create a substantial barrier to PE Fund participation in the recapitalization of failed banks. Maintaining such a high level of capital would not be consistent with an efficient use of investment capital by a PE Fund and would effectively bar such investments by PE Funds.

The Commenters suggest that ***all*** investors and acquirers of failing banks, whether shell holding companies, individuals, PE Funds, or other entities, be treated identically, and that the capital required be based on an analysis of the management of the bank, the risks inherent in the business plan, and other demonstrable regulatory concerns. In that regard, the Commenters

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[10] Indeed, the federal banking agencies also have broad authority to modify the capital requirements applicable to any particular bank in specific cases. *See, e.g.*, 12 C.F.R. § 3.9-3.13 (OCC); 12 C.F.R. § 325.3(a) (FDIC); 12 C.F.R. § 567.8 (OTS); and 12 C.F.R. pt. 208, Appendix B(II)(a) (FRB).

believe that in a failed bank acquisition, the primary federal banking agency and the FDIC should consult on such capital requirements. Such consultation might consider, for example, the capital requirements imposed for a *de novo* charter.[11] If the capital requirements for *de novo* banks are sufficient to reflect the risks inherent in a start-up operation, they should work equally as well from a safety and soundness standpoint for a failed bank acquired by new investors.[12]

Closely related to the issue of the initial capitalization of a bank acquired by PE Funds are (i) the need to maintain the capital of the bank at a designated level and (ii) the obligation of individual investors to provide additional capital, should it be necessary. The Proposal is not clear as to which parties would be subject to these requirements or how these requirements would operate. Depending upon how these requirements are interpreted, they could create substantial barriers to the investment of new capital into failed banks by PE Funds, which have an obligation to protect the financial interests of their investors.

The Commenters suggest that for these purposes, the Proposal's definition of "Investor" rely on traditional concepts of holding company and bank control established by the FRB, the Office of the Comptroller of the Currency ("OCC"), the FDIC, and the Office of Thrift Supervision ("OTS"), and be limited to parties that are legally deemed to have control of a BHC or bank. In most cases, that would result in future capital obligations being directed only at a PE Fund that becomes a BHC or any PE Fund that has "control" of a BHC or bank, as such term is defined under current control and holding company rules. Any direct, open-ended capital obligations of a PE Fund which invests in a BHC or bank, but does not have control of such an entity and is not itself a registered BHC will discourage any and all investments by PE Funds. The Commenters believe that it may be more appropriate where dealing with a number of passive investors for regulators to receive commitments from them that, under certain circumstances, they will not use whatever limited corporate governance rights they have to block capital raising efforts from other sources.

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11 The FDIC's Statement of Policy on Applications for Deposit Insurance establishes a presumption of an initial 8% Tier 1 leverage capital requirement for *de novo* institutions, subject to adjustment based upon applicable factors related to the institution. 1 FDIC Law, Regulations and Related Acts 5349 (amended December 27, 2002). Unlike *de novo* institutions, many institutions resulting from a failed bank acquisition will have the benefit of a significant loss sharing agreement with the FDIC.

12 To the extent that PE Funds are required to maintain higher capital levels than other potential buyers, they will necessarily have to request more financial assistance from the FDIC. As a result, the FDIC will have to spend more to resolve failed banks, or PE Funds will be prejudiced when bidding against other potential acquirers.

5.3. Cross Guarantees

The Financial Institutions Recovery and Reform Enforcement Act of 1989 added the concept of cross-liability among commonly controlled banks, thus permitting the FDIC to recoup its losses from the failure of one commonly controlled bank from another.[13] The statutory requirement relies, however, on the fundamental element of common ***control***. The Commenters suggest that to address the legitimate concerns that the FDIC may have regarding commonly controlled banks, it rely on applicable legal precedents and apply cross-guarantee liability where a PE Fund or group of PE Funds actually have control under the long-standing control and BHC rules that are currently in place. In that regard, there would seem to be little precedent that would ascribe responsibility to a party for the operation of a bank when that party cannot control the operation of the bank.

The Commenters believe that any regulatory effort to enlarge the scope of cross-guarantees, which potentially makes non-controlling passive investors in multiple banks responsible on a cross-institutional basis for the failure of any of those banks, or be required to make some undefined type of pledge in connection with such potential liability, could seriously threaten the ability of BHCs and banks, both large and community banks, to attract new capital when it is needed.[14] Again, the Commenters believe that the interests of the FDIC can be adequately satisfied by reliance on current law without prejudicing the interests of passive PE Fund investors.

5.4. Affiliate Transactions

The Commenters agree with the FDIC that PE Funds should not generally invest in a bank in order to use the bank to finance their affiliated interests. However, the Proposal seems to suggest that greater limitations than exist under current law may be necessary to prevent PE Funds from doing business with a bank in which they have invested. It is not clear whether the Proposal in this respect is directed at situations where a PE Fund is deemed legally to be in control of a BHC or bank, or is simply one of a number of passive investors that own a majority or all of the financial interests in a BHC or bank. The Proposal seeks to prohibit an extension of credit by the bank, at the very least, to the controlling PE Fund, any of its portfolio companies, and any affiliates of the PE Fund. The effect of this would be to impose far stricter requirements on lending transactions with the foregoing category of entities than applies to any other parties

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13 Pub. L. No. 101-73, § 206(a)(7), 103 Stat. 183, 196-205 (1989) (codified at 12 U.S.C. § 1815(e)).

14 As mentioned above, the Proposal does not contain certain information that would be useful to the public in providing comments. In that regard, the Commenters believe that they could provide additional information to the extent that the FDIC provided, among other things, definitions of the terms used and parties impacted, authority for the imposition of certain restrictions, and an assessment of the impact of the Proposal on large and small banks.

that are deemed to control a bank. The Proposal does not explain why the current limitations imposed by Section 23A and Section 23B of the Federal Reserve Act are inadequate to protect a bank from harmful transactions with a PE Fund and associated parties. Neither does it provide a basis for the implied suggestion that controlling PE Funds are more likely than any other controlling party to engage in transactions that are harmful to the subsidiary depository institution. Furthermore, it would be especially inappropriate to impose such prohibitions on a PE Fund that is a non-controlling investor in a BHC or a bank, where such a party is not in a position to influence bank lending activities. An imposition of such a requirement could create substantial barriers to PE Fund participation in the recapitalization of failed banks.

In addition, the term "portfolio company," as used in the Proposal, does not appear to distinguish among the potentially varying levels of investment that a PE Fund may have in such a company. As a result, unless the term "portfolio company" is clarified to be limited to companies that qualify as an "affiliate," the Proposal could preclude a wide range of lending opportunities for a bank to entities not under the control of a PE Fund and not affiliated with it.

To ensure the safety and soundness of the acquired subsidiary bank, the Commenters suggest that the FDIC rely upon the requirements of applicable law set forth in the FRB's Regulation W and Sections 23A and 23B of the Federal Reserve Act, as interpreted and imposed by the appropriate federal banking agencies.

5.5. Secrecy Jurisdictions

The Commenters appreciate the regulatory concerns that have been articulated by the FDIC with respect to offshore funds and the protection of regulatory principles. However, the Commenters suggest that there is no specific need to restrict only PE Funds to comprehensive and consolidated supervision jurisdictions, particularly when they are not in control of a BHC or bank. Again, the Commenters assume that if there were a substantial exposure that had been identified in actual cases, the appropriate federal banking agencies would be bringing enforcement actions under current law to address deficiencies posed by offshore fund investments.

Alternatively, verifiable regulatory standards can be developed to assure compliance of offshore entities with basic anti-money laundering policies and practices as well as to provide jurisdictional certainty with regard to U.S. enforcement interests. The Commenters suggest, however, that, at the very least, any new requirements of this nature that are imposed on PE Funds should focus on funds that acquire control and avoid open-ended commitments in favor of certainty.[15]

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[15] In particular, the requirement that PE Funds consent to be bound by statutes administered by U.S. banking agencies creates an undefined and unusually broad commitment that would be difficult for any investor to agree to.

5.6. Continuity of Interest

The Commenters recognize the interests of the FDIC in awarding failed banks to stable investors, but would again suggest, consistent with many years of regulatory precedent and practice, that if special continuity of ownership interests are to be applied, they be limited to the holdings of a PE Fund in a BHC or bank that it actually controls. Non-controlling PE Fund investors should be able to liquidate their investment consistent with applicable law and the terms of the governance provisions of the investment vehicle. Indeed, since they do not have control over the bank or its management, the sale or transfer of its stock should, by definition, be neutral to the operation of the bank.

By creating a broad prohibition on "selling ***or*** transferring" the securities of the investors' holding company or depository institution, the policy statement would create an approval process that would impose unnecessary regulatory impediments. For example, if a large bank wished to purchase a PE Fund's 4.9% investment in a bank that had been acquired from the FDIC after one or two years, it would need a special regulatory approval to do so. Additionally, to the extent that such a three-year restriction could deter a new holding company from going public in part or whole, it should be modified to facilitate a transaction that results in the formation of a public company.

Because of ambiguities inherent in the continuity of interest and three-year holding requirements of the Proposal, the Commenters further suggest that the FDIC clarify that:

(i) reorganizations within PE Funds would not trigger continuity of interest restrictions;

(ii) PE Fund redemptions and similar events, such as changes in investment positions within a particular PE Fund, would not create continuity of interest concerns;

(iii) a sale of passive non-controlling interests by a PE Fund in a BHC or bank would not be subject to continuity of interest restrictions; and

(iv) a bank that has been in existence for three years, which is acquired by new investors just prior to their acquisition of a failed bank from the FDIC, should be viewed as satisfying the three-year holding period rule of the Proposal, even though the PE Funds would not have been invested in the bank for three years.[16]

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[16] This structure provides the FDIC with a valuable tool to resolve failing banks which we assume it is in the public interest to maintain. For example, to the extent that PE Funds A, B and C can recapitalize Bank A by acquiring 80% of its stock (20% remains in the hands of the original shareholders), Bank A should be able to bid for and acquire failing Bank B from the FDIC without the imposition of the restrictive regulatory requirements that would apply to PE Funds in any final policy statement. *See, e.g.*, FDIC Press Release No. PR-130-2009, "State

To the extent that the FDIC is concerned that a sale within three years may reflect on the economics of the original transaction, we note that the FDIC has statutory boundaries that it must satisfy with regard to the cost of assistance.[17] In addition, there will always be transactions with strategic buyers happening at the same time, so the FDIC should be able to compare private equity sales with discounts and assistance being given to strategic buyers to be confident that it is not selling a seized bank at an inappropriate value.[18]

5.7. Disclosure

The Commenters believe that the FDIC's regulatory concerns are effectively addressed by current requirements that investors who seek to control a BHC or a bank must provide all information necessary to the appropriate federal banking agencies (OCC, OTS or the FRB) to obtain regulatory approval. If they were not, we assume that the FRB, OTS or OCC would have raised this concern.

5.8. Silo Transactions

As an undefined term, it is very difficult to comment on this aspect of the Proposal and provide meaningful assistance to the FDIC since there are a variety of different silo-type structures that are possible. The principal of a PE Fund may, for example, establish a separate line of BHCs to acquire banks with or without investors involved in the non-bank funds. Some silos are separable investment vehicles that are not inter-related economically and do not have a significant overlap of investors. Depending on the structure of the silo and its relationship to other interests of the silo sponsor, it is possible that regulatory concerns may vary significantly. For example, control and other regulatory issues may arise with regard to (i) the ownership structure of the bank acquisition silo, (ii) the extent of overlap between the identity of investors of the bank acquisition silo and non-bank PE Funds, (iii) the extent to which the economics of the bank acquisition silo impact the non-bank PE Funds, and (iv) the source of investor money and whether it is from new commitments or PE Fund commitments.

Bank and Trust Company, Pinehurst, Georgia, Assumes All of the Deposits of the Six Bank Subsidiaries of Security Bank Corporation, Macon, Georgia" (July 24, 2009).

[17] 12 U.S.C. § 1823(c)(4).

[18] Since the FDIC works under testable metrics, the sale restriction may be more about the ability to track the outcome. The strategic buyer blends profit from the seizure into its overall earnings, making it impossible to identify profit made solely from an acquisition. However, a PE Fund buyer which owns a single bank does not have that option.

The Commenters believe that silo transactions can be a useful means to facilitate investment by PE Funds, which can be structured to conform to the law and avoid the types of regulatory concerns noted above. But before they can attempt to comment further in a way that is responsive to the FDIC, the FDIC should consider republishing with specificity its definition of silo transactions, its views regarding the variety of silo transactions that are feasible, and the regulatory concerns that can arise with regard to each.

6. Conclusion

The Commenters believe that there is no basis to treat PE Funds differently from other investors in, or acquirers of, failed depository institutions.[19] The Proposal, if adopted, will have a significantly adverse impact on the ability and interest of PE Funds to invest in both failed depository institutions and operating depository institutions of all sizes and deprive banks of an important source of new capital at a critical time, likely resulting in greater demands on taxpayer funds. Accordingly, the Commenters urge the FDIC to moderate its approach and adopt the alternatives discussed herein.

* * *

Thank you for the opportunity to participate in the development of this important federal policy.

Sincerely,

Thomas P. Vartanian

[19] In some respects, the Proposal does not provide an adequate opportunity to provide meaningful comment to the extent that it does not define the terms that it employs.