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Via Email (LLPComments@FDIC.gov) and Courier
Mr. Robert E. Feldman
Executive Secretary
Attention: Comments
Federal Deposit Insurance Corporation
550 17th Street NW
Washington, DC 20429

Re: Legacy Loan Program – Program Description and Request for Comments

Dear Mr. Feldman:

Bank of America Corporation appreciates the opportunity to submit this comment letter to the Federal Deposit Insurance Corporation regarding its proposed Legacy Loan Program (the "LLP"), which, as a constituent portion of the Federal government's Public-Private Investment Program, is expected to improve balance sheets and thaw credit markets.

Below are our answers to many of the questions posed by the FDIC in its request for comments. This letter also raises a few additional but important issues, primarily relating to accounting and tax considerations.

a. Comments Requested by the FDIC.

QUESTION 1. *Which asset categories should be eligible for sale through the LLP? Should the program initially focus only on legacy real estate assets or should any*

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asset on bank balance sheets be eligible for sale? Are there specific portfolios where there would be more or less interest in selling through the LLP?

ANSWER: We believe that the FDIC should consider a broad universe of asset categories to be eligible for inclusion in the LLP. For example, the FDIC might consider the asset classes that are included as collateral eligible for pledging with the Federal Reserve System (other than those that are securities). These assets are familiar to both financial institutions and the government. Important opportunities may exist regarding the sale of OREO assets, residential and commercial mortgage loans, corporate loans, construction loans, and revolving credit facilities. The inclusion of these asset categories could also provide insured banks with the ability to reduce geographic and sector concentration risk.

QUESTION 2. *Should the initial investors be permitted to pledge, sell or transfer their interests in the PPIF? If so, how should the FDIC ensure that subsequent investors meet the program's criteria for investors*?

ANSWER: Yes. Free transferability of interests in the PPIF would foster market efficiency and make the program more attractive to investors. The FDIC could reasonably ensure that subsequent investors meet the program's criteria for PPIF investors by borrowing theories from Rule 144A under the Securities Exchange Act of 1934, as amended, concerning the FDIC qualified status of subsequent purchasers.

Additionally, restrictions on the ability of PPIF equity investors to pledge or exchange their equity investments may have an impact on the seller's ability to receive sale accounting treatment under current and proposed GAAP. As further discussed below in the section entitled *"Accounting Considerations",* the FDIC may wish to consult with the FASB and SEC regarding this and other accounting implications of this program.

QUESTION 5. *How can the FDIC best encourage a broad and diverse range of investment participation? How can the FDIC best structure the valuation and bidding process to motivate sellers to bring assets to the PPIF?*

ANSWER: Market clearing prices for legacy loans are going to be very dependent upon the level of leverage permitted by the FDIC and the pricing and terms of the FDIC guaranteed notes. Thus, for the program to encourage both sellers and investors, it is going to be critical the FDIC achieve the correct balance between mitigating its risks on the notes and facilitating market clearing prices.

The structure of the valuation and bidding process should follow established market standards and practices concerning documentation, data requirements, disclosure, due diligence, and other salient features. These techniques should vary depending on the product, as they do in the private market. In addition, the statistical models (including the related assumptions) used by the FDIC's third-party valuation firms should be shared with potential loan sellers, in order to ensure that they fully understand the assumptions and methodologies considered by the FDIC.

QUESTION 6. *What type of auction process facilitates the broadest investor participation? Should we require investors to bid on the entire equity stake of a PPIF, or* *should we allow investors to bid on partial stakes in a PPIF? If the latter, would a Dutch auction process or some other structure provide the best mechanism for bridging the potential gap between what investors might bid and recoverable value? If multiple investors are allowed to bid through a Dutch auction, or similar process, how should asset management control be determined*?

ANSWER: We would recommend the publication of summary disclosure of proposed transaction terms and loan characteristics along with a bid list, followed by due diligence and an auction (on an "all or none" basis), which is an established market practice that has proven successful in the past for whole loan transactions. This process, in turn, employs a bidding process to find market clearing prices for the PPIF equity. Reasonably prior to the time of committing to a purchase and sale transaction, investors and sellers should also have access to final transaction terms, including the information described in our response to your Question 9, below. Sellers need to have the option of establishing a minimum, reserve level, under which no sale will occur – this protection is important due to, among other things, potential safety and soundness concerns that may arise with insured banking organizations acting as asset sellers. Full or partial equity stakes should be accommodated, with a bias in favor of full equity stakes (which are freely transferable) going to the highest bidder, and when there are multiple private equity investors the exact terms of PPIF control and management should be left to negotiation, within certain broad limits (please refer to our answer to Question 2, above). For example, at this time it appears unclear if any LLP equity held by the U.S. Treasury will have voting rights, and if it does, how and when such voting rights might be used.

Auction process results may affect fair value considerations that we describe below in the section entitled *"Accounting Considerations"*.

QUESTION 7. *What priorities (i.e., types of assets) should the FDIC consider in deciding which pools to set for the initial PPIF auctions*?

ANSWER: Consistent with the answer to your Question 1, we would encourage the FDIC to consider making a broad universe of asset categories eligible for inclusion.

QUESTION 9. *What parameters of the note and its rate structure would be essential for a potential private capital investor to know at the time of the equity auction to provide equity*?

ANSWER: Private equity investors will need standard market information available to them at the time of the auction in order to provide the best prices for this program and its success. Investors will need to know: (1) the debt-to-equity ratio; (2) the note rate (and whether it is fixed or floating); (3) the expected and legal final maturity (and whether it is a bullet maturity, or not); (4) collateral prepayment assumptions; (5) optional termination provisions; (6) recourse provisions (including basic counterparty information); (7) covenants and other terms of the transaction documentation; and (8) the existence or option of additional debt, security interest matters, and similar disclosures.

QUESTION 10. *Would it be preferable for the selling bank to take a note from the PPIF in exchange for the pool of loans and other assets that it sells? Alternatively,* *what would be the advantages and disadvantages of structuring the program so that the PPIF issues debt publicly in order to pay cash to the selling bank? Would a public issuance of debt by the PPIF limit its flexibility compared to the issuance of a note to a selling bank?*

ANSWER: Banks selling to a PPIF under the LLP should have the latitude to receive cash consideration, an FDIC-guaranteed note, or a mix of cash and an FDIC-guaranteed note. Selling institutions participating in the LLP may want to consider on a transaction by transaction basis how the total mix of consideration best serves their objectives. The structure of the consideration received by the selling bank should be determined prior to the auction.

Many significant uncertainties remain concerning the FDIC-guaranteed notes to be issued by the PPIFs. These uncertainties include whether the notes would enjoy a 0% risk weighting; whether they would be eligible for pledging to the Federal Reserve; whether a repo funding market will develop; whether they would have bullet maturities; whether note principal would pay down with the loan pool; whether they would be exempt securities for securities law purposes; and how the interest rate would be determined. Bullet maturities would likely be more liquid and desirable to investors, and thereby may attract higher prices, which would ultimately enhance the goals of loan liquidity. However, such structures would likely require the participation, structural accommodations, and costs of liquidity providers or other enhancement providers, which may present practical difficulties. Having the PPIFs issue FDIC-guaranteed notes that experience the prepayment risks of the pools would avoid these costs, and would serve to match the duration of the PPIF's liabilities with the duration of its assets, but such instruments may be less liquid, more complex, and may trade at a discount to similar bank issuances supported by the Temporary Liquidity Guarantee Program.

An alternative the FDIC may wish to consider would permit additional PPIF leverage that is not directly supported by the FDIC – and that is not capped at a 6-to-1 ratio. This additional leverage could be provided as seller financing by the selling bank, or by another third party creditor, and would be fully subordinated to the FDIC. This could provide a market tool to enhance the participation and power of this program, and, even without direct credit support, could be overseen by the FDIC for practical and prudential purposes.

QUESTION 11. *In return for its guarantee of the debt of the PPIF, the FDIC will be paid an annual fee based on the amount of debt outstanding. Should the guarantee fee be adjusted based on the risk characteristics of the underlying pool or other criteria?*

ANSWER: No. The FDIC should implement guarantee pricing based on leverage and expected life of the debt (based on weighted average life to maturity using disclosed prepayment assumptions).

QUESTION 12. *Should the program include provisions under which the government would increase its participation in any investment returns that exceed a specified trigger level? If so, what would be the appropriate level and how should that participation be structured?*

ANSWER: No. Warrants already have been proposed. The suggested provisions could exacerbate fears that some private market participants have concerning partnering with the government, and would serve merely to reduce the prices that they would otherwise have been willing to bid.

QUESTION 13. *Should the program permit multiple selling banks to pool assets for sale? If so, what constraints should be applied to such pooling arrangements? How can the PPIF structure equitably accommodate participation by smaller institutions? Under what process could proceeds be allocated to selling banks if they pool assets*?

ANSWER: If the LLP permits multiple selling banks to pool assets for sale into a PPIF, few substantive constraints should be applied to such pooling arrangements. As long as the loans or other assets contributed into the PPIF are relatively homogenous, such a process should not be difficult. The FDIC might consider consolidating the sub-servicing function for such blended pools into one provider in cases where consolidation is consistent with market practice, such as residential mortgages.

QUESTION 15. *What should the relative role of the government and private sector be in the selection and oversight of asset managers? How can the FDIC most effectively oversee asset management to protect the government's investment, while providing flexibility for working assets in a way which promotes profitability for both public and private investors*?

ANSWER: The FDIC should use existing market conventions for loan servicing and management. The FDIC should establish reasonable guidelines for the

LLP, but should not materially amend them without industry participation and an opportunity to be heard. These standards necessarily will vary based on asset category (for example, residential mortgages, commercial mortgages, or others), and will vary based on each pool's performance. The success of the LLP would be significantly enhanced if loan servicing standards and requirements established by the FDIC, including those associated with foreclosure and loss mitigation, are consistent with the requirements imposed on the banking industry generally. In order for the program to be successful, LLP assets will need to be managed in a manner consistent with the interests of the investors. Accordingly the FDIC should adopt a duty to act in interest of all investors, defined as reasonably maximizing investment returns, rather than other considerations.

QUESTION 16. *How should on-going servicing requirements of underlying assets be sold to a PPIF and paid for? Should value be separately attributed to control of the servicing rights*?

ANSWER: Servicing requirements of loans transferred under the LLP should be based on existing market standards. In the case of residential and commercial mortgage loans, the sub-servicing fee paid to the servicer could be expressed as a servicing fee rate based upon the outstanding principal balance of the PPIF pool, paid monthly, or as a fixed dollar price per loan. Because in the ordinary course the loan seller will also be the sub-servicer, the details of this arrangement could be a stipulated portion of the transaction. In certain cases, however, there may be legitimate grounds for a PPIF not to own the servicing rights, including in cases where the selling bank does not itself own the servicing rights, and the FDIC should attempt to accommodate these situations. In addition to this, some separate value may be assigned to the mortgage servicing right inherent in the PPIF's ownership, which would need to be determined on a case-by-case basis.

QUESTION 17. *Should data used by the independent valuation consultant, as well as results of such consultant's analysis, be made available to potential bidders? Should it be made available to potential sellers prior to their decision to submit assets to bid?*

ANSWER: The collateral data used by the FDIC's independent valuation consultant, as well as the important information outlined in our answer to Question 9 above, should be made available to potential PPIF equity bidders. Such disclosure will close informational asymmetries between the valuation consultants, sellers and buyers that might cause transactional uncertainties, and thereby aid in efficient price discovery.

b. Additional Issues.

1. *Perceived Risks and Uncertainties.*

The goal of the LLP is to restore liquidity to loan assets currently on the balance sheets of banking organizations. This can be achieved by encouraging participation from a broad spectrum of investors and sellers, with sufficient transparency to produce market clearing bids. Private sector participants must also be highly confident that, once the core terms of the program are established, neither the FDIC nor other government bodies will engage in undue efforts to change the terms of the program. The financial community has witnessed punitive modifications to other government programs after they had been established, creating uncertainty and discouraging participation.

2. *Accounting Considerations.*

We believe that resolution of significant accounting questions is required before this program can succeed. Accounting literature associated with loan portfolio transfers as well as market valuation considerations are subject to significant judgmental determinations, and depend on various factors and circumstances of each unique situation. The unique nature of the LLP public/private partnership, its presumably limited duration, and the sensitivity and scale of the loan assets it could influence suggest that direct FDIC consultation with the FASB and SEC might be warranted.

For example, issues related to whether the seller would be able to achieve sale accounting given the current structures being considered, the impact on the balance sheet classification of and subsequent accounting for loans that may be sold in which the decision to sell would be dependent on pricing, and any potential ramifications related to determining fair value for such loans (*e.g.*, does the FDIC valuation create a presumption of fair value for such portfolio) should be fully considered and resolved in order to best promote the success of the LLP.

3. *Tax Matters.*

The current-law tax treatment of net operating losses ("NOLs") may have significant implications for a bank's willingness to sell assets in connection with the

LLP. Sales of accrual loans in connection with the LLP may trigger losses that, under current law, can be carried back for only two years. President Obama's FY 2010 budget includes a proposal to allow taxpayers to elect an extended NOL carryback period. If this proposal were enacted and made available to banks, it would improve substantially the tax treatment of losses attributable to LLP sales, which could greatly encourage participation in the program.

4. *Other Possible Structural Solutions.*

In addition to PPIP loan sale structures described in the original LLP summary of terms, the FDIC might choose to consider alternative structural approaches. One such approach would be for the FDIC to utilize the beneficial aspects of existing securitization techniques. The banking industry has developed private-label (non-GSE) asset securitization for the divestiture of certain assets, and there are numerous similarities that exist between the benefits provided to a seller through securitization and the benefits sought under the LLP program. The success of the LLP might be optimized by somewhat broader structural latitude, including employing the pre-existing experiences and mechanics of existing term securitization structures.

The concept of an FDIC guaranteed debt component would consist of a guarantee on the senior AAA/Aaa rated portion of the securitized capital structure. The remaining subordinated portion of the securitized capital structure, analogous to the LLP equity contribution, would consist of a co-investment between the highest bidder in the auction process and the U.S. Treasury. This alternative approach allows for: (i) the creation of fully transferable interests; (ii) the ability to provide asset sellers with full cash consideration; and (iii) the ability to leverage the existing operational processes inherent in securitizations in order to expedite the execution and ensuing beneficial impacts of the LLP's implementation. By helping to unlock the securitization market, this alternative method may be a sensible option to maximize the LLP's ability to assist banks in raising capital and securing stable funding to support lending.

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We appreciate the opportunity to comment on this important initiative. If the FDIC or its staff has any questions regarding the comments contained herein, we would be happy to address them.

Respectfully submitted,

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