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April 10, 2009

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

Attention: Comments to Legacy Loans Program

Via email to LLPComments@FDIC.gov

Dear Mr. Feldman,

Thank you for the opportunity to submit comments regarding the Legacy Loans Program. Below is a brief overview of The Situs Companies and our responses to the FDIC's request for comments.

For 25 years, The Situs Companies' has provided trusted insight into global real estate as a leader in real estate consulting and advisory services to the commercial real estate lending industry from Main Street to Wall Street. Situs is a *Rated* Primary and Special Servicer by Standard & Poor's and Fitch Ratings and is approved by Moody's Investors Service. In 2008, Situs was awarded the first FDIC contract as *Emergency Special Servicer* for the workout of troubled assets and loans from failed financial institutions. In addition, over the past several months, we have performed in-depth underwriting, financial modeling, and cash flow and credit scenario analysis of large-scale commercial real estate loan portfolios on behalf of clients that manage commercial banks, finance companies, and opportunity funds. Through our core business activities, we have first-hand knowledge of the complexities of asset resolution and value maximization for financial institutions' loan portfolios which will present both challenges and opportunities in the Legacy Loans Program.

Situs provides advisory, due diligence, and business process solutions to the commercial real estate industry in the following areas:

- Consulting and Advisory Services
- Real Estate Due Diligence, Loan Underwriting and Accounting Diligence
- Asset Management and Disposition Services
- Primary Servicing, Special Loan Servicing, and Asset Workout/Resolution
- On-Shore Outsourcing Solutions and Dedicated Support Teams for US CRE Investors
- Commercial Real Estate Education and Credit Underwriting Training– *Situs University*
- Technology solutions for market research, underwriting and valuation including:

  - *Situs INSIGHT* - a CRE market information management e-Library system;
  - *CLOSER* - a loan and property data management and diligence system; and
  - *SNAPWIRE* - a valuation report platform.

Responses to the FDIC's Request for Comments on the Legacy Loans Program (LLP)

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 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?

   In the interest of maximizing recovery for the investors and taxpayers, we recommend that the LLP initially target commercial real estate senior whole loans in order to ease investor diligence requirements and maximize the probability of broadly accepted transactions in the early stages of the program development. Overtime, as the market for PPIFs develops, more complex assets, including junior positions and partial interests in loans should be included so as to most directly address the challenging assets that disproportionately create stress within banks.

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?

   Investors should be permitted to pledge, sell or transfer interests in the PPIF in order to accommodate a broad base of investors with differing investment horizons, risk tolerance levels and liquidity needs that may vary overtime. The FDIC could help ensure that investors understand the risks associated with PPIF investments and that such investments are suitable by using well developed standards in the securities markets.

3. What is the appropriate percentage of government equity participation which will maximize returns for taxpayers while assuring integrity in the pricing by private investors? How would a higher investment percentage on the part of the government impact private investment in PPIFs? Should the amount of the government's investment depend on the type of portfolio?

   One of the goals of the PPIP is to have taxpayers share in the investment up-side along private investors. In this light, a 50/50 split seems fair and balanced. Other possible splits do not intuitively relate to the particular attributes of a portfolio. In addition, fund leverage that is made available through FDIC guarantees, combined with a government co-investment, provides substantial buying power and thereby, helps relatively small investors participate in a meaningful way.

4. Is there any reason that investors' identities should not be made publicly available?

   Concern for confidentiality among the investor group could impact the participation of some investors. Disclosure and reporting requirements for the PPIF would have to be clarified in order to determine if investors would object to making the list of investor participants publicly available. The public disclosure of lead investors could be the FDIC requirement, without a requirement for the look through to the passive equity investors.

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?

   The broadest investor base will be attracted to PPIFs if high quality diligence information is made available to bidders. High quality information, including dynamic underwriting models for underlying properties, will increase transparency and reduce cost as a barrier for qualified bidders to participate. The FDIC should also consider making basic representations and warranties, particularly with respect to certain legal aspects of assets to further reduce bidder diligence costs and/or reduce the risk premium demand by investors to cover risks that are not practicable to diligence.

   Based on Situs' experience as diligence and underwriter for both sellers and buyers of real estate properties and investments on a global basis, one of the primary impediments to transactions is the lack of sufficient and consistently-presented collateral and loan information which can be used as the basis for estimating a supportable cash flow stream and valuation. Banks as sellers are often confronted with a lack of information on their loan positions, which without a thorough diligence process and documentation of assets could result in unnecessarily lower investor bids due to insufficient data to determine the value of the asset pools. Alternately, thorough documentation and easily-accessed asset data generally facilitates the investor diligence and results in broader investor participation in the bidding as well as higher and informed bids.

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?

   The auction process would facilitate investor interest by pooling homogenous assets which could be analyzed and underwritten in a straight-forward manner.

   The sale of assets on the *servicing-released* basis is a critical factor to the investor bids and to the maximization of value for the PPIF. The successful investor should be the determiner of asset management for the PPIF, within the guidelines of servicers and special servicers which could be pre-qualified for work on the PPIFs. The commercial real estate industry has an established and recognized process of qualifying and rating loan servicers and special servicers, which could form the basis for pre-qualifying firms for the asset management of PPIFs.

   In order to ensure consistent, comprehensive, and sustainable monitoring and recovery of the pool investments, the transfer of asset management and loan servicing for the PPIFs should be transferred upon sale to a rated loan servicer and rated special servicers, which could be pre-qualified by the FDIC, with the final selection at the discretion of the successful investor for the PPIF.

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

   Ultimately, the selling bank and their advisor should have the unfettered ability to determine the optimal asset portfolios based on market conditions at the time. The FDIC would increase investor interest by pooling homogenous assets which could be analyzed and underwritten efficiently. Common portfolio traits may include geographic concentrations, similar property types, loan structures, as well as cash flow and recovery horizons. Highly diverse pools may prevent certain investor's participation because portions of larger assets pools, such as loans back by undeveloped land, do not meet certain investment criteria.

8. What are the optimal size and characteristics of a pool for a PPIF?

   The optimal size and characteristics of a pool for a PPIF will likely be determined by the bank portfolios which meet the loan type and documentation characteristics required by the FDIC. Pools of assets should be of sufficient size to justify PPIF structuring and attract investors to a new investment arena. Depending upon the availability of bank assets for pooling, the more homogeneous loan and asset types which could be pooled will potentially streamline the investment decision making process for bidders. Large pools of legacy assets would be most efficiently transacted when thorough data management and document review has been performed and can be made available to the investors in advance of the bidding process.

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?

   At the time of the equity auction, it would be essential for potential private capital investors to be fully aware of all terms of the note and its rate structure in order for the FDIC to receive informed and consistent bids. Such parameters would include leverage level, interest rate structure, loan term, recourse provisions, prepayment parameters and other typical financing terms along with government participation fees and terms. Standard Note forms and security documents should be provided at the same time as the auction materials.

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?

    As currently planned, the PPIF will issue debt that is guaranteed by the FDIC and collateralized by the PPIF assets. Participant banks, as planned, would be the re-seller of the debt into the market, as required for bank liquidity. The FDIC would charge a debt guarantee, a portion of which would be allocated to the Deposit Insurance Fund.

Although the selling bank taking a note from PPIFs may be planned for transaction simplicity, we recommend that PPIFs issue debt publicly in order to pay cash to the selling bank and to avoid potential conflicts and accounting complications (seller financing/true sale issues). Debt structures may evolve which could support PPIF structuring and investment process, and provide market feedback on the debt issued. Issuance of debt publicly should further open the structured finance market over time. The selling bank will benefit from immediate liquidity.

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?

In return for its guarantee of the debt of the PPIF, an annual fee paid to the FDIC by the PPIF should be based on the amount of debt outstanding as well as the risk characteristics of the underlying pool which may include a variety of factors which would be pool specific. Risk factors may include expected losses, geographic exposures, maturity profiles, borrower and property type concentrations, among other factors.

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?

The program terms as stated include provisions under which the government and private investors would benefit from investment returns on a *pro rata* basis, based on the respective equity interests. Capping returns to private investors will reduce investor interest and lower prices they are willing to pay for assets.

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 would proceeds be allocated to selling banks if they pool assets?

The program should permit multiple selling banks to pool assets for sale. This could facilitate broader bank participation and limit adverse selection on the basis of institution size and geographic location. The FDIC would determine the initial loans to be targeted by PPIFs and could assist in the pooling of loans, upon review of the eligible assets and completing the diligence and valuation of assets from each institution. Proceeds would be allocated to the selling banks according to the FDIC valuation and final bids from private capital investors. Participant banks which pooled assets would have to agree on a process for accepting or rejecting of the bid after auction.

14. What are the potential conflicts which could arise among LLP participants? What structural arrangements and safeguards should the FDIC put into place to address or mitigate those concerns?

    Potential conflicts which could arise among participants include control and liquidity issues. One major concern to be addressed is the FDIC oversight and how this oversight may impact investor's ability to make intelligent and appropriate decisions regarding restructuring and resolution of positions in order to maximize value in a timely manner. Structural arrangement should be developed in the PPIF term sheet to address and mitigate these issues, by determining the decision making and governance responsibilities of the program participants. The use of commercial real estate industry standard participation agreements which address conflicts and resolution should be adopted.

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?

    The role of the government is to ensure that the PPIFs are established, funded and operated under the criteria established by the FDIC and that information is distributed and collected from all PPIFs in a consistent manner. The government will set the standards for data and reporting from PPIFs, and oversee the performance of the funds. The role of the private sector is to participate in establishing a market-based valuation of pooled assets and market-based investment process, as well as to seek the highest returns based on experienced investment decision making, asset management and resolution strategies.

    The FDIC can effectively oversee asset management to protect the government's investment by defining clear and consistent reporting on PPIF performance from each fund. The asset management and loan servicing should be controlled by the PPIF lead investor, who would determine the selection of the most qualified providers. Governance of the asset management and loan servicing should be the responsibility of the lead investor in order to promote competition and market-based oversight of performance in asset management and resolution to achieve the highest returns to the PPIF.

    The FDIC could pre-qualify *Rated* loan servicers and special servicers as potential vendors to the PPIFs. Since the government is taking a loss position, we recommend that only *Rated* loan servicers, which are rated and annually evaluated by recognized rating agencies such as Standard and Poor's, Fitch Ratings, and Moody's Investors Service, be permitted to service PPIF assets. These recognized rating agencies are the industry's established groups which ensure that servicers adhere to specific management and operational standards with annual review, audit and publishing of findings to the industry. Similar to the practice of Fannie Mae, the FDIC could independently review and approve *Rated* loan servicers and special servicers to serve as potential vendors to the program.

Additionally, the FDIC oversight of decisions and recommendations could be accomplished through the retention of PPIF oversight managers. These PPIF oversight managers could have similar qualifications as the special servicers and be responsible for oversight on behalf of the FDIC.

Loan servicers and special servicers should be *Rated* by a minimum of two recognized rating agencies. Loan servicers should have a demonstrated ability to provide servicing for varied types and sizes of loans, and a full range of loan servicing requirements including cash processing and cash management, tax and insurance administration, escrow analysis, investor reporting, UCC administration, reserve and draw management, site inspections, asset summary reviews and portfolio management reporting. Special servicers should have a demonstrated ability to successfully implementing strategic action plans that maximize the recovery in complex transactions involving modification, foreclosure, bankruptcy, litigation, and borrower fraud. Special servicers should provide delinquency management, asset management of defaulted loans, and management and sale of foreclosed assets. Experience with complex transactions across historical real estate cycles should be evaluated by the FDIC in order to pre-qualify servicers as potential vendors to PPIFs.

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?

On-going servicing requirements of underlying assets should be estimated as part of the diligence and bid preparation process by investors. PPIF terms should include the solicitation of bids on a *servicing released* basis; as opposed to a *servicing retained* basis in which the selling bank continues to service the assets. The control over the special servicing and asset management of the portfolios is integrally related to the ultimate success of the venture and would need to be controlled by the PPIF lead investor. The FDIC would have approval of the servicer and special servicer, and could also approve any transfer of servicing. PPIF lead investors should control the decision making with regard to the on-going servicing and special servicing of underlying assets, with monitoring by an FDIC oversight vendor/manager.

Investors typically price the value of the servicing rights based on the data supplied in connection with the loan pool, and this valuation is a component of the investor bid on the pool of assets. Servicing requirements and pricing may vary depending on the asset characteristics and loan structures within the pool, and as such, the lead investor should analyze the extent of loan servicing and special servicing required. Additional monitoring and reporting may be required for the PPIF structures which may require market-based collaboration and should encompass competitive bidding from rated servicers. In order to ensure adequate investor control and monitoring of investments in the pool, we strongly recommend that the PPIF terms should on a *servicing released* basis.

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?

    The data used by the independent valuation consultant should be made available and would be valuable to potential bidders in their pre-bidding diligence process. Data may include loan and asset data and documentation, as well as all data collected by the consultant in the diligence and valuation process. However, the results of the independent valuation consultant's analysis should not be made available to potential bidders. Publishing the independent valuation consultant's conclusions would circumvent the bidders' diligence process and thwart the intended process of receiving informed, independent, market-based bids for the asset pools from potential investors.

    The independent valuation consultant's analysis and conclusions should be used by the FDIC to evaluate the potential for pooling of assets from multiple selling banks. The conclusions should not be made available to selling banks prior to their decision to submit assets to bid, since the bid process would be the determinate of the market-based transaction value for the pool and ultimately allow the selling banks the discretion to accept or reject the winning bid.

We appreciate the opportunity to respond to the FDIC as the Legacy Loans Program evolves. The efforts of the FDIC and the US Treasury to return liquidity to the financial institutions and to structure a market-based program in which investor and taxpayer interests are aligned is commendable. We look forward to further supporting the FDIC's process of establishing the Legacy Loans Program.

Sincerely,

Steven J. Powel
Principal
Chief Operating Officer

Situs