April 10, 2009

<u>VIA Electronic Mail</u>

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

Dear Mr. Feldman:

In response to FDIC's March 26, 2009 solicitation and the specific questions FDIC has raised regarding details of the proposed Legacy Loans Program, the undersigned parties submit the following comments.

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*?

Initial focus should be on real estate loans, but other types of loans should be considered if it would advance the policy objectives of the FDIC.

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*?

We believe allowing investors to sell their interests in PPIFs will enhance liquidity and make the LLP more attractive for investors. In order to protect the interests of the government, transfers of direct interests in a PPIF should be limited to only those people who meet certain eligibility criteria. Subject to those eligibility requirements, the direct or indirect interests of investors in PPIFs should be freely transferable by sale, pledge or otherwise.

Eligibility requirements and requirements regarding proof of eligibility must be carefully articulated, however, in order to avoid discouraging participation in the LLP. An investor should be prohibited from participating in the LLP only if the investor's participation would implicate overriding government concerns, such as OFAC compliance. The concept of affiliated individuals and entities should be sufficiently limited so as not to exclude an individual solely because that individual was previously employed by or affiliated with a prohibited investor, unless there is a substantial connection between the individual and the prohibited investor's prior conduct.

Potential private investors include a wide array of foreign sources of capital, and LLP regulations should expressly state that foreign investors may participate in PPIFs, subject only to these eligibility requirements.

Another component of broad participation in the LLP would be support for the policy stated in the LLP terms and conditions that FDIC and Treasury will encourage participation by minority-owned and women-owned firms. We suggest that FDIC and Treasury make efforts to publicize the offering of assets through the LLP, as well as the procedures for pre-qualification of eligible investors in PPIFs, in a manner that promotes this goal.

Requirements regarding proof of eligibility should not unnecessarily burden passive investors or interfere with their privacy. Substantiation requirements should be limited to a covenant, disclosure or representation, made by the private investment entity holding a direct ownership interest in the PPIF, as to the eligibility of its upstream participants. In order not to be unreasonably burdensome, this disclosure requirement should be limited to investors holding a substantial portion of the PPIF's interests.

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*?

Greater government investment will discourage private investment. The government's percentage should be in a range which provides reasonable upside for taxpayers and reasonable incentive for private investors and which justifies a passive decision-making role for the government. This would suggest government equity participation in the range of 20% - 40%. In any event, prior to bidding, the equity percentage of the government should be disclosed to bidders.

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

Yes, but depending on how high up in the ownership chain the disclosure obligation runs, a requirement that all indirect investors disclose their identities, and the administrative burdens that would attend such a requirement, would unnecessarily discourage a large array of potential participants. A disclosure requirement should reflect the fact that the government's interest in identifying participants in the LLP (subject to the eligibility requirements mentioned above) does not extend to investors who do not hold a controlling interest in PPIF participants or their upstream affiliates. For this purpose control should be defined not with reference to any percentage of ownership or economic interest, but with reference to control over the relevant entity. If the investor is an investment fund itself, then disclosure should be limited to the identity of that investment fund. In other cases disclosure should be limited to the identity of the person who controls the PPIF.

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*?

See response to Question 6 below.

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 must strike a balance between selling banks' interest in being sure that their loan portfolios will sell at a desirable price and minimizing the costs and administrative burdens to private bidders of conducting due diligence. The FDIC should subcontract the auction process to private firms with experience in underwriting, valuing and sourcing loans, as well as the auction process. One reasonable way of satisfying the sellers' interest in receiving a fair price for their assets is for the seller to set a strike price for each loan pool. The FDIC should assess the reasonableness of the proposed strike price and such strike price should be disclosed to bidders at the outset of the auction. The auction process would consist of one round of bidding in which each participant's bid is firm. If the highest definitive bid for that pool is not at or above the strike price, the selling bank would be free to reject the bid, but if the highest definitive bid for that pool is at or above the strike price, the bank would be obligated to sell.

Private investors should not be permitted to bid on less than all of the private equity component of a PPIF.

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

See response to question 8 below.

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

Loan pools should be established in a range of various sizes to promote the participation of a broad array of investors. While the LLP would function most efficiently through sales of large pools involving substantial equity investments, investor participation and participation by selling banks will both be skewed if the LLP focuses only on large, highly geographically-diverse portfolios of loans. Ideally the LLP should employ the capital of a variety of investors. In order to attract those investors a variety of asset types and sizes should be offered, as investors who have more limited debt and equity capacity, or who have narrower asset requirements (in terms of geography or otherwise) may not be able to participate in the larger, more diverse pools. To attract investors that specialize in certain asset types, the LLP should include some pools that are highly segmented (such as pools of all-hotel loans or pools of all-office loans) as well as some pools that are focused on specific geographic areas.

The purchase price for loan pools sold through the LLP, and the speed of transactions, will be enhanced, regardless of their sizes or other characteristics, if selling banks make reasonable representations and warranties regarding the loans comprising those pools. For that reason, and to promote efficient price discovery, FDIC should develop a standard set of representations and warranties that all selling banks will be required to make with respect to assets sold through the LLP. Each selling bank would explicitly make any necessary exceptions to those standard representations and warranties in its transaction-specific documentation with a particular PPIF, and the representations and warranties (along with any relevant exceptions) would be disclosed to participants prior to bidding on loan pool. Those representations and warranties should be backed by the selling bank's or any of its parent's agreement to repurchase or revalue all or a portion of the loan pool in the event of a material breach by the selling bank. Any entity with a repurchase obligation should be creditworthy.

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*?

Interest rate, principal amount, maturity date, amortization and repayment terms. In addition, we suggest that a standard form loan agreement be developed so bidders know the requirements of the loan documents.

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*?

Whatever structure is utilized, the material terms of the financing must be disclosed prior to the bidding process.

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*?

Yes, the amount of the fee should be established on a risk-based analysis and disclosed prior to the bidding process.

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*?

Increased participation in returns by Treasury would likely discourage participation by private investors. Note that increased profit realization by Treasury, given Treasury's role in the PPIF, would be the converse of a typical commercial joint venture in which the manager or sponsor, not the passive equity participant, receives an increased share of profits as a reward for successfully managing the entity's 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*?

Allowing banks to pool loans might allow smaller banks that would not otherwise be able to participate in the LLP, or larger banks who do not initially wish to commit large bundles of assets to the LLP, to group assets together. Allowing banks to sell collectively would amplify the need for certainty at the outset regarding certain aspects of the LLP mentioned elsewhere in these comments, including (a) the right of the PPIF to select a servicer (see response to Question 16 below); (b) the nature of, and liability for, reps and warranties that selling banks would be required to make with respect to loans they sell through the LLP (see response to Question 8 above); and (c) the terms of loan documents between the PPIF and the selling banks, if the selling banks provide financing to the PPIF (see response to Question 14 below).

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*?

No comment.

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*?

Private investors in PPIFs must have the ability to select their own asset managers. The FDIC should implement a clearly-defined and objective set of qualifications for asset managers. The FDIC should implement specific reporting requirements for asset managers in advance, and those reporting requirements should be commercially reasonable and consistent (in terms of scope and frequency) with the kind of information reported on. An investor will then be able to determine efficiently whether it or a third party manager of its choosing meets those criteria. Asset managers should be subject to removal, if at all, only under narrowly-defined circumstances, such as fraud.

Treasury and FDIC should not have approval rights over asset-level or servicing decisions, and PPIFs should not be subject to any asset-management or servicing restrictions under the LLP. Such approval rights and restrictions are not necessary since the interests of the government as an equity investor and the private PPIF participant will be completely aligned.

Guidance on the LLP has thus far indicated that executive compensation limits will not apply to “passive” investors. Such limitations will have a very serious chilling effect on willingness to participate in the LLP. FDIC and Treasury must determine and make explicit in implementing the LLP that executive compensation limits will not apply to <u>any</u> participants in the LLP, including asset managers and other participants who may not be characterized as passive. As a policy matter, the LLP is different from programs which disburse bailout funds to eligible recipients, because private investors in PPIFs will be committing large sums of their own capital, as well as substantial time and other resources, to the success of the PPIF.

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*?

Private investors should determine how the loan pools will be serviced, and would incorporate those terms (including whether to retain the existing servicer or whether to retain a new servicer) in their bids. FDIC should determine qualification requirements for loan servicers selected by private investors, for the same reasons discussed under (15) above regarding selection of asset managers.

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*?

Investors will likely not rely on FDIC's diligence in valuing a pool, but there does not seem to be a compelling reason not to make the information available, and investors may find some use in the underlying due diligence FDIC and its contractors conducted in determining the leverage ratio for the pools.

18. *Additional comments*.

FDIC and Treasury should determine, with public participation and comment, a standard form of PPIF operating agreement and a pre-approved set of loan documents for use with third-party lenders to the PPIF. Those documents should be established in advance of private bids for participation in the PPIF, so that investors are aware of the specific terms of their relationship with Treasury and the terms of financing FDIC is willing to guaranty. Material terms of the PPIF operating agreement would include any decisionmaking or approval rights Treasury would have regarding asset management or other matters, any limitations on servicing and special servicing, the flow of funds and other matters typically addressed in a joint venture agreement.

Sincerely,

Blumberg Capital Partners, LLC
Carlton Strategic Ventures, LLC
CNL Private Equity Group
Providence Asset Management, LLC
Trimark Corporation