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April 10, 2009

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

**RE: FDIC REQUEST FOR COMMENTS TO THE LEGACY LOANS PROGRAM**

Dear Mr. Feldman,

This letter responds to the request for comments (**"Request"**) of the Federal Deposit Insurance Corporation ("**FDIC**") dated March 31, 2009, on all aspects of the proposed Legacy Loans Program ("**LLP**"). The Request sets forth particular questions for the consideration of interested parties. Set forth below certain of the questions in the Request (identified by number) are certain considerations which we believe may be helpful.

**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?**

There are many categories of legacy loans held by insured depository institutions as to which secondary market liquidity has declined markedly and which, accordingly, might be appropriate candidates for the LLP. The illiquidity of such asset classes compromise the availability of observable inputs (such as quoted prices in active markets) of the fair value of such assets and have in many cases resulted in write-downs that have adversely affected the capital positions of the affected depository institutions.

Moreover, the availability of a broader range of asset classes might be expected to attract stronger investor participation. On the other hand, some classes of assets may introduce structural and credit complexities that could complicate administration of the LLP.

Assets which, due to size and some degree of fungibility, are readily susceptible to pooling and underwriting on a pooled basis may present fewer challenges to the administration of the LLP. Such assets include residential mortgage loans and, to a lesser extent, commercial real estate mortgage loans. Inclusion of commercial and industrial (**"C&I"**) loans would certainly broaden interest in the LLP and enhance the market for C&I loans in a way that would facilitate the restoration of lending; however, loan size and underwriting complexity (complicated, in the case of borrowers with public securities, by potential inequities between public and private side investors) might constitute an obstacle to transparent and efficient auctions, particularly in the case of syndicated C&I loans. Large tranches of syndicated C&I loans might also result in the related PPIF being less diversified and potentially more volatile from a performance perspective. While it is possible that the inclusion of sufficiently diversified pools of C&I loans to small to medium-sized businesses might be consistent with the LLP from an operational perspective, because there has not been a well-established secondary market for such loans, it is unclear that including them in the LLP would be a significant factor in unlocking related credit markets.

**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?**

The FDIC has suggested that, in its view, an interest in a PPIF should be viewed as a buy and hold investment, a view that leads it to contemplate affirmative restrictions on pledge, sale or transfer of interests in PPIFs. However, arbitrary or burdensome restrictions on the pledge, sale or transfer of PPIF interests that are not reasonably transparent to prospective investors may inhibit participation in the LLP. Such restrictions would particularly inhibit participation by investors -- such as mutual funds, employee benefit plans, certain hedge funds and common investment trusts -- that have only limited scope for restricting redemptions and other withdrawals, with the result that managers must carefully manage liquidity.

Affirmative restrictions on sale, transfer or pledge may not, in any case, be necessary to ensure that most investors acquire such PPIF interests pursuant to a buy and hold strategy. For purely legal reasons, investors in private funds – including transferees – are required to satisfy a variety of different criteria. Often, they must be "qualified purchasers" within the meaning of Section 2(a)(51) of the Investment Company Act of 1940 (**"Investment Company Act"**) or not be persons whose investment in the PPIF would result in the assets of the PPIF being deemed "plan assets" for purposes of 29 CFR § 2510.3-101. To the extent that the FDIC or Treasury adopt objective criteria for eligibility, such criteria could be made conditions to eligibility for transfer and enforceable by Treasury, as a member of the PPIF. Moreover, due to restrictions under the Investment Company Act and the Securities Act of 1933 (**"Securities Act"**), we expect that interests in such private funds would be sold in private sales. As a consequence of these restrictions and the inability to sell interests using general advertising, investors in private funds recognize that secondary sales often entail significant liquidity haircuts that make such transfers inadvisable, except when absolutely necessary. Secondary sales of interests in private funds remain relatively rare, although the frequency of such sales have grown with the increase of investors experiencing severe illiquidity incident to the financial crisis.

For these reasons, formal restrictions on transfer, sale or pledge, other than those of the nature described above, are probably not necessary to the achievement of the objectives of the FDIC and Treasury to ensure that most investors "buy and hold" their interests in PPIFs. To the extent that the FDIC and Treasury desire to facilitate secondary market transactions in PPIF interests to attract investors -- including mutual funds, common investment trusts and employee benefit plans -- compelled to maintain ample liquidity, the FDIC and Treasury may wish to explore ways to mitigate the impact of existing legal inhibitions on transfer.

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

This question correctly anticipates likely trepidation among prospective investors over the possibility of public disclosure of participation in the LLP. Such trepidation is likely amplified by well-justified fear of political or popular attacks on LLP participants. At the same time, transparency requires that appropriate information about the LLP, PPIFs and participants be made publicly available. It is difficult to conceive of circumstances in which public disclosure of information identifying passive investors would ever be appropriate. A case could be made for the disclosure of the identity of investment managers who manage or investors who control a PPIF. In most cases, given the significant economic interest of Treasury, in the absence of express rights of management or the actual power to remove or replace the manager, we would expect that a private non-manager investor would be deemed to be a passive investor.

We recognize that there may be arguments for the public disclosure of the identity of investment managers or investors who control a PPIF and perhaps (i) the character of the assets acquired by the PPIF, (ii) the institution from which such assets were acquired, (iii) the price at which such assets were acquired, (iv) at any time, the amount of the investment or credit exposure of Treasury and the FDIC, and (v) at termination, the aggregate returns (losses) realized by Treasury and the FDIC. There is probably no, or at least a much weaker, argument for public disclosure of commercial information concerning the ongoing management of a PPIF or the strategies of the manager.

**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 should be tailored to the category of legacy loan assets. To the extent that an investor (or investor group) is permitted to bid to acquire only a portion of the private investor equity in a PPIF, the FDIC's question correctly anticipates some of the potential complications. The question asks how asset management control should be determined, reflecting the recognition that it may be difficult to obtain meaningful partial bids from investors, unless asset management responsibility is awarded and disclosed before the partial bid. Given the complexity of such arrangements, it may make more sense for the FDIC to facilitate in a neutral way the ability of interested prospective investors to identify and to affiliate with groups that are in a position to submit bids for all of the private equity in a PPIF.

Small prospective investors might also be able to participate in PPIFs if the FDIC were to refrain from imposing restrictions on sales, transfers or pledges. In such cases, it might be possible for successful bidding groups to admit additional members after having successfully completed an auction process.

**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?**

The issuance of debt in a public offering could face obstacles under the Securities Act, the Trust Indenture Act of 1939 and the Investment Company Act. In the Securities and Exchange Commission (**"SEC"**) No-Action Letter dated November 24, 2008 (Debt

Guarantee Program component of the Temporary Liquidity Guarantee Program of the Federal Deposit Insurance Corporation, Incoming letter dated November 24, 2008), the SEC acknowledged that notes fully and unconditionally guaranteed by the FDIC under the Debt Guarantee Program component of the Temporary Liquidity Guarantee Program would be exempt from registration under Section 5 of the Securities Act because the notes would be exempt securities under Section 3(a)(2) of the Securities Act. Presumably, the provisions of the Trust Indenture Act (**"TIA"**) would also not apply. *See* Section 304(a)(4)(A) of the TIA. It would be helpful to the perfection of the exemptions if the FDIC were to (a) confirm by regulation that its guarantee is backed by the "full faith and credit" of the United States, (b) explicitly and unconditionally guarantee the timely payment of principal and interest when due on the obligations of a PPIF, and (c) obtain from the SEC, by no-action relief or otherwise, satisfactory confirmation that notes of a PPIF guaranteed by the FDIC are exempt from registration under the Securities Act and exempt from the provisions of the TIA.

The FDIC may wish to consider seeking exemptive relief from the SEC to the effect that a PPIF would not be obligated to register as an investment company under Section 8 of the Investment Company Act as a result of the public distribution of FDIC guaranteed debt of the PPIF. Moreover, to the extent that it is contemplated that registered investment companies will participate as investors, it may be desirable to seek exemptive relief from the SEC with respect to the provisions of Section 12(d)(1)(A)(i) of the Investment Company Act which would impose quantitative limits on investments by "investment companies" in companies deemed to be "investment companies." *See also* Section 3(c)(1) and 3(c)(7) of the Investment Company Act (deeming certain private funds to be "investment companies" for purposes of Section 12(d)(1)(A)(i) and (B)(i)).

The FDIC has proposed that the duration and payment terms of debt would in some manner be adjusted to reflect the cash flow terms of the underlying assets. In order to better facilitate the creation of robust trading markets in FDIC guaranteed debt -- a feature that would reduce discounts implicit in its issuance -- we suggest that the FDIC take steps to ensure that FDIC guaranteed debt issued by a PPIF has payment dates and maturity dates aligned insofar as is possible to permit it to be traded as a nearly fungible instrument. Whether originally issued to the selling bank or to the public, such alignment will tend to maximize its value and help maximize the likelihood that it will be deemed readily marketable for purposes of 12 CFR Part 1 and for other purposes.

It is contemplated that private investors would, through identified investment managers, manage asset pools and the timing of dispositions. The FDIC should clearly identify the extent to which prepayments with respect to partial dispositions would be required and the terms of any make-wholes that would be required in connection with any partial or full prepayment.

Subject to these considerations and realization of best price, private investors should be encouraged to determine (in cooperation with the FDIC and Treasury) in each case, which capital structure affords them access to the best pricing taking into account the terms of the FDIC guaranteed notes.

**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?**

The FDIC has suggested that auctions for the legacy loan assets should be limited to the legacy loan assets themselves and the responsibility for any required servicing be determined separately and not have any impact on the valuation or pricing of the assets themselves. This issue is probably most critical in respect of residential mortgage loans, in which servicing requires specialized skills and scale, in addition to participation in the Home Affordable Modification Program of Treasury. (in the case of eligible residential mortgages)

It is contemplated that PPIFs will have asset managers for asset management, and servicing within parameters established by the FDIC and Treasury. Particularly in the case of hard-to-service assets such as residential mortgage loans, we assume that the FDIC and Treasury will establish minimum standards of servicing. Subject to such standards, it is clearly intended that PPIFs will have the discretion to select and direct servicers. For that reason, it would provide greater consistency if all bids were required to be submitted on a "servicing released" basis. If requested by one or more bidders, we propose that it might make sense to permit the selling depository institution to submit an offer of terms for servicing the subject assets.

**CLOSING.**

We thank the FDIC for the opportunity to submit this comment letter. We would be happy to discuss with you any of the comments or alternative proposals described above or any other matters that would be helpful in adopting final rules and regulations of the LLP. Please do not hesitate to contact Doron Lipshitz in New York (212-326-2220) or Bill Satchell in Washington D.C. (202-383-5342) if you have any questions concerning these comments.

Respectfully submitted,

Bill Satchell

O'Melveny & Myers LLP