CARRINGTON COLEMAN

April 10, 2009

Robert E. Feldman (*Via E-mail*)
Executive Secretary
Attention: Comments, Federal Deposit Insurance Corporation
550 17th Street, NW.
Washington, DC 20429

Re: Legacy Loan Program Comments

Dear Sir or Madam:

We include the following questions and comments concerning the Legacy Loan Program Fact Sheet and Summary of Terms:

FACT SHEET		
p. 2		
Three Basic Principles		
• ***Shared Risk and Profits with Private Sector Participants:***	• Additional information is needed as to how the "private sector investors" stand to "lose their entire investment in a downside scenario" while the taxpayer shares in "profitable returns." • The materials provide no guidance as to how, when or to what extent the PPIF can, during the course of liquidating the acquired asset, pay out dividends to its own participants and investors (whether or not the UST equity component is still outstanding). Assurances and clarification must be given in this regard; otherwise the PPIF's capacity to raise its own initial capital will be greatly diminished.	1
p. 3		
The Legacy Loan Program		
• ***Involving Private Investors to Set Prices***	• What are the precise requirements and criteria for forming a "Public-Private Investment Fund"? • Can funds formed only privately (i.e., those declining FDIC guarantees or "taxpayer" participation") also compete to acquire Legacy Loan Program assets or is the process closed so that only to those funds accepting these guarantees and equity investments can be "Public-Private Investment" funds and hence	2

<table>
<tr><td></td><td>participate in the auctions?
Privately formed funds, i.e., those funds willing to forego both the proposed UST 50% equity and FDIC guarantees, should also be allowed to compete in the auctions of legacy assets. If the intent is to foreclose these non-PPIF's from participating in the auctions, the result will tend to diminish, rather than maximize, the competitive nature of the auctions. In such instance, the auctions will in fact not be open but rather closed auctions, substantially more susceptible to fraud, abuse, corruption and favoritism.</td><td></td></tr>
<tr><td>Using FDIC Expertise to Provide Oversight.</td><td>Substantial disclosure will be required both as to the nature and extent of FDIC's purported expertise, the means by which this expertise will be applied, and the nature and extent of oversight FDIC will exercise. In the absence of significant comfort in these areas, private investors may be loathe to become involved in the Program in the first place.</td><td>3</td></tr>
<tr><td>Joint Financing from Treasury, Private Capital and FDIC:</td><td>Precise specification of the nature of Treasury's (UST's) investment will be required if private equity is to be attracted to these investments. Without limitation:
What form of equity will or may this be – limited partnership interests, limited or non-managing membership interests in LLCs, preferred stock, etc.? It is noted somewhere that the interest will be non-managing, but additional guidance is required.
What dividend rights will attach to Treasury's equity, i.e., timing, seniority, fixed rate or amount versus profit based, mandatory or discretionary, etc., cumulative or non-cumulative?
Particularly, what rights, if any, will the private investor have to force redemption of Treasury's equity, at what time points in the investment, and on what terms? If the private investor cannot economically buy out the Treasury equity at some point(s) in the process of a successful investment (i.e., to "privatize" the venture), the overall investment opportunity is substantially less appealing from the outset.</td><td>4</td></tr>
<tr><td>" " "</td><td>In that same section, private investors are almost certain to require a thorough statement of the scope and parameters of the "rigorous oversight" to be exercised by the FDIC, including:
To what extent will the FDIC be involved in day to day governance of the funds as formed after the legacy assets are acquired – keeping involvement by the FDIC to a defined,</td><td>5</td></tr>
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	necessary minimum will be essential if any private investors are to find this Program attractive. o In working out, liquidating, or compromising legacy assets, or in participating in bankruptcy or receivership proceedings, will FDIC approvals be required and, if so, for what level of materiality, i.e., resetting, waiving, or dispensing with certain covenants, resetting payment dates, deferring interest, forgiving interest, forgiving principal, releasing or compromising third-party guarantees of legacy loans, voting for or against plans of reorganization or arrangement, merging or partially dissolving legacy loan makers, etc.? Clarification here is also essential to any hope of attracting private investors. o If and to the extent FDIC approvals (above) are required, what procedures will be required for soliciting and obtaining such consents? o If and to the extent FDIC approvals (above) are required, will FDIC be required to respond within a stated time period or else be deemed to accept the proposals? (Absent a procedure of this nature, any required FDIC approvals may pose an insurmountable and unacceptable roadblock to investment in the first place.) o If and to the extent FDIC approvals (above) are required, what penalty, if any, will ensue if the private investor managing the fund nonetheless takes the action without or while awaiting FDIC consents? (Uncertainty in this area may also substantially diminish interest in participation, particularly if any such penalties are disproportionate to the measures taken.)	
• ***Joint Financing from Treasury, Private Capital and FDIC***	See comments above.	6
• ***The Process for Purchasing Assets Through the Legacy Loan Program***		
o *Banks Identify the Assets They Wish to Sell*	Will there be any requirements of uniformity or make up of the pools of loans identified by the banks? Will this procedure effectively freeze out smaller or more	7

	locally based banks whose legacy loan inventory largely consists of types or sizes of loans not typically found in loan pools?	
" " "	If the FDIC fixes an upper limit to its guarantee on a particular asset or pool prior to the auction, presumably potential bidders will be advised of this upper limitation? But, if so, the FDIC's own limitations will likely cap as well the extent of bids at the ensuing auction unless (as suggested here) the auction is also open to totally private bidders (i.e., those willing to forego both FDIC guarantees and Treasury equity investments) who prefer to base all-cash bids on their own judgments and analysis of the diligence materials rather than those of the FDIC.	8
" " "	o The method by which the "6 to 1 leverage ratio" will be calculated will require strict definition. o The "6" presumably refers (see comments below on the page 4 Table) to the value of the legacy asset as fixed by the FDIC prior to the auction, but this could pose a mismatch in timing, since the private investor will need to raise its 1/6th (or ½ of 1/6th) significantly before the auction. There should be sufficient time between learning of the FDIC's value determinations and the auction itself to adjust for this mismatch.	9
" " "	Even though "financial institutions of all sizes will be eligible to sell assets," what arrangements will be made to permit smaller banks, possessing loans not typically suited for pooling, to sell such loans?	10
o *Pools are Auctioned Off to the Highest Bidder:*	o If the "highest bidder" has "access to the Public-Private Investment Program to fund 50 percent of the equity requirement of their purchase," must the highest bidder access this funding or can it instead elect to rely only on its own equity and to reap all of the potential upside, free and clear of the component of Treasury equity? If Treasury and FDIC (and the taxpayers) are not required at all to participate in the continued risk of the legacy assets post-auction, why should such private funds not be permitted to participate in the diligence and auctions? o If the highest bidder must take funding from the Public-Private Investment Program, how (as above) can it ultimately conclude the relationship with Treasury vis a vis its equity	11

	component? o Can Treasury, during the term of the investment, sell or convey its equity interest to third parties and, if so, will the "highest bidder" have any veto rights with respect to Treasury's selection of transferees (i.e., essentially the highest bidder's new "partner") or any right of first refusal? Failing a veto right or right of first refusal, can the highest bidder at the point of a non-consensual transfer by Treasury elect to dissolve the arrangement, wind up the arrangement, and ultimately terminate it? o If so, according to what law or regulatory scheme would such a dissolution be conducted?	
o *Financing Is Provided Through FDIC Guarantee*	o Clarification is needed – presumably this means the private equity investors would secure its own lender and that this lender would be the beneficiary of the FDIC guarantee. If this is not the case, the intent needs to be spelled out. o Presumably, the phrase, "[t]he FDIC-guaranteed debt would be collateralized by the purchased assets . . ." means that the loan from the private lender is secured by a pledge of the purchased assets and the FDIC, as guarantor, is subrogated for its reimbursement rights to the rights of the private lender. If this is not the case, the intent needs to be spelled out. o The amount of the FDIC's guarantee fee (or formula for determining same) and its administrative fees must be specified. The private investor and private lender will need to build this in to their economic model from the outset. o A specimen of the FDIC guarantee and any related reimbursement agreement should be promulgated and made available early on. A separate comment period may be required on these forms, as discomfort with these forms could chill interest in this Program from the outset.	12
o *Private Sector Partners Manage the Assets*	o With all due respect to the FDIC, the phrase, ". . . private fund managers will control and manage . . . subject to strict FDIC oversight" is discouraging, rather than encouraging, to the prospects of involving private investors in the Program. Candor is required here.	13

	o The phrase "FDIC oversight" is not a positive to the investment community. If the nature and extent of such oversight is not well defined and limited at the outset, the entire Program may be unattractive to private investors. o If FDIC "oversight" has even the potential for being harsh, slow, unresponsive, bureaucratic, or predictably negative, that potential alone will create a prevailing negative perception among potential private investors and their potential private lenders, depressing the prices they might otherwise be willing to pay for participation.	
p. 4		
Sample Investment (Table)	o See cumulative comments above. o As described, the Program makes no accommodation for the situation where legacy loans held by one bank are from the same underlying borrower as legacy loans held by another bank or banks, and no accommodation permitting such banks to cooperatively pool common-borrower legacy loans into a single package to be sold at auction. In many instances this could lead to under-pricing of legacy assets at auction and could make the Program far less useful to smaller or regional banks. o As described, the Program does not seem to invite the underlying legacy borrower to take the initiative to promote the common pooling of its outstanding obligations at various banks into a single legacy asset that can then be auctioned to a private fund (i.e., a potentially more flexible loan manager). While the interests of the underlying legacy borrower are obviously not the first concern of the Program, as scripted, the current approach seems to squander the potentially helpful and cost-saving initiative that may be brought to bear by the very persons with the greatest interest in promoting a prudent, profitable, and business-like outcome for the legacy assets.	14
Providing Investors Greater Confidence to Purchase Legacy Assets	See cumulative comments above; indeed, as proposed, the Program may have exactly the opposite effect, with many potential private investors preferring to use their own initiative, investigation, diligence and capital to locate potential assets, negotiate directly with the bank(s) holding the legacy assets, to form capital structures to acquire such assets, and to manage the liquidation of such assets without	15

	interference by FDIC or an uncomfortable pairing with Treasury as an equity player.	
Funding Purchase of Legacy Securities	This is the first mention of a "non-recourse" loans and comes with too little description what is meant. Will the FDIC's reimbursement rights on its guarantee have recourse only to the legacy assets acquired at auction under the program? Or is the private lender, i.e., the presumed beneficiary of the FDIC guarantee, somehow required to make only non-recourse loans to the fund acquiring the legacy assets? Is the private lender prohibited from requiring or accepting guarantees from the principals of the private investor fund that is acquiring the legacy assets? These issues could go to the economic underpinnings that will be important to both the private investors and private lenders in deciding whether to participate in the Program at all or in making underwriting decisions about a particular legacy asset or pool.	16
Working with Market Participants	o The phrase, "Haircuts will be determined at a later date and will reflect the riskiness of the assets provided as collateral" is unclear and interjects many potentially troubling issues. o Which "haircut" is the subject here? o If this is intended to refer to the discounts that may be afforded to the underlying legacy borrower in exchange for cooperation or speed, etc. in the liquidation process, this "haircut" should be left more or less to the "control and management" and sound business judgment of the private fund investor. If the FDIC is to have veto rights over this process on a case to case basis, then the entire Program may be unworkable from the outset. If the FDIC's criteria for approving such "haircuts" are instead to be standardized, these criteria should be published at the outset of the Program so that potential private investors and their potential private lenders can determine whether these criteria are reasonable, workable, and sufficiently flexible in the main or as they relate to a particular legacy loan package.	17
LEGACY LOANS PROGRAM (Summary of Terms)		

p. 1		
Intro – "substantially sized pools"	References to "substantially sized pools" seems once again likely to freeze out smaller or more regional banks from participating as sellers in the legacy loans program, particularly if the Program is to have any effective outreach for commercial loans, as opposed to purely residential loans. Perhaps accommodation could be made for a "pooling of pools," i.e., the creation of larger pools wherein smaller pools could be proposed by smaller or regional banks and then, in turn, merged with other smaller to create greater mass and, potentially, greater distribution of risk. This might also enable the pooling of "common-borrower" loans held by several smaller or regional banks.	18
Summary of Public-Private Investment Funds		
	See cumulative comments relating to the Fact Sheet.	19
	In the fifth unnumbered bullet point, the description sounds as if the Program is geared much more, if not exclusively, to the treatment of legacy residential loans and loan pools, and that too little regard has been given to the task of pooling and selling commercial loans and the tremendous economic stimulus that might be gained from the rehabilitation of commercial loans by this process.	20
	In the seventh unnumbered bullet point, the phrase, "[p]roposed . . . leverage ratios for each PPIF will be established by the FDIC . . . (prior to bid submission)" is confusing when combined with prior statements leading one to believe that the 6 to 1 guarantee ratio and 50% equity infusion by Treasury are intended to be standard for all loans or pools sold at auction. If the intent of this phrase is that FDIC will determine its own internal and perhaps upper value (i.e., as a limitation on the amount that will be guaranteed), this should be specified and may help to clear up other, earlier points of confusion.	21
	The seventh, eighth and ninth unnumbered bullet points, taken together, are confusing, and seem to suggest that the PPIFs will actually be formed by the FDIC ahead of the auction process, rather than by the private investors themselves, and that the private investors will then be bidding for equity in the PPIFs. o This seems to contradict earlier descriptions and, if this present description is intended to prevail over prior descriptions, also seems to run counter to the competitive process by which private investors bid on the legacy assets or pools. o The process of competitively auctioning legacy	22

	assets or pools may yield the best results if the processes for forming the PPIFs and raising their respectively non-Treasury equity contributions is left more, if not exclusively, to the private investors, subject to their satisfaction of meeting criteria to qualify as a PPIF.	
	In the ninth unnumbered bullet point, the reference to "debt issued by the PPIFs" as a possible component of the consideration paid to the Participating Banks (i.e., the banks selling the legacy assets) and to the guarantee of such debt by the FDIC is confusing. Heretofore, discussions tend to suggest that the consideration to the Participating Banks (sellers of legacy assets) would be cash or cash equivalents, whereas the PPIF (purchaser) could partially finance its purchase through borrowings from a private bank which, in turn, would become the beneficiary of an FDIC guarantee for its loans to the PPIF. Now it is suggested that the Participating Banks, as sellers, may receive and carry FDIC-guaranteed debt from the PPIF in consideration (or partial consideration) for its sale of the legacy assets or pools, and no mention is made of a private bank lending to the PPIF. The interjection of the process of negotiating with (or somehow imposing on) the Participating Banks terms of new loans from the PPIFs for acquisition of legacy assets, to be secured by those same legacy assets, seems arcane and cumbersome, and may be likely to impede the process of assembling competitive bidders. In any event, this should be clarified early on.	23
	The eleventh and twelfth unnumbered bullet points again suggest (by references, inter alia, such as "asset managers," "servicing," "servicing agreements," etc.) that the Program is intended solely for the sale of residential mortgage pools, to the exclusion of commercial loans or loan pools. If this is the intent, it should be more clearly stated. If commercial loans or loan pools are, however, intended to be included in the Program, it may be best to partition the Program into separate residential and commercial functions and to state separate, better adapted rules and criteria for each.	24
Eligible Private Investors		
p. 2		
	• It should be expressly stated that the notion that "UST and the FDIC will encourage participation by small, veteran, minority, and women-owned firms" does not interfere with or diminish the principals that the highest bidder at a given auction is the	25

	prevailing party, and that all potential bidders are given equal access to diligence information. • It is perhaps appropriate at this point to once again comment that interested private funds, willing to forego FDIC guarantees, UST equity infusions and to bid "all cash," should be permitted to participate in all auctions and to have equal access to all diligence information in order to maximize the competitive nature of the auctions (subject to meeting criteria establishing ability to perform an all-cash bid in advance of a give auction.)	
Governance & Management		
p. 3		
" " "	The requirement in the second unnumbered bullet point to the effect that "Private Investors may not participate in any PPIF that purchases assets from sellers that are affiliates of such investors . . ." is similar to prohibitions applied to workouts and liquidations in the 1980s and 1990s, all to disastrous effect. While this sounds like it is prohibiting self-dealing or insider advantage, it may actually be shutting out the most motivated buyers from the process. Although this type of relationship should certainly be disclosed to other potential bidders, enthusiastic bidding (in any open bidding context) by such related parties may actually inform and encourage non-related bidders rather than chilling their interest. (This also suggests that open bidding, rather than sealed bidding, should be utilized in any context in which related parties are involved.)	26
" " "	Likewise, that portion of the same phrase that states that "Private Investors may not participate in any PPIF . . . that represent more than 10% or more of the aggregate private capital in the PPIF" seems unwarranted absent other justification. If the concern has to do with the character, criminal history, or financial instability of a proposed 10%+ Private Investor participant, these factors should instead be dealt with substantively during the qualification phase.	27
" " "	In the fourth unnumbered bullet point, the reasonableness of the requirement that "[e]ach PPIF will be required to make certain representations, warranties and covenants regarding the conduct of their business . . ." depends entirely on the precise wording of such "representations, warranties, and covenants." This language must be promulgated early on in the process and should perhaps be subject to a comment period of its own.	28
	In the fifth unnumbered bullet point, the reasonableness of	29

" " "	the requirement that "[e]ach PPIF will provide information to FDIC . . ." depends entirely on the precise wording of such "representations, warranties, and covenants." This language must be promulgated early on in the process and should perhaps be subject to a comment period of its own.	
p. 4		
	In the sixth unnumbered bullet point, some modicum of "reasonable access" should be built into the system. PPIFs and their private investors will have little interest in signing on to a type of access that is determined on an ad hoc basis by bureaucratic processes and applied in a manner that, in the view of the PPIF, may be disruptive or potentially disruptive to sound business operations.	30
Equity Capital	In a given transaction, a PPIF should be allowed to opt to forego UST equity infusion altogether, as opposed to having to accept in every instance at least some "minimum to be determined" later? Particularly in the absence of some further statement of how the UST equity piece can be redeemed or bought out by the PPIF, this requirement seems to be far too intrusive and unnecessary.	31
Treasury Warrants	As above, the UST should not receive warrants if the PPIF opts not to accept UST equity, and in the interest of competitive bidding, they should be afforded that right.	32
Non-Recourse Debt	See cumulative comments above.	
Servicing	There is little if any reason why the Participant Bank (seller) should be the default servicer, unless one is referring solely to pools of residential mortgages. In the context of commercial loans, the default service provider should be the PPIF itself, unless a third-party servicer is needed and engaged.	33
p. 5		
FDIC Fees and Expenses	The provision that FDIC "will be reimbursed for all expenses relating to conducting Eligible Asset Pool auctions" presumably refers to reimbursement at closing of the auction, as a deduction from the net payment to the Participant Bank (seller). If otherwise, this should be clarified.	34
	The provision that "[o]ngoing administration fees . . . will be paid to the FDIC by PPIF's for oversight functions performed by FDIC" is so open ended as to be potentially chilling to the process. • First, the scope of FDIC's proposed oversight and involvement should be spelled out in detail in advance of implementation of the Program. The more involvement by FDIC, the less interest private parties will have in participating;	35

	• Second, the fees FDIC proposes to charge for the benefit of this oversight should likewise be specified far in advance of the auction. • Third, any fees FDIC proposes to charge apart from a pre-published schedule should be subject to the same "reasonableness" requirement that any private party faces in a commercial setting.	
	The prospect of an "annual guarantee fee" once again supports the proposition that the PPIFs and their private lenders should be permitted to opt out of receiving an FDIC guarantee and/or any equity infusion from the UST.	36

Thank you for the opportunity to comment.

Sincerely,

Sally A. Longroy
J. Michael Sutherland

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