From: Ian McGrath [mailto:mcgrath@mcgrathlegal.com]
Sent: Tuesday, April 07, 2009 7:12 PM
To: LLPComments
Subject: Legacy Loans Program

To Whom it May Concern:

I am writing to you in my capacity as the representative, and one of the principals of, Capital Legacy Partners, a firm that has just recently been formed by group of experienced professionals (based largely in the Washington, DC and New York areas) to pursue investment opportunities that may arise through the Legacy Loans Program. Capital Legacy Partners is comprised of principals with financial, legal and operational experience in credit analysis and servicing, real estate investment and management, and real property law.

Capital Legacy Partners is pleased to have the opportunity to address the FDIC's request for comments as follows:

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?

   We feel that virtually any asset category should be eligible for sale through the LLP. As reflected in our comments below, however, our consistent recommendation throughout is that assets be grouped into smaller pools, with collateral sharing similar geographic and asset-type characteristics.

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?

   Yes. We feel that transfer and/or sale of "in situ" interests in a PPIF will provide a healthy alternative to a hold-only investment profile. Knowing that transfer or sale is a viable option will be very likely to increase the price investors are willing to pay for PPIF interests. We recognize that the FDIC has a legitimate economic and regulatory interest in ensuring that subsequent transferees meet certain qualifications. We feel that keeping the Program consistent by allowing transfers only to prospective buyers or transferees who meet the same criteria as original participants would maintain clarity for all participants, both now and in the future.

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?

   We firmly believe that the appropriate level of government equity participation is 49% across the board. We feel that many potential PPIF private investors will feel that in going into partnership with the government as a fellow investor (not as a regulator and not as sovereign), the private investors will need to feel that they have a permanent equity majority

in a PPIF. The government's participant as a majority or even 50% equity participant may drive away many potential private investors, who feel that there will always be a risk that the government, if it maintains a controlling interest in its role as investor, may force a PPIF to take decisions that are motivated by political or other concerns, rather than motivated purely by investment considerations. This would generally restrict, at least at the margins, the amount of potential private equity capital available for the LLP.

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

   Yes. We believe that making all investors' identities public may substantially reduce interest in Program participation, particularly among high-net-worth individuals and families who may not be interested in the publicity that participation would entail.

   We feel that Section 13(f) of the Securities Exchange Act of 1934, together with the Rules adopted thereunder, provides a very workable compromise in this regard. While requiring large institutions to publicly report their equity holdings, the Section contains provisions for non-public reporting when the public disclosure of holdings information would reveal the holdings of an individual person or family. A similar division between public and non-public reporting, to minimize publicity with respect to identifiable individuals and families, would likely encourage the maximum participation in the Program while maintaining a reasonable degree of public accountability.

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?

   As we discuss in more detail below, our core recommendation is to bundle assets into smaller pools, localized geographically, containing underlying collateral in similar asset classes. We fundamentally believe that the highest bid levels could be made by smaller, specialized asset managers who are already experienced and familiar with specific types of assets. Bundling assets with which these types of operators are not familiar would force these potential bidders to apply a discount to their bids, in order to allow for the uncertainty in their valuations of assets with which they are not familiar and with which they have little or no management experience. We would also encourage finding ways to promote minority participation, which may especially benefit the bidding on pools of assets concentrated in areas hardest hit by foreclosures and distressed sales.

   We believe that sellers would be most motivated to bring assets into a PPIF where there is going to be an extended open bidding process (*i.e.,* a "silent-auction" type of process with a longer bidding window of several weeks, where individual bidders could place their bids as they finalize their internal due diligence and valuation work). While this sort of open bidding process does entail a certain danger of communication and even collusion among bidders, it would help to ensure that the most potential bidders would be available for a given auction.

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?

As discussed above, we believe that longer-duration, open auctions would encourage bidders to participate as they complete their due diligence on particular pools.

We also feel that staggering auctions of pools containing similar assets (geographically and by collateral asset type) would allow bidders who are specialist operators (and, in our opinion, best suited to give the best bids on any given asset pool) to concentrate their due diligence efforts on one PPIF at a time, and if they do not make a successful bid, to meaningfully participate in the next auction of the assets in which they specialize. We believe that specialist asset managers should be able to attend an auction and concentrate on one PPIF that is in their area of expertise. This would encourage maximum competition among precisely those bidders best positioned to pay the best prices for a given pool of assets. Having a delay of a week or more between auctions of geographically similar pools with similar collateralization profiles would allow: a) winning bidders to have an opportunity to raise fresh capital to return to the auction process; and b) losing bidders to conduct due diligence and analysis on the next pools within their areas of expertise that will come up for auction.

We do not believe that allowing bidding on partial stakes would be helpful. In many instances, the most attractive bidders will be those investors managed by asset managers who can best handle a specific type of asset, and the management uncertainty in situations where ownership is fragmented may actually result in bidders applying a lack-of-control discount to the maximum bids they are willing to proffer. Our strongest recommendation is that asset pools be sized and concentrated (geographically and by asset type) so that smaller, specialized bidders can make meaningful bids on them and still maintain control.

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

   To repeat our theme, we believe that smaller, geographically concentrated pools of assets with similar collateral profiles should take priority. We firmly believe that these types of assets will attract bidders whose asset managers are highly specialized and prepared to extract maximum value from any given asset pool. We believe that this will result in higher maximum bid and will be very likely to encourage further participation in the Program, as sellers see the prices being obtained.

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

   Size: We feel strongly that the optimal size for a pool would be very small, in the $6-12M range. The reasoning for this is that the most permissive registration exemption under Regulation D under the Securities Act of 1933 allows for equity capital to be raised in amounts up to $1M. For smaller, more nimble and more specialized asset managers, this would be a threshold at which they may have the most ready access to capital. By applying the equity match from the Treasury and the FDIC-sponsored debt financing to the equation, we arrive at optimal pool sizes being in the $6-12M range.

   As discussed throughout our comments, we feel that the optimal pool characteristics would be to group assets into relatively small pools, with close correlation of collateral asset type and geographic location. We feel that smaller, specialized and highly localized operators will be best equipped to deal with the assets in those pools, and/or the underlying collateral if they are forced to take possession of it. Asset managers like these, who have an intimate

familiarity with local conditions, will be much better equipped to price the assets aggressively and would maximize the potential bid levels for a given group of assets.

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?

   In our opinion, effectively everything about the note and its rate and payment structure would need to be known before a bidder could possibly know what its maximum bid could be. The cost of funds and the note structure's impact on projected cash flow are highly important factors in considering the desirability of bidding on a given asset or pool of assets.

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?

    We do feel that selling banks should be strongly encouraged to take back FDIC-backed notes for the debt-financed portion of the pool. They would effectively be swapping "toxic" assets for a government-backed obligation, which would presumably be a very desirable asset for them to have on their books. At the pool sizes that we strongly recommend, we do not believe that public issuance of debt (unless it were organized and conducted by, for example, the FDIC on behalf of PPIFs) would be an economically feasible alternative for the smaller pools.

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?

    We feel strongly that the fee should not adjust based on risk characteristics of the underlying pool. The leverage ratio and other considerations may vary, but we feel that scaling the fee itself would discourage bids, at least at the margin, for the most distressed assets. This, to some extent, would defeat the purpose of the program.

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?

    Absolutely not. We feel quite strongly that this sort of provision would create massive disincentives for private investors to bid for the most distressed assets (i.e., those with the greatest risk/reward trade-off). This would have an extremely negative impact on the program's ability to address the problems that it is supposed to address.

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?

    We do feel that, as part of the valuation and pooling process, banks should be permitted to pool assets with similar geographical and collateral characteristics. This would, in our opinion, optimize the desirability of the pools for potential bidders. In our opinion, the most effective means of doing this would be to allow institutions to work with one another and

with valuation consultants to pool assets into value-maximizing pools. They would simply need to agree with one another at the time of pooling as to how proceeds of sale would be allocated among the asset contributors.

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?

    We feel that the compensation structure for asset managers should strike an appropriate balance between incentives for profit-maximization and incentives for risk management. This may involve a combination of profit-sharing and asset-based fees (much like the current fee structure in the private fund world today).

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?

    We feel that the government should, initially, accept the fee structure to which private participants have agreed in freely-negotiated transactions. We do believe, however, that fee arrangements with PPIF asset managers should be reviewable by the participants in the investor pools at least biennially, with the government participating as a 50% (or, per our recommendation, 49%) owner in the PPIF investor pool.

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?

    We feel that the entire asset should be sold into the PPIF. IF our recommendation for smaller, more concentrated pools is followed, we feel that bidders will want to acquire the assets *in toto*, servicing and all. The extreme levels of over-intermediation between asset owners and borrowers (including through the extensive use of third- and fourth-party servicing) has, in our opinion, been one of the drivers of the breakdown in workouts and modifications that would have otherwise been beneficial to all parties. It should be up to the individual PPIF as to whether or not it wants to out-source servicing.

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?

    We feel that as much data as possible should be made available to all parties involved in the auction process, and that as much transparency as possible should be made part of the process. We feel that, among other things, this would help to address a major concern among bidders that the asymmetry of information between bidders and sellers will create a perverse incentive for sellers to put forward only those assets that they believe to have intrinsic values *less* than the values that they may receive in a PPIF auction.

Capital Legacy Partners would also appreciate some clarification as to when the FDIC anticipates promulgating final rules and program information on the LLP. We feel that for groups interested in raising or allocating capital to invest in the Legacy Loans Program, some idea of the anticipated timing would be helpful.

Thank you for the opportunity to address these important issues.

____
Ian M. McGrath
Law Offices of Ian M. McGrath PLC
118 N. Alfred St.
Alexandria, VA 22314
(703) 548-3022 phone
(703) 548-3211 fax
<mcgrath@mcgrathlegal.com>