FDIC Final Statement of Policy on Qualifications for Failed Bank Acquisitions

On August 26, 2009, the Board of Directors of the FDIC adopted a final Statement of Policy on the acquisition of failed insured depository institutions by private investors (the **Policy Statement**). The Policy Statement eases some of the restrictions set forth in the proposed policy statement that was released in July; however, it imposes a number of stringent requirements and provides guidance to investors interested in acquiring or investing in failed banks or thrifts.

Applicability and Definition of Investors

The Policy Statement applies to private investors in any company (including, but not limited to, any private equity fund) that is proposing to assume deposit liabilities (or liabilities and assets) from the resolution of a failed depository institution and applicants for insurance in the case of *de novo* charters issued in connection with the resolution of a failed depository institution. Investors that hold (directly or indirectly) 10 percent or more of the equity of an institution in receivership will not be eligible to invest in such institution.

Excluded from the Policy Statement are: (i) investors that acquired failed depository institutions in an acquisition completed prior to August 26, 2009 (ii) investors in banks, thrifts or holding companies that have maintained a composite Camels 1 or 2 rating continuously for seven years, (iii) investors with 5 percent or less of the total voting power of the acquired depository institution and (iv) investors in partnerships or joint ventures with bank or thrift holding companies where such holding companies will have a majority interest in the resulting bank. The FDIC encourages private investors to partner with established bank or thrift holding companies that have successful records of operating banks or thrifts.

Capital Requirements and Continuity of Ownership

The proposal required that the institutions maintain a Tier 1 leverage ratio of 15 percent. The final Policy Statement imposes a capital commitment requirement that the depository institutions must maintain a 10 percent ratio of Tier 1 common equity to total assets for the first three years from the time of acquisition. This is a lower percentage than the initial proposal, however, the measurement (Tier 1 leverage vs. Tier 1 common equity) is different. Tier 1 common equity is defined as Tier 1 capital minus non-common equity elements, including qualifying perpetual preferred stock, plus minority interests and restructured core capital elements. After three years, the institution must remain "well capitalized," and the failure to maintain such levels of capital will cause the institution to be treated as "undercapitalized" for the purposes of Prompt Corrective Action. The FDIC has imposed this more stringent capital standard based on the fact that *de novo* institutions are subject to a "considerably higher rate of failure." Although the proposed statement also required that investors serve as a "source of strength" for subsidiary depository institutions through capital qualifying borrowing and certain equity sales, the FDIC removed this provision from the Policy Statement.

ADDITIONAL RESOURCES

For a copy of the FDIC's Policy Statement, please click here.

CONTACT A TEAM MEMBER

If you have any questions, please contact:

David S. Katz
Partner
Washington, D.C.
202.339.8497

Amie B. Davis
Associate
New York
212.506.5027

Investors are prohibited from selling or transferring their securities in the depository institutions or holding companies for three years following acquisition without approval of the FDIC (which will not be unreasonably withheld for transfers to certain affiliates). This three-year prohibition does not apply to certain mutual funds defined as open-ended investment companies and registered under the Investment Company Act of 1940.

Cross Guarantee/Cross Support

While the FDIC proposal called for cross guarantees by investors owning two or more depository institutions, the Policy Statement imposes a "cross support" obligation. If two or more depository institutions are commonly owned at least 80 percent by common investors covered by the Policy Statement, the stock of the commonly owned institutions will be pledged to the FDIC to be exercised to recoup any losses in the event of a subsequent failure.

Other Notable Provisions

The Policy Statement prohibits extensions of credit to investors or their affiliates by any insured depository institution acquired by investors, subject to the Policy Statement. The FDIC is also imposing comprehensive supervision requirements on investors establishing ownership structures with entities located in "bank secrecy jurisdictions," defined as countries applying certain types of bank secrecy laws that limit the information available to U.S. bank regulators. Investors will be required to disclose to the FDIC certain information about themselves and other entities in the ownership chain, including the size of the capital fund(s), their diversification, the return profile, the marketing documents, the management team, the business model, and any other information the FDIC deems necessary to ensure compliance with the Policy Statement. Finally, the Policy Statement includes a provision providing the FDIC Board of Directors with discretion to waive one or more provisions of the Policy Statement if it is in the best interests of the Deposit Insurance Fund and if it is determined that the goals and objections of the Policy Statement can be accomplished through other means.

CONTACTS

If you have any questions regarding the above memo, please contact:

David S. Katz	Partner	Washington, D.C.	202.339.8497	dkatz@orrick.com
Amie B. Davis	Associate	New York	212.506.5027	davisa@orrick.com