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SPECIAL EDITION

FDIC RELEASES FINAL POLICY STATEMENT ON PRIVATE EQUITY INVESTMENTS IN FAILED BANKS OR THRIFTS

The Federal Deposit Insurance Corporation (the "FDIC") on August 26, 2009 released a Final Statement of Policy on Qualifications for Failed Bank Acquisitions (the "Final Policy Statement") that provides guidance to private capital investors interested in acquiring or investing in the assets and assuming the deposit liabilities of failed banks or thrifts. The Final Policy Statement offers guidance on the terms and conditions that the FDIC will require in connection with such investments or acquisitions. The Final Policy Statement reflects changes made in response to public comments on the Proposed Statement of Policy on Qualifications for Failed Bank Acquisitions released by the FDIC on July 2, 2009 (the "Proposed Policy Statement"). For further discussion of the Proposed Policy Statement, please see the [July 6, 2009 Special Alert](#).

The Final Policy Statement retains many of the provisions set forth in the Proposed Policy Statement. The FDIC did, however, make significant changes to the applicability, capital commitment, and cross-guarantee standards, as well as certain other more minor changes. Furthermore, in response to suggestions made by public commenters, the Final Policy Statement does not contain a requirement that private capital investors agree to serve as a source of strength for their subsidiary depository institutions. The requirements of the Final Policy Statement will only apply to investors who agree to its terms by acquiring from the FDIC assets and liabilities of a failed institution. The Final Policy Statement will not apply to acquisitions of failed depository institutions completed prior to its approval date. The FDIC noted that it will review the operation and impact of the Final Policy Statement within 6 months of its approval date and make adjustments as it deems necessary.

Applicability. The FDIC provided greater precision in the definition of the types of investors to be covered by the Final Policy Statement. The FDIC noted the difficulty in using precisely defined terms to apply to private investors and noted that under some of the structures used by private investors, such investors are not institution affiliated parties and are not subject to the Bank Holding Company Act, the Change in Bank Control Act, the prompt corrective action rules, cross guarantees, or Sections 23A and 23B of the Federal Reserve Act. In the Final Policy Statement, the exclusion for private capital investors in bank or thrift holding companies that were created or acquired by the investor at least three years prior to the date of the Policy Statement has been deleted. Rather, upon application and approval by the FDIC's Board of Directors, the Final Policy Statement will no longer apply to a private capital investor in a bank or thrift, or bank or thrift holding company of an insured institution covered by the Final Policy Statement if the bank or thrift has maintained a Camels 1 or 2 rating continuously for seven years. The Final Policy Statement also does not apply to private capital investors in partnerships or similar ventures with depository institution holding companies (excluding shell holding companies) where such holding

companies have a “strong majority interest” in the acquired bank or thrift and an established record of successful operation of insured banks or thrifts. The FDIC stated that it strongly encourages such partnerships with depository institution holding companies.

In addition, the Final Policy Statement includes an added provision that the Final Policy Statement will not apply to private capital investors individually holding 5 percent or less of the total voting power of an acquired depository institution or its bank or thrift holding company provided there is no evidence of concerted action by these private capital investors. The FDIC stated that it may waive one or more provisions of the Final Policy Statement if such exemption is in the best interests of the Deposit Insurance Fund (the “DIF”) and the goals and objectives of the Final Policy Statement can be accomplished by other means.

Capital Commitment. The Proposed Policy Statement’s capital commitment requirement of a 15 percent Tier 1 leverage ratio received the most public comment. The Final Policy Statement contains a less burdensome requirement that subsidiary depository institutions of private capital investors subject to the Final Policy Statement provide an initial capitalization level sufficient to maintain a ratio of Tier 1 common equity to total assets of at least 10 percent throughout the first three years following acquisition. Notably, preferred stock and other non-common stock elements of Tier 1 capital will not count for purposes of meeting this requirement. Following this initial three year period, such depository institutions must continue to operate at a “well capitalized” level for the remaining period of ownership of the private capital investors. If at any time such a depository institution fails to meet the applicable standard, immediate action would have to be taken to restore the institution to the 10 percent Tier 1 common equity to total assets ratio or the “well capitalized” standard, as applicable.

Cross-Guarantee. The Final Policy Statement scales back the circumstances in which what is now referred to as “cross support” would be required. Pursuant to the Final Policy Statement, a cross support obligation would apply if two or more depository institutions are owned by a group of investors covered by the Final Policy Statement if both depository institutions are at least 80 percent owned by common investors. Further, the FDIC stated that it may waive the cross support obligation if enforcing the obligation would not reduce the cost of the bank or thrift failure to the DIF.

Transactions with Affiliates. The Final Policy Statement contains limited changes to the scope of the affiliate transactions provision. The definition of the term “affiliate” has been modified to mean “any company in which the Investor owns, directly or indirectly, at least 10 percent of the equity of such company and has maintained such ownership for at least 30 days.” The FDIC stated that this change was designed to make compliance easier and is based on the assumption that very short term investments do not provide a reason for extensions of credit. The Final Policy Statement contains an additional requirement that private capital investors will provide regular reports to the insured depository institution identifying all affiliates. An exemption for existing extensions of credit has also been added to the Final Policy Statement.

Bidding Eligibility of Silo Structures. Despite public comments objecting to a blanket prohibition on “silo” structures, the Final Policy Statement prohibits bids by ownership structures that involve a private equity firm (or its sponsor) that create multiple investment vehicles funded and apparently controlled by the private equity firm (or its sponsor) to acquire ownership of an insured depository institution.

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Secrecy Law Jurisdictions. In response to requests by commenters that the FDIC clarify the meaning of “bank secrecy jurisdiction,” the Final Policy Statement, defines a “bank secrecy jurisdiction” to mean “a country that applies a bank secrecy law that limits U.S. bank regulators from determining compliance with U.S. laws or prevents them from obtaining information on the competence, experience and financial condition of applicants and related parties, lacks authorization for exchange of information with U.S. regulatory authorities, or does not provide for a minimum standard of transparency for financial activities.”

Continuity of Ownership. The Proposed Policy Statement’s requirement that private capital investors hold their investment for at least three years has been largely left unchanged. However the Final Policy Statement does contain a statement that in the case of transfers to affiliates, FDIC approval shall not be unreasonably withheld provided the affiliate agrees to be subject to the same requirements that are applicable under the Final Policy Statement to the transferring private capital investor. Furthermore, the Final Policy Statement clarifies that the three-year holding period does not apply to open-end investment companies registered under the Investment Company Act of 1940.

Disclosures. Unlike the Proposed Policy Statement, the Final Policy Statement provides that confidential business information will be treated as such and not disclosed except in accordance with applicable law.

If you have any questions regarding this Special Edition, please call or email [Thomas J. LaFond](#), [William E. Stern](#), [Robert S. Seigal](#) or your regular Goodwin Procter contact.

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