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## FDIC Releases Additional Questions and Answers Regarding Final Policy Statement Governing Private Equity Investments in Failed Banks

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The Federal Deposit Insurance Corporation ("FDIC") continued its dialogue with potential investors in failed banks when, on April 23, 2010, it quietly added clarifications (the "April Q&As") to its Questions and Answers issued on January 7, 2010 (the "January Q&As") regarding its Final Statement of Policy on Qualifications for Failed Bank Acquisitions (the "Statement") released on August 26, 2009. As we expect that these requirements will continue to evolve, we suggest that the FDIC be consulted with respect to investments in connection with failed depository institutions.

The April Q&As further clarify the following aspects of the Statement:

- "Strong majority interest" – pre-acquisition holding period;
- Applicability to recapitalizations in connection with acquisitions of failed banks;
- Anchor investors – the FDIC's "one-third rule";
- Applicability to *de minimis* investors; and
- Secrecy Law Jurisdiction issues – tax law compliance and offshore investor information requirements.

### I. "Strong Majority Interest"

The Statement exempts "investors in partnerships or similar ventures with bank or thrift holding companies or in such holding companies (excluding shell holding companies)" ("Existing HC") where the Existing Holding Company "has a strong majority interest in the resulting bank or thrift and an established record for successful operation of insured banks or thrifts."

The April Q&As: Clarify that pre-existing investors need not have held their ownership interests in Existing HCs for a specific time period; although, the FDIC will take into account, in determining the

applicability of the Statement, whether a "significant portion" of the total equity or voting equity shares held by pre-existing investors was recently acquired or part of a recapitalization.

## II. Applicability to Recapitalizations

The April Q&As: Clarify that the Statement does not apply to investors who "recapitalize" Existing HCs, except for new investors who have "recently" recapitalized an Existing HC that seeks to acquire a failing bank. The FDIC will review whether the additional capital was contingent upon completion of a failing bank acquisition.

The Statement will apply if one or more failed institutions are acquired within an 18-month period following the recapitalization, which acquisitions, in the aggregate, exceed 100 percent of the recapitalized Existing HC's total assets.

## III. Anchor Investors – the "One-Third Rule"

The Statement aims to ensure that "the ownership and management of insured depository institutions remain stable to provide guidance and continuity for safe and sound operation of the bank or thrift." In the absence of evidence of concerted action, the FDIC exempts an investor that owns 5 percent or less of the voting shares from the Statement unless, in the aggregate, all such investors own more than two-thirds of the total voting shares. The FDIC will not presume concerted action if there are other investors whose ownership collectively constitutes one-third or more and who are bound by the terms of the Statement (the "one-third test").

The April Q&As: Specifies in connection with the "one-third test":

- At least one-third of (1) the total voting equity shares or (2) the combination of total voting equity shares and total equity shares as a proportion of total equity shares of an acquired bank or thrift or its Existing HC (the "anchor group") must be bound by the terms of the Statement.
- The anchor group may include investors with 5 percent or less of the voting shares so long as they agree to comply with the Statement.
- The "one-third test" only needs to be met at the time of the failed bank acquisition; although, investors subject to the 3-year holding period by the Statement (mutual funds are not) are prohibited from selling their securities for a 3-year period following the acquisition, unless FDIC approval is obtained.

## IV. Applicability to *De Minimis* Investors

The Statement in general does not apply to any *de minimis* investor (5 percent or less of the total voting power of an acquired depositor or its Existing HC).

The April Q&As: Some exceptions, when the Statement would apply:

- There is evidence (or a presumption – see Anchor Investors above) of concerted action among the *de minimis* investors;
- The *de minimis* investors voluntarily agree to comply with the Statement in order to meet the FDIC's "one-third test";
- The exercise of a right of first refusal results in the investor holding more than 5 percent of the voting equity shares; or
- An investor has a right to designate a board member.
- Members of senior management are not automatically subject to the Statement merely by virtue of their position.

#### V. Secrecy Law Jurisdiction Issues

The Statement excluded investors utilizing ownership structures in "bank secrecy jurisdictions" unless the investors are subsidiaries of companies that are subject to comprehensive consolidated supervision ("CCS").

The April Q&As:

- Allow offshore investors to be in compliance with the Statement absent a CCS parent if their investments are made through at least one wholly owned subsidiary established under the laws of any state of the United States.
- Specify that the FDIC will not make determinations concerning whether investors are in compliance with applicable tax laws.
- Require that each offshore investor and its domestic subsidiary agree to maintain in the U.S. at the offices of its subsidiary or subsidiaries:
  - Its business books and records (or copies);
  - A current list of all investors in the offshore investor; and
- Require that these records be made available to the FDIC upon request as necessary to implement and enforce the Statement or the FDIC's supervisory, deposit insurance or receivership obligations.
- Expect that any offshore investor will pay U.S. federal income tax on the income from their

ownership (including on dividends and capital gains) as if it had made the investment directly.

Finally, it is important to remember that the FDIC retains the right to waive one or more of the provisions of the Statement if such exemption "is in the best interests" of the Deposit Insurance Fund and the "goals and objectives" of the Statement "can be accomplished by other means."

Click [here](#) to access a full copy of the FDIC's Statement.

Click [here](#) to access a full copy of the FDIC's January 6, 2010 Q&As, as revised on April 23, 2010 (the revision begins on page 3).

For more information, see our [January 15, 2010](#) and [August 27, 2009](#) Email Alerts on this subject.

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