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## FDIC Releases Final Policy Statement Governing Private Equity Investments in Failed Banks

2009-08-27

At its Board Meeting held yesterday afternoon the Federal Deposit Insurance Corporation (the "FDIC") issued its Final Statement of Policy on Qualifications for Failed Bank Acquisitions (the "Final Statement").

As expected, the FDIC reduced the Tier 1 capital leverage ratio proposed for private equity investors investing in failed banks from 15% Tier 1 to 10% Tier 1 (but only common equity) to total assets. It also removed the "source of strength" requirement in an effort to make it easier for failing institutions to attract private equity buyers. However, the Final Statement retains many of the other elements in the original proposal with the goal of adequately protecting the failed institutions and the Deposit Insurance Fund.

The Final Statement makes clear that these requirements will apply only prospectively and will not apply to investors with 5% or less of the total voting power of an acquired institution. In a further attempt by the FDIC to encourage partnerships between private equity investors and depository institution holding companies (excluding shell holding companies) where the holding company has a clear majority interest in the acquired depository institution and an established record of success in operating such depository institutions, the Final Statement makes clear that it does not apply to investors in partnerships with such depository holding companies.

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

The Final Statement will be reviewed by the FDIC within six months.

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

A summary chart comparing the July 9, 2009 proposal with the Final Statement is included below.

<b>Issue</b>	<b>July 9, 2009 Proposal</b>	<b>August 26, 2009 Financial Statement</b>
Capital commitment	Ratio of Tier 1 capital to total assets of 15% for three years and maintenance of well-capitalized status thereafter. Institution is subject to prompt corrective action rules for undercapitalized institutions if the institution no longer meets the required ratios. "Well-capitalized" is as defined in 12 CFR 325.103(b)(1), requiring minimum ratios of 6% Tier 1 capital and 10% Tier 1 and 2 capital to total risk-based assets and a leverage ratio of 5% Tier 1 capital to total assets.	Reduced to ratio of Tier 1 capital (but only common equity) to total assets of at least 10% for three years and maintenance of well-capitalized status thereafter. Institution is subject to prompt corrective action rules for undercapitalized institutions if the institution no longer meets the required ratios.
"Source of Strength"	Private equity firms will be required to be a "source of strength," or financial backstop, if an acquired bank has financial trouble.	Not included in the Final Statement.
Cross guarantee	Private equity investors that individually or collectively	Retained as "cross support;" however, it will only apply

	purchase a majority interest in two or more banks must pledge "proportionate interests" in each bank to repay the FDIC for losses from any other entities.	in instances where two or more banks are at least 80% owned by the same investors. Can be waived by the FDIC if enforcing obligation would not reduce cost of failure to the Deposit Insurance Fund.
Continuity of ownership	No transfer of an investor's holdings in a holding company or depository institution for three years without FDIC prior approval.	Retained, but FDIC approval for transfers to affiliates will not be unreasonably withheld; mutual funds exempted from this three year holding period.
Restrictions on transactions with affiliates	No extensions of credit to private equity investors and their "affiliates" (i.e., any company in which the private equity investor owns 10% or more of equity).	Retained; however, the 10% ownership threshold must be held for 30 days for an entity to qualify as an affiliate. Existing extensions of credit are exempted. Private equity investors will be required to provide regular reports to the institution identifying affiliates.
Silo structure	Investment vehicles featuring silo structures are	Retained, with additional clarification on a silo

	ineligible to acquire failed banks.	structure as typically involving a private equity firm (or its sponsor) creating multiple investment vehicles funded and apparently controlled by the private equity firm (or its sponsor) to acquire ownership of an insured depository institution.
Bid limitations	Private equity investors that directly or indirectly held 10% or more of the failed bank's total equity may not bid on such bank's deposit liabilities or both such liabilities and assets.	Adopted without change.
Secrecy law jurisdictions	Private equity investors with ownership structures domiciled in "bank secrecy jurisdictions" are not eligible to acquire failed banks.	Retained, with additional clarification on the definition of a bank secrecy jurisdiction, as a country that applies a bank secrecy law that limits U.S. bank regulators from determining compliance with U.S. laws, prevents U.S. bank regulators from obtaining information on the applicants and related

parties, lacks authorization for exchange of information with U.S. regulatory authorities, or does not provide a minimum standard of transparency for financial activities.

Additional disclosure	Private equity investors may be required to provide additional disclosure of their financials, investors and business plans, even when purchasing a non-controlling interest.	Retained, with an assurance that confidential business information will be treated as such.
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