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

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The Federal Deposit Insurance Corporation (the "FDIC") released a set of questions and answers (the "Questions and Answers") on January 7, 2010, regarding its Final Statement of Policy on Qualifications for Failed Bank Acquisitions (the "Final Statement") released August 26, 2009.<sup>1</sup> The Questions and Answers attempt to provide clarification on the types of private investors excluded from the requirements outlined in the Final Statement for bidders for failing banks or thrifts.

### "Concerted Action"

As we reported in our August 27, 2009 alert entitled, "[FDIC Releases Final Policy Statement Governing Private Equity Investments in Failed Banks](#)," the Final Statement's requirements do not apply to investors that will hold 5% or less of the total voting shares of an acquired institution. This exception requires there be "no evidence of concerted action" among the investors holding 5% or smaller voting interests.

The Questions and Answers state that the determination of concerted action will be based on a "facts and circumstances" analysis. Although the

Questions and Answers explain the FDIC will not presume concerted action based on contemporaneous share purchases by multiple investors, each of whom will hold 5% or less of the total voting shares and who in the aggregate will hold two-thirds or less of the total voting shares, the Questions and Answers echo the FDIC's previous concerns about private investors. The Questions and Answers state that ownership structures in which all or substantially all the investors own less than 5% of the voting shares, exempting the investors and possibly the acquired institution from the Final Statement's requirements, may raise some of "the same capital and prudential" concerns which prompted the adoption of the Final Statement.

To address this concern, the FDIC will apply a rebuttable presumption that concerted action is occurring where such investors would hold in the aggregate more than two-thirds of the total voting shares. In deciding whether the presumption has been rebutted, the FDIC will consider a number of factors, including, among others, whether each investor decided independently to invest in the acquired entity; whether multiple investors are managed or advised by the same investment manager or advisor; whether substantially the same investors have engaged as part of a similar group in other U.S. activities; whether an investor has a significant ownership interest or is entitled to acquire equity in any other investor in the acquired entity; and whether there are any agreements between the investors for purposes of controlling the acquired entity. The FDIC will also consider, but may not necessarily defer to, the acquired entity's primary federal banking regulator's evaluation of whether investors are acting in concert for purposes of applying the Bank Holding Company Act and the Change in Bank Control Act.

Provided there is no concerted action, non-voting equity interests that are in no circumstances convertible into shares with voting rights will not be

aggregated with voting shares to calculate whether an investor is over the 5% threshold of voting power.

### "Strong Majority Interest"

The Final Statement also exempts investors (i) in partnerships or joint ventures with bank or thrift holding companies or (ii) directly in bank or thrift holding companies (excluding shell holding companies) where the 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 Questions and Answers clarify that a "strong majority interest" in scenario (i), is one in which at least two-thirds of the total equity and voting equity of the partnership or venture is not held by the private investors, and in scenario (ii), is one in which the equity holders in the holding company pre-dating the acquisition retain at least two-thirds of the total equity of the resulting bank or thrift holding company. In either scenario, the FDIC will also consider any special rights the private investors may have, such as special voting rights.

This clarification seems to indicate the FDIC's preference for having private investors participate in failed bank acquisitions through partnership with or investment in established banking or thrift entities. After release of the Questions and Answers, it also appears evident that the FDIC wants to control the definition of "control" when it comes to the acquisition of failed banks by private investors.

A full copy of the Questions and Answers can be found [here](#).

A full copy of the FDIC's Final Statement can be found [here](#).

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<sup>1</sup> The Questions and Answers represent the FDIC's second release regarding these issues. On December 11, 2009, the FDIC issued a first set of questions and answers and almost immediately withdrew them.

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## *Authors*



**Stephanie C. Evans**

PARTNER

✉ [stephanie.evans@wilmerhale.com](mailto:stephanie.evans@wilmerhale.com)

☎ +1 202 663 6355