OCC, FDIC Relax Rules Applying To Bidders For Troubled Institutions

2008-12-02

I. Introduction

Following an earlier policy statement by the Board of Governors of the Federal Reserve System[1] designed to provide flexibility and opportunities for new investors to provide capital to the banking system, both the Office of the Comptroller of the Currency (the OCC) and the Federal Deposit Insurance Corporation (the FDIC) have issued recent statements designed to increase the ability of new investors to purchase troubled depository institutions.

II. OCC Approves First National Bank "Shelf Charter"

On November 21, 2008, the OCC announced its first conditional preliminary approval of a new type of national bank "shelf charter." The OCC granted approval to an investor group of a preliminary national bank charter, which will remain inactive, or "on the shelf," until the investor group can acquire a troubled institution.

The "shelf charter" application process entails the following:

In its initial review, the OCC will evaluate the qualifications of the proposed management team of the investor group, the sources and amount of capital that would be available to an acquired bank, and a streamlined business plan describing how the acquired bank will be operated. After this review, the OCC can grant preliminary approval of a national bank charter, subject to certain conditions and requirements that more detailed operating plans, satisfactory to the OCC, would be submitted if the investor group is approved to acquire a particular institution. This conditional preliminary approval permits the investor group be cleared to view the FDIC's list of troubled and failing institutions and to submit bids to acquire those institutions.

During the period between provisional and final approval of the charter, the OCC may impose conditions on operations of the investor group and activation of the shelf charter. The investor group must provide periodic updates on the status of any changes in the information provided in its application materials and notify the OCC immediately of any material changes to such information.

After a bid is submitted by an investor group for a failing institution, the OCC will evaluate the specific proposal. If this proposal is accepted by the OCC, and if the FDIC approves the bid, the OCC will grant final charter approval, together with final approval of deposit insurance by the FDIC. Upon acceptance by the FDIC and within one day of signing an acquisition agreement for the failing institution, the investor group must also enter into an operating agreement with the OCC.

If a bid is not accepted by the FDIC, the charter in question will remain on the shelf for up to 18 months. During this period, the charter can be used for bids for other institutions.

The OCC granted the first preliminary charter approval for the establishment of the Ford Group Bank, National Association.

III. FDIC Expands Bidder List to Institutions Without Bank Charter

On November 26, 2008, the FDIC established a modified bidder qualification process with the goal of qualifying additional non-bank parties for the FDIC's failing institution bidders list.

Under this process, a bidder for a troubled institution will not be required to have an active bank charter in order to apply for permission to purchase such an institution. But a bidder must have conditional approval for a charter from the responsible agency--such as approval of the shelf charter by the OCC discussed above--and meet other bid criteria established by the FDIC. In certain cases an investor may need to obtain conditional approval to establish a bank or thrift holding company.

The FDIC will now consider abbreviated information submissions and may issue conditional approval for deposit insurance to qualify interested parties for the failing institution bidders list. Basic areas of consideration for these applications by the FDIC will include review of a business plan compliant with the Community Reinvestment Act, evidence of readily available capital and identification of a management team subject to financial and biographical review.

IV. Conclusion

Following the easing of restrictions on noncontrolling investments in banks and bank holding companies by the Board of Governors of the Federal Reserve System, the OCC and FDIC are also relaxing their respective requirements to allow interested non-bank parties to participate in the bid process for failing depository institutions. The OCC may provide provisional approval of a bank charter, allowing an investor to qualify for FDIC consideration as a bidder, and the FDIC will not limit its list of qualified investors to those holding an active bank charter. These actions represent the agencies' recent attempts to attract more investors and capital for troubled financial institutions.

[1] See WilmerHale's email alert entitled "Federal Reserve Issues Guidance on Noncontrolling Investments in Banking Organizations," dated September 24, 2008.

Authors

Russell J. Bruemmer

RETIRED PARTNER

+1 202 663 6000

Stephanie C. Evans

PARTNER

stephanie.evans@wilmerhale.com

+1 202 663 6355