

SCHWARTZ & BALLEN LLP
1990 M STREET, N.W. • SUITE 500
WASHINGTON, DC 20036-3465

WWW.SCHWARTZANDBALLEN.COM

TELEPHONE
(202) 776-0700

FACSIMILE
(202) 776-0720

MEMORANDUM

July 2, 2009

To Our Clients and Friends

Re: FDIC Proposed Policy on Qualifications for Failed Bank Acquisitions

The Federal Deposit Insurance Corporation has proposed a policy statement providing guidance on the terms and conditions applicable to investors interested in acquiring or investing in assets and liabilities of failed depository institutions. The proposed guidance addresses the FDIC's concern that certain private investment structures proposed in connection with purchasing banks in receivership raise potential safety and soundness considerations and risks to the deposit insurance fund. Public comments on the proposal are due in 30 days.

DISCUSSION

The FDIC's proposal provides guidance to private capital investors interested in acquiring or investing in failed insured depository institutions regarding the terms and conditions for such investments or acquisitions. The guidance describes the terms and conditions that private capital investors would be expected to satisfy to obtain eligibility for a proposed acquisition structure. The measures would cover capital support and cross guarantees, transactions with affiliates, secrecy jurisdiction investors, continuity of ownership requirements and disclosure.

- The proposal will apply to private capital investors in certain companies, including all entities in such an ownership chain, and applicants for insurance in the case of *de novo* charters issued in connection with the resolution of failed insured depository institutions.
- "Silo" structures would not be considered to be eligible bidders for failed bank assets and liabilities because, according to the FDIC, under these structures beneficial ownership cannot be ascertained, the responsible parties for making decisions are not clearly identified, and/or ownership and control are separated.

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- The depository institution will be required to maintain a Tier 1 leverage ratio of 15 percent for a period of at least three years. Thereafter, the institution will be required to be “well capitalized.”
- Investors’ organizational structures would be expected to agree to serve as a source of strength for their subsidiary depository institutions. Source-of-strength commitments are to be supported by the agreement of the depository institution’s holding company to sell equity or engage in capital qualifying borrowing.
- Investors whose investments constitute a majority of the investments in more than one insured depository institution would be expected to pledge to the FDIC their proportionate interests in each such institution to pay for any losses to the deposit insurance fund resulting from the failure of any other such institution.
- All extensions of credit by a depository institution to its investors, their investment funds, their affiliates and companies in which the investors or affiliates invest would be prohibited.
- Entities that are domiciled in bank secrecy jurisdictions would not be eligible to own an interest in a depository institution unless the investors are subsidiaries of companies that are subject to comprehensive consolidated supervision and agree to additional specified conditions.
- Investors would be prohibited from selling or otherwise transferring securities of the holding company or depository institution for a three-year period without the consent of the FDIC.

A copy of the FDIC’s proposal can be found on our website at http://www.schwartzandballen.com/whats_new.html.

If you have any questions, please call Gilbert Schwartz, Robert Ballen, Tom Fox or Heidi Wicker at (202) 776-0700.