

CORPORATE AND SECURITIES LAW

Alert

NEWS FOR THE CLIENTS AND FRIENDS OF BASS, BERRY & SIMS PLC

FDIC Releases Final Policy Statement on Qualifications for Failed Bank Acquisitions; Extends Transaction Account Guarantee Program & Increases Assessment Fee

September 3, 2009

On August 26, 2009, the Federal Deposit Insurance Corporation issued a final policy statement governing the terms and conditions of investments and acquisitions by private investors acquiring failed insured depository institutions. The final policy statement, which was approved by a 4-to-1 vote, with Acting OTS Supervisor John Bowman opposing the other four board members, is less onerous than the original proposed guidelines. The FDIC has indicated that it will review the operation and impact of the policy statement within six months of its approval and will make adjustments as it deems necessary.

- **Applicability**

The final policy statement applies to (i) private investors in a company, including any company acquired to facilitate bidding on failed banks or thrifts that is proposing to assume deposit liabilities, or such liabilities and assets, from the resolution of a failed insured depository institution and (ii) applicants for insurance in the case of de novo charters issued in connection with the resolution of a failed insured depository institution (hereinafter as the “Investors”). The final policy statement does not apply to (i) transactions where private investors are in partnerships or similar ventures with bank or thrift 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 or (ii) Investors with 5 percent or less of the total voting power of an acquired depository institution, absent evidence of concerted action by Investors.

- **Capital Commitment**

The resulting depository institution must maintain a ratio of Tier 1 common equity to total assets of at least 10 percent for a period of three years from the time of the acquisition. After that period, the institution must remain “well capitalized” as long as the Investors’ ownership continues. Failure to maintain the required capital level will result in the institution being treated as “undercapitalized” and therefore subject to all measures that would be available to the institution’s regulator under the Prompt Corrective Action regime. In addition, the institution would have to take immediate action to restore the institution to the 10 percent or well-capitalized standard, as applicable. The “source of strength” provision included in the original proposal was dropped from the final policy statement.

- **Cross Support**

The proposed cross support guidelines were scaled back in the final policy statement. If one or more Investors own 80 percent or more of two or more banks or thrifts, the stock of such entities owned by such Investors must be pledged to the FDIC. Upon a bank or thrift failure, the FDIC may exercise such

pledges to recoup any losses incurred by the FDIC. The FDIC may waive this pledge requirement where exercise of the pledge would not result in a decrease in the cost of the bank or thrift failure to the Deposit Insurance Fund.

- **Transactions with Affiliates**

Rejecting the argument that Sections 23A and 23B and Regulations W and O are sufficient to prevent inappropriate affiliate and insider transactions, the final policy statement includes special limitations on affiliate transactions. The final policy statement prohibits all extensions of credit to any Investor, their investment fund or their affiliates by a failed insured depository institution acquired by such Investors under the policy statement. For purposes of the policy statement, an “affiliate” is any company in which an Investor owns, directly or indirectly, at least 10 percent of the equity of such company and has maintained such ownership for at least 30 days. This definition eliminates very short term investments in an attempt to make compliance with the policy statement easier.

- **Secrecy Law Jurisdictions**

Subject to certain exceptions, the Investors employing ownership structures involving entities that are domiciled in bank secrecy jurisdictions would not be eligible to own an interest in any depository institution. For purposes of the policy statement, a “secrecy law jurisdiction” is any country that applies a bank secrecy law that limits U.S. bank regulators from determining compliance with U.S. laws or prevents them from obtaining information on the competence, experience and financial condition of applicants and related parties.

- **Continuity of Ownership**

The final policy statement leaves largely unchanged the proposed guidelines’ three-year holding period requirement. Under the final policy statement, Investors are prohibited from selling or transferring their securities for a three-year period of time following the acquisition absent the FDIC’s approval, which shall not be unreasonably withheld in the case of transfers to affiliates provided the affiliate agrees to be subject to the conditions applicable under the policy statement.

- **Prohibited Structures**

The final policy statement prohibits complex ownership structures, in which the beneficial ownership is difficult to ascertain, the responsible parties for making decisions are not clearly identified, and ownership and control are separated, from acquiring an insured depository institution. The final policy statement specifically states that an ownership structure that involves a single private equity fund that seeks to acquire ownership of a depository institution through the creation of multiple investment vehicles, funded and apparently controlled by the parent fund, would be considered a prohibited structure.

- **Special Owner Bid Limitation**

Any Investors that hold 10 percent or more of the equity of a bank or thrift in receivership are not eligible to bid on the failed depository institution.

- **Disclosure**

The final statement of policy requires that the Investors disclose certain information to the FDIC, including information regarding the size of capital fund, its diversification, the return profile, the marketing documents, the management team and the business model.

FDIC Extends TAG Program and Increases Assessment Fee

On August 26, 2009, the FDIC issued a final rule (i) extending the Transaction Account Guarantee Program (“TAG”) under the Temporary Liquidity Guarantee Program to June 30, 2010 and (ii) increasing the assessment fee from 10 basis points to 15, 20 or 25 basis points, depending on the institution’s risk rating, for entities participating in the TAG program after January 1, 2010. The fee will apply only to

deposit amounts that exceed the existing deposit insurance limit of \$250,000. If an entity is participating in the TAG program and does not want to be subject to the higher assessment, then the entity must opt out of the TAG program. The option to opt out is a one-time option, and any decision to opt out is irrevocable. In order to exercise the option to opt out, a participating entity must submit an email to the FDIC no later than November 2, 2009 and post a notice prominently on its website that noninterest bearing transaction accounts will no longer be fully guaranteed.

Bass, Berry & Sims PLC's Financial Institutions Subgroup monitors and advises on developments affecting financial institutions and their holding companies. Our attorneys have extensive experience in this area and provide advice to both public and private financial institutions.

If you have any questions regarding the issues addressed in this Corporate and Securities Law Alert please feel free to contact any of your regular contacts in the Corporate and Securities Group or any of the attorneys in our Financial Institutions Subgroup listed below.

| | | |
|------------------|----------------|--|
| Bob Thompson | (615) 742-6262 | bthompson@bassberry.com |
| Scott Holley | (615) 742-7721 | sholley@bassberry.com |
| Price Wilson | (615) 742-7820 | pwilson@bassberry.com |
| Frank Pellegrino | (615) 742-7947 | fpellegrino@bassberry.com |

Bass, Berry & Sims PLC Corporate and Securities Group

The Corporate and Securities Group includes the following subgroups comprised of our attorneys with a particular expertise who are focused on current trends and developments in these areas of the law. This Alert has been brought to you courtesy of the Financial Institutions subgroup.

| | |
|--|--------------------------------------|
| Corporate Finance/1933 Act | Corporate Governance |
| Cross-Border Transactions | Distressed M&A |
| Executive Compensation | Fiduciary Duties |
| Financial Institutions | Investor Relations/Earnings Releases |
| Joint Ventures | M&A Trends and Developments |
| Periodic and Current Reporting | Private Equity/Venture Capital |
| Private Placements | Real Estate Capital Markets |
| Securities Laws Liabilities/ SEC Priorities and Enforcement | Shareholder Activism |
| Trading by Insiders/Equity and Debt Repurchases | Transactional Tax |

315 Deaderick Street • Suite 2700 • Nashville, TN 37238-3001 • (615) 742-6200
The Tower at Peabody Place • 100 Peabody Place, Suite 900 • Memphis, TN 38103-3672 • (901) 543-5900
1700 Riverview Tower • 900 S. Gay Street • Knoxville, TN 37902 • (865) 521-6200