July 6, 2009

CLIENT ALERT

FDIC PROPOSES STANDARDS APPLICABLE TO BUYERS OF FAILED THRIFTS

In an effort to provide guidance to private investors interested in acquiring or investing in failed depository institutions in receivership, on July 9, 2009, the Federal Deposit Insurance Corporation (FDIC) proposed eligibility standards for investors who are not already owners of a bank or thrift holding company. As defined in the FDIC's proposed policy statement, "Investors" means (a) private capital investors in a company (other than a bank or thrift holding company existing or acquired at least three years prior to the effective date of the proposed policy) that proposes to directly or indirectly assume deposit liabilities and/or assets from a failed insured depository institution in receivership, and (b) in the case of de novo charters issued in connection with the resolution of failed insured depository institutions, applicants for insurance.

The proposed standards are designed to provide for—

- initial and continuing capital support of the acquired depository institution
- cross guarantees over substantially commonly owned depository institutions
- a prohibition on extending credit to insiders and affiliated parties of Investors

- maintenance of continuity of ownership for three years after the acquisition or investment, absent FDIC approval of the transfer of any interest therein

- a prohibition on the use of secrecy law jurisdiction vehicles as the channel for investments unless the parent company is subject to consolidated supervision in its home country.

Under the proposed standards, Investors would be expected to agree to cause the depository institution acquiring deposit liabilities (or both such liabilities and assets) from a failed depository institution in receivership to be initially capitalized at a minimum 15 percent Tier 1 leverage ratio[1] for a period of three years (or such longer period as determined by the FDIC) and thereafter to maintain the depository institution at no lower level of capital adequacy than "well capitalized" (as defined by the Federal Deposit Insurance Act, or "Act") during the remaining period of their ownership. If, at any time, the depository institution fails to meet this standard, the Investors would be obligated to immediately facilitate restoring the institution to the "well capitalized" standards. Failure to maintain the required capital level would result in the institution being treated as "undercapitalized" (as defined by the Act) for purposes of "Prompt Corrective Action" (as defined by the Act), triggering all of the measures that would be available to the institution's regulator in such a situation.

The FDIC proposes to obtain "cross guarantees" of its insurance obligations with respect to insured depository institutions owned or acquired by Investors. This will be achieved by requiring Investors whose investments, individually or collectively, constitute a majority of the direct or indirect investments in more than one insured depository institution, to pledge to the FDIC their proportionate interests in each such institution as security for the payment of any losses to the FDIC's deposit insurance fund resulting from the failure of, or assistance provided to, any other such institution.

The FDIC's proposed policy prohibits all extensions of credit by an insured depository institution acquired or controlled by Investors to such owning or controlling Investors, their investment funds (if any), any affiliates of either and any portfolio companies (i.e., companies in which the Investors or affiliates invest).

Unless otherwise approved by the FDIC, Investors would be prohibited from selling or otherwise transferring securities of the Investors' holding company or owned or acquired depository institution for a three-year period of time following the acquisition of an insured depository institution.

Investors employing ownership structures utilizing entities that are domiciled in bank secrecy jurisdictions would not be eligible to own a direct or indirect interest in an insured depository institution unless the Investors—

- are subsidiaries of companies that are subject to "comprehensive consolidated supervision" as recognized by the Federal Reserve Board
- execute agreements regarding the provision of information to the primary federal regulator about the nondomestic Investors' operations and activities
- maintain their business books and records (or a duplicate) in the United States
- consent to the disclosure of information that might be covered by confidentiality or privacy laws
- agree to cooperate with the FDIC, if necessary, in obtaining information maintained by foreign government entities
- consent to jurisdiction and designation of an agent for service of process
- consent to be bound by the statutes and regulations administered by the appropriate U.S. federal banking agencies.

In addition, Investors that directly or indirectly hold 10 percent or more of the equity of a depository institution in receivership would not be eligible to invest in the deposit liabilities and/or assets of such depository institution.

The FDIC is seeking public comments on these standards. Comments must be submitted not later than July 31, 2009.

[1] Tier 1 capital is a depository institution's "core capital," consisting primarily of common stock and disclosed reserves (or retained earnings), but also including nonredeemable noncumulative preferred stock.

CONTACT INFORMATION

We also invite you to visit the firm's Economic Recovery Resource Center for news and analysis concerning the government's economic recovery programs and their impact on business and the law.

If you have any questions concerning this alert, please contact—

Corporate

C.N. Franklin Reddick III	310.728.3204	freddick@akingump.com	Los Angeles
William D. Morris	713.220.5804	wmorris@akingump.com	Houston

Investment Funds

Burke A. McDavid	212.872.1083	bmcdavid@akingump.com	New York
Stephen M. Vine	212.872.1030	svine@akingump.com	New York

Government Contracts

Scott M. Heimberg	202.887.4085	sheimberg@akingump.com	Washington, D.C.
Robert K. Huffman	202.887.4530	rhuffman@akingump.com	Washington, D.C.

Public Law and Policy

J. David Carlin	202.887.4133	dcarlin@akingump.com	Washington, D.C.
Robert J. Leonard	202.887.4040	rleonard@akingump.com	Washington, D.C.

Real Estate and Finance

Roberta F. Colton	202.887.4072	rcolton@akingump.com	Washington, D.C.
Michael S. Mandel	202.887.4196	mmandel@akingump.com	Washington, D.C.

Tax

Patrick B. Fenn	212.872.1040	pfenn@akingump.com	New York
Stuart E. Leblang	212.872.1017	sleblang@akingump.com	New York