FURTHER CLARITY, IF NOT FLEXIBILITY: FDIC PUBLISHES ANSWERS TO QUESTIONS REGARDING ITS FAILED BANK POLICY

April 26, 2010

To Our Clients and Friends:

On Friday evening, the FDIC published its second, more detailed set of responses to frequently asked questions regarding its Statement of Policy on Qualifications for Failed Bank Acquisitions ("the Policy Statement"). The latest responses do not amend the substantive requirements (*e.g.*, no transfer for 3 years) of the Policy Statement, but rather focus principally on further clarifying when, and to which investors, those requirements apply. For example, these responses address with varying degrees of specificity: (1) that investors recapitalizing a bank may become subject to the Policy Statement if the bank then engages in material failed bank acquisitions; (2) the general need for at least 1/3 (by voting or total equity) of investors to be subject to the Policy Statement; (3) that a board representative will subject an investor to the Policy Statement, but a senior management representative may not; and (4) the ability of a U.S. intermediate fund to enable a parent fund from a bank secrecy jurisdiction to invest in a failed bank structure.

Viewed as a whole, these responses principally evidence that the FDIC remains committed to the position that private investors with a material investment or governance position in a failed bank structure generally should be subject to the Policy Statement. Nonetheless, greater clarity as to its application, unto itself, may enable private equity and other investors to more actively and effectively participate in bidding on these structures. This year is on pace to see even more bank failures than last, suggesting that many opportunities for such participation should exist.

Below is a verbatim copy of the FDIC's most recent FAQ. We intend to provide a more detailed discussion of the failed bank market, as well as the evolution of both the FRB and FDIC's legal framework for private investment in that market, in a future Debevoise publication.

Please feel free to contact us with any questions.

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FDIC'S ADDITIONAL QUESTIONS & ANSWERS PROPOSED TO ADDRESS RECENT QUESTIONS – APRIL 23, 2010:

I. Applicability – Strong Majority Interest. The statement of policy excludes: "investors in partnerships or similar ventures with bank or thrift holding companies or in such 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."

1. *In the circumstances described above, in determining whether the Investors in the established bank or thrift holding company pre-dating the proposed failed institution acquisition hold a "a strong majority interest in the resulting bank or thrift" is there any requirement that the pre-existing Investors have held their ownership interests for a specific amount of time?*

There is no requirement that pre-existing Investors must have held their ownership interests for a specific amount of time in evaluating application of the Statement of Policy. The FDIC will take into consideration whether a significant portion of the total equity shares or voting equity shares held by Investors in the established bank or thrift holding company pre-dating the proposed failed institution acquisition was recently acquired or was part of a recapitalization of the existing institution.

2. *Does the Statement of Policy apply to recapitalizations of existing banks? Would it apply if the recapitalized institution acquired a failed insured institution?*

Recapitalizations of existing institutions are not subject to the Statement of Policy. Where new Investors have recently recapitalized an institution and the institution seeks to acquire a failing bank, the FDIC will review whether the additional capital was provided contingent on completion of failing bank acquisitions. The Statement of Policy will apply if any acquisition of one or more failed institutions occurs that in combination exceed 100% of the recapitalized institution's total assets within an eighteen-month period following the recapitalization. Irrespective of the foregoing, any acquisitions will remain subject to otherwise applicable supervisory considerations or requirements.

II. Applicability – De Minimis Investors. The statement of policy does not apply to any Investor with 5 percent or less of the total voting power of an acquired depository institution or its bank or thrift holding company provided there is no evidence of concerted action among these Investors.

1. *Does the FDIC require that a certain percentage of investors be bound by the terms of the Statement of Policy? If so, what is the requirement?*

The Statement of Policy is designed, in part, to ensure that the ownership and management of insured depository institutions remain stable to provide guidance and continuity for safe and sound operation of the bank or thrift. To help accomplish this goal, Investors holding a minimum of one-third of the total voting equity shares or total equity shares of an acquired

institution or its bank or thrift holding company must be bound by the terms of the Statement of Policy.

2. *Is the 1/3 test for investors based upon voting equity shares or total equity shares?*

Investors may satisfy the one-third test through an 'anchor group' of Investors that comply with the terms of the Statement of Policy. The 'anchor group' may consist of one-third or more of the total voting equity shares or one-third or more of a combination of total voting equity shares and total equity shares as a proportion of total equity shares. The 'anchor group' includes Investors who must comply by the terms of the Statement of Policy (*i.e.* Investors with more than 5 percent of the total voting power) and any additional Investors who agree to comply in order to meet the one-third test.

3. *Does the 1/3 ownership test only have to be met at the time of offering or on an ongoing basis?*

The 1/3 ownership test only needs to be met at the time of the failed bank acquisition. However, as provided in the Statement of Policy, Investors subject to it are prohibited from selling or otherwise transferring their securities for a 3 year period of time following the acquisition absent the FDIC's prior approval.

4. *Can investors with 5% or less of voting equity shares elect to be subject to the statement of policy in order to meet the 1/3 test?*

Yes, investors with 5% or less of voting equity shares and therefore not subject to the statement of policy may elect to be subject themselves to the Statement of Policy in order to contribute towards meeting the 1/3 anchor investment.

5. *Are investors that have the right to designate a board member subject to the statement of policy even if they hold 5% or less of the voting equity shares?*

Yes, if an investor has a right to designate a board member then that investor will be subject to the Statement of Policy.

6. *Is senior management automatically subject to the statement of policy, regardless of the amount of voting equity shares they may own?*

No, senior management is not automatically subject to the Statement of Policy simply due to their position as senior management. However, they may be subject to the Statement of Policy if they would otherwise be subject to its provisions by virtue of their equity share ownership, ability to designate a board member, some combination of such rights, or evidence of concerted action.

7. *Would a right of first refusal, which would give a shareholder the right to acquire another shareholder's shares at the same price and on the same terms be permissible?*

Rights of first refusal are permitted for those investors who do not make up the 1/3 anchor group. However, if the purchase results in the Investor holding more than 5% of the voting equity shares, the Investor would become subject to the Statement of Policy.

8. *What information is required from investors who hold 5% or less of the voting equity?*

Investors holding 5% or less of the voting equity are not subject to detailed questionnaires such as those requested of the Investors who are subject to the Statement of Policy or who are otherwise included in the 1/3 'anchor group.' However, investors holding 5% or less of the voting equity are subject to being included on the List of Investors provided to the FDIC. This list provides: each Investor's name; type of Investor (*i.e.* mutual fund, hedge fund, individual); domicile; the number of shares of voting stock and total equity held by the Investor both prior to the capital raise and subsequent to the capital raise; options, warrants, interests convertible into voting stock, and rights to control voting stock owned by others; and shares held by affiliates or immediate family members.

III. Secrecy Law Jurisdiction Issues

1. *Does the FDIC review tax information from investors operating through U.S. subsidiaries, but whose parent company operates through or is domiciled in Secrecy Law Jurisdictions for compliance with tax laws?*

The FDIC will not make determinations as to whether an Investor is in compliance with all relevant tax laws. In applying the Statement of Policy's secrecy law jurisdiction requirements to anchor Investors utilizing entities domiciled in bank secrecy jurisdictions (Offshore Investors), the FDIC will consider those entities to be in compliance with the Statement as long as each Offshore Investor makes its investment in the bank or the bank or thrift holding company through at least one wholly-owned subsidiary established under the laws of any state of the United States (Domestic Subsidiary), as further explained below.

Each Offshore Investor and its Domestic Subsidiary must agree: (1) to maintain in the United States at the offices of its subsidiary or subsidiaries (i) its business books and records (or duplicates thereof) and (ii) an exact duplicate of the books and records of the Offshore Investor; (2) to maintain in the United States at the offices of its Domestic Subsidiary a current list of all investors in the Offshore Investor; and (3) to make the required books, records, and lists identified in (1) and (2) above available to the FDIC upon request as may be necessary to implement and enforce the provisions of the Statement or the FDIC's supervisory, deposit insurance or receivership obligations.

It is expected that any Offshore Investor will pay U.S. federal income tax on the income from their ownership, including dividends and capital gains, at the same time, at the same tax rate, and to the same extent as if it had made its investment directly in the bank or the bank holding company.