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Comment Period Closes on FDIC Private Equity Policy Statement

The Federal Deposit Insurance Corporation ("FDIC") on July 2, 2009, requested comment on its proposed Statement of Policy on Qualifications for Failed Bank Acquisitions (the "Proposal"). *See* *FDIC Proposes Guidelines for PE Investments in Failed Institutions: The Debate Begins*, 21st Century Money, Banking & Commerce Alert® (July 6, 2009). The FDIC received 59 comments as of the close of the public comment period on August 10, 2009.

Fried Frank filed a comment letter (the "Comment") on behalf of a number of clients of the firm. While welcoming the FDIC's efforts to address the role of private equity funds ("PE Funds") in the acquisition of failed banks and noting that the interests of the FDIC and PE Funds are aligned in seeking to ensure that banking operations acquired from the FDIC are operated in a safe and sound manner, the Comment offered several constructive, alternative approaches to the FDIC's proposed treatment of PE Fund investors in failed banks:

1. Capital requirements are indeed important, but they should be a function of the nature of the risks inherent in an institution's asset and liability profile, rather than of the identity of an institution's investors. PE Funds that participate in failed bank acquisitions, whether as passive or controlling investors, should continue to be subject to the same requirements and restrictions as other types of investors.
2. The FDIC should continue to rely on the established laws and regulations of the four federal banking agencies which have jurisdiction regarding passive and controlling investments in, and the safety and soundness of, insured depository institutions. In that regard, passive investors, whether PE Funds or other investors, are subject to stringent passivity commitments and related undertakings to avoid control, and are subject to civil and criminal liability for any violation of them.
3. The Proposal can achieve greater consistency with applicable federal law regarding control by clarifying that the FDIC would not hold passive PE Fund investors responsible for the actions or losses of a bank or thrift. When passive investors are barred from influencing the management or policies of a banking institution and certify that they will maintain that position, federal law does not generally hold them responsible thereafter for capital deficiencies or other actions that they could not cause or avoid given their passive role.
4. The Proposal would benefit from clearer definitions of the parties and types of transactions that it seeks to restrict. In that regard, the Comment suggests that such restrictions on private capital investors be triggered by traditional concepts of control under federal banking law, and that the FDIC identify and distinguish the types of silo transactions that it is concerned about.

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A copy of the Comment is available here.

Authors and Contributors

For more information regarding this client alert, please contact your usual Fried Frank attorney or any of the attorneys listed below:

Thomas P. Vartanian
+1.202.639.7200

David L. Ansell
+1.202.639.7011

Robert H. Ledig
+1.202.639.7016

Gordon L. Miller
+1.202.639.7173

Fried, Frank, Harris, Shriver & Jacobson LLP

New York
One New York Plaza
New York, NY 10004-1980
Tel: +1.212.859.8000
Fax: +1.212.859.4000

Washington, DC
1001 Pennsylvania Avenue, NW
Washington, DC 20004-2505
Tel: +1.202.639.7000
Fax: +1.202.639.7003

Frankfurt
Taunusanlage 18
60325 Frankfurt am Main
Tel: +49.69.870.030.00
Fax: +49.69.870.030.555

Hong Kong
in association with
Huen Wong & Co.
9th Floor, Gloucester Tower
The Landmark
15 Queen's Road Central
Hong Kong
Tel: +852.3760.3600
Fax: +852.3760.3611

Shanghai
40th Floor, Park Place
1601 Nanjing Road West
Shanghai 200040
Tel: +86.21.6122.5500
Fax: +86.21.6122.5588

Fried, Frank, Harris, Shriver & Jacobson (London) LLP

London
99 City Road
London EC1Y 1AX
Tel: +44.20.7972.9600
Fax: +44.20.7972.9602

Fried, Frank, Harris, Shriver & Jacobson (Europe)

Paris
65-67, avenue des Champs Elysées
75008 Paris
Tel: +33.140.62.22.00
Fax: +33.140.62.22.29

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