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Economic Crisis Response Group

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OTS Approves Bank Purchase by a Consortium of Private Equity Firms in Shift from Fed Policy; FDIC Facilitates Acquisition

The Office of Thrift Supervision recently approved the purchase of a thrift (BankUnited FSB) under its supervision by a consortium of private equity firms. This decision makes the OTS the first bank regulatory authority to approve the acquisition of a controlling interest in a U.S. bank by private equity firms.

The transaction approved by the OTS involved a "silo structure," whereby the purchaser forms a separate entity to acquire and manage the target bank, allowing it to insulate the bank from its other investments. Regulatory authorities previously have allowed individual investors to purchase controlling interests in banks, even if they managed private equity firms, provided such individuals made such acquisitions using their own funds.

The consortium formed a newly chartered federal savings bank and acquired the assets of the bank in an FDIC receivership subject to a loss-sharing agreement with the FDIC. The FDIC asserted that this option was the least costly among those available for banks in receivership and stated that it anticipates similar transactions going forward (in this case, the bank in receivership had been devastated by the downturn in real estate markets). The FDIC expects to issue policy guidance governing such transactions in the near future.

The recent actions by the OTS and the FDIC mark a departure from the policy of the Federal Reserve Board, which, to date, has not authorized the acquisition of controlling interests in banks under its supervision by private equity firms, through a silo structure or otherwise.

Increased Deposit Insurance Coverage Extended through the End of 2013

On May 20, President Obama signed the Helping Families Save Their Homes Act, which included a provision extending the increase in FDIC insurance to $250,000 per depositor through 2013. Under the new law, on January 1, 2014, the maximum insured amount returns to $100,000 per depositor per institution (except for certain self-directed retirement accounts, which will remain at $250,000). Coverage with respect to non-interest bearing transaction accounts at institutions that elected to participate in the FDIC's Temporary Liquidity Guarantee Program has not been extended; such accounts carry unlimited deposit insurance coverage through December 31, 2009.

Credit Cardholders' Bill of Rights Act

On May 22, President Obama signed the Credit Cardholders' Bill of Rights Act of 2009, new credit card legislation that significantly increases restrictions on credit card terms and practices and contains a number of consumer protections.

The legislation, which amends the Truth in Lending Act, generally becomes effective in early 2010 and places limits on increases in an individual cardholder's interest rate, regulates the time allotted to pay credit card bills, and restricts who can receive cards. Many fees, such as late fees and over-the-limit fees, also are restricted under the new legislation.

The new legislation restricts when interest rates charged on existing credit card balances can be increased. In general, 45 days' notice is required to raise rates or change terms, but much longer delays apply to increases in certain circumstances. The law also restricts universal default, preventing banks from raising rates based on an account holder's failure to pay an unrelated debt, and prohibits interest charges on debt that is timely paid.

Certain credit card issuers have indicated that as a result of this legislation, current credit card holders that pay in a timely fashion and do not incur interest charges may, going forward, be assessed an annual credit card fee for the privilege of maintaining an account. Other issuers have suggested that interest could start to accrue on the day of purchase.

HUD Announces Additional Programs under the American Recovery and Reinvestment Act

The Department of Housing and Urban Development recently announced new initiatives under the American Recovery and Reinvestment Act of 2009 ("ARRA") that will provide public housing authorities with funds to improve public housing. These programs include nearly $1 billion in grants and are designed to help public housing authorities improve the quality and/or energy efficiency of public housing, as well as create jobs. HUD will award grants to public housing authorities for projects: (i) to create energy-efficient public housing, (ii) to develop or renovate public housing projects that were previously stalled due to lack of resources, (iii) to rebuild or renovate "obsolete" public housing developments, or (iv) to improve public housing units and create facilities for the delivery of medical or other services to the elderly and persons with disabilities.

New Consumer-Oriented Financial Regulatory Authority under Consideration

The Obama administration is considering the creation of a new regulatory authority to protect consumers that use financial products as varied as mortgages, credit cards and mutual funds. Such authority would be granted potentially broad powers to regulate the terms and marketing of a wide range of financial products.

Plans for the new regulatory authority remain abstract, though discussions have begun among members of the administration, lawmakers, industry officials and other financial experts. Regulation of consumer financial products is currently divided among a number of federal agencies, and SEC Chairman Mary Schapiro has objected to the creation of a new regulatory authority that could cause existing agencies, including the SEC, to lose powers, personnel and funding. Chairman Schapiro said that she "question[s] pretty profoundly any model that would try to move investor protection functions out of the Securities and Exchange Commission."

One of the leading proponents of a consumer-focused regulatory authority is Elizabeth Warren, the Harvard law professor who also chairs the Congressional Oversight Panel for the government's financial rescue initiative. In 2007, Professor Warren proposed the creation of a new agency modeled on the Consumer Product Safety Commission, which protects buyers of consumer products. In March, Senator Richard Durbin introduced legislation, co-sponsored by Senators Charles Schumer and Edward Kennedy, to create a Financial Product Safety Commission based on Warren's proposal. According to the senators, the proposed commission would be responsible for identifying emerging problems with and educating consumers about various types of financial products.

Proskauer's Economic Crisis Response Group includes lawyers with extensive experience representing private and public companies, institutional investors, financial services companies, private equity and hedge funds, lenders, commercial banks and individuals in the complex and interrelated areas impacted by the current financial situation. Our multidisciplinary group brings together the talents of our business and transactional lawyers with our litigation capabilities, particularly as they pertain to acquiring, managing or disposing of distressed assets; issues concerning investments in financial services companies; and complex financial instruments and transactions, including structured finance products; as well as a broad range of other areas such as corporate governance and defense, insurance coverage, reductions in force and other employment and benefit-related issues, securities regulation, and bankruptcy and restructuring matters.

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