

Client Alert

# Economic Crisis Response Group

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Economic Crisis  
Response Group

Edited by  
Charles E. Dropkin

## **FDIC Approves Proposed Policy Statement on Investor Qualifications for Failed Bank Acquisitions**

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On July 2, the FDIC released a Proposed Policy Statement on Qualifications for Failed Bank Acquisitions (“[Proposed Policy Statement](#)”). The purpose of the release is to provide private investors, including private equity funds, with guidelines regarding the terms and conditions of investments or acquisitions of assets and liabilities of failed banks or thrifts.

Under the Proposed Policy Statement, the FDIC would set standards for bidder eligibility with respect to the resolution of failed insured depository institutions. The proposed requirements include: enhanced capital support of the acquired depository institutions; agreement to a cross-guarantee over substantially commonly-owned depository institutions; limits on transactions with affiliates; requirements regarding continuity of ownership; limits on investors from so-called secrecy jurisdictions which do not provide information with respect to potential money laundering; limitations on special owner bids; and more detailed disclosure requirements as to ownership and control.

The Proposed Policy Statement would not allow holders of 10% or more of the equity of a failed bank to bid for its assets. Of special interest to potential private equity investors, the Proposed Policy Statement would not allow “silo structures” to be eligible bidders. The silo structure has been used to facilitate private equity investment in financial institutions by creating an investment vehicle that is isolated from other existing funds in portfolio. The FDIC’s shift in policy appears to be in response to Congressional criticism of recent transactions involving private equity participation in IndyMac and Bank United. (For a discussion of silo and other structures, see “[PE, Hedge Funds to the Rescue?](#)” published in *Investment Dealers’ Digest* on March 20, 2009 and co-authored by Proskauer partners Charles Dropkin and Joshua Thompson.)

If fully adopted, the Proposed Policy Statement would impose the “source of strength” principle on investors (*i.e.*, investors’ organizational structures would be expected to support the depository institutions) as well as cross-guaranty obligations (such that controlling owners of multiple depository institutions would be expected to pledge to the FDIC their proportionate interests in each institution to pay for any losses incurred by the FDIC in liquidating or assisting any affiliated institution).

The Proposed Policy Statement includes a condition that acquired depository institutions be very well-capitalized (at a Tier 1 leverage ratio of 15 percent) for a period of at least three years, and at no less than a “well capitalized” level thereafter.

The FDIC is seeking public comment on the appropriate level of initial capital required to satisfy safety and soundness considerations, as well as on all aspects of the Proposed Policy Statement before it becomes effective. As announced, the proposals would affect the conditions for potential private equity investment in failing banks and increase the responsibilities of investor funds.

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.

If you have any questions regarding the matters discussed in this Client Alert, please contact any of the lawyers listed below:

**Charles E. Dropkin**  
212.969.3535 – [cdropkin@proskauer.com](mailto:cdropkin@proskauer.com)

**James P. Gerkis**  
212.969.3135 – [jgerkis@proskauer.com](mailto:jgerkis@proskauer.com)

**Jeffrey A. Horwitz**  
212.969.3229 – [jhorwitz@proskauer.com](mailto:jhorwitz@proskauer.com)

**Bruce L. Lieb**  
212.969.3320 – [blieb@proskauer.com](mailto:blieb@proskauer.com)

**David A. Picon**  
212.969.3974 – [dpicon@proskauer.com](mailto:dpicon@proskauer.com)

**Stephen L. Ratner**  
212.969.3290 – [sratner@proskauer.com](mailto:sratner@proskauer.com)

**D. Eric Remensperger**  
310.284.4590 – [eremensperger@proskauer.com](mailto:eremensperger@proskauer.com)

**Kathy H. Rocklen**  
212.969.3755 – [krocklen@proskauer.com](mailto:krocklen@proskauer.com)

**David W. Tegeler**  
617.526.9795 – [dtegeler@proskauer.com](mailto:dtegeler@proskauer.com)

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