Client Alert.

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New Q&As on the Statement of Policy on Qualifications for Failed Bank Acquisitions, April 23, 2010

On April 23, 2010, the Federal Deposit Insurance Corporation (FDIC) published additional Q&As on the Statement of Policy on Qualifications for Failed Bank Acquisitions, issued on September 2, 2009 (Policy Statement). The additional Q&As address recent questions regarding the applicability of "Strong Majority Interest" and "*De Minimis* Investors," and clarify certain issues regarding "Secrecy Law Jurisdiction."

INVESTMENTS IN EXISTING BANK HOLDING COMPANIES: STRONG MAJORITY INTEREST

The Policy Statement excludes from its applicability investors in partnerships or similar ventures with bank or thrift holding companies where the holding company has a *strong majority interest* in the failed bank or thrift, and an *established record for successful operation* of insured banks or thrifts.

The Q&As clarify that there is no requirement that the investors must have held their ownership for a specific amount of time. The FDIC will take into consideration whether a significant portion of the shares (total equity or voting equity) held by the investors in the holding company pre-dating the proposed acquisition of the failed bank was recently acquired, or was part of a recapitalization of the existing institution.

The Q&As state that recapitalizations of existing institutions are not subject to the Policy Statement. The FDIC will review whether the Policy Statement will apply where new investors have recapitalized an institution, and such recapitalization was contingent on a successful acquisition of a failed bank. However, notwithstanding any other applicable supervisory considerations or requirements, the Policy Statement will apply if any acquisition of one or more failed banks occurs such that total assets in combination exceed 100% of the recapitalized institution's total assets within an 18-month period following the recapitalization.

Unfortunately, the Q&As do not define the terms "significant portion," "recently acquired," or "recapitalization" and it remains to be seen how the FDIC will interpret those terms.

DE MINIMIS OR 5%-OR-LESS INVESTORS

The Policy Statement does not apply to any investor with 5% or less of the total voting power of an acquired depository institution or its bank or thrift holding company unless there is evidence that several *de minimis* investors acted in concert. The Q&As address certain issues in connection with the applicability of the Policy Statement in cases where a number of 5%-or-less investors seek to invest in a bank or a bank or thrift holding company.

The one-third test

In order to ensure stability of the ownership and the management of insured depository institutions and to provide guidance and continuance for safe and sound operation of a bank or a thrift, the Q&As state that at least one-third of the

investors must be investors who are bound by the terms of the Policy Statement (the so-called "anchor group").

The anchor group may consist of the holder(s) of one-third or more of the total voting equity shares, or of a combination of total voting equity shares and total equity shares. Because *de minimis* investors may elect to be subject to the Policy Statement in order to contribute towards the one-third test, the anchor group may include investors who must comply by the terms of the Policy Statement (i.e., investors each having more than 5% of the total voting power) and any additional investor who voluntarily agrees to comply with the terms of the Policy Statement.

The one-third test must be met at the time of the acquisition of the failed bank, but it is not a continuing requirement. The Policy Statement nonetheless prohibits investors who are part of the anchor group to sell or otherwise transfer their securities for a three year period after the acquisition without the FDIC's prior approval.

Board members and senior management

An investor who has the right to designate a board member is automatically subject to the Policy Statement, even if such investor holds 5% or less of the total voting equity shares of the institution. Members of senior management, on the other hand, are not automatically bound by the Policy Statement if they hold 5% or less of the voting equity shares. However, members of senior management would be bound by the Policy Statement if they would otherwise be subject to its provisions (e.g., not a *de minimis* shareholder; possibility to designate a board member; concerted action).

Right of first refusal

An investor having a right of first refusal to acquire another shareholder's shares at the same price and on the same terms will not be subject to the Policy Statement as long as the execution of such right would not result in the ownership of more than 5% of the voting equity shares of the institution.

The Q&As ambiguously state that "[R]ights of first refusal are [only] permitted for those investors who do not make up the 1/3 anchor group." However, we believe that this should not exclude investors that are part of the anchor group from having a right of first refusal, because such investors are already subject to the Policy Statement.

Information from *de minimis* shareholders

Investors holding 5% or less of the voting equity are not subject to detailed questionnaires required by the Policy Statement, as long as they are not part of the anchor group. However, *de minimis* investors must be included in the *List of Investors* provided to the FDIC.

The *List of Investors* provides: each investor's name; type of investor; domicile; number of shares of voting stock and total equity held by the investor both prior to any capital raise and subsequent to the capital raise; options, warrants, interests convertible into voting stock, and right to control voting stock owned by others; and shares held by affiliates or immediate family members.

SECRECY LAW JURISDICTION ISSUES

An investor that is part of the anchor group, and therefore is subject to the Policy Statement, may use an entity domiciled in a bank secrecy jurisdiction (Offshore Investor), as defined in the Policy Statement, as long as such Offshore Investor makes its investment in the bank or the bank or thrift holding company through at least one whollyowned U.S. subsidiary. In addition, in order to be in compliance with the Policy Statement, the Offshore Investor and its U.S. subsidiary must

agree to:

1. Maintain in the United States at the offices of the U.S. subsidiary (i) its business books and records, and (ii) an exact duplicate of the books and records of the Offshore Investor;
2. Maintain in the United States at the offices of the U.S. subsidiary a current list of all investors in the Offshore Investor; and
3. Make such required books, records, and list available to the FDIC upon request as may be necessary.

The following are the links to the Policy Statement and the Q&As (the April 2010 Q&As start on page 3):

Final Statement of Policy on Qualifications for Failed Bank Acquisitions, September 2, 2009

Q&As on Policy Statement for Failed Bank Acquisitions, January 6, 2010, with addition on April 23, 2010

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