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# Memorandum

## FDIC Opens Door to Private Equity Acquisitions of Failed Banks

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On March 23, 2026, the FDIC officially rescinded financial crisis-era guidance that had, for nearly two decades, discouraged private equity investors from participating in the resolution of failed banks. This recission, along with other actions that the FDIC recently previewed to improve its bank resolution toolkit, should help remove barriers to "a potentially significant flow of capital into failed institutions." For private equity investors, the FDIC's newfound openness to nonbank bidders could present opportunities to acquire loan portfolios, servicing rights or—with careful and creative regulatory structuring—whole-bank franchises with compelling seller financing or FDIC loss-share terms. As underscored by FDIC Chairman Travis Hill, however, "advance preparation during peacetime" will be critical for private equity investors seeking to participate in future failed-bank marketing processes, given the potential speed of modern-day bank failures.

### Private Capital in Failed Bank Resolutions

When resolving a failed bank, the FDIC will typically market the failed bank to potential bidders (either on a whole-bank basis or partitioned among particular assets and liabilities, such as all deposits, insured deposits, or loan pools). The opportunity to participate in these FDIC-assisted sales of failed banks can be attractive to buyers, which have typically been healthy FDIC-insured banks, for several reasons:

- *Loss-Sharing Agreements*: In some cases, the FDIC may offer shared-loss transactions in which the FDIC agrees to share credit losses on certain of the failed bank's distressed assets (such as commercial or residential loans) up to a specified limit, which can protect the acquirer from downside risk on acquired loan portfolios while still realizing upside from positive asset performance.
- *Asset Discounts*: In "whole bank" transactions, the FDIC offers bidders the opportunity to acquire essentially all of the failed bank's assets on an "as is" basis, allowing investors to bid at a discount from the assets' book value.
- *Seller Financing*: The FDIC has, in some instances, offered seller-financing for acquisitions of failed banks or their assets, allowing buyers to finance the acquisition with a purchase money note issued to the FDIC (as receiver for the failed bank) at a potentially favorable interest rate.

The FDIC is required to minimize losses to the Deposit Insurance Fund, and often prefers "weekend sale" whole-bank purchases as the optimal resolution outcome for minimizing disruption in order to avoid the "melting ice cube" problem of post-failure asset value deterioration. Importantly, as a legal matter, only a bank or similar depository institution is authorized to maintain deposit liabilities. Without the ability to assume deposit liabilities, private equity bidders face significant impediments participating in the failed bank resolution process. Several banking laws—including the Bank Holding Company Act of 1956 and its "Volcker Rule"—also impose regulatory challenges for a private equity firm seeking to control a newly formed or existing bank.

In some cases, however, multiple private equity firms and institutional investors have structured bank investments through a consortium (or "club") deal structure, in which no single firm is deemed to "control" the bank for regulatory purposes. In the midst of the 2008-2009 financial crisis, private equity firms used this club deal structure to acquire failed banks, including IndyMac and BankUnited.

## 2009 Policy Statement – Additional Barriers Against Private Capital Entry

Within months after the private equity-backed resolutions of IndyMac and BankUnited, the FDIC issued its 2009 Statement of Policy on Qualifications for Failed Bank Acquisitions. The Policy Statement, which appeared premised on a concern that private investors might operate an acquired institution in a riskier manner than would a strategic bank acquirer, included "onerous and highly prescriptive" conditions to private capital investments in failed bank resolutions, including:

- *Requirement to Maintain Higher Capital Level*: A requirement for the PE-backed bank to satisfy a minimum tier 1 common equity-to-total-assets ratio of at least 10% for the first 3 years from the acquisition. This ratio was double the 5% leverage ratio required for banks to be considered "well capitalized," greater than the 8% leverage ratio requirement typically imposed on de novo banks under FDIC guidelines, and based on a stricter measure of *common* equity than the "tier 1" capital (which can include preferred equity) measured under both of these more generally applicable leverage ratios.
- *Cross-Guarantee Liability*: A requirement for private capital investors in a failed bank to pledge their stock in other healthy bank investments to the FDIC (which the FDIC could exercise to recoup losses to the Deposit Insurance Fund) if that other bank would be at least 80% owned by common investors with the failed bank (post-resolution), creating a significant deterrent for private capital investors with multiple bank investments.
- *Transactions With Affiliates*: An outright prohibition against all extensions of credit by the target bank to private capital investors, their investment funds, and any of the firm's affiliates or portfolio companies in which an investor-sponsored fund holds a 10%+ equity interest. This prohibition was significantly more onerous and far-reaching than affiliate-transaction restrictions under standard banking laws (sections 23A and 23B of the Federal Reserve Act) and was driven by the FDIC's concern that private equity investors would face a "temptation" to use a bank's deposits to fund their other portfolio investments.

- *Lock-Up Period*: A general prohibition against private capital investors selling or transferring their bank shares for a three-year period following the acquisition of a failed bank without prior FDIC approval (precluding even an IPO during the holding period where the proceeds of the offering go the bank itself).
- *Prohibited Structures*: A ban on "complex and functionally opaque" ownership structures in failed bank acquisitions, specifically targeting "silo" structures designed to separate a private equity firm's banking investment from the rest of the firm so that the sponsor's non-financial activities and investments do not become subject to restrictions under the Bank Holding Company Act.
- *"Alliance" Bidding Structures*: An exception for "alliance" bids, pursuant to which the Policy Statement restrictions would not apply to private capital investors partnering with traditional banks to acquire failed-bank assets or liabilities, but only if the bank partner has a "strong majority interest" (*i.e.*, at least two-thirds of the partnership's equity interests).

The FDIC has since recognized that these additional requirements created a significant "deterrent effect on private capital investment." The 2009 Policy Statement revealed an apparent FDIC prejudice against private equity, referring to private capital structures as "functionally opaque" and "artificial" and expressing concern about the ability of private capital investors to "serve as responsible custodians of the public interest." The 2009 Policy Statement offered no support for its belief that PE-backed bidders posed a "higher risk profile" than strategic bank bidders. To the contrary, a recent study by economists at the FDIC's Center for Financial Research found that private equity investors have "had a positive role in stabilizing the financial system in the crisis through their involvement in failed bank resolution," helping to channel capital to failed banks where strategic bank acquirers are constrained or have little appetite to bid, and "filling [a] gap created by an undercapitalized banking sector."[1]

## Current Efforts to Expand Pools of Capital for Failed Banks

Rescission of the 2009 Policy Statement should help level what had long been a "separate and unequal" playing field for private capital bidders in failed-bank resolutions. Following the major bank failures in the spring of 2023, for example, nonbanks involved in the FDIC auctions for Silicon Valley Bank (according to media reports) and First Republic Bank (as confirmed by former FDIC Director Jonathan McKernan) were not offered "the same generous financing and loss-share terms that [the FDIC] offered to bank bidders." Without the 2009 Policy Statement's imposition of arbitrary competitive disadvantages, private equity investors could see improved bidding prospects in future FDIC auctions, adding potentially significant pools of capital that could be deployed to help stabilize weakness in the banking sector.

The Policy Statement's recission may also allow private equity investors to employ a broader range of transaction tools and structures in failed-bank acquisition proposals. For example, while the FDIC has long claimed that "alliance bid" partnerships between banks and nonbanks are "strongly encouraged," Chairman Hill recently observed that the FDIC's policies have not been "sufficiently flexible" to accommodate these bank-nonbank

[1] Emily Johnston-Ross, Song Ma & Manju Puri, *Private Equity and Financial Stability: Evidence from Failed-Bank Resolution in the Crisis*, 80 J. Finance 163 (2025).

partnerships. Without the added burden of the 2009 Policy Statement requirements, bank-nonbank alliances may be better able to submit more competitive, comprehensive bids that, together, account for a failed bank's entire franchise.

Rescission of the 2009 Policy Statement is one key component of a broader effort by the FDIC to expand the pool of qualified bidders for failed banks. Other components of this initiative include:

- *Shelf Charters*: Beginning in 2008, private capital investors developed a mechanism of obtaining preliminary approval for a bank charter, which would remain inactive ("on the shelf") until the investor group is in a position to acquire a troubled bank. While this pre-clearance process allows the organizers of a shelf charter to more readily participate in a failed bank auction, FDIC Chairman Hill noted that the full shelf charter process (which can require separate approvals from the chartering authority, the FDIC for deposit insurance, and the Federal Reserve for a bank holding company) can take years to complete. Chairman Hill recently indicated that the federal banking agencies are exploring the possibility of establishing emergency "shelf charter" procedures to enable nonbanks to more rapidly bid on a failed institution following a sudden failure.
- *Eligibility for Seller Financing*: Chairman Hill confirmed that the FDIC has developed a seller-financing program for nonbank bidders in failed bank auctions, which could broaden access to incentives such as buyer-favorable purchase money notes for private equity firms in the FDIC marketing process.
- *Bidder Prequalification*: The FDIC recently announced a new pre-qualification process for nonbank bidders, which it expects to make publicly available following an initial pilot phase, allowing for nimble participation in FDIC auctions for pre-qualified bidders.

Investors who review the newly available paths to failed-bank bidding during periods of relative stability in the banking sector may be well positioned to capitalize on these advanced preparations in the event of future market weakness.

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