HUNTON & WILLIAMS

CLIENT ALERT

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Hunton & Williams Represents First "Shelf Charter" Banks

With the number of banks failing in the U.S. rising sharply this year, the Federal Deposit Insurance Corporation (FDIC) is once again building its approved "bidder's list." This list is the tool used by the FDIC to contact potential buyers when a bank will soon fail. If your name is not on the list, you probably won't be contacted by the FDIC to bid on a failed bank.

This time around, however, the FDIC has taken a different stance from its position in the late 1980s and early 1990s. Previously, the FDIC would permit investor groups that did not own a depository institution to bid on a failed bank. If the investor group was the successful bidder, the FDIC and other regulatory agencies would work with the investor group to approve a charter for the investor group overnight and grant that charter FDIC insurance.

But the FDIC and other regulatory agencies have informally told investor groups that the days of the "overnight charter" are over. These agencies have indicated that it is simply not possible for them to do their homework to approve an investor group for a new charter within the timing constraints of a failed bank transaction, which is generally completed within a few days.

A team of Hunton & Williams attorneys led by Charles "Stormy" Greef and Brian R. Marek have been working with the FDIC, the Office of the Comptroller of the Currency and the California Department of Financial Institutions to create a structure whereby an investor group can be pre-approved for bidding on failed bank transactions.

In that regard, on Friday, November 21, 2008, the Office of the Comptroller of the Currency announced the conditional approval of the first national bank "shelf charter." Likewise, on November 17, 2008, the California Department of Financial Institutions approved its first "shelf charter" for a California state bank. Further, on November 26, 2008, the FDIC issued a press release describing how the use of a shelf charter will permit investor groups to bid on failing depository institutions.

Both of these shelf charters were approved exclusively to facilitate bidding on failing depository institutions. In essence, these agencies granted an investor group preliminary approval for a bank charter. The charter is to remain inactive, or "on the shelf," until the investor group is the successful bidder on a failing depository institution.

In each instance, the applicable agency approved the charter subject to several conditions. As a result, the process for use of a shelf charter is completed in stages.

First, the investor group applies for a charter with the applicable federal or state chartering agency and with the FDIC for deposit insurance. Before granting preliminary approval of the charter, the agency will evaluate the qualifications of the proposed management team, the financial resources that would be available to the bank, and a streamlined business plan that describes how the acquired bank would be operated. At the end of this process, the chartering agency grants conditional preliminary approval of the charter, subject to certain conditions.

Once preliminary approval is received, the shelf charter bank can participate in the failed bank bid process. After a bid is submitted, the chartering agency will evaluate the specific proposal. If it is found to be acceptable, and if the FDIC approves the bid, final charter approval is granted, together with final approval of deposit insurance by the FDIC. If the charter is the successful bidder on a failed institution, the resulting bank will be required to submit to the chartering agency a satisfactory operating plan that is specific to the institution acquired.

The charter can remain "on the shelf" for up to 18 months. The charter is not granted specifically for bidding on only one failing financial institution. Accordingly, if the charter is not successful in bidding on one failed financial institution, it can be used to bid on another until it is the successful bidder and completes a failed bank acquisition. At that point, the charter will no longer be "on the shelf," and the resulting institution can bid on other failed banks to the extent its financial and managerial resources will allow.

We believe that a shelf charter is an attractive tool to allow investor groups to bid on failing financial institutions while no other means appear to be currently available. We welcome your questions and comments.

To view the OCC's press release on the first shelf charter, please click on the following link: http://www.occ.treas.gov/ftp/release/2008-137.htm.

To view the FDIC's press release on investor group participation in the failed bank bid process, please click on the following link: http://www.fdic.gov/news/news/press/2008/pr08127.html.