THE FAILING BANK SCENARIO — AN EXPLANATION AND SUGGESTED ANALYSIS FOR A BANK'S BOARD OF DIRECTORS AND MANAGEMENT

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This article addresses questions frequently raised by banks and their officers and directors when a bank has been identified by one of the bank regulators as likely to fail. The discussion focuses on examination results that frequently lead to failure scenarios, including when a bank is served with an order requiring it to restore capital following required write-downs of losses experienced in the loan portfolio.

The failure of a Federal Deposit Insurance Corporation ("FDIC") insured commercial bank, savings association or industrial loan company (collectively, "bank") is traumatic and economically devastating to both stakeholders in the institution, as well as the local economy served by that entity. For management and a board of directors of a bank being confronted with a possible failure scenario, the events leading up to a failure are not well understood, and there exists little reliable guidance that assists in addressing the multiple issues presented to avoid a failure — most notably the goal of attempting to restore the institution to adequate capitalization.

In an effort to provide some clarity to this area, this article addresses questions frequently raised by banks and their officers and directors in the cir-

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cumstance in which a bank has been identified by one of the "Bank Regulators" as likely to fail.[1] Among other things, the discussion will address examination results that frequently lead to failure scenarios, including the situation frequently experienced in which a bank is served with an order requiring it to restore capital following required write-downs of losses experienced in the loan portfolio.

Although each bank failure has its own unique factual bases that lead to a determination to close the institution, this discussion will be based upon the most typical cause of a failure — specifically, a bank that has been ordered to write-down the value of loans and other assets due to a deteriorating economy or poor underwriting while simultaneously being unsuccessful when attempting to restore the bank to capital adequacy by either raising new capital, engaging in a merger or change of control or shrinking the balance sheet to return to required capital ratios.

To facilitate the discussion, the analysis will be divided into the following components:

- The context in which a bank failure occurs;
- The regulatory tools generally employed by the Bank Regulators immediately prior to a failure;
- Strategies available to a bank's management and board of directors to resolve a potential failure situation;
- The closing process itself;
- Potential liability of a bank's officers and directors;
- The role of special counsel; and
- Observations and recommendations.

THE FACTUAL CONTEXT IN WHICH A FAILURE OCCURS

A bank failure might best be viewed over a limited time-line that is only 12 to 18 months in length. Within that period, a bank may experience a sudden and unexpected downgrading of its CAMELS rating from a 1, 2 or 3 to a 4 or a 5.[2] Accompanying one or several reports of examination that lead

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up to the adverse CAMELS rating are a series of "cease and desist" ("C&D") and related enforcement orders, which virtually always include either a capital directive or a "prompt corrective action" order that requires the bank to restore its capital ratios to the "well-capitalized" category. In addition, C&D orders issued prior to a potential failure almost always include a host of remedial actions required to be taken by a bank, including compliance plans and numerous special reporting requirements.[3]

While the fault for a potential failure may be in dispute, the financial condition of a bank as reflected in its balance sheet is rarely at issue. This is because the Bank Regulators will require a bank to reflect loan losses and other write-downs on its Call Reports — whether or not the bank concurs. (It is from these official financial records that determinations are made regarding the health of the institution, including capital adequacy.) Although a bank experiencing losses to its asset portfolio will attempt to negotiate with its Bank Regulator the aggregate amount of accounting adjustments, it is highly improbable that an institution will succeed in refusing to take adjustments ordered as a result of a safety and soundness examination.[4]

While there may not be disagreement about the bank's financial records, there may exist significant disagreement regarding the reason for the alleged failure situation.

From the perspective of insiders at the bank, there may be profound surprise, consternation and frustration. Among other things, management and a board of directors may criticize the accuracy of the most recent reports of examination, the severity of the examination's conclusions, and may also experience growing hostility in the bank's relationship with state and federal bank examiners. For example, during the period that a bank might have been successfully implementing a business strategy using a focused niche lending approach, the Bank Regulator might have lauded the bank for its astute strategy implementation. Following the most recent examination, however, the implementation of the formerly successful lending strategy becomes the basis for the Bank Regulator criticizing underperforming assets, the lack of diversification and inadequate enterprise risk management.

From the perspective of the Bank Regulators, however, the perception is quite different. Rather than a rapid change in attitude to explain the reasons for a potential failure, the Bank Regulator may point to formal and informal

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regulatory correspondence that evidences a pattern of non-compliance by the bank and the refusal of management and a board of directors to implement suggested corrective measures included in prior reports of examination and/or regulatory guidance — the effect of which is arguably a primary cause for the current crisis.

THE REGULATORY TOOLS UTILIZED BY THE BANK REGULATORS

The net effect of increased scrutiny of a bank in the situation described above leads to a conclusion by the Bank Regulators that the safety and soundness of the bank is threatened — which invariably means that the capital position of the bank is threatened, or likely to be threatened, in the near future. As noted above, the Bank Regulators possess extraordinarily broad authority to require remedial action for banks under Section 8 of the Federal Deposit Insurance Act (the "FDIA").[5] As a bank's capital deteriorates, however, the authority of the Bank Regulators to order the bank to restore capital becomes of paramount importance, and the Bank Regulators employ two primary tools to order a bank to improve its capital position.

The first tool is the ability of all of the Bank Regulators to order a bank to maintain a level of capital that is unique to that bank and reflects a level of capital deemed reasonable by the Bank Regulators. This tool — called a "capital directive" — is often the first step taken when a bank begins to experience losses, and is frequently included in a C&D order.[6] Although a capital directive is difficult—if not impossible—to challenge, from the perspective of a bank its impact is less onerous when made public, which is due in part to the fact that the imposition of automatic operational restrictions do not accompany the issuance of a capital directive.[7]

The second capital recovery tool utilized by the Bank Regulators is an order to increase capital under the "prompt corrective action" ("PCA") authority of Section 38 of the FDIA.[8] The PCA authority is the focal point utilized by the Bank Regulators to seize a measure of control over a potentially failing institution and to alert the board and management that urgent attention must be taken to avoid a failure scenario.[9] This is because the capital levels

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articulated in the PCA regulations impose significant limits on a bank's operational flexibility as follows:

Adequately Capitalized

- Limitations on acceptance or renewal of brokered deposits.

Undercapitalized

- Capital restoration plan;
- Imposition of guaranty on holding company;
- Asset growth restriction; and
- Prior approval required for acquisitions, branching and new lines of business.

Substantially Undercapitalized

- Mandatory sale of capital stock;
- Restricted transactions with affiliates;
- Restrictions on rates of interest paid on deposits;
- Additional restrictions on growth;
- Restrictions on bank activities;
- Requirements to improve management;
- Prohibiting deposits from correspondent banks;
- Requiring prior approval of capital distributions by a holding company;
- Requiring divestiture; and
- Limiting executive compensation.

Critically Undercapitalized

- Limit or prohibit payment on subordinated debt; and
- Appointment of a receiver or conservator upon failure to remedy critically undercapitalized status.[10]

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In addition to the foregoing, accompanying the statutory restrictions required as a bank's capital deteriorates are a host of related regulatory restrictions and limitations typically contained in a C&D order.

STRATEGIES AVAILABLE TO A BANK TO RESTORE CAPITAL ADEQUACY

A bank receiving a PCA order must understand that the PCA provision of the FDIA and implementing regulations require the Bank Regulator to impose increasingly harsher and more limiting restrictions should an initial order to restore capital adequacy prove to be unsuccessful and the bank's capital continues to deteriorate. In today's world of shareholder disclosure, moreover, the receipt of a capital directive or PCA order *de facto* requires a bank to disclose the deteriorating condition of the bank to its shareholders — whether or not the bank or its holding company is subject to registration pursuant to the Securities Exchange Act. Stated another way, the Bank Regulators generally will include as part of an enforcement order such as a C&D a requirement that the bank notify its shareholders that an enforcement order has been issued, including the requirement that the capital of the bank be restored to specified levels.

In such a situation, a bank's management and board of directors are presented with three priorities: First, in communities where adverse publicity could result in a deposit run or severe outflow of local deposits, the issuance of a capital directive or a PCA order is a public relations nightmare. To address these concerns, banks experiencing this predicament often make use of public relations firms that specialize in managing adverse media reporting over specified news cycles — which as a practical matter may last several days. Strategically, a bank may elect to take a proactive approach and notify its shareholders and depositor base in advance of adverse news reports, and train branch personnel to minimize deposit outflows.[11]

Second, management is forced to reorganize the operating departments of the bank and to immediately direct them to respond to numerous reporting requirements imposed by an enforcement order included as part of a C&D or a PCA order.[12]

Third, and most importantly, the bank must restore capital adequacy.

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This goal is usually accomplished by three alternatives: (a) raising additional capital through private investors; (b) selling bank assets; or (c) selling control or merging the bank with another institution.

THE CLOSING PROCESS OF AN ACTUAL FAILURE

General

In the unfortunate situation in which a bank is unable to correct its capital condition, several regulatory actions begin to occur, and obligations of insiders of the failing bank begin to be focused upon by the bank's officers and directors.

First, regardless of the administrative agency that is the chartering or "primary" bank regulator, the FDIC as the deposit insurer begins to take the leading role in anticipation of a failure. The primary bank regulator will increase communications with the FDIC's Division of Receiverships and Liquidation, and the FDIC will schedule a tentative closing date for the failing bank.

Second, from the perspective of the Bank Regulators, there is a notable deterioration in the financial condition of the bank, with the result that bank examiners are likely to be stationed at the bank on a full-time basis to monitor the bank's operations.

Simultaneously, the deteriorating condition of the bank may cause the Bank Regulators to issue additional PCA orders — which at this juncture have the effect of prohibiting management of the bank from exercising discretion in a manner that severely restricts the bank's ability to do anything except maintain the *status quo ante.*[13]

Third, while these regulatory actions are transpiring, a bank's board of directors and management are presented with a number of potentially conflicting obligations, including obligations to shareholders, to the FDIC as insurer and to themselves as individuals.

In regard to their obligation to shareholders, management and a board of directors of a failing bank may have little choice when attempting to recapitalize the bank except by severely diluting shareholder value by selling control of the bank to a new investor group or effecting a merger transaction with another banking institution. For example, at the later stages of a bank failure, a forced sale of the bank that eliminates shareholder value may be the only vi-

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able option available to avoid a bank closing. Unfortunately, in this situation existing shareholders frequently are caught unawares of the true condition of the bank, and a merger or change of control of the bank that saves the bank from closing may itself become the basis for lawsuits filed by disgruntled shareholders against bank insiders.

In regard to an obligation to the FDIC, the FDIC has long taken the legal position that, in a possible failure situation, because the FDIC becomes the primary creditor of the bank, the board and management owe a duty to preserve the value of the bank's assets and deposits.[14] While this duty is not well defined by judicial precedent, as a practical matter it is a factor considered by the FDIC whether — and to what degree — the FDIC as receiver should file lawsuits against insiders of a failed bank. For example, the bulk sale of a bank's quality assets that diminishes the FDIC's ability to sell the bank out of a receivership is often pointed to as a negative factor when evaluating whether to institute suit against a board of directors or management following a bank closing.[15]

In regard to the personal obligations of board members and management, the threat of administrative and civil liability becomes more certain. Suddenly the coverage of a bank's directors' and officers' liability policy becomes important, as well as possible policies available pursuant to other available coverages, such as a bank's fidelity bond insurance.

Similarly, management and individual board members may become aware for the first time of the need to assemble documentation evidencing their stewardship of the bank prior to a failure. While it is not atypical for insiders to believe that they have unlimited access to the written records of a bank, it is important to note that any rights to access the bank's official records terminate upon failure and the appointment of the FDIC as receiver. Stated another way, individual members of management and the board of a bank often do not have possession of bank records and other documentation that evidences compliance with their obligations as fiduciaries of the bank.[16]

The FDIC's Closing Procedures

Assuming that a bank failure cannot be avoided, the FDIC will schedule a proposed closing date — typically on a Friday afternoon — and coordinate

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under the various statutory provisions of the FDIA and related banking statutes to have itself appointed receiver of the bank.[17]

Having determined that a failure cannot be avoided, the FDIC will evaluate and select the "least cost alternative" for resolving the potential bank failure as required by the FDIA — which often means that a so-called "purchase and assumption" ("P&A") transaction will be attempted. Essentially, a P&A transaction is a sale and assumption of some or all of the assets and liabilities of a failed bank, with the assuming entity — usually another bank or holding company — immediately opening the failed bank on the next business day as a branch of the assuming bank or as a subsidiary of a holding company.

In a P&A transaction, the FDIC as receiver will retain all assets not agreed to be assumed by the successful bidder, and may share losses on a negotiated basis with the assuming bank or holding company. In addition, claims against the failed bank or related to assets transferred to the assuming entity will also be retained by the FDIC as receiver, including litigation, employment and similar matters.[18] In this manner, the receivership is able to "wash" the assets and liabilities of the failed institution through the receivership, thereby retaining in the receivership all adverse claims relating to transferred assets or liabilities.[19]

To effectuate a P&A transaction — as well as to minimize the cost of a failure to the FDIC's Deposit Insurance Fund — for a proposed P&A transaction the FDIC will develop a bid package in the weeks leading up to a bank failure and invite interested parties to bid on the failing bank. Qualified bidders — which are usually direct competitors of the failing bank as well as large financial institutions — may be afforded the opportunity to perform some degree of onsite and/or offsite due diligence, and to submit bids that specify on a competitive basis the terms for a proposed P&A transaction, including the degree to which the FDIC would be required to provide financial assistance, including asset support and other types of indemnification.[20]

Following the conclusion of the bidding process — which typically is completed by the middle of the week in which the bank closing is scheduled — upon receipt of official notification that the bank has been closed and that the FDIC has been appointed as receiver, the FDIC and the successful bidder enter the closed bank and take control of the operations of the failed institution. Although an exhaustive discussion of the FDIC's closing procedures

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is beyond the scope of this article, as a practical matter closing procedures include:

- Assuming physical and legal ownership and control of all components of the failed bank's assets, liabilities and operations;
- Closing-out all deposit and lending transactions as of the day of the closing;
- Inventorying physical assets;
- Creating a closing balance sheet that will become the basis for the P&A transaction; and
- Other receivership functions.[21]

Finally, the FDIC would execute the P&A agreement with the successful bidder and commence the process of transferring the operations of the failed bank to the new owner.

POTENTIAL LIABILITY OF OFFICERS AND DIRECTORS

In its role as receiver of a failed bank, the FDIC's authority under the FDIA authorizes it to stand in the shoes of the bank, the bank's former shareholders and its officers and board of directors. Because the FDIC as the operator of the Deposit Insurance Fund has a fiduciary duty to minimize its losses as a result of a bank failure, it regularly initiates an investigation into the reasons for the failure. Specifically, the FDIC conducts an investigation to determine whether grounds exist to allege misfeasance or malfeasance against insiders at the failed bank, as well as other persons or entities involved in the management of the bank such as independent (*i.e.,* outside) directors. This post-closing period can be very difficult for a former bank insider because the FDIC possesses investigative authority that includes subpoena authority to depose former officers and directors, as well as to require insiders to disgorge records and documents that are owned by the bank and which are not records personally maintained by the particular officer or director.

Accordingly, it is often the case that insiders at a failed bank find themselves at a disadvantage when the FDIC conducts an investigation following the clos-

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ing of a bank. This is because, as noted above, the official records of a bank are now owned by the FDIC as receiver, and the FDIC has no obligation to make those records and documents available to the insider being investigated.

It is noteworthy to mention that potential liability for insiders commences immediately upon the closing of a bank. This is because there frequently are loans and deposits maintained at a failed bank that are held or owed by officers and directors — including affiliated companies. Because of the possibility that claims might be filed against these individuals, the FDIC as receiver carefully reviews all relationships by insiders and may elect to assert setoff rights or otherwise freeze accounts until an evaluation of potential claims might be determined.[22]

THE ROLE OF COUNSEL

It is strongly recommended that a bank experiencing a potential failure situation retain special counsel immediately upon recognizing that a failure might occur. This recommendation is made based upon the following.

First, providing legal advice in the context of a failing bank situation requires specialized legal experience that rarely is possessed by attorneys who regularly provide representation to a healthy bank on lending, litigation and general corporate matters. Moreover, because legal efforts necessary to avoid a bank failure are so multi-faceted and time consuming in nature, assembling a team that includes specialized legal expertise in this area to assist and advise a bank may assist in avoiding a failure.

Second, because the administrative process leading up to a failure—or successfully restoring the bank to capital adequacy—is so opaque—specialized legal assistance is necessary. Among other things, utilizing special counsel to assist who understand the process when communicating with the Bank Regulators, including the FDIC, may assist in minimizing inaccurate communications and maximizing possible alternatives that require regulatory approval.

Third, from time to time there arise potential regulatory criticisms that create potential conflicts among the various insiders at a failing bank. For example, it is not unusual that independent directors of a bank may require their own counsel to advise them regarding demands made by a Bank Regulator — particularly if management has been harshly criticized for malfea-

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sance. Alternatively, an entire board of directors or individual members of management might require separate legal counsel. For example, while it is not unusual for the board of a holding company and a failing bank to be substantially identical, potential conflicts between the fiduciary obligations between the holding company and the bank might dictate that each entity employ separate counsel to advise it.

OBSERVATIONS AND RECOMMENDATIONS

For a bank's management and board of directors, understanding that the actions by the Bank Regulators in a potential failure scenario is very formalized in nature may be useful for purposes of focusing on the goal of preventing a failure from actually taking place. In that regard, several observations and recommendations are offered:

First, while a bank may believe that its objections to regulatory criticisms that result in a capital impairment may be meritorious, unless the bank commences challenging those criticisms while it still is adequately or well capitalized, such a strategy is frequently unsuccessful. Oftentimes the only reasonable alternative is to attempt to restore the bank to capital adequacy in a manner that is satisfactory to the Bank Regulators.

Second, management and a board of a failing bank should assemble a team of experienced individuals and entities that can provide consistent and focused advice. Among other things, capable legal counsel and an investment banker are strongly recommended as part of the proposed team.

Third, the bank should attempt to record its reasonable efforts to respond to all regulatory orders, as well as investigations into all alternative means of resolving a capital deficiency. For example, if a board is forced to substantially dilute existing shareholders by agreeing to a change of control or a merger transaction, demonstrating the efforts of an investment banker to identify all possible sources of new capital may provide protection against subsequent lawsuits by existing shareholders.

Finally, both a board and management should be sensitive to the stress and pressure that a potential failure may cause in regard to employees and related parties at the bank. Often a potential bank failure is accompanied by allegations of fault aimed at one or several individuals associated with a bank

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— with the likely outcome that those individuals will either lose their jobs and/or be subjected to additional harsh regulatory criticism. Moreover, particularly in regard to closely held institutions, personal fortunes may be lost — including life savings that are reflected in bank stock. While the favorable resolution of the capital condition of the bank must, of course, remain the primary goal, in order to achieve that goal sensitivity to the human element must be maintained.

As noted above, this article is intended to provide a general overview of legal issues that arise in the bank failure context, but should not be viewed as an exhaustive treatment of the topic. Each potential bank failure presents potentially unique concerns, and should be analyzed by experienced counsel.

Among other things, management or a member of a Board reviewing this article should note that the relationship between a bank and its holding company is not considered, but would certainly present a separate set of factors to be considered in a failure situation, including the possible involvement of the FRB as the Bank Regulator for a bank holding company. In addition, because a holding company is generally looked to by the Bank Regulators as the most probable source of new capital for a bank, the interaction between a parent holding company and a subsidiary bank often presents competing interests between the entities. Moreover, in the situation in which a bank actually fails, a concomitant effect of the failure is consideration of bankruptcy for the holding company.

In addition to the foregoing, the discussion contained herein addresses the process of a bank failure that does not include potential failures that present systemic risk (*i.e.,* banks that are "too big to fail"). Further, the analysis has not included the impact that the federal government's initiatives under the recent bank bailout legislation may have on bank failures in the immediate future, including the ability of the federal government to utilize components of the TARP to purchase assets from a bank's balance sheet on an open-bank basis, and similar alternatives.

NOTES

[1] For purposes of this article, the term "Bank Regulators" includes the Federal Deposit Insurance Corporation (the "FDIC"), the Office of the Comptroller of

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the Currency (the "OCC"), the Office of Thrift Supervision (the "OTS") and the Board of Governors of the Federal Reserve System (the "FRB"). (In addition, please note that, while the emphasis in this article will be on the regulatory actions and responsibilities of the federal banking regulators, the same discussion will apply to the regulatory oversight and safety and soundness responsibilities of comparable state banking agencies).

[2] The examination rating scheme utilized by the Bank Regulators utilizes the acronym "CAMELS," which stands for capital, assets, management, earnings, liquidity and sensitivity to interest rate risk. A Bank Regulator assigns a rating to each component of the CAMELS, as well as an overall composite rating, with a 1 constituting the optimum or best rating and a 5 indicating the probable failure of the bank.

[3] Because the Bank Regulators use standard forms of C&D orders to achieve remedial action, it is not unusual that such orders in potential failure situations bear striking resemblance to each other, and include provisions addressing issues and requirements such as : (a) maintaining capital at specified levels; (b) reducing classified assets; (c) maintaining adequate allowances for loan and lease losses; (d) developing an asset/liability management plan; (e) retaining acceptable management; (f) correcting violations of law and eliminating unsafe and unsound practices; (g) reducing unsafe concentrations of credit; (h) developing a comprehensive loan policy; (i) developing an acceptable strategic plan; (j) developing an acceptable budget and profit plan; (k) reporting progress to the Bank Regulator on a quarterly basis; and (l) similar corrective measures and reporting requirements.

[4] While there are circumstances in which a formal or informal administrative challenge to the conclusions of a bank examination and/or proposed C&D order may benefit a bank, such options becomes less viable as the capital position of the bank deteriorates.

[5] 12 U.S.C. § 1811 *et seq. See,* The Banking Law Journal, *Responding to Proposed Enforcement Actions by the Federal Banking Agencies* (January 2005).

[6] 12 U.S.C. § 3907.

[7] Although a capital directive may be issued as a stand-alone document, it is typically included as one of the terms of a C&D order.

[8] Because the use of a capital directive is often used before a bank falls below well-capitalized status, its impact on management and a board of directors is not well appreciated as constituting the first indication by the Bank Regulators of capital concerns for the bank.

[9] 12 U.S.C. § 1831o.

[10] 12 C.F.R. § 325 *et seq.*

[11] Pursuant to Section 1818(u) of the FDIA, the Bank Regulators are required to

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publically announce the issuance of enforcement orders, which typically are made public in the month following the effective date of the enforcement order.

[12] Even though ultimately the imposition of these reporting requirements can be salutary in their eventual effect, at this stage of the bank's existence the result can be disruptive of management's focus and divert scant personnel and other resources to satisfy the terms of a C&D order.

[13] Although the logic of this approach might be debated, the "lock-down" authority of the prompt corrective action order in a failure situation prevents a bank from taking emergency action to save itself by selling at fire sale prices valuable loan assets or other assets such as branches — and thereby diminishing the franchise value of the bank when placed into receivership by the FDIC.

[14] Among other things, avoiding or limiting the sale of a bank's performing loans and core deposits preserves the franchise value of the bank when being marketed by the FDIC — thereby reducing potential loss to the Deposit Insurance Fund.

[15] Among other things, this means that a bank experiencing a potential failure should maintain close communications with its Bank Regulator regarding transactions that are not in the ordinary course of business. (Note that a sale of assets that is not in the ordinary course of business may also violate an operational restriction contained in a PCA order).

[16] While beyond the scope of this article, copies of records that may prove to be valuable include: (a) board minutes; (b) loan committee minutes; (c) documentation of compliance with regulatory criticisms; and (d) formal and informal communications and correspondence with Bank Regulators.

[17] Although the actual language of the provisions of the FDIA indicates that there is some discretion by the primary bank regulator not to appoint the FDIC as conservator or receiver of a failing bank, that language is formalistic in deferring to a determination regarding the conservator or receiver; in fact, the FDIC possesses statutory authority under the FDIA to cause its appointment as receiver should a primary bank regulator ever make an election to the contrary.

[18] The powers and authorities of the FDIC as receiver are formidable and generally are viewed as exceeding the powers exercisable by a bankruptcy trustee. *See* Section 1821 *et seq.* of the FDIA.

[19] Of particular note is the approach the FDIC has taken through the loss share provisions of recent P&A transactions, which minimizes the asset management obligations of the FDIC in exchange for a broad loss guaranty by the successful acquiring institution. *See*, http://www.fdic.gov/bank/individual/failed/bankunited_P_and_A.pdf.

[20] As an indication of the potential number of failures that might occur in the next 24 months, the OCC and the OTS have announced an expedited application process to

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pre-approve investors that are not existing banks, thrifts or holding companies. This application approach may encourage hedge funds and others to make investments in banks without the threat of being deemed to be in control and hence become subject to direct regulation and supervision.

[21] Detailed descriptions of numerous tasks performed by the FDIC immediately prior to a bank closing, during the weekend immediately following and thereafter are set forth in several receivership and liquidation manuals employed by the FDIC to standardize as much as possible the bank closing process.

[22] It should be noted that the FDIC's receivership authority also permits it to exercise setoff rights against non-affiliated borrowers and depositors, which authority is not based upon potential malfeasance or misfeasance claims, but merely upon its rights as receiver under the FDIA to collect on loans and other obligations owed.

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