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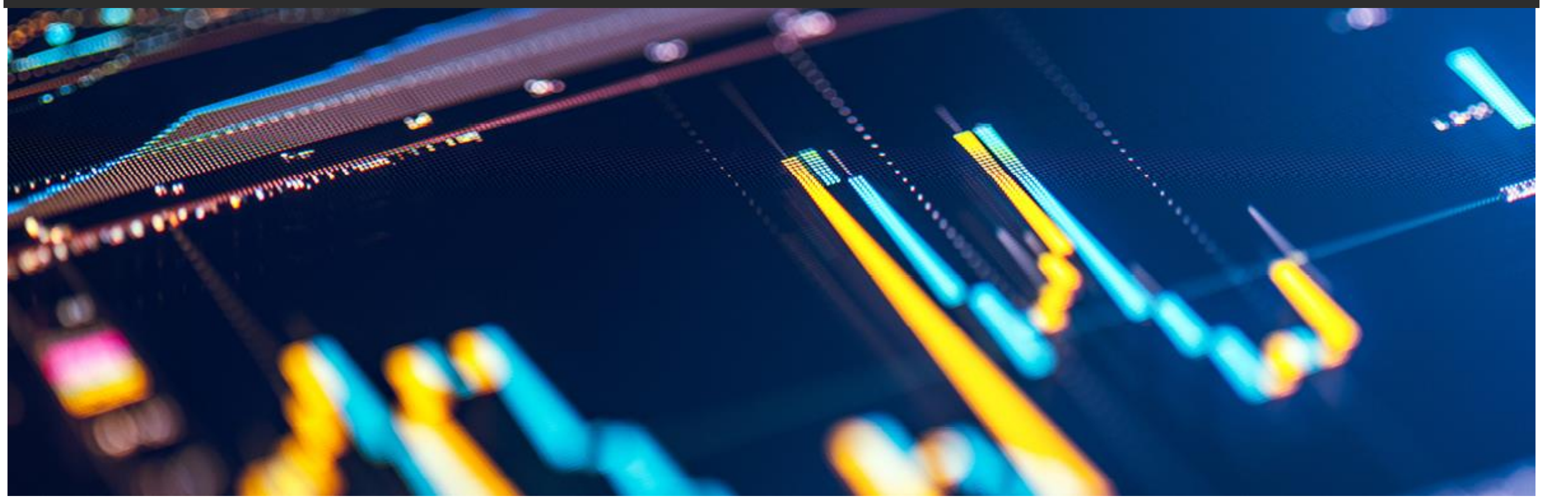

March 2023

The 2023 Banking Crisis: Guidance for Private Investors Seeking to Acquire or Invest in Assets of Failed Insured Depository Institutions

This GT Alert provides a general overview for investors interested in acquiring or investing in the assets of failed depository institutions and requirements and restrictions applicable to private investors' participation in the FDIC's bid process.

Following the failure of both Silicon Valley Bank, Santa Clara, CA (SVB) and Signature Bank, New York, NY (SigBank), the Federal Deposit Insurance Corporation (FDIC) was appointed as receiver of each institution pursuant to the agency's authority under Section 11(e) of the Federal Deposit Insurance Act. The FDIC transferred all deposits and substantially all assets of SigBank to a newly created, full-service FDIC-operated 'bridge bank' – Signature Bridge Bank, N.A. (Sig Bridge). The FDIC operated Sig Bridge until March 19, 2023, when Flagstar Bank, N.A., a wholly owned subsidiary of New York Community Bancorp, Inc., entered into a Purchase and Assumption (P&A) transaction to purchase approximately $38 billion in assets, including $25 billion in cash, assume liabilities of approximately $36 billion, including $34 billion in deposits, acquire certain commercial and industrial loan portfolios of Sig Bridge, acquire its wealth management and broker-dealer businesses, and assume all of Sig Bridge's branches. SigBridge's commercial real estate portfolio and certain other loans remain unsold.

The FDIC also transferred all deposits and substantially all assets of SVB to a newly created, full-service FDIC-operated 'bridge bank' – Silicon Valley Bridge Bank, N.A. (SVB Bridge). The FDIC operated SVB Bridge until March 27, 2023, when First-Citizens Bank & Trust Company, the banking subsidiary of First Citizens BancShares, Inc., announced it had entered into a P&A transaction to purchase SVB Bridge's assets of $110 billion, deposits of $56 billion, loans of $72 billion and assume the 17 former branches of SVB Bridge as part of the deal. The FDIC as receiver and First-Citizens Bank & Trust Company also entered into a loss share coverage agreement pursuant to which the parties share in the losses and potential recoveries on certain loans covered by the agreement. The loss share transaction is projected to maximize recoveries on the assets by keeping them in the private sector. Approximately $90 billion in securities and other assets from SVB Bridge remain in the FDIC's receivership for disposal.

To promote efficient and expedient liquidation at the least cost to the Deposit Insurance Fund, the FDIC, by statute, has special resolution powers to use in the liquidation of the assets from failed banks. The most common and preferred method for resolving a failing bank is a P&A transaction, whereby a healthy institution agrees to purchase some or all of the assets of the receiver bank, as was the case with Sig Bridge.

In the absence of a P&A transaction, or if the assuming institution does not acquire all the assets, as in the case of both Sig Bridge and SVB Bridge, the FDIC, as a receiver, assumes ownership of the failed bank's remaining assets and must manage, market, and sell them. The FDIC conducts sales of a variety of failed bank assets, including ***loans, securities, owned real estate, furniture, fixtures, and equipment***. Qualifications, requirements, and processes vary depending on type of assets.

A. Loan Sales

Loan sale is a commonly used term for the sale of loans or loan pools. Loans the FDIC acquires from failed financial institutions may be sold in pools through sealed bid sales.

Who is eligible to participate in FDIC loans sales?

To be eligible to participate in FDIC loan sales, prospective bidders must meet the requirements set forth in the Purchaser Eligibility Certification.

How does the FDIC structure these loans sales?

Typically, the FDIC pools loans that have similar characteristics based on specific criteria, including loan size, performance status, type, collateral, and location. These loan portfolios include a variety of performing and non-performing loan products, including mortgage, commercial, and consumer loans. The FDIC makes no representations or warranties in connection with any of these loans, and all associated risks are passed to the buyer.

How can I participate in FDIC loan sales?

1. **Registration on the Loan Sale Advisor Website**: When the FDIC has loans available for sale, they may be marketed on one of the four loan sale advisor websites set forth below. Prospective bidders will need to contact each of the loan sale advisors and request an account to be established. Each loan sale advisor has its own requirements for granting access to its website.

First Financial Network (FFN) www.ffncorp.com 405-748-4100	**Mission Capital Advisors** www.missioncap.com 212-925-6692
Newmark Knight Frank www.ngkf.com 212-372-2000	**The Debt Exchange (DebtX)** debtx.com 617-531-3400

2. **Purchaser Eligibility Certification**: Prospective bidders will need to complete the Purchaser Eligibility Certification, which is a prerequisite to bid and is available on the website of the applicable loan sale advisor responsible for the sale. Prospective bidders should review a sample copy of the Purchaser Eligibility Certification to self-screen.

3. **Confidentiality Agreement**: Prospective bidders must agree to the confidentiality agreement provided on the loan sale advisor's website. The FDIC has provided a sample confidentiality agreement for prospective bidders.

4. **Initial Deposit**: An initial deposit must be received no later than two business days prior to the bid deadline which amount is determined by the bid instructions in a given sale.

Where will I find specific terms and conditions of the sale?

The loan sale agreement provides the terms and conditions of the sale unique to each sale and can be found on the specific loan sale advisor's website. The FDIC has provided a sample loan sale agreement for prospective bidders. The bid instructions will contain any additional requirements to bid on a given pool of loans.

Once a sale is awarded, how long does it take to close the transaction?

FDIC sales usually are consummated within 20 business days after a bid is awarded.

B. Financial Asset Sales (Structured Transactions)

The FDIC may also sell the following additional assets of failed institutions: certain debt, equity, mortgage-related, municipal, and other securities, mortgage servicing portfolios, mortgage servicing platforms and related assets, loans, loan origination platforms, and related assets, shared national credits (interests in syndicated loans), credit card receivables, and interests in structured transactions (i.e., joint ventures, limited liability companies, and other newly formed entities) involving notes, other evidences of indebtedness, and collateral property.

The FDIC, as receiver for a failed institution, employs a variety of strategies to manage and sell these assets. One such model involves Structured Transactions, as the FDIC uses the term, which are joint ventures or partnerships between the FDIC, as receiver, and private sector entities, designed to facilitate the disposition of selected assets from failed financial institutions. These allow the FDIC to retain an interest in the assets, while transferring day-to-day management responsibility to expert private sector professionals who also have a financial interest in the assets and share in the costs and risks associated with ownership.

In these transactions, the FDIC contributes loans to a newly formed entity, a limited liability company (LLC) or other entity, and then sells an equity interest in the LLC to a bidder or consortium of bidders through a closed bid process. The winning bidder becomes the managing member of the LLC and is responsible for managing and liquidating the assets pursuant to the LLC agreement and other transaction documents.

Who is qualified to participate in these types of asset sales?

A prospective bidder must satisfy the requirements set forth in the Pre-Qualification Request and the Purchaser Eligibility Certification (fdic.gov).

How do I participate in FDIC sales of these assets?

Those interested in participating in bidding on sales of these assets should initiate the pre-qualification process by completing the (i) Pre-Qualification Request (which must be delivered every six months), (ii) Purchaser Eligibility Certificate (which must be delivered every six months) and (iii) Contact Information Form, and delivering the completed information as follows:

> **If electronically, to**: prospectivepurchaser@fdic.gov
>
> **If in hard copy, to**: FDIC – DRR/Asset Marketing Section, 3501 Fairfax Drive, Office 3701 – 8048, Arlington, VA 22226-3500

The FDIC reserves the right to require any prospective bidder to meet additional qualification criteria, even if they have been pre-qualified. For example, the bidder will need to complete and submit transaction-specific qualification requests and provide information regarding financial, managerial, and legal matters by completing the Bidder Qualification Application in accordance with the Application Guidance and Instructions.

Questions regarding the FDIC pre-qualification process or the transaction-specific qualification process should be directed to prospectivepurchaser@fdic.gov, or to the financial adviser for that specific transaction if the prospective bidder already received a transaction-specific announcement.

C. Real Estate Assets

The FDIC sells real estate retained from failed banks and divides the assets by location and type of real estate assets (i.e., commercial, developed and undeveloped land, multi-family, single family, FF&E (furniture, fixtures and equipment), and bank branches).

Who is eligible to purchase real estate assets from the FDIC?

Although the FDIC does not set specific eligibility criteria on its website, various criteria are considered by the FDIC when evaluating offers from prospective bidders. These include, but are not limited to appraised value, purchase offer amount, earnest money deposit, how the purchase will be funded (e.g., cash or financing (the FDIC does not provide seller financing)), due diligence, inspection and closing periods, net sales proceeds, and the submission of fully executed documents the FDIC requires.

The FDIC reserves the right to accept, reject, and/or counter any offer. While reviewing such offers, the FDIC further reserves the right to continue its sales efforts, including responding to any other inquiries or offers from other parties concerning the purchase of a property.

How does the FDIC market and sell real estate?

Properties are generally sold individually through listings with local real estate agents and/or brokers who FDIC real estate contractors hire. Occasionally, the FDIC conducts open "outcry" and online real estate auctions. All properties are sold on an "as is, where is, with all faults" basis. The FDIC makes no representations or warranties with respect to the properties, and all diligence responsibility falls on the buyer.

Where can I find information on purchasing real property or participating in real estate auctions?

Latest inventory of real estate currently available for sale can be found on the FDIC Real Estate for Sale webpage. The online listing includes contact information for the local real estate agent and/or broker, and the FDIC real estate contractor. Any of these parties will be able to provide additional details on any property of interest. Auction announcements can be found on the FDIC Special Real Estate Sales Event webpage.

The FDIC recommends prospective bidders contact their local county clerk or recorder's office for additional information regarding ownership of any specific property. For further questions, contact the FDIC Owned Real Estate Department at RealEstateforSale@fdic.gov or (800) 568-9161.

D. Acquisition of failed depository institutions and assumption of deposit liabilities

In 2009, the FDIC adopted the Statement of Policy on Qualifications for Failing Bank Acquisitions (SOP) to provide guidelines addressing qualifications, requirements, and restrictions to permit private capital investors to participate in the FDIC's bid process for the acquisition of failed depository institutions.[1] The SOP described the terms and conditions private capital investors are expected to satisfy to obtain bidding eligibility for a proposed acquisition. Previously, private investors generally were barred from bidding on failed banks because they were not chartered banks. Following the promulgation of the SOP, from 2009 until 2014, private investors acquired approximately a quarter of all failed bank assets.

Who is eligible and to whom does the SOP apply?

The SOP applies to "private capital investors" in a company, including any company acquired to facilitate bidding on failed banks, that is proposing to, directly or indirectly (including through a shelf charter), assume deposit liabilities, or such liabilities and assets, from the resolution of a failed insured bank. The SOP also applies to "private capital investors" involved in applications for deposit insurance in conjunction with *de novo* charters issued in connection with the resolution of failed insured depository institutions.

The SOP does not apply to and exempts the following: (i) investors in partnerships or similar ventures with bank holding companies (excluding shell holding companies) where the holding company has a strong majority interest in the resulting bank and an established record for successful operation of insured banks; or (ii) investors with 5% or less of the total voting power of an acquired depository institution or its holding company, provided there is no evidence of concerted action by these investors.

[1] The FDIC subsequently published two sets of questions and answers on its website on January 2010 and April 2010.

How do I get started?

To get started on the application process, send an email to expbidprocess@fdic.gov. The FDIC's Division of Risk Management and Supervision in Washington reviews such proposals.

What are some of the requirements prospective SOP bidders must satisfy in order to make a successful bid to acquire assets of a failed depository institutions (note the below is not comprehensive)?

1. Capital Commitment

The resulting depository institution will need to maintain a ratio of Tier 1 common equity to total assets of at least 10% for a period of three years from the time of the acquisition and remain well-capitalized thereafter. The FDIC retains the right to impose a higher capital requirement depending on the experience and business plan of the acquirer.

2. Cross-Support

The cross-support provision applies to investors owning 80% or more of two or more banks or thrifts. It requires such investors to pledge the stock of such commonly owned banks or thrifts to the FDIC. The FDIC holds such pledged shares as security against any losses the FDIC incurs if one of the owned depository institutions fails.

3. Transactions with Affiliates

Extensions of credit by the depository institution to its investors, their investment funds, and any affiliates of either, is prohibited.

4. Secrecy Law Jurisdictions

Generally, investors from "secrecy law jurisdictions" are not eligible to own a direct or indirect interest in an insured depository institution. However, investors that are subsidiaries of companies subject to comprehensive consolidated supervision, as recognized by the Federal Reserve Board, may satisfy this requirement by agreeing to additional promises of cooperation. The SOP defines a "secrecy law jurisdiction" as a country that (i) limits U.S. bank regulators from determining compliance with U.S. laws, (ii) prevents them from obtaining information on the competence, experience and financial condition of applicants and related parties, or (iii) permits offshore companies to operate shell companies.

5. Continuity of Ownership

Investors subject to the SOP are prohibited from selling or otherwise transferring their ownership interest in the failed bank for a three-year period, absent prior FDIC approval.

6. Special Owner Bid Limitation

Investors that directly or indirectly hold 10% or more of the equity of a bank or thrift in receivership are not eligible to be an investor in the deposit liabilities or assets of that failed depository institution.

7. Disclosure

Investors subject to the SOP are required to submit to the FDIC information about the investors and all entities in the ownership chain, including the size of the capital fund or funds, its diversification, return profile, marketing documents, management team and business model. In addition, investors and all entities in the ownership chain will be required to provide the FDIC such other information as is determined to be necessary to ensure compliance with the SOP. Nothing in the SOP relieves investors from having to comply with any requirements imposed by a depository institution's primary federal regulator.

What does the due diligence process look like?

Each prospective bidder that receives information or documents must first execute the FDIC's confidentiality agreement to obtain access to the secure website and to perform on-site due diligence. Approved prospective bidders will receive an email notification of an acquisition opportunity from an FDIC project email box. The email provides a link to a virtual data room (VDR) site for a specific institution. The FDIC provides pertinent information and transaction information in the VDR to prospective bidders to facilitate analysis of the acquisition.

The purpose of due diligence is for prospective bidders to obtain more current detailed information on the deposit franchise, facilities, operations, and any assets offered for sale. In most cases, approved prospective bidders can review loan files and other documentation and meet with institution personnel during the due diligence process. The FDIC monitors the due diligence process to ensure fairness and consistency to all bidders.

How are the winning bids selected?

The FDIC, as deposit insurer, reviews the qualifications of prospective bidders, and coordinates with the applicable federal and state regulators throughout the review process to resolve failing banks in the least costly manner.

What if I have additional questions on the process?

Please reach out to an attorney at Greenberg Traurig, LLP at prepared@gtlaw.com, or the FDIC at:

FDIC's Division of Resolutions and Receiverships

InstitutionSales@fdic.gov
Toll-Free Number - (800) 568-9161
Main Number - (214) 754-0098

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Franchise Marketing
600 North Pearl Street,
Dallas, TX 75201

Asset Sales and Unclaimed Funds
Toll-free number:
800-568-9161

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