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Private-Equity-Backed Acquisitions of Failed Banks, 2008–2013

George French, Donald Hamm, Scott Leifer,
Derek Sturtevant, Ann Taylor, and Catherine Topping[1]

Abstract:

This paper describes the Federal Deposit Insurance Corporation's (FDIC) experience with private-equity-backed acquisitions of failed banks during the 2008–2013 banking crisis. It explains the relevant legal and regulatory framework, the types of transaction structures used to effect acquisitions and recapitalizations, and the issues and challenges the FDIC encountered and resolved. The paper lists the crisis-era failed banks and their acquirers identified by FDIC staff as being backed by private equity investors to an appreciable extent, and provides context on the role of private equity in capital raising and failure resolution during the crisis. The conclusion is that, on balance, the careful approach the FDIC took during the crisis when entering into failing bank transactions with private equity investors was successful in lowering the agency's bank failure resolution costs in a manner consistent with ensuring the safety and soundness of the resulting banks.

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The banking crisis of 2008–2013 resulted in the sale by FDIC receiverships of the deposits and assets of hundreds of failed banks.[2] The large volume of failed bank sales attracted the interest of private investor groups seeking to acquire or make investments in banks. During the crisis years, these groups would play a role in the acquisition of both failed and open banks.

This paper is primarily based on the observations of FDIC staff during and shortly after the crisis, including staff's contemporaneous identification of failed bank acquisitions backed by private equity investors (PEIs). There is no universally agreed-upon definition of PEIs, but the term often refers to investment funds that offer unique or specialized investment strategies to high net-worth investors, that deploy leverage to enhance investment returns, or that are exempt from registration under the Investment Company Act. Such entities have generally been viewed as having investment strategies that focus on buying undervalued assets and selling them for a profit over a shorter time horizon than would be the case for a longer-term strategic investor.[3]

PEI groups were a source of needed capital to the banking industry during the crisis, and their acquisitions of failed banks reduced the financial cost of those failures to the FDIC. In a number of instances, PEI-backed acquisitions of failed banks enabled the FDIC to avoid the more disruptive resolution alternative of an insured deposit payout and liquidation of assets. At the same time, however, transaction structures that investor groups presented to the FDIC sometimes raised concern about the safety and soundness of the banks that would have resulted. How the FDIC addressed such concerns forms part of the history of the banking crisis of 2008–2013.

Background

Entry into the U.S. banking industry, whether by PEIs or otherwise, is governed by a statutory framework designed to promote a number of public policy goals. In broad terms, these include maintaining a safe-and-sound banking industry that operates in compliance with laws and regulations, avoiding monopoly or undue concentrations of economic power, and meeting the credit needs of communities. Statutory firewalls—including the restrictions on the transactions between a bank and its affiliates imposed by Sections 23A and 23B of the Federal Reserve Act, the Bank Holding Company Act Section 106 restrictions on tying, and Federal Reserve Regulation O (which restricts transactions with insiders)—are intended to protect federally insured banks from activities of their nonbank affiliates that may present risk to the bank.[4]

Under various statutes, entry into the banking industry—whether by merger or acquisition, change of control, or establishment of a new bank—requires the approval (or in some cases only the non-objection) of the relevant banking agencies. In deciding whether to approve the various types of filings required for entry into the industry, the relevant agencies must determine whether certain statutory factors are satisfied.

Among other things, agencies must review the strength of proposed bank management and owners, and ensure that resulting banks are in sound financial condition and able to meet various legal requirements. As has been observed with respect to the supervision of the savings and loan industry during the 1980s, insufficient attention to these matters can have significant adverse effects.[5] Thus, in acting on filings dealing with entry into banking, the agencies generally must determine

[2] Throughout this paper, the term "bank" is an encompassing reference to FDIC-insured depository institutions unless a distinction with thrift institutions is evident from the context.

[3] For context on the private equity business model, *see* Justin L. Browder, "The 2007 Private Equity Bust: Re-Contextualizing Material Adverse Change Clauses in a Credit-Stricken Market," *University of Miami Law Review* 63 (July 2009); Ravi R. Desai, "Private Equity Investment in Financial Institutions and How to Avoid Becoming a Bank Holding Company," *North Carolina Banking Institute* 13, no. 1. (2009); Chip MacDonald, "Private Equity Investments in Financial Services Firms: Threading the Regulatory Needle," *Bloomberg Law Reports – Banking and Finance* 4, no.2 (2011); and Frank Righeimer Martin, "Private Equity Investment in Failed Banks: Appropriate Investors Welcome," North Carolina Banking Institute 14 (March 2010).

[4] *See* 12 U.S.C. §§ 371c, 371c-1; 12 U.S.C. § 1972; 12 C.F.R. § 215.

[5] *See generally* National Commission on Financial Institution Reform, Recovery, and Enforcement, *Origins and Causes of the S&L Debacle: A Blueprint for Reform: a Report to the President and Congress of the United States* (Washington, D.C.: The Commission, 1993), 37.

that the filing satisfies the relevant statutory factors.[6] These determinations are important to maintaining a safe-and-sound banking industry, and they are inherently fact-specific.

Investment by PEIs in banks and their parent companies was not a new or unique aspect of the crisis. For example, Federal Reserve guidance states, "For many years, bank holding companies, nonbank financial companies, private equity funds, and other firms have made minority investments in banks and bank holding companies."[7] Similarly, the FDIC wrote, "Capital investments by individuals and limited liability companies acting through holding companies operating within a well-developed prudential framework has long been the dominant form of ownership of insured depository institutions."[8] The prudential framework that governs bank holding company ownership is intended to ensure that companies that acquire control of banks have the financial strength and managerial ability to exercise control in a safe-and-sound manner.

The rapid escalation in the number of troubled and failing banks during the crisis, and the need for capital, created opportunities for PEIs to acquire or make equity investments in banking organizations. Federal bank regulators, for their part, implemented new policies and approaches that allowed PEIs to bid on failing banks. The development of ways for PEIs to bid was a new aspect of the 2008–2013 crisis. With these new approaches in place, a number of investor groups offered proposals to acquire failed or troubled banks. These proposals sometimes had complex features or raised legal and policy issues, and in reviewing these proposals the FDIC dealt with a wide range of issues and challenges. Given the urgency of resolving these issues in a timely and transparent manner, the FDIC developed guidance about the types of failed bank acquisition transactions it viewed as being consistent with the safety and soundness of resulting institutions.

This paper describes the framework of laws and regulations relevant to PEIs' investment in banking organizations, the types of transaction structures used to effect acquisitions and recapitalizations, and the issues and challenges the FDIC encountered and how those issues and challenges were resolved. The paper then summarizes information about PEI-backed acquisitions of failed banks during the crisis and discusses the role of PEIs with respect to capital raising and failure resolution. The conclusion is that, on balance, the careful approach the FDIC took during the crisis when entering into failing bank transactions with PEIs was successful in lowering the agency's bank failure resolution costs in a manner consistent with ensuring the safety and soundness of the resulting banks.

The Failed Bank Resolution Process as It Relates to PEIs

The FDIC's process for handling failed banks is described in Chapter 6 of *Crisis and Response: An FDIC History, 2008–2013*, and additional information is available in the FDIC's Resolutions Handbook.[9] The FDIC is statutorily required to resolve a failed bank in a way that minimizes its expected cost.[10] For 463 of the 489 banks that failed from 2008 through 2013, the least-cost transaction involved the FDIC arranging for some or all of the banking activities of the failed banks to be taken over by other private-sector banks.[11] In these situations, the failing bank was placed into FDIC receivership, and its insured deposits and some of its other assets and liabilities were transferred to the acquiring bank. Depending on the specific assets and liabilities

[6] *See* 12 U.S.C. § 1816.

[7] Federal Reserve, Policy Statement on Equity Investments in Banks and Bank Holding Companies, codified at 12 C.F.R. 225.144, September 2008.

[8] FDIC, Proposed Statement of Policy on Qualifications for Failed Bank Acquisitions, 74 Fed. Reg. 32931–32934 (July 9, 2009).

[9] Federal Deposit Insurance Corporation (FDIC), *Crisis and Response: An FDIC History, 2008–2013* (2017) (*Crisis and Response*), available at https://www.fdic.gov/bank/historical/crisis/; FDIC Resolutions Handbook, available at https://www.fdic.gov/bank/historical/reshandbook/.

[10] *See* Section 1 of the Federal Deposit Insurance Corporation Improvement Act of 1991 (Pub. L. No. 102--242; 105 Stat. 2236), effective December 19, 1991 (codified to 12 U.S.C. 1811 note). The only exception arises when a "systemic risk" determination is made (see Chapter 3 of *Crisis and Response*).

[11] Seventeen institutions were handled via a liquidation of assets and payout of insured deposits; seven were handled by the creation of a Deposit Insurance National Bank (DINB), a form of payout where the deposit accounts are transferred to a newly chartered temporary bank operated by the FDIC whose purpose is to ensure that depositors have continued access to their insured deposits as they transfer their deposit accounts to other financial institutions; one was handled by the creation of a National Deposit Institution, a temporary bank that was similar to a DINB except for being chartered by the Office of Thrift Supervision; and one was handled by a bridge bank that self-liquidated within a short time.

transferred, and the nature of any loss-sharing or other indemnification arrangements, transactions could include a cash payment from the FDIC to the acquiring bank or vice versa.

In short, the preferred, cost-effective resolution for most banks that failed during the crisis involved a transfer of banking activities to another FDIC-insured bank. Moreover, as discussed in more detail in a subsequent section, legal requirements and prudential considerations require that the acquiring bank be in sound financial condition and well-managed. To this end, the FDIC solicits bids from among an approved list of acquiring banks. Eligible bidders can ask to be contacted when the FDIC solicits bids for upcoming bank failures, and they may conduct due-diligence to decide whether, and under what financial terms, they would wish to bid.

Since the FDIC's preferred resolution process involved the transfer of banking activities to an acquiring bank, PEIs proposed to invest directly, or more often indirectly through a holding company, in a new or existing bank or thrift. The bank or thrift, in turn, would acquire the deposits and selected assets of failing banks or other banks. Further details on how this worked will follow.

PEIs and the Statutory Framework Governing Equity Investments in Banks or Their Parent Companies

Investments of PEIs in banking organizations took place within a statutory framework that, in very broad terms, is intended to promote a safe-and-sound banking system that operates in compliance with laws and regulations. As such, the federal bank regulatory agencies carry out several responsibilities. With respect to PEI acquisitions of and investments in failing banks, unique responsibilities of each agency include the following: for the FDIC, acting on applications for deposit insurance for investor groups seeking to charter a newly insured bank and implementing least-cost resolution of failing banks; for the Office of the Comptroller of the Currency (OCC), acting on proposals to establish new national banks or federal thrifts; and for the Federal Reserve, determining whether a proposed transaction would result in a company acquiring control of an FDIC-insured institution (thereby becoming a bank or thrift holding company subject to regulation by the Federal Reserve) and, if so, whether to approve the formation of the bank or thrift holding company. All three agencies act on merger applications or change in control notices for banks under their respective supervision.[12] Before the abolishment of the Office of Thrift Supervision (OTS) mandated by the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act), the OTS made similar determinations about the formation of savings and loan holding companies, as well as chartering, merger, and change of control determinations for thrift institutions it regulated.

New Banks. PEIs sometimes sought to establish a new bank specifically to acquire one or more troubled or failing banks. Establishing the new bank required the approval of the relevant chartering authority: the OCC for national banks and, after the enactment of the Dodd-Frank Act, federal thrifts; the OTS for federal thrifts before the Dodd-Frank Act; and state banking authorities for state-chartered banks.

A deposit insurance application was also required for investor groups seeking to establish a proposed new insured bank. Before the enactment of the Federal Deposit Insurance Corporation Improvement Act (FDICIA) in 1991, the FDIC acted on such applications for state-chartered banks and the OCC acted for national banks.[13] Since 1991, the FDIC has been responsible for acting on all applications for FDIC deposit insurance. In determining whether to approve such applications, the FDIC is required to consider the statutory factors in section 6 of the Federal Deposit Insurance Act (FDI Act) listed in Table 1.

[12] Changes of control require notice; the agencies act on these notices by objection or non-objection.

[13] See FDICIA §115, amending section 5 of the Federal Deposit Insurance Act.

Table 1	
Statutory Factors for Deposit Insurance Applications	
Deposit Insurance Application: Statutory Factors	• Financial history and condition. • Adequacy of capital structure. • Future earnings prospects. • General character and fitness of management. • Risk to the Deposit Insurance Fund. • Convenience and needs of the community to be served. • Consistency of corporate powers with the purposes of the Federal Deposit Insurance Act.
Source: 12 U.S.C. § 1816.	

Bank Mergers. In some cases, PEIs proposed to facilitate a merger between a troubled bank and another bank, thereby averting a bank failure. Section 18(c) of the FDI Act, commonly called the Bank Merger Act, reflects a number of policy goals related to bank mergers, including the maintenance of a sound and competitive banking system. Merger transactions exclusively involving banks are subject to the approval of the primary federal regulator of the insured depository institution that would result from the merger, or by the FDIC in any case where a merger transaction involves an insured depository institution and a noninsured entity. In reviewing the merger application, the responsible agency must consider the statutory factors in Table 2.

Table 2	
Statutory Factors for Bank Merger Act Applications	
Bank Merger Act Application: Statutory Factors	• Whether the transaction will result in a monopoly. • Whether the effect in any section of the country may be to substantially lessen competition, tend to create a monopoly, or in any other manner be in restraint of trade. • The financial and managerial resources and prospects of the existing and proposed institutions, and the convenience and needs of the community to be served. • The effectiveness of any institution involved in the proposed merger in combating money laundering activities. • The risk to the stability of the United States banking or financial system.
Source: 12 U.S.C. § 1828(c).	

Bank Control—By a Company. Often, the end result of a transaction proposed by PEIs would be that a company has an investment in one or more insured banks, and the PEIs have an investment in the company as well as, in some cases, involvement in the management or policies of the insured banks. In all such proposed transactions, the Federal Reserve must determine whether the company would control the insured banks for purposes of the Bank Holding Company Act (BHCA). If so, the company would become a bank holding company subject to regulation by the Federal Reserve (or after the Dodd-Frank Act, potentially a thrift holding company subject to regulation by the Federal Reserve).

Under the BHCA, a company that controls a bank, or another bank holding company, is a bank holding company and is subject to certain activities restrictions and the Federal Reserve's supervision and regulation.[14] A company is deemed to have "control" of a bank if it owns or can vote 25 percent or more of any class of voting securities of the bank, if it controls the election of a majority of the directors or trustees of the bank, or if the Federal Reserve determines the company exerts

[14] 12 U.S.C. § 1841(a)(2).

a "controlling influence" over the management or policies of the bank.[15] The precise threshold for the ownership stake triggering the application of the BHCA depends on whether the Federal Reserve finds the existence of "controlling influence" on the bank. The BHCA also contains a presumption that a company does not control a bank if it does not own 5 percent or more of any class of voting securities of the bank.

The Federal Reserve has indicated that in reaching its determinations regarding whether an investor has control over a banking organization, it has been mindful of two key purposes of the BHCA.[16] The first purpose cited by the Federal Reserve is to ensure that companies that control banking organizations do so in a safe-and-sound manner, and that companies that wish to enjoy the benefits of controlling a banking organization must also bear responsibility to address downside risks by being prepared to provide financial and managerial resources to support their exercise of control. The second purpose cited by the Federal Reserve is to limit the mixing of banking and commerce by effectively preventing companies with commercial interests from having a controlling interest in a banking organization.[17]

Under the BHCA, it is unlawful for any company to become a bank holding company or acquire control of a bank without the prior approval of the Federal Reserve. When considering whether to approve such transactions, the Federal Reserve is required to consider several factors enumerated in the BHCA, as described in Table 3.[18]

Table 3

Statutory Factors for Bank Holding Company Acquisitions of Banks

Bank Holding Company Act: **Statutory Factors for Applications for Companies to Acquire Control of a Bank**	• Whether the proposal would result in a monopoly. • Whether the effect of the proposal in any section of the country may be to substantially lessen competition, tend to create a monopoly, or in any other manner be in restraint of trade. • The financial and managerial resources and future prospects of the company or companies and the banks concerned. • The convenience and needs of the community to be served. • The treatment of certain bank stock loans. • The ability of the Federal Reserve to obtain adequate information about the company; whether a foreign bank would be subject to comprehensive, consolidated supervision in its home country. • The competence, experience, or integrity of the officers, directors, and principal shareholders. • The effectiveness of the company in combating money laundering. • Risks to the financial stability of the United States.

Source: 12 U.S.C. § 1842(c)(1-7).

Bank Control—By a Person, or Persons Acting in Concert. Under the Change in Bank Control Act of 1978 (CIBC),[19] a person, or persons acting in concert, must submit prior written notice to the appropriate federal banking agency before acquiring control of a bank or bank holding company.[20] A person for this purpose includes an individual, corporation,

[15] 12 U.S.C. § 1842(a)(2); 12 CFR § 225.2(e).

[16] *See* Federal Reserve, Policy Statement on Equity Investments in Banks and Bank Holding Companies, September 22, 2008.

[17] Statutory exceptions exist that allow for ownership of FDIC-insured institutions by commercial firms in limited circumstances. 12 U.S.C. §1841(c)(2)(H).

[18] Before it was abolished by the Dodd-Frank Act, the OTS was the federal regulator of savings and loan (S&L) holding companies. The regulation of these holding companies was different from that of bank holding companies, but it did involve the OTS determining whether a company controlled a thrift institution, and thus whether that company was an S&L holding company subject to OTS regulation. Such determinations were governed by the Home Owners Loan Act, and the details will not be discussed in this article.

[19] 12 U.S.C. § 1817(j).

[20] Steve Mumm, "Change in Bank Control Act: What You Need to Know," *Bank Owner*, Spring 2013, https://thebhca.org/change-in-bank-control-act-what-you-need-to-know/.

limited-liability company, partnership, trust, or any other form of entity. A number of specific exceptions exist to the requirement to file a change of control notice, including if the transaction is already subject to review under the BHCA or the Bank Merger Act. The appropriate federal banking agency has the authority to disapprove the transaction.

Commentary from shortly after the CIBC's passage indicates that it was passed "primarily to prevent speculative purchases of small banks by irresponsible individuals with questionable integrity."[21] Shortly before the CIBC's passage, a congressional report noted that with respect to the 101 banks that failed between 1960 and 1977, the vast majority failed because of fraud and insider abuse, and there was concern that some individuals were acquiring banks with the intent of using bank resources for personal gain.[22] In this sense, the CIBC has goals similar to the BHCA but applies to transactions involving a broader class of entities than "companies."[23]

A federal banking agency generally has 60 days to decide whether to object to a change in control notice. In deciding whether to object, the agency must consider the statutory factors in Table 4. These statutory factors are similar to those that must be considered by the federal banking agencies in other contexts regarding proposed entry into banking.

Table 4

Statutory Factors for Review of Change in Control Notices

Notice of Change in Control: Statutory Factors	
	• Whether the proposal would result in a monopoly. • Whether the effect of the proposal in any section of the country may be to substantially lessen competition, tend to create a monopoly, or in any other manner be in restraint of trade. • The financial condition of the acquiring party or the future prospects of the institution and their potential impact on the bank or depositors. • The competence, experience, or integrity of any acquiring person or proposed management. • Whether any acquiring party neglects, fails, or refuses to furnish information required by the FDIC. • The effect on the Deposit Insurance Fund.

Source: 12 U.S.C. § 1817(j)(7).

Under the CIBC, a person has control of an insured depository institution if it has the "power, directly or indirectly, to direct the management or policies of an insured depository institution," or the power to vote 25 percent or more of any class of an insured institution's voting securities.[24] In addition, each federal banking agency has adopted a regulatory presumption of control under the CIBC. It is triggered if a person owns 10 percent or more of the institution's outstanding voting common stock and either the stock is publicly traded or no other person holds a greater amount.[25] If the CIBC is implicated, the investor must submit a written notice to the appropriate federal banking agency of the institution that includes extensive information about the investor and entities that control the investor. Some PEIs were unwilling to file a CIBC notice and, thus, sought to structure their investments to avoid a required filing.

[21] Roger D. Rutz, "Chain Banking, Competition, and the Change in Bank Control Act of 1978," *Nebraska Law Review* 59 (1980): 237.

[22] Rutz (1980), p. 237.

[23] Rutz (1980), p. 238.

[24] 12 U.S.C. § 1817(j)(8)(B).

[25] 12 C.F.R. § 303.82(b)(2) (FDIC); 12 C.F.R. § 5.50(f)(2) (OCC); 12 C.F.R. § 225.41(c)(2) (FRB).

Crisis-Era Policy Developments Relevant to PEI Investments in Banking Organizations

Beginning in the fall of 2008, the federal banking regulators took steps to clarify, and in a number of respects ease, requirements related to private equity investments in banking organizations.

Federal Reserve. In September 2008, the Federal Reserve issued its Policy Statement on Equity Investments in Banks and Bank Holding Companies (Policy Statement) that provided additional guidance on the Federal Reserve's position on minority equity investments in banks and bank holding companies that generally do not constitute "control" for purposes of the BHCA.[26] The guidance described how large minority investors (companies that acquire between 10 and 24.9 percent of the voting stock of a banking organization) typically have avoided acquiring a controlling interest in a banking organization by providing the Federal Reserve with passivity commitments and avoiding certain control enhancing mechanisms. For example, as stated in the guidance, minority investors have avoided exerting a controlling influence by limiting their total and voting equity investments in the banking organization, avoiding the use of covenants that restrict the banking organization's management and other attempts to influence the organization's decision making processes, and limiting director interlocks and business relationships between the investor and the banking organization.[27]

The Policy Statement indicated that the Federal Reserve was changing its approach to evaluating control determinations in a number of respects, three of which will be mentioned here. First, while past Federal Reserve practice had been generally not to permit minority investors to have representation on the board of directors of the banking organization, the Policy Statement indicated the Federal Reserve's belief that a minority investor generally should be able to have a single representative on the organization's board of directors (or two representatives in certain circumstances) without acquiring a controlling influence. Second, the Policy Statement expanded the types of communication that minority investors could have with banking organization management without the Federal Reserve determining that the minority investors were exercising control. Third, while past Federal Reserve practice had been to view ownership of nonvoting equity of more than 25 percent of total equity as raising control issues, the Policy Statement revised that presumption. Specifically, the Federal Reserve indicated that it would not expect a minority investor to exert control if the investor owns less than one-third of the total equity of the organization, provided the investor does not own 15 percent or more of any class of voting securities of the organization.[28]

The BHCA's definition of control over a banking organization, and the standards the Federal Reserve uses in making control determinations, are of considerable significance to PEIs. One reason is that bank holding companies typically are permitted to engage in only those activities that are closely related to banking.[29] Private equity firms have traditionally invested in a host of nonbanking and nonfinancial activities and, thus, may find it difficult to become a bank holding company and maintain their other investments. Another reason is that bank holding companies must act as a "source of strength" for the insured depository institutions they control, which may require the bank holding company to make capital injections.[30] Private equity firms typically were not structured nor willing to provide such financial support. Most PEIs took care to structure proposed banking investments in a way that would not cause them to be found to exert control and thereby become bank holding companies. As a result, the vast majority of the private equity that has been invested in banking organizations represents ownership stakes of 24.9 percent or less.[31]

[26] Federal Reserve, "Board Announces the Approval of a Policy Statement on Equity Investments in Banks and Bank Holding Companies," press release, September 22, 2008.

[27] Federal Reserve, Policy Statement on Equity Investments in Banks and Bank Holding Companies, September 22, 2008.

[28] In January 2020, the Federal Reserve issued a final rule revising its framework for determining whether a company has control over another company under the BHCA. The 2008 Federal Reserve Policy Statement remains in effect to the extent not superseded by the final rule. *See* Control and Divestiture Proceedings, 85 Fed. Reg. 12398 (March 2, 2020).

[29] 12 U.S.C. §§ 1843(j); 1843(k)(1).

[30] 12 U.S.C. § 1831o; 12 C.F.R. § 225.4(a)(1).

[31] Matthew Monks, "The Private Equity Effect," *American Banker*, November 1, 2012, https://www.americanbanker.com/news/the-private-equity-effect.

Office of the Comptroller of the Currency. During the crisis, the OCC implemented a "shelf charter" program, which provided PEIs a vehicle to bid for failed banks.[32] The charter remains inactive, or "on the shelf," until the investor group is named the winning bidder for a failing or failed bank. Assuming their bids presented the least cost to the Deposit Insurance Fund (DIF),[33] the shelf charter allowed entities other than banks the ability to immediately acquire deposits and assets of failed banks. Companies or investor groups acquiring an interest in the resulting national bank through a holding company structure were subject to holding company control determinations and approvals by the Federal Reserve.[34] The OTS[35] also developed a similar pre-clearance process that enabled PEIs that did not currently own an insured institution to bid for failed institutions.[36] Private equity groups acquired two of the larger, early failed institutions, IndyMac Bank, FSB, Pasadena, California, and BankUnited, FSB, Coral Gables, Florida, from the FDIC (as receiver) in this manner.

Federal Deposit Insurance Corporation. In November 2008, the FDIC, recognizing the importance of additional sources of capital to resolve the growing number of failed banks, established a modified bidder qualification process to expand the pool of qualified bidders for the deposits and assets of failing banks.[37] The modified process allowed interested parties that did not have a bank charter to participate in the bidding process for failing banks. In the modified process, the FDIC evaluated applications for deposit insurance based on streamlined information submissions and applications. For example, the streamlined process provided the FDIC with critical information for making a supervisory determination but did not include field investigations. The process allowed proponents, as a condition of approval, to submit comprehensive business plans and other supporting documentation (that normally would have been required before an application could be approved) to the FDIC within 60 days of the date that the FDIC approved an application. The application reviews were closely coordinated among the agencies, and final deposit insurance and charter approvals were granted concurrently to address each of the agencies' timing requirements. In particular, companies or investor groups with a stake in any resulting banks were subject to holding company control determinations and approvals by the Federal Reserve (or the OTS as applicable) and, as noted earlier, these entities often attempted to structure their involvement to avoid a determination of control and consequent regulation as a bank holding company.

The FDIC's modified bidder program generated considerable interest. Potentially interested parties included individuals, private equity firms, banks and bank holding companies, consulting or professional service firms, and nonbank financial companies. However, interested parties frequently presented a number of concerns with respect to management depth and qualifications, the proposed business strategy (or lack thereof), or the source, structure, or level of capital.

As expressions of interest in the modified bidder program were being evaluated, the FDIC completed two significant resolution transactions involving PEIs. These transactions occurred early in the evolving crisis and helped inform the FDIC's thinking about the parameters for PEI investments in banking organizations. The resolutions involved newly chartered federal thrift institutions that acquired IndyMac Federal Bank, FSB, in March 2009, and BankUnited, FSB, in May 2009. The IndyMac transaction was the largest PEI acquisition of a failed institution.

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[32] Office of the Comptroller of the Currency, "OCC Conditionally Approves First National Bank Shelf Charter to Expand Pool of Qualified Bidders for Troubled Institutions," news release 2008-137, November 21, 2008, http://www.occ.gov/news-issuances/news-releases/2008/nr-occ-2008-137.html. *See also* Righeimer Martin (March 2010): 410.

[33] 12 U.S.C. § 1823(c)(4).

[34] *See, e.g.*, OCC, RE: Application to establish a new national bank, with the title of Ford Group Bank, National Association, Application Control Number: 2008-SO-01-0015, Charter No. 24911, November 17, 2008, available at https://www.occ.gov/news-issuances/news-releases/2008/memo-ford-group-bank-approval-2008.pdf.

[35] The FDIC processed bidder clearance requests and related filings concurrently with the OTS before its dissolution in July 2011.

[36] *See* the description in Office of Thrift Supervision, "OTS Gives Preliminary Clearance to Successful Bidders for IndyMac," news release OTS-09-001, January 2, 2009.

[37] FDIC, "FDIC Expands Bidder List for Troubled Institutions," press release PR-127-2008, November 26, 2008.

IndyMac Failure

IndyMac Bank, FSB (IndyMac) was closed by the OTS on July 11, 2008, and the FDIC was appointed receiver. IndyMac Federal Bank, FSB (New IndyMac) was chartered on the same day, and the OTS appointed the FDIC as conservator of the new institution. Before its failure, IndyMac reported approximately $31 billion in assets and $19 billion in deposits. Its failure was due to poor asset quality in its portfolios of nontraditional mortgages, construction loans, and private mortgage-backed securities. Substantially all of IndyMac's assets and nonbrokered insured deposits were passed from the receiver to the conservator with the intent of marketing the institution in conservatorship.

The FDIC, having no intention of operating New IndyMac as conservator on a long-term basis, entered into discussions with an investor group of PEIs about the group's interest in acquiring the business and operations of New IndyMac. The investor group generally consisted of private equity firms and personal investment vehicles with sizeable asset holdings and financial resources. The FDIC and the OTS ultimately determined that the proposed acquisition would be most appropriately achieved through a newly established OTS thrift charter, approval of deposit insurance, and a purchase and assumption transaction between the FDIC, as receiver of New IndyMac, and the new thrift (ultimately named OneWest Bank, FSB).

The structure of the proposed transaction illustrates the statutory and regulatory considerations outlined in the preceding sections of this paper. Several applications were submitted in connection with the proposed acquisition. For example, the FDIC considered an application for deposit insurance for the new thrift; the OTS reviewed the new thrift's charter application and an application for OneWest Bank, FSB to merge with New IndyMac; and the OTS also reviewed applications to allow the applicable parties to acquire control of OneWest Bank, FSB and become savings and loan holding companies under the Home Owners' Loan Act.[38]

Central to the transaction for the PEIs was that they would have equity investments in OneWest Bank's thrift holding company, without these investments causing them to become a regulated thrift holding company or BHC. In other words, while OneWest Bank was controlled by a regulated holding company, the PEI investors in that holding company did not wish to become regulated holding companies themselves. Thus, rebuttals of control were submitted on behalf of the parent thrift holding company's two largest shareholders and their related entities—Paulson & Co., Inc. and J.C. Flowers & Co. LLC—each of which acquired 24.99 percent ownership interests in the thrift holding company. These companies also sought and received a determination from the FDIC that their proposed equity investments in the parent thrift would not result in either group being deemed to be (i) in control of OneWest Bank, FSB or its holding company within the meaning of 12 U.S.C. § 1813(w)(5) or § 1831o or (ii) a "controlling shareholder" within the meaning of 12 U.S.C. § 1813(u). These determinations ensured that their equity investments in the new thrift holding company and in other institutions would not cause them to become subject to the FDIC's statutory cross-guarantee authority.[39]

As the PEIs with equity investments in the parent thrift holding company were not viewed as control investors, and therefore were not subject to holding company regulation, it was important to ensure that they did not exert management control over the new institution. The FDIC's approval of deposit insurance was conditioned on receiving the rebuttals of control mentioned above, which would limit the investors' influence on the management and policies of the new thrift and restrict transactions between the investors, the investment funds they managed, and the new thrift. The FDIC's approval of the application for deposit insurance also required prior notice of any material business plan changes, quarterly business plan variance reporting, and monthly reporting under the bank's loss-share agreements with the FDIC. The proposed transaction

[38] Investors in OneWest Bank, FSB included four savings and loan holding companies in a tiered structure. For details, search under RSSD ID = 3943386 (IMB Management Holdings Group, LLC) using the FFIEC National Information Center search tool at https://www.ffiec.gov/NPW, with an as-of date of June 30, 2009.

[39] Under 12 U.S.C. § 1815(e), an FDIC-insured depository institution may have a liability to the FDIC for losses the FDIC incurs in the event of the failure of, or FDIC assistance to, a commonly controlled insured institution. The FDIC may waive the liability if doing so is in the best interest of the DIF.

was approved based on evaluation of the statutory factors, including the capital resources contributed by the investors to the transaction and management's overall banking experience and expertise.

FDIC Statement of Policy on Qualifications for Failed Bank Acquisitions

As the FDIC reviewed the proposals submitted under the modified bidder qualification program, it determined that some of the proposed structures raised potential safety-and-soundness concerns and risks to the DIF. The FDIC determined that it should provide clarity to potential acquirers about the types of failed bank transactions the FDIC believed would be consistent with the safety and soundness of the resulting banks.

A proposed Statement of Policy was published in July 2009. As the FDIC conveyed in the statement's introduction, its concerns centered on the need for fully adequate capital, a source of financial and managerial strength for the depository institution, and the potential adverse effects of extensions of credit to affiliates. The proposed Statement of Policy explained, "The FDIC is particularly concerned that owners of banks and thrifts, whether they are individuals, partnerships, limited liability companies, or corporations, accept the responsibility to serve as responsible custodians of the public interest that is inherent in insured depository institutions and will devote their efforts to assuring that banks or thrifts acquired with assistance from the deposit insurance fund do not return to the category of troubled institutions."[40]

The FDIC sought and reviewed comments on the proposed Statement of Policy and, in September 2009, published a Final Statement of Policy (Statement).[41] The Statement contained elements designed to preserve the safety and soundness of the insured institutions resulting from failed bank acquisitions. It applied to private investors in companies proposing to directly or indirectly assume deposits of a failed bank, and to applicants for deposit insurance for bank or thrift charters issued in connection with the resolution of failed banks. The Statement clarified that it was not intended to interfere with or supplant holding company regulation, and that any of the Statement's provisions could be waived by the FDIC Board of Directors if doing so was in the best interests of the DIF.

The Statement communicated the FDIC's expectations in a number of areas including that (1) insured institutions resulting from failed bank acquisitions would maintain a ratio of tier 1 common equity capital to total assets of at least 10 percent for three years following the transaction; (2) if one or more investors own 80 percent or more of two or more banks or thrifts, the stock of these banks or thrifts commonly owned by the investors would be pledged to the FDIC against the possibility that any of these banks or thrifts would fail; (3) new extensions of credit from resulting insured institutions to the investors or certain of their interests would be prohibited; (4) ownership structures involving entities domiciled in secrecy law jurisdictions would not be permitted to have direct or indirect ownership of a resulting insured institution unless the investors are subject to comprehensive and consolidated supervision and agree to providing certain information to U.S. banking regulators;[42] (5) investors would be prohibited from selling or transferring their securities within three years following the acquisition without FDIC approval; (6) complex and opaque ownership structures, for example "silo structures," would not be viewed as appropriate for approval for ownership of insured banks;[43] and (7) investors that directly or indirectly own more than 10 percent of a failing institution would not be eligible to bid for that institution in receivership.

[40] FDIC, Proposed Statement of Policy on Qualifications for Failed Bank Acquisitions, 74 Fed. Reg. 32931 (July 9, 2009).

[41] FDIC, Final Statement of Policy on Qualifications for Failed Bank Acquisitions, 74 Fed. Reg. 45440–49 (Sept. 2, 2009).

[42] The Statement describes secrecy law jurisdictions as countries that apply bank secrecy laws that, among other things, limit U.S. regulators ability to ascertain compliance with U.S. law.

[43] "Silo structures" have been described as arrangements where a fund manager may have a fund dedicated to bank investments and other funds dedicated to commercial investments, in such a way that the fund manager avoids designation as a bank holding company (even if one or more entities within the banking silo are designated as bank holding companies). By avoiding designation as a bank holding company, the fund manager can avoid divesting the commercial activities and avoid source-of-strength commitments. *See* Desai (2009).

The Statement addressed FDIC concerns about a number of proposals put forward by PEIs to acquire failed banks. New banks formed from the assets of failed banks posed potentially greater risk than other new banks, and the expectation for resulting banks to maintain a 10 percent ratio of tier 1 common equity to assets for three years was intended to mitigate these risks.[44] The expectation for investor agreement to a form of cross guarantee was to protect the DIF when the FDIC entered into transactions with investors who were seeking substantial common ownership of multiple insured institutions. The prohibition on new extensions of credit to investors was to address risks with respect to transactions with affiliates by private capital investors who are not subject to the activities restrictions of the Bank Holding Company Act.[45] Direct or indirect ownership of insured banks by entities domiciled in bank secrecy jurisdictions can make it difficult for the FDIC to obtain information about a company's owners and its affiliated entities. Limitations on the sale of an investor's interest within the first three years were intended to encourage long-term investments to promote the stability of an insured bank, including the stability of the institution's management. The expectation that silo structures would not be permitted was to avoid situations where effective control of an insured institution was held by an entity that assumed none of the obligations typically associated with such control.[46] The limitation on participation by persons with substantial ownership of the failed bank was intended to address the potential conflicts of interest inherent in such situations.[47]

Although the Statement provided potential investors with information about the FDIC's expectations about the parameters of failed bank acquisitions, certain aspects required additional clarity. The FDIC subsequently posted two sets of questions and answers on its website, in January 2010 and in April 2010.[48] The questions and answers addressed several issues and clarified the portion of the Statement dealing with "strong majority interest." The Statement had indicated that it did not apply to "investors in partnerships or similar ventures with bank or thrift holding companies or in such holding companies (excluding shell holding companies) where the holding company has a strong majority interest in the resulting bank or thrift and an established record for successful operation of insured banks or thrifts." The questions and answers outlined, with greater specificity, situations in which the FDIC would not generally expect investors to agree to be subject to the terms of the Statement.

In short, while PEIs were seeking to enter into failing bank transactions with the FDIC that they hoped would be financially advantageous to them, the Statement described the FDIC's expectations for failing bank transactions that would be consistent with the safety and soundness of resulting insured institutions. Whether to agree to be subject to the terms of the Statement was up to each PEI entity.

Agreements were memorialized in writing as part of the conditions for approval of deposit insurance, if applicable, or in acknowledgement letters that the FDIC required the PEIs to provide as a condition for entering into a transaction. Generally, the FDIC would proceed with a transaction only if investors representing at least a third of the resulting insured bank's total voting equity shares or total equity shares—a so-called anchor group—agreed to be subject to the terms of the Statement.[49]

[44] FDIC, Final Statement of Policy on Qualifications for Failed Bank Acquisitions, 74 Fed. Reg. 45446 (Sept. 2, 2009). By comparison, the FDIC Statement of Policy on Applications for Deposit Insurance states that the initial capital raised by a proposed institution should generally be sufficient to provide a leverage ratio of at least 8 percent throughout the first three years of operation. *See* 63 Fed. Reg. 44756 (Aug. 20, 1998). As the FDIC has also stated, "While the 8 percent threshold will generally be applied to proposals displaying a traditional risk profile, the FDIC may seek a higher level of capital for those proposals displaying heightened risk profiles or complexity, such as with respect to the proposed institution's anticipated size, complexity, and business strategy." *See* FDIC Statement of Policy on Applications for Deposit Insurance Q&As, November 2014, available at https://www.fdic.gov/news/financial-institution-letters/2014/fil14056a.pdf.

[45] FDIC, Final Statement of Policy on Qualifications for Failed Bank Acquisitions, 74 Fed. Reg. 45447 (Sept. 2, 2009).

[46] *See* 74 Fed. Reg. 45447.

[47] *See* 74 Fed. Reg. 45447; *see also* FDIC, Proposed Statement of Policy on Qualifications for Failed Bank Acquisitions, 74 Fed. Reg. 32932 (July 9, 2009).

[48] FDIC, Statement of Policy on Qualifications for Failed Bank Acquisitions, Q&As Posted in January and April 2010, https://www.fdic.gov/regulations/laws/faqfbqual.html.

[49] FDIC, Q&As Posted in January and April 2010.

Failed Bank Transaction Structures

Because bidders for failed banks must be FDIC-insured if they are to assume failed bank deposits, organizers backed by PEIs typically used one of two vehicles to establish a platform to acquire a failed bank: a newly insured bank or thrift, or a recapitalized existing bank or thrift. A deposit insurance application was required for investor groups seeking to obtain clearance to bid through newly chartered and newly insured banks or thrifts (commonly called "shelf charters"). Alternatively, investor groups obtained clearance to bid using an existing insured bank as the acquisition platform (commonly called "inflatable charters").[50] For inflatable charters, the underlying application or filing could include a merger application, change in control notice, or other filing depending on the circumstances.

Regardless of the strategy selected by the investors or the type of filing, the FDIC, in granting its clearance to bid, required, at a minimum, conditional approval from the chartering authority, an acceptable business plan (including detailed integration plans and strategies), appropriate and readily available capital, and a satisfactory management team.[51] In addition, as noted, the FDIC expected an anchor-group of investors to agree to the terms of the Statement.

Table 5 lists the types of filings submitted in conjunction with open bank recapitalizations, as well as shelf and inflatable charter proposals.

Table 5

Applications and Filings Submitted in Connection With Bank Acquisitions and Recapitalizations

Structure	Filing Type	Purpose
Shelf Charters	• Charter and Deposit Insurance Application	• Necessary to establish an insured shelf charter.
	• Holding Company Filing(s) – as applicable	• Necessary in the event of holding company formation or to resolve requirements to operate as a passive investor.
Inflatable Charters and Open Bank Recapitalizations	• Bank Merger Act Application	• Necessary to effect acquisition of an insured depository institution (IDI) by an existing IDI, depending on the transaction structure.
	• Notice of Change in Control	• Necessary for the primary organizer to acquire control of the "platform" IDI, though investors may be passive.
	• Other Filing (e.g., Business Plan Change Request, Capital Restoration Plan)	• May be necessary depending on the circumstances of the platform or target institution.
	• Holding Company Application(s) – as applicable	• Necessary in the event of holding company formation or to resolve requirements to operate as a passive investor.

Source: FDIC.

Ultimately, all applicable statutory factors and other applicable regulatory requirements had to be considered and favorably resolved for the FDIC (and the other banking agencies) to approve the respective filings and allow PEI-backed acquisitions to occur. Table 6 differentiates common characteristics of successful and unsuccessful PEI-backed proposals.

[50] Inflatable charters involve the injection of significant capital into existing institutions for the purpose of acquiring one or more failed IDIs.

[51] Certain investors were also required to make passivity commitments to the FDIC, the Federal Reserve, or the chartering agency with respect to their planned ownership interests.

Table 6

Characteristics of Successful and Unsuccessful Failed Bank Acquisition Proposals

Aspect	Successful	Unsuccessful
Business Plans	• Well-supported business plan with reasonable underlying assumptions. • Appropriate focus on three key phases: resolution of acquired problem assets, generation of organic loans/deposits, and transition into ongoing operations consistent with business model. • Comprehensive and well-developed integration and contingency plans.	• Vague, poorly conceived, or aggressive business plan that places an undue emphasis on growth and/or acquisitions without viable long-term strategies. • Unsupported projections and assumptions. • Failure to address integration plans. • Plans that included staggered ("pay-as-you-grow") or uncertain capital contributions over the first three years of operation.
Management	• Key management and/or directors with requisite experience identified early in the filing process. • Individuals with strong backgrounds in managing problem assets, handling acquisitions, and overseeing contemplated activities. • Adequate risk management framework (policies, procedures, controls, etc.). • Appropriate staffing depth and management succession plans. • Reasonable compensation plans (e.g., salaries/bonuses, employment agreements, stock incentive plans, severance packages).	• Unacceptable management/directors and/or voids in several key management positions (e.g., Chief Lending Officer or Chief Financial Officer). • Poor due diligence (proposed management candidates with unsuitable backgrounds). • Inexperience managing problem assets or working in a regulated banking environment. • Inadequate policies, procedures, controls, risk tolerance levels, staffing resources, and/or succession plans. • Unacceptable compensation plans (e.g., salary based on third-year assets, excessive stock options, stock warrants tied to achieving certain stock prices).
Capital	• Sufficient capital relative to risk profile and acquisitions strategy. • Firm capital commitments (signed investor agreements and escrowed funds). • Acceptable equity structures without unfavorable embedded control elements.	• Insufficient capital given risk profile and planned growth through acquisitions. • Inability to secure capital commitments. • Undisclosed follow-on or contingent capital plans. • Unacceptable, convoluted, or overly complicated equity structures.
Other	• The FDIC was able to favorably resolve all statutory factors and other relevant regulatory/supervisory considerations. • No issues with respect to affiliate, insider, or third-party relationships. • Satisfactory resolution of considerations described in the FDIC Statement of Policy on Qualifications for Failed Bank Acquisitions (FDIC Policy Statement).	• The FDIC was unable to resolve one or more statutory factors applicable to the filing (commonly capital, management, and/or risk to the Deposit Insurance Fund). • Material affiliate or insider concerns. • Unresolved FDIC Policy Statement issues (e.g., ownership/equity structure, secrecy jurisdiction).

Source: FDIC.

PEI Involvement in FDIC Failure Resolutions During the 2008–2013 Banking Crisis

According to data gathered contemporaneously during the crisis by FDIC staff, 17 acquiring banks connected with PEI groups purchased 58 failed banks during the crisis years 2008 through 2013, and two other failed banks in 2014, through the creation of new bank charters (e.g., shelf charters) specifically to acquire failed banks or through substantial equity injections that positioned existing banks (e.g., inflatable charters) to acquire failed banks.[52] Table 7 lists the 17 acquiring banks and the 60 failed banks they acquired. Table 7 also lists the open banks that some of the 17 banks acquired after their initial failed bank acquisitions.[53] For some of the acquiring banks in Table 7, the investor groups consisted of multiple PEI entities. To avoid attempting to distinguish a lead PEI group for each acquiring bank, Table 7 does not list the PEI groups associated with the 17 acquiring banks.

The 60 failed banks collectively reported about $81 billion in assets on their last Consolidated Reports of Condition and Income (Call Report) before failure. Their assets at failure totaled about $75 billion, of which the 17 acquiring banks acquired about $63.4 billion. FDIC staff has estimated based on Call Report data that the PEIs contributed approximately $5.4 billion in new capital in connection with these failure resolutions.[54] The 60 failures cost the DIF approximately $21.3 billion. FDIC staff analysis indicated that without PEI participation, the estimated cost to the DIF of the 60 failures would have been $24.6 billion. The $3.3 billion difference reflects the difference in cost between the winning PEI bids and the next-best bids submitted by banks that were not backed by PEIs, or in some cases the difference between the PEI bids and the estimated cost of a payout and liquidation. The staff analysis indicated that 24 of the 60 failures would have been handled as payouts, absent PEI participation.

As shown in Table 7, a number of these 17 failed bank acquirers became active acquirers of open banks. Through December 31, 2020, the 17 acquiring banks in Table 7 collectively acquired 38 other open banks, with last-reported total assets (in aggregate) of $22.6 billion, after acquiring their first failed bank. Twelve of these open banks were acquired during the 2008–2013 crisis years, and 26 were purchased after the crisis.

A notably large proportion of the 17 private-equity backed acquiring banks have since been acquired by other banks, an outcome that is generally consistent with the view that most private equity investors in failed banks did not intend to become permanent investors in the acquired banks. Of the 17 acquiring banks in Table 7, through December 31, 2020, 13 had merged into other banks. Of these 13, 11 were acquired by unaffiliated banks and 2 were consolidated into affiliated banks.[55] Three of the 17 acquiring banks existed as active FDIC-insured institutions.[56] One of the 17 acquiring banks (CertusBank, NA) voluntarily relinquished FDIC insurance in 2015 and self-liquidated without FDIC assistance. None of the 17 had failed.

[52] Specifically, the 17 acquiring institutions were those for which staff believed the nature of PEI involvement triggered application of the FDIC's Statement of Policy on Qualifications for Failed Bank Acquisitions, or would have triggered its application had the Statement been in effect. Johnston-Ross et al. (2021) (available at https://www.fdic.gov/analysis/cfr/working-papers/2021/cfr-wp2021-04.pdf), using slightly broader criteria not based on the applicability of the FDIC's Statement, report that 62 failed banks acquisitions were backed by private equity compared with the 60 reported in this paper.

[53] In Table 7, "Hillcrest Bank, NA/Bank Midwest/NBH" is listed as a single acquiring bank. Hillcrest Bank NA and Bank Midwest (which changed its name to NBH Bank) were separate banks under the common control of NBH Holdings.

[54] FDIC research staff estimated the capital contributions based on first reported capital for de novo acquirers and change in capital surplus for pre-existing acquirers.

[55] Hillcrest Bank, NA was acquired by an affiliate, Bank Midwest, NA (the two were commonly controlled by NBH Holdings); and Superior Bank was acquired by an affiliate, Cadence Bank (the two were commonly controlled by Community BC LLC).

[56] The three remaining banks as of December 31, 2020, were Premier Bank, NBH Bank, and BankUnited, NA. OneWest Bank, FSB became a division of CIT Bank after CIT Group acquired OneWest Bank in 2015. Thus, although CIT Bank operated under the original OneWest Bank FDIC certificate number as of year-end 2020, OneWest is considered an acquired bank for purposes of this discussion.

Table 7

Private-Equity Acquisitions of 2008–2013 Failed Banks and Subsequent Acquisitions[1]

Acquiring Bank	Bank Acquired (Failed banks are not shaded; open banks are shaded)	
	Name	**Acquisition Date**
OneWest Bank, FSB[a]	IndyMac, FSB	March 19, 2009
	First Federal Bank of California	December 18, 2009
	La Jolla Bank, FSB	February 19, 2010
BankUnited, NA[b]	BankUnited, FSB	May 21, 2009
	Herald National Bank	March 22, 2013
State Bank and Trust Company[a]	Security Bank of North Metro	June 24, 2009
	Security Bank of Jones County	June 24, 2009
	Security Bank of Houston County	June 24, 2009
	Security Bank of Gwinnett County	June 24, 2009
	Security Bank of Bibb County	June 24, 2009
	Security Bank of North Fulton	June 24, 2009
	The Buckhead Community Bank	December 4, 2009
	First Security National Bank	December 4, 2009
	Northwest Bank and Trust	July 30, 2010
	United Americas Bank, NA	December 17, 2010
	Piedmont Community Bank	October 14, 2011
	Community Capital Bank	October 21, 2011
	Bank of Atlanta	October 1, 2014
	First Bank of Georgia	July 24, 2015
	S Bank	December 31, 2016
	National Bank of Georgia	December 31, 2016
	Alostar Bank of Commerce	September 30, 2017
Premier American Bank, NA[a]	Premier American Bank	January 22, 2010
	Florida Community Bank	January 29, 2010
	Peninsula Bank	June 25, 2010
	Sunshine State Community Bank	February 11, 2011
	Cortez Community Bank	April 29, 2011
	First National Bank of Central Florida	April 29, 2011
	Coastal Bank	May 6, 2011
	First Peoples Bank	July 15, 2011
	Great Florida Bank	February 1, 2014
	Floridian Community Bank	March 1, 2018

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Table 7 *continued from page 16*

Private-Equity Acquisitions of 2008–2013 Failed Banks and Subsequent Acquisitions[1]

Acquiring Bank	Bank Acquired (Failed banks are not shaded; open banks are shaded)	
	Name	**Acquisition Date**
Community & Southern Bank[a]	First National Bank of Georgia	January 29, 2010
	Appalachian Community Bank	March 19, 2010
	First Commerce Community Bank	September 17, 2010
	Bank of Ellijay	September 17, 2010
	The Peoples Bank	September 17, 2010
	Georgia Trust Bank	July 20, 2012
	First Cherokee State Bank	July 20, 2012
	Verity Bank	June 24, 2014
	Eastside Commercial Bank	July 18, 2014
	Alliance National Bank	September 19, 2014
	Community Business Bank	May 8, 2015
First Michigan Bank[a]	CF Bancorp (Citizens First Savings Bank)	April 30, 2010
	First Banking Center	November 19, 2010
	People's State Bank	February 11, 2011
	Community Central Bank	April 29, 2011
	First Place Bank	February 10, 2014
	Signature Bank	February 6, 2015
	Talmer West Bank	August 21, 2015
Bay Bank, FSB[a]	Bay National Bank	July 9, 2010
	Carrollton Bank	April 19, 2013
	Slavie Federal Savings Bank	May 30, 2014
	Hopkins Federal Savings Bank	July 8, 2016
NAFH National Bank[a]	Turnberry Bank	July 16, 2010
	Metro Bank of Dade County	July 16, 2010
	First National Bank of the South	July 16, 2010
	TIB Bank	April 30, 2011
	Capital Bank	June 30, 2011
	GreenBank	September 8, 2011
	Southern Community Bank and Trust	October 11, 2012
	Communityone Bank, NA	October 26, 2016
First Southern Bank[a]	Haven Trust Bank	September 24, 2010
	First Commercial Bank of Florida	January 7, 2011

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Table 7 *continued from page 17*

Private-Equity Acquisitions of 2008–2013 Failed Banks and Subsequent Acquisitions[1]

Acquiring Bank	Bank Acquired (Failed banks are not shaded; open banks are shaded)	
	Name	Acquisition Date
Hillcrest Bank, NA/	Hillcrest Bank	October 22, 2010
Bank Midwest, NA/	Bank of Choice	July 22, 2011
NBH Bank[c]	Community Banks of Colorado	October 21, 2011
	Pine River Valley Bank	August 1, 2015
	Peoples National Bank	January 1, 2018
	Peoples Bank	January 1, 2018
Grandpoint Bank[a]	First Vietnamese American Bank	November 5, 2010
	First Commerce Bank	December 28, 2010
	Orange Community Bank	August 30, 2011
	Bank of Tucson	June 21, 2013
	Regents Bank, NA	September 20, 2013
	Gilmore Bank	September 26, 2013
	The Biltmore Bank of Arizona	March 21, 2014
CertusBank, NA[d]	CommunitySouth Bank and Trust	January 21, 2011
	Atlantic Southern Bank	May 20, 2011
	First Georgia Banking Company	May 20, 2011
	Hometown Community Bank	November 16, 2012
	Parkway Bank	April 26, 2013
AloStar Bank of Commerce[a]	Nexity Bank	April 15, 2011
Superior Bank, NA[a]	Superior Bank	April 15, 2011
Hamilton State Bank[a]	Bartow County Bank	April 15, 2011
	McIntosh State Bank	June 17, 2011
	The First State Bank	January 20, 2012
	Douglas County Bank	April 26, 2013
	Cherokee Bank, NA	February 17, 2014
	Highland Commercial Bank	August 31, 2015
Premier Bank[b]	Mid City Bank, Inc	November 4, 2011
	Farmers Bank and Trust Company	April 6, 2015

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Table 7 *continued from page 18*

Private-Equity Acquisitions of 2008–2013 Failed Banks and Subsequent Acquisitions[1]

Acquiring Bank	Bank Acquired (Failed banks are not shaded; open banks are shaded)	
	Name	Acquisition Date
Harbor Community Bank[a]	Putnam State Bank	June 15, 2012
	Bank of St. Augustine	August 29, 2013
	Highlands Independent Bank	October 25, 2014
	First America Bank	May 9, 2015
	Florida Citizens Bank	December 5, 2015
	Jefferson Bank of Florida	July 28, 2017

Source: FDIC.

[1] As of December 31, 2020. Acquiring banks were identified by FDIC staff as being backed by PEIs to an extent that triggered application of the FDIC's Statement of Policy on Qualifications for Failed Bank Acquisitions, or would have had the statement been in effect. Acquiring bank name is as of its first failed bank acquisition during 2008–2013. Names of acquired open banks are shaded, names of acquired failed banks are not shaded.

[a] Acquired by another insured institution after acquiring the listed banks.

[b] Active insured institution, same name.

[c] Active insured institution, different name.

[d] Voluntarily relinquished insurance and self-liquidated.

Context on the Role of PEIs During the Crisis

This paper has described the framework and processes by which PEIs made investments in companies that acquired one or more failing banks during the 2008–2013 banking crisis. In this section we broaden the focus by placing in context the role of private equity investment in all banks (that is, not limited to the failing banks discussed above) relative to overall capital raising by U.S. banks, and the role PEIs played in the resolution of crisis-era bank failures.

Private equity investment appears to have constituted a small but by no means immaterial subset of overall capital raising by FDIC-insured banks during the 2008–2013 banking crisis. There is no readily available, non-proprietary source of information about private equity investments in banks, but a number of accounts provide a rough sense of the scope and extent of PEI activity. An *American Banker* article published in November 2012 stated that $31 billion had "changed hands" in 187 private equity transactions involving U.S. banks since the start of 2008.[57] Shortly thereafter, SNL Financial reported that it had identified only "23 major-exchange-traded U.S. bank and thrift stocks where a PE firm owned at least 10% of the listed common shares outstanding," as of May 2013.[58] More recently, DeYoung, Kowalik, and Torna (2018) collected data on private equity investments from SNL Financial, S&P Capital IQ, and Bloomberg databases and reviewed press releases and U.S. Securities and Exchange Commission filings relevant to banks identified by the data.[59] The authors identified private equity capital injections in 97 banking companies between 2004 and 2016, of which 79 were publicly traded and 18 were privately held. The authors stated, "To the best of knowledge, these deals comprise the population of all PE investments in publically traded commercial banks during this time period."[60] The authors also stated that "In 2008, PE investment in U.S. banking companies totaled only

[57] Monks, "The Private Equity Effect."

[58] Andy Pierce and Maria Tor, "SNL Report: Private Equity Mostly Ignores Banking Sector," *Banking Exchange*, May 17, 2013, https://m.bankingexchange.com/management-topics/item/1951-snl-report-private-equity-mostly-ignores-banking-sector.

[59] Robert DeYoung, Michael Kowalik, and Gokhan Torna, "Private Equity Investment in U.S. Banks," (Unpublished Working Paper, March 26, 2018), https://business.depaul.edu/about/centers-institutes/financial-services/Documents/DeYoung%20Kowalik%20Torna.pdf.

[60] DeYoung et al. (March 26, 2018), p. 2.

about $400 million; by 2012, PE investment in U.S. banking companies had increased to more than $7 billion."[61] To place these dollar amounts in context, total capital injections into FDIC-insured institutions by one measure totaled $392 billion during the 2008–2013 crisis.[62] Investments by the U.S. Treasury under its Troubled Asset Relief Program (TARP) bank programs totaled about $245 billion.[63] Thus, of the $392 billion, at least $147 billion consisted of capital injections from private sector sources.[64]

In the sphere of failed bank resolution, PEI groups played an important role. During the crisis years 2008–2013, the 17 PE-backed acquirers in Table 7 acquired 58 failed banks, or 12 percent of crisis-era failures, and the assets they acquired in these transactions were about 22 percent of assets passed to all acquirers of crisis-era failed banks (excluding the assets of Washington Mutual). PEI involvement materially reduced the FDIC's resolution costs of those failures and allowed the FDIC to resolve banks less disruptively than would otherwise have been the case. The new capital infused into the banking industry by these PEI groups likely supported credit availability during the crisis. This is especially the case in those failures where resolution by deposit payoff and liquidation of assets was avoided, as that is the type of resolution where the risk of disruptions to established credit relationships may be greatest.[65]

Conclusion

The acquisition of failed banks by PEI-backed acquirers presented opportunities and risks to both the PEIs and the FDIC. PEIs sought an opportunity to acquire equity investments in banking franchises at potentially favorable prices or terms. For the FDIC's part, PEI participation in the bidding process for failed banks held out the possibility of avoiding disruptive deposit payouts or increasing the prices the FDIC received for failed bank assets, and thereby lowering its resolution costs.

The primary risk to PEIs that acquired a stake in a bank was that the investment would not work out as hoped. A well-known example of this was the investment in Washington Mutual, led by the private equity firm TPG, in April 2008. The September 2008 headline, "WaMu Fall Crushes TPG" illustrates that investments in banks are not risk-free.[66] Acquiring failed banks, where the FDIC as receiver bears a significant portion of the losses, may have been viewed as presenting more limited downside risks for PEIs.

However, unless the FDIC liquidates a failed bank's assets and pays off its insured deposits, a failed bank transaction requires an agreement between the acquirer and the FDIC. Thus, any transaction must both attract bidders and be less costly to the FDIC than a payoff or the other bids. Notwithstanding that any transaction requires the FDIC to thread these multiple constraints, there is always the possibility that a transaction is viewed in retrospect as being costly to the DIF. Such criticism happened, for example, with the BankUnited transaction.[67]

[61] DeYoung et al. (March 26, 2018), p. 2.

[62] "Capital injections" for this analysis were measured for each bank at each of the six year-ends 2008–2013, as the sum of "sale, conversion, acquisition, or retirement of capital stock, net (excluding Treasury stock transactions)," if positive, and "other transactions with stockholders (including a parent holding company)," if positive, from Call Report schedule RI-A.

[63] The U.S. Treasury reports that its total investments under the three TARP bank programs that made investments were as follows: in the Capital Purchase Program, $204.9 billion; in the Targeted Investment Program (Citigroup and Bank of America Corporation), $40 billion; and in the Community Development Capital Initiative, $570 million (*see* https://home.treasury.gov/data/troubled-assets-relief-program and follow the link to "bank investment programs").

[64] This analysis does not attempt to determine how much of the $245 billion in TARP investments was down-streamed from bank holding companies into FDIC-insured banks, nor what amounts were invested in credit unions or other nonbanks.

[65] For a discussion of adverse local economic spillover effects associated with bank failures, *see* Adam Ashcraft, "Are Banks Really Special? New Evidence from the FDIC-Induced Failure of Healthy Banks," *American Economic Review* 95, no. 5 (December 2005).

[66] Peter Lattman, "WaMu Fall Crushes TPG," *Wall Street Journal*, September 27, 2008.

[67] *See, e.g.*, Shira Ovide, "BankUnited IPO: Who Got Rich?" *Wall Street Journal*, January 28, 2011.

The private equity business model may sometimes involve a short-term investment horizon or a willingness to take risk that may be associated with a high potential return.[68] In entering into failed-bank transactions with PEIs, the FDIC sought to manage the risk that the resulting banks would not be appropriately capitalized or that PEI investors would adopt short-term strategies that would not be consistent with the long-term safety and soundness of the resulting banks. The FDIC sought to limit these risks by ensuring that failed bank transactions with PEI-backed acquirers were on prudent terms.

Given the numerous expressions of interest in acquiring failed banks, the FDIC decided it would be appropriate to clarify the parameters for failed bank acquisitions that it viewed as generally consistent with the safety and soundness of the resulting banks. The FDIC provided this clarity in its Statement of Policy on Qualifications for Failed Bank Acquisitions and subsequently published question and answer documents.

In retrospect, private equity investments in failing banks during the 2008–2013 crisis appear to have had satisfactory outcomes. FDIC staff estimated that PEI participation lowered the FDIC's resolution costs by about $3.3 billion on a subset of the crisis-era bank failures and enabled the FDIC to handle 24 failures as purchase and assumptions instead of payouts. None of the acquiring insured depository institutions in Table 7 has failed. On balance, experience to date suggests that the careful approach the FDIC took during the crisis when entering into failing bank transactions with PEIs was successful in lowering the agency's failure resolution costs in a manner consistent with the safety and soundness of resulting banks.

[68] DeYoung et al. report that the 79 public companies that received PE capital injections appear to have operated with a higher-return, higher-risk strategy than their peers. An analysis of the performance of private-equity-backed acquiring banks is in Emily Johnston-Ross, Song Ma, and Manju Puri, "Private Equity and Financial Stability: Evidence from Failed Bank Resolution in the Crisis," (Working Paper, no. 2021-04, FDIC Center for Financial Research, April 2021), https://www.fdic.gov/analysis/cfr/working-papers/2021/cfr-wp2021-04.pdf.