

# UPDATE

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## News of Developments in the Financial Sector and Related Areas

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*De Novo Bank Applications*

The Federal Deposit Insurance Corporation ("FDIC") has recently updated its Statement of Policy on applications for FDIC deposit insurance. It is the hope that more organizing groups will apply for a new bank charter based on the updated policy. The policy recommends that a representative of the organizing group meet with the chartering authority and FDIC prior to filing an application to reach an understanding of the information requirements by each agency. The pre-filing meeting promotes open communication regarding the application, regulatory expectations and the application review process. The intent of the meeting is to provide a forum for the applicant to present an overview of the proposal, with emphasis on management, the business plan and capital. Pre-filing meetings assist applicants in developing a complete and comprehensive application that facilitates the review process.

While processing times will vary depending on the unique characteristics of a proposal, applications are generally acted on within four to six months after being deemed substantially complete. The Interagency Charter and Federal Deposit Insurance Application Form and instructions are

available on the FDIC's website. In addition to general instructions for preparing the application, the form includes guidance with respect to the business plan and the financial projections. Use of the form, together with insights obtained during the pre-filing meeting, should provide a basis on which to assemble an application that enables the FDIC and other agencies to evaluate the applicable statutory and other regulatory requirements.

The policy provides 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. 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. As with the Leverage Ratio, the amount of cash capital necessary to organize an institution will be largely derived from the proposed institution's size, complexity and business strategy.

The business plan submitted with the application should cover the first three years of operation. Business plans for subsequent periods will be addressed through established supervisory processes. It is the hope that the policy will attract more applicants to apply for a de novo bank.

The close of 2014 marked the fourth year in a row that there has only been one new bank charter. Except for the one bank

charter approved by the FDIC in 2013, the last de novo charter occurred in the fourth quarter of 2010. Bank of Bird-in-Hand was approved by the FDIC in 2013 and serves primarily a small farming community located east of Lancaster, Pennsylvania. The bank was organized with \$17 million of capital by Amish businessmen with the shareholders being evenly split between Amish and non-Amish investors. During 2014 one bank application was filed for the a bank to be called Primary Bank to be located in Bedford, New Hampshire.

Our firm is experienced and available to answer questions regarding de novo bank applications and the raising of capital relating to the formation of banks.

### *Letters of Intent*

Letters of intent, which are sometimes known as memorandums of understanding or letters of understanding, are generally utilized by parties to a business transaction to set forth the major terms of their understanding prior to the execution of a definitive agreement. Letters of intent may be either binding or non-binding, and it is important that the parties to a letter of intent state their understanding.

A typical provision in letters of intent is a statement that it is not a binding agreement. However, the parties may want to specifically provide that although the letter of intent is not binding on the parties until the execution of the definitive agreement, that certain portions of the letter of intent are binding and enforceable such as (i) the parties will deal exclusively with one another and will not utilize the letter of intent to shop the proposed transaction to third parties, (ii) a confidentiality provision requiring the parties to maintain in strict confidence all confidential information relating to the terms of the proposed transaction and the disclosed information by one party to

another, (iii) access to information to determine if the proposed transaction should proceed, commonly referred to as "Due Diligence", and (iv) each party will be responsible for their own legal fees and expenses.

The main purpose of a letter of intent is to summarize the material terms of the proposed transaction and to prevent unnecessary expense in the preparation of the definitive agreement. In those cases where the parties cannot agree upon the terms of a letter of intent, there is no need to proceed with the effort and expense of preparing a definitive agreement.

A non-binding letter of intent may include material terms such as, the purchase price, the assets involved in the transaction, closing conditions, date for closing, and other terms which may also be in the definitive agreement. Besides setting forth the key elements, a letter of intent provides a sense of assurance that each side is committed to moving forward with the proposed transaction. The letter of intent needs to be signed by the parties to the proposed transaction.

In connection with the execution of a letter of intent by the parties, courts have recognized the obligation of each party to act in good faith in attempting to negotiate a definitive agreement. Some years ago after signing a letter of intent to merge with Pennzoil, the Getty Oil board of directors backed out of the deal and merged with Texaco because Texaco had made a better offer. When litigation arose over the obligations of the parties to the letter of intent, the jury in the case awarded Pennzoil over \$10 billion in compensatory and punitive damages with the case being ultimately settled by the parties for approximately \$3 billion. As a result, each party needs to deal in good faith when entering into a letter of intent.