

**BankBCLP**

## **FDIC WEIGHS IN ON DIRECTOR AND OFFICER REMOVAL OF BANK DOCUMENTS**

Mar 19, 2012

Following the failure of over 400 financial institutions since the beginning of 2008, the FDIC has clarified its expectations with respect to collection and retention of bank documents by directors and officers of troubled or failing financial institutions for the purpose of explaining or defending their conduct. The FDIC's Financial Institution Letter (FIL) released today sets forth the FDIC's position that "[d]irectors and officers of troubled or failing financial institutions who remove originals or copies of financial institution records under such circumstances breach their fiduciary duty to the institution." Presumably the FDIC would also object to a director or officer of a healthy bank copying and removing bank documents if the FDIC concludes that it is being done for improper purposes, although the FIL does not specifically address that issue.

Even though the guidance comes late in the game, we believe it is helpful for the FDIC to articulate its position on this matter to provide clarity to industry participants. We are disappointed, however, that the FDIC chose to issue this broad guidance through a financial institution letter (which cites no statutory authority or judicial decisions in support of its position) rather than through a formal rulemaking process whereby affected parties could offer comments.

Directors and officers of more than 400 failing financial institutions have faced concerns about bank documents with no formal guidance from the FDIC. A failed bank's directors' and officers' practical concerns were partially related to the fact that the FDIC has sometimes been unwilling or unable to locate or produce bank documents to defense counsel for those directors and officers when they were requested.

Directors and officers of failed banks have the right to contest the FDIC's charges and have the need for access to records of their service. In addition, under corporate and banking laws of many states, directors have rights to access these documents. Given the restrictions set forth in the FIL, we are hopeful that the FDIC's processes and procedures for retaining a failed bank's documents and making them accessible will improve correspondingly.

The FIL acknowledges that bank directors and officers must have access to bank documents to properly perform their functions in overseeing and managing their banks. Clearly it would be a great disservice to the industry for the FDIC to limit a current director's access to bank information in any

way. However, given the restrictions set forth in the FIL and the potential penalties associated with conduct that the FDIC deems objectionable, it is important for bank directors and officers to be aware of the FDIC's position stated in the FIL. Given the variance between the FDIC's position and the needs of failed bank directors and officers to access bank documents and information, we recommend seeking the advice of counsel before taking action. Please contact any member of Bryan Cave's Financial Institutions group for additional information regarding the FIL.

## MEET THE TEAM



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