



1120 Connecticut Avenue, NW  
Washington, DC 20036

1-800-BANKERS  
www.aba.com

*World-Class Solutions,  
Leadership & Advocacy  
Since 1875*

**Robert W. Strand**  
Senior Economist  
202-663-5350  
rstrand@aba.com

September 15, 2008

*By electronic delivery*

Mr. Robert E. Feldman  
Executive Secretary  
Federal Deposit Insurance Corporation  
550 17<sup>th</sup> Street, NW  
Washington, D.C. 20429

*Attention:* Comments

Re: RIN 3064–AD26; Processing of Deposit Accounts in the Event of an Insured Depository Institution Failure; 12 CFR Part 360; 73 Federal Register 41170; July 17, 2008

Dear Mr. Feldman:

The American Bankers Association (ABA) appreciates the opportunity to comment on the Interim Rule relating to processing deposit accounts in a bank failure. ABA brings together banks of all sizes and charters into one association. ABA works to enhance the competitiveness of the nation's banking industry and strengthen America's economy and communities. Its members – the majority of which are banks with less than \$125 million in assets – represent over 95 percent of the industry's \$13.3 trillion in assets and employ over 2.2 million men and women.

We commend the careful, deliberative process the Federal Deposit Insurance Corporation (FDIC) has undertaken to progress to a final rule. The FDIC requested comments on the rule it adopted on an interim basis in July, as well as on the proposed disclosures to customers of automated overnight sweep arrangements. ABA's overall recommendations, which are explained below, are:

- The FDIC should rarely use an FDIC Cutoff Point.
- The FDIC should clarify the scope of the rule regarding sweep accounts.
- The final rule should not be overly prescriptive as to the form and content of disclosures.
- The requirements should also be flexible as to the means and timing of disclosures.

### **The FDIC should rarely use an FDIC Cutoff Point.**

Regarding FDIC's authority to establish an FDIC Cutoff Point, the ABA, Clearing House Association, and Financial Services Roundtable wrote to the FDIC:<sup>1</sup>

This concept is both unnecessary and problematic because it would create uncertainty and inconsistency in how accounts are handled in a bank failure. Each institution has different cutoff times depending on the type of transaction as well as geographic location. The Associations instead support the proposed general approach for determining deposit account balances based on the closing ledger balances after the normal processes of the failed bank are completed for the day.

Nonetheless, the FDIC has asserted in the Interim Rule its authority to use an FDIC Cutoff Point. However, the Interim Rule provides that:<sup>2</sup>

The FDIC will apply the institution's normal cutoff times in most cases, but establishing an FDIC Cutoff Point is essential to the efficient finalization of end-of-day ledger balances in some situations.

Given the potential problems that would result from termination of a bank's normal daily transactions at a time arbitrarily set by the FDIC, ABA recommends that ***the FDIC should hold to its resolve to use an FDIC Cutoff Point very rarely, and only in cases where it is absolutely essential for an orderly resolution.***

### **The FDIC should clarify the scope of the rule regarding sweep accounts.**

In response to the prior proposal (NPR) that led to the Interim Rule,<sup>3</sup> the ABA, Clearing House Association, and Financial Services Roundtable wrote:<sup>4</sup>

The NPR includes a number of new proposals relating to the treatment of sweep products that are problematic for the financial services industry. Sweep transactions provide benefits both to banks and to their consumers: banks are able to secure substantial funding at reasonable costs, while customers can achieve their financial objectives. Since the proposed changes are complex and significant and have not been included in prior proposals, the Associations recommend that the sweep provisions be removed from the NPR and reconsidered in a separate proposal.

The Interim Rule has not dispelled banker concerns, as there is continuing uncertainty as to how sweep accounts will be affected, and how swept funds would be treated in a bank failure. Bankers

---

<sup>1</sup> ABA, Clearing House Association and Financial Services Roundtable, letter to the FDIC, April 16, 2008, page 1 ([www.fdic.gov/regulations/laws/federal/2008/08c20AD26.PDF](http://www.fdic.gov/regulations/laws/federal/2008/08c20AD26.PDF)).

<sup>2</sup> FDIC, "Processing of Deposit Accounts in the Event of an Insured Depository Institution Failure," 73 Federal Register 41170, July 17, 2008, page 41175.

<sup>3</sup> FDIC, "Processing of Deposit Accounts in the Event of an Insured Depository Institution Failure and Large-Bank Deposit Insurance Determination Modernization," 73 Federal Register 2364, January 14, 2008.

<sup>4</sup> ABA, Clearing House Association and Financial Services Roundtable, letter to the FDIC, April 16, 2008, page 2.

find the term “swept funds” unclear, especially when applied to non-automated transactions. It would therefore be useful for the FDIC to clarify the intended scope of its regulation, including whether it is meant to apply to funds transferred outside the books of a bank.

**The final rule should not be overly prescriptive as to the form and content of disclosures.**

ABA supports clear disclosure to customers of the terms of bank products and the associated risks. The proposal justifies a need for more disclosures over concerns that the treatment of swept funds in the event of a bank failure is not clearly understood by sweep customers. However, all of the bankers we consulted on the proposal said that their sweep agreements currently detail for customers the sweep process, how funds are swept into specific investments, and that funds swept out of the bank are not FDIC-insured deposits. Thus, it is not clear what additional information would be provided as a result of an FDIC sweep disclosure requirement.

ABA recommends that *guidelines for disclosures should be flexible and permit banks to exercise appropriate discretion in communicating with customers about the terms of their sweep systems, including insurance and other security*. This approach would allow banks to design disclosures that best suit customer understanding and the banks’ processes. It would also avoid explicit requirements that could be expensive to implement and administer, and could therefore restrain the development of new sweep products. The bankers we consulted spoke of many types of sweep systems administered in a variety of ways. A *universal disclosure statement would be unworkable* in this context.

Rules that the FDIC adopted recently make it difficult to know before a bank fails how its sweep customers would be treated. In a bank failure, the Interim Rule gives the FDIC the right, at its discretion, to impose an FDIC Cutoff Point for transactions in and out of the bank. The timing of the FDIC Cutoff Point could have a material effect on whether uninsured funds remain in a deposit account or would be transferred to an external sweep investment. Moreover, the FDIC will soon be able to place provisional holds on deposits, including internal sweeps, in a “large” failed bank using another rule now being implemented.<sup>5</sup> Describing these contingencies to sweep customers could leave them confused, with no better understanding of what might happen if the bank were to fail. Bankers would prefer that the FDIC allow them to augment their current disclosures in ways that maintain customer confidence yet educate as to the new risks.

Some bankers believe that a model disclosure form for sweep customers would be helpful as they consider how best to communicate with customers. Other bankers, however, believe that any model disclosure would become the *de facto* standard that they would have to implement, even though it may be unsuited to, or fail to provide the best disclosure for, their particular sweep program. Thus, while a model form may be a useful tool, the regulation should make it clear that there is no expectation that it be the required disclosure.

---

<sup>5</sup> FDIC, “Large-Bank Deposit Insurance Determination Modernization,” 73 *Federal Register* 41180, July 17, 2008, would apply to banking firms with over \$2 billion in domestic deposits and either over 250,000 deposit accounts or else over \$20 billion of total assets.

**The requirements should be flexible as to the means and timing of disclosures for sweep customers.**

As noted, banks already disclose in one form or another the risks to sweep customers. ABA recommends that *the FDIC should allow banks to provide notice via several established means of communication, such as sweep contracts, client letters, transaction confirmation statements, and month-end statements.* In addition, *the final rule should clarify that banks will not be required to modify existing client contracts,* which may have been negotiated years ago. This would allay banker concerns that changes in disclosure provisions will be expensive to implement and disruptive to sweep customer relationships. Furthermore, when the disclosure is already included in a client contract, a requirement to provide periodic statements or other disclosures to customers (repeating what is already in account agreements) would impose further costs with no clear benefit. The key objective is that sweep customers receive the information they need to evaluate the risks of their deposits, not that this information needs to be provided via a specific means at a specified time.

ABA appreciates this opportunity to comment on the Interim Rule and proposed disclosures. The public, deliberative, and active approach of FDIC in establishing a final rule is to be commended. We further appreciate the willingness of FDIC staff to work with bankers as they implement the provisions of the associated large bank insured deposit determination rule. We will continue to facilitate discussions throughout implementation of the two rules.

Sincerely,

*Robert W. Strand*

Senior Economist