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VIA ELECTRONIC MAIL

May 11, 2009

Mr. Joseph DiNuzzo
Counsel, Legal Division
Federal Deposit Insurance Corporation
550 17th Street, NW
Washington, DC 20429

Re: Clarification of Perfection Requirements in FDIC Final Rule on Processing of Deposit Accounts in the Event of an Insured Depository Institution Failure, 74 *Federal Register* 5797, February 2, 2009

Dear Mr. DiNuzzo:

We appreciated the opportunity to talk to you and Munsell St. Clair on Tuesday about concerns of members of the American Bankers Association (ABA)[1] arising from the FDIC's discussion of improperly perfected sweep repurchase agreements. As we discussed, this issue arises in the context of the Final Rule on Processing of Deposit Accounts in the Event of an Insured Depository Institution Failure (the Failed Bank Rule). Initial conversations with our members suggest that a large number of repurchase accounts held by both large and small financial institutions may not be considered by the FDIC to be properly perfected as that concept is defined by the Failed Bank Rule. As we discussed, the consequences of such a determination are significant, reaching far beyond a compliance notification obligation.

The Failed Bank Rule requires all financial institutions to engage in a review of their sweep repurchase arrangements to determine whether they are 'properly executed." According to the Rule, in a properly executed sweep repurchase agreement, at the end of the day the sweep customer becomes either "a legal owner of identified assets (typically government securities) subject to a repurchase agreement or obtains a perfected security interest in the identified securities." As we discussed, there is considerable confusion about the nature of the custodial arrangement the FDIC will require a bank to have in place to ensure that a repo customer's security interest in identified securities is properly perfected. ABA members are concerned that the Failed Bank Rule may require implementation of a true "tripartite" sweep repo, an arrangement that may be operationally infeasible for many banks to operate profitably.

[1] The American Bankers Association 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 $13.6 trillion in assets and employ over 2 million men and women.

You noted, however, that there are banks that have implemented sweep arrangements with a Federal Reserve bank that satisfy the Failed Bank Rule. We urge you to provide additional guidance on this subject so that banks can evaluate their sweep programs, make changes as appropriate, and prepare the necessary disclosures.[2]

As we discussed, the consequences of a determination that a bank operates an improperly executed sweep arrangement are significant. Preparing and sending the necessary disclosures are just the beginning. Considering the public's current anxiety about the condition of the banking industry, ABA member banks are understandably sensitive about unexpected disclosures mailed to customers. This is particularly true for disclosures touching upon the degree of deposit insurance coverage. Many sweep repurchase accounts have large balances which will exceed FDIC deposit insurance limits after December 31, 2009. Banks fear that upon receipt of the disclosure, customers may reduce their sweep account deposits to FDIC insurance limits, leading to a significant contraction of deposits for many institutions. We need to be sure of the coverage and have the chance to address regulatory issues and make adjustments in our programs. Otherwise, we would just be feeding unnecessary disintermediation.

ABA and its membership fully support the FDIC's goals of transparency and customer protection. However, we believe that the Government Securities Act (GSA) provisions requiring written repurchase agreements, specific disclosures, and daily confirmations for Hold-in-Custody (HIC) sweep repurchase accounts adequately ensure that these goals are met. To comply with the GSA, all financial institutions that issue HIC repurchase agreements must disclose in writing to their customers that the funds held pursuant to the repurchase agreement are not a deposit and are not federally insured. Thus, our membership questions what is to be gained by the additional disclosure required by the Failed Bank Rule, and as explained above, they are concerned that the disclosure may lead to an unnecessary and inopportune contraction of deposits.

In addition, the Failed Bank Rule requires institutions to report the funds held in improperly executed sweep accounts as deposits rather than "other borrowings" on their Call or Thrift Financial Reports,[3] resulting in increased deposit insurance assessments. Reporting these funds as deposits is inconsistent with the GSA requirement of a written disclosure stating that the funds held pursuant to the repurchase agreement are not a deposit. Moreover, our members report that moving these typically large balances into their deposit base will artificially raise deposit totals and thereby significantly increase their deposit insurance assessments.

Finally, there is confusion about the effective date of the Failed Bank Rule. Section 360(e), the provision establishing the sweep account disclosure requirement, expressly establishes a July 1, 2009, compliance date.[4] Our members have relied on this date and report that this time will be necessary in order for them to review their sweep repurchase agreements, to make appropriate changes to their sweep operations, and to prepare the necessary disclosures. A March 2, 2009 effective date, in contrast, appears only in the

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[2] The following is a link to the SIFMA Master Repurchase Agreement used by many banks—http://www.sifma.org/services/stdforms/globalmasterRepurchase.html --for your review and comment as to whether this establishes a properly executed sweep arrangement.

[3] The classification of these accounts as deposits also places financial institutions in the untenable position of violating Regulation Q's prohibition on the payment of interest on demand deposits.

[4] *See* 74 *Fed.Reg.* 5797, 5807 (February 2, 2009) ("Beginning July 1, 2009, in all new sweep account contracts, in renewals of existing sweep account contracts and within sixty days after July 1, 2009, and no less than annually thereafter, institutions must prominently disclose in writing to sweep account customers whether their swept funds are deposits within the meaning of 12 U.S.C. 1813(l).")

preamble of the Failed Bank Rule, and its application would result in the presumably unintended consequence of subjecting improperly executed sweep account balances to the special assessment. We urge you to confirm that the effective date of the Rule as it relates to sweep accounts is July 1, 2009.

Thank you for your consideration and clarification of these issues.

Sincerely,

Cc. Arthur Murton
Munsell St. Clair
James Marino