



Banks Face September 1 Deadline for Sweep Account Disclosures

Client Advisories

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Pursuant to a final rule the Federal Deposit Insurance Corporation (FDIC) published in the Federal register earlier this year, banks face a September 1, 2009, deadline to meet certain disclosure requirements in connection with sweep accounts already in effect on July 1, 2009. For sweep accounts originating after July 1, 2009, the disclosures must be provided as soon as the bank enters into a new sweep arrangement with a customer or renews an existing one. Thereafter, the disclosures must be provided annually.

The sweep account disclosure requirements are included in the earlier Federal Register publication as part of a final rule amending 12 CFR 360.8, captioned, "Method for determining deposit and other liability account balances at an insured depository institution." On July 6, 2009, the FDIC issued a Financial Institution Letter providing answers to frequently asked questions about the disclosure requirements. The FAQs note that among the various kinds of sweep arrangements described in the Federal Register publication, the three most common involve Eurodollar or IBF deposits, Repurchase agreements, and Money Market Mutual funds.

What is the prescribed form of disclosures?

The FDIC has not prescribed any particular form for the disclosures. In its comments published along with the final rule, the FDIC stated: "(A)n institution may comply with the requirement for the initial and periodic disclosures through, for example, client letters, transaction confirmation statements or account statements." Excluded from the disclosure requirements are sweep accounts where the transfers are within a single account, or the sweep account involves only deposit-to-deposit sweeps such as zero-balance accounts, unless the sweep results in a change in the customer's insurance coverage.

What must be disclosed?

Banks must prominently disclose in writing to sweep account customers whether their swept funds are deposits, as defined in the FDIC Act. If they are not deposits, the bank must further disclose the status the funds would have if the bank failed, e.g. general creditor status or secured creditor status. The disclosures must be consistent with how the bank reports such funds on its call reports.

How does a bank determine status of the funds?

The answers to the FAQs provide guidance on how to determine whether the customer would become a general creditor or have secured creditor status in the case of repo sweeps. The FDIC makes a distinction between properly executed and not properly executed repo agreements. With regard to the former, the customer becomes the legal owner of securities, or acquires a perfected security interest in them, but they would not be considered deposits. If the agreement is not properly executed, the customer obtains neither an ownership interest nor a perfected security interest in the securities. A common example of a not properly executed arrangement is where a customer's swept funds rest in an account in which a pool of securities are also transferred, but where the customer has neither an ownership nor a perfected security interest in any identified security. In such cases, upon the bank's failure, the FDIC will treat the swept funds as if they never left the deposit account from which they originated. The bank should report the swept funds as deposits in its call report.

What about Eurodollar or IBF sweeps?

Customers in Eurodollar or IBF sweeps would not fare as well in the event of the bank's failure. The FDIC commented: "Usually, the underlying contract for a Eurodollar sweep specifies that the obligation at the foreign branch is not payable in the United States and, hence, is not a deposit for deposit insurance and depositor preference purposes. Upon an institution's failure, the amounts in a Eurodollar account in a foreign branch of the failed institution are treated as unsecured, non-deposit liabilities and are not eligible for insurance or depositor preference status. The same treatment will apply to sweeps to IBFs, which by statutory definition are not deposits. Eurodollar and IBF accountholders will thus be accorded general creditor status in the receivership estate."

If you have any questions about the sweep disclosure requirements, please contact Gary L. Green, Chair of Archer's Banking Law & Finance Practice Group, at (856) 354-3047 or ggreen@archerlaw.com, or Group member William M. Aukamp at (302) 356-6630 or waukamp@archerlaw.com.

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Related People



Gary L. Green

Partner

✉ ggreen@archerlaw.com

☎ 856.354.3047



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Attachments

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