



July 2009 - INTERSTATE CAPITOL COMMENTS

Community Bankers Association of Kansas

3003 SW Van Buren, Suite A *Topeka, KS 66611-2224 *Phone: 785-271-1404 *Fax: 785-271-1508
info@cbak.com * www.cbak.com



K-STATE TAILGATE EVENT

Join CBA for a tailgate member appreciation event at the 2009 opening K-State football game.

K-State vs. UMass Sept. 5, 2009

This is the K-State Football Family Reunion to welcome Coach Bill Snyder back to the stadium. What a way to start the new football season.

(To access a blue underlined hyperlink, place your cursor on the link, use Ctrl + Click and the page will open.)

OCC Bulletin reminds banks of FDIC rule on notices to sweep account customers

The OCC issued a bulletin ([2009-19](#)ⁱ) reminding banks of a new FDIC rule that requires banks to provide notices to sweep account customers. Pursuant to the rule, beginning on July 1, 2009, each depository institution should have begun prominently disclosing, in writing to its sweep account customers, whether the customers' swept funds are "deposits" within the meaning of 12 USC 1813(l), and, if not, the status of such funds in the event of the institution's failure. Such notices must be included in all new sweep account contracts and in all sweep account contract renewals, effective July 1, 2009. For existing sweep accounts, these disclosures must be made within 60 days after July 1, 2009, and at least annually thereafter. In cases when, based on the rules for determining end-of-day balances, it is possible that an account's sweep transaction may not be completed on the day of a bank's failure, the bank must disclose this possibility along with the resulting status of such unswept funds. The disclosure requirements do not apply to sweep accounts in which the transfers are within a single account or sub-account, or to sweep arrangements involving a deposit account-to-deposit account sweep in which the sweep does not affect the customer's insurance coverage. [74 FR 5797](#)ⁱⁱ (February 2, 2009) [FIL-9-2009](#)ⁱⁱⁱ (February 4, 2009).

Sweep account disclosure requirements Frequently Asked Questions

On January 27, 2009, the FDIC finalized its rule "Processing of Deposit Accounts in the Event of an Insured Depository Institution Failure" (see [FIL-9-2009](#)^{iv}). In addition to establishing practices for determining deposit and other account balances at a failed depository institution, the rule includes disclosure requirements for certain sweep accounts, effective July 1, 2009. In response to industry questions regarding the sweep account disclosure requirements, the FDIC has prepared the attached list of [Frequently Asked Questions](#)^v (FAQs).

FDIC: Be aware of third-party referrals promising above-market rates on CDs

FDIC-insured institutions should be aware of any unsolicited deposits received through third-party referrals. Certain insurance companies and other financial services firms (third parties) are advertising above-market rate CDs to attract customers. When a customer buys the advertised CD, the customer is referred to the Web site of an FDIC-insured institution with the third party "making up" the difference between the insured institution's actual rate and the advertised above-market rate. This practice may cause a contradiction with the terms in the insured institution's Truth-in-Savings disclosures. In some cases, these third parties have used the FDIC official sign, seal, logo, or similar representations in connection with these offers. [FIL-32-2009](#)^{vi}.

Comment: Brokered deposits are considered volatile funding sources. Management must be aware that such deposits impact an insured depository institution's earnings,

The CBA Tailgate begins at 3:00 pm and will be located at Cat Town. Spend time with family and friends before the game starts at 6:10pm.

Game Tickets Are Not Provided

Please invite all of the Kansas bankers you know (*membership to CBA is not required*) to join us for free food and beverage.

Check your mail, more information will be arriving soon. We look forward to seeing you and your guests.

liquidity, and interest rate risk. Deposits received by an insured institution from a third-party referral also may expose the institution to reputation risk, as customers may be misled about the interest rate and other terms and conditions under which the institution offers deposit products. In addition, insured institutions may be associated with third parties who have misused the FDIC logo.

Fed seeks Consumer Advisory Council nominees

The Board is inviting the public to nominate qualified individuals for appointment to its Consumer Advisory Council, whose membership represents interests of consumers, communities, and the financial services industry. New members will be selected for three-year terms that begin in January 2010. The nomination deadline is August 28. Board expects to announce the selection of new members in early January. Click [here](#)^{vii} to nominate someone. [Solicitation of Nominations for Membership](#).^{viii}

FDIC seeks comments on proposed alternatives to conclude TAG program

The FDIC is seeking comment on all aspects of the [notice of proposed rulemaking](#),^{ix} which presents two alternatives for the conclusion of the Transaction Account Guarantee Program, a component of the FDIC's Temporary Liquidity Guarantee Program. Comments are due July 30, 2009. [FIL-34-2009](#).^x [74 FR 31217](#).^{xi}

Comment: The FDIC has proposed two alternatives to phase-out the TAG Program under which certain qualifying transaction accounts are insured for an unlimited amount. The first proposed alternative would result in no change to the FDIC's current regulation. Under this alternative, the FDIC's guarantee for deposits held in qualifying noninterest-bearing transaction accounts would expire on December 31, 2009. There would be no increase in fees for this coverage. The second proposed alternative would extend the TAG Program until June 30, 2010, with an increase in annual fees from 10 basis points to 25 basis points during the proposed extension period. The second proposed alternative also would provide insured depository institutions participating in the TAG Program with a one-time opportunity to opt out of the extended TAG Program on or before October 31, 2009. Institutions that choose not to continue in the TAG Program would be required to notify their customers that, beginning on January 1, 2010, deposits in qualifying noninterest-bearing transaction accounts would not be covered by the FDIC beyond standard deposit insurance limits. Institutions that remain in the TAG Program might need to modify their disclosures to alert depositors of the extended expiration date of the TAG Program.

BSA E-Filing Transition to Adobe Forms

Effective June 27, 2009, BSA E-Filing transitioned to the use of Adobe forms. BSA E-Filing forms available for download from the BSA E-Filing Web site will now be Adobe electronic forms. Benefits of using Adobe forms include improved form usability and enhanced validation. IBM PureEdge forms will no longer be available for download. The BSA E-Filing system will continue to accept and process PureEdge versions of the BSA E-Filing forms through December 31, 2009. This period will allow current filers an opportunity to become familiar with and transition to the new Adobe forms. Please note that BSA E-Filing users will require use of Adobe Reader to read secure messages provided by BSA E-Filing. A Transition Questions and Answers document is available on the [BSA E-Filing Web site](#)^{xii} with information about how to download the compatible versions of Adobe Reader prior to the release. [Download Acrobat Reader](#).^{xiii}

Supreme Court rules on states' enforcement of state laws at national banks

On Monday, June 29, the US Supreme Court ruled that, with regard to national banks, state attorneys general ("AGs") may engage in ordinary enforcement of state laws that are not otherwise pre-empted by federal law, and that this enforcement is not prohibited by the National Bank Act ("NBA") limits on "visitorial" powers. The court concluded that the OCC regulation that purports to pre-empt state law is not a reasonable interpretation of the NBA.

The result of this decision is that state AGs may file lawsuits to enforce state laws such as fair lending acts, credit laws, Uniform Commercial Codes, and consumer protection statutes. However, AGs may not conduct examinations and generally inspect or require

the production of books or records of national banks (e.g. by issuance of an AG's subpoena against a bank). They may request records in the course of litigation, with all of the limitations and protections that a court proceeding requires. (This ruling has nothing to do with an AG's subpoena for the records of a customer.)

In [Cuomo v. Clearing House Association](#)^{xiv}, the New York attorney general had informally requested "voluntary" delivery of information from national banks regarding the banks' possible discrimination against minorities. If the banks did not comply, then the AG would bring a civil suit. Therefore, the Supreme Court concluded that the AG's investigation was properly enjoined, but that the AG could investigate through litigation. In short, the AG lost the battle but won the war because it was questionable as to whether the AG could investigate a national bank at all.

In recent cases, the Supreme Court has given deference to the OCC's reasonable interpretation of statutes it administers. However, the Supreme Court did not give the OCC deference in its rule making in this case—a very rare result. The court held that uncertainty does not expand deference to cover any interpretation. The court also did not overrule earlier preemption cases, like *Watters v. Wachovia Bank* (state licensing of bank operating subs).

The decision was 5 to 4, with Justice Scalia writing the majority opinion and Justice Thomas writing an opinion that dissents in part and concurs in part. Meanwhile, the Obama administration has issued a position paper reflecting that it does not favor pre-emption and will support it only if there is clear statutory authority for it. In short, the banking industry can expect more activity and arguments against broad pre-emption.

Federal agencies' final rules and guidelines promoting accurate reports on consumers

On July 1, the federal financial regulatory agencies and the FTC published final rules and guidelines to promote the accuracy and integrity of information furnished to credit bureaus and other consumer reporting agencies, and widely used to determine consumers' eligibility for credit, employment, insurance, and rental housing. As required by FACTA, the Fed, FDIC, FTC, NCUA, OCC, and OTS published these final rules and guidelines, with an effective date of July 1, 2010.

Under the rules, entities that furnish information about consumers to consumer reporting agencies generally must include a consumer's credit limit in the information provided. The federal agencies are also publishing an Advance Notice of Proposed Rulemaking (ANPR) to identify possible additions to the information that furnishers must provide to consumer reporting agencies, such as the account opening date. Also, under the rules, if a consumer believes his or her credit report includes inaccurate information, the consumer may submit a dispute directly to the entity that provided the information to the consumer reporting agency, and that entity must investigate the dispute. The rules do not change a consumer's ability to submit a dispute to a consumer reporting agency or a furnisher's duty to investigate a dispute referred by a reporting agency. The attached [final rules and guidelines](#),^{xv} and the [ANPR](#),^{xvi} were published in the Federal Register.

Annual audit and reporting requirements final amendments to Part 363

The FDIC amended Part 363 of its regulations, which sets forth annual independent audit and reporting requirements for insured institutions with \$500 million or more in total assets. The FDIC Board of Directors adopted these amendments in light of changes in the industry; certain sound audit, reporting, and audit committee practices incorporated in the Sarbanes-Oxley Act of 2002; and the FDIC's experience in administering Part 363. The amendments also provide clearer and more complete guidance for compliance with Part 363. [FIL-33-2009](#).^{xvii} [Part 363 - Annual Reports and Other Required Reports](#).^{xviii}

OTS Webinar on information security

The OTS will present a Webinar this month for senior managers of savings associations, especially chief information officers, chief security officers, chief technology officers, board members and audit committee members, to learn how to prepare for information security incidents and, if they occur, how to respond. The Webinar, "When the Worst Happens: Managing an Information Security Incident," will be on July 29, 2009, at 3:00

p.m. (EDT). The presentation will include information on notifying the OTS of an incident and tips for establishing an effective incident response policy. Register [here](#).^{xix}

PUBLICATIONS, REPORTS, STUDIES, TESTIMONY & SPEECHES

- **Summer 2009 issue of the FDIC's Supervisory Insights Journal**

The FDIC's Summer 2009 issue of Supervisory Insights features a chronology of the unprecedented financial developments of 2008 and a discussion of how these events may affect the future focus of bank supervision; an overview of new requirements mandated by amendments to Regulation Z and the Home Ownership and Equity Protection Act; and a discussion of risks and appropriate risk management strategies associated with Remote Deposit Capture technology. Click [here](#)^{xx} to see this publication. [FIL-31-2009](#).^{xxi}

This publication is designed to provide accurate and authoritative information in regard to the subject matter covered. It is provided with the understanding that the publisher is not engaged in the rendering of legal, accounting or other professional advice - from a Declaration of Principles adopted by the American Bar Association and a Committee of Publishers and Associations. © 2009 Independent Bankers Association of Texas.

Web site: www.ibat.org. All rights reserved.

ⁱ <http://www.occ.treas.gov/ftp/bulletin/2009-19.html>

ⁱ <http://www.fdic.gov/news/news/financial/2009/fil09009a.pdf>

ⁱ <http://www.fdic.gov/news/news/financial/2009/fil09009.html#body>

ⁱ <http://www.fdic.gov/news/news/financial/2009/fil09009.html>

ⁱ <http://www.fdic.gov/news/news/financial/2009/fil09039a.html>

ⁱ <http://www.fdic.gov/news/news/financial/2009/fil09032.html>

ⁱ <https://www.federalreserve.gov/secure/cacnomination/default.aspx>

ⁱ <http://www.federalreserve.gov/newsevents/press/other/other20090622a1.pdf>

ⁱ <http://www.fdic.gov/news/board/june2309no6.pdf>

ⁱ <http://www.fdic.gov/news/news/financial/2009/fil09034.pdf>

ⁱ <http://www.regulations.gov/fdmspublic/component/main?main=DocumentDetail&o=09000064809e63ce>

ⁱ <http://bsaefiling.fincen.treas.gov/main.html>

ⁱ <http://get.adobe.com/reader/>

ⁱ <http://www.supremecourtus.gov/opinions/08pdf/08-453.pdf>

ⁱ <http://www.occ.gov/ftp/release/2009-79a.pdf>

ⁱ <http://www.occ.gov/ftp/release/2009-79b.pdf>

ⁱ <http://www.fdic.gov/news/news/financial/2009/fil09033.html>

ⁱ <http://www.fdic.gov/news/news/financial/2009/fil09033a.pdf>

ⁱ http://www.ots.treas.gov/_apps/databreach/index.cfm

ⁱ <http://www.fdic.gov/regulations/examinations/supervisory/insights/index.html>

ⁱ <http://www.fdic.gov/news/news/financial/2009/fil09031.html>

