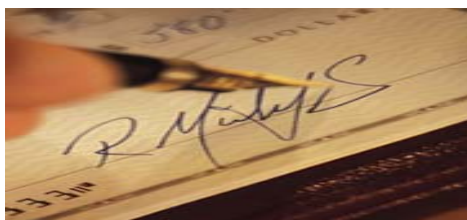


IS YOUR OVERDRAFT PROTECTION PROGRAM PLACING YOUR INSTITUTION AT RISK?

Robert Riley of our Little Rock office writes:

In response to concerns over how overdraft protection programs are run by banks, the federal banking agencies issued guidance last month on consumer disclosure, marketing, and other issues. These agencies – the Federal Reserve Board (FRB), the Federal Deposit Insurance Corporation (FDIC), the Office of the Comptroller of the Currency (OCC), and the National Credit Union Administration – were concerned that consumers should receive more disclosure about fees and the scope of the overdraft protection programs.



Many consumers have misconceptions about overdraft protection

(Please see <http://www.fdic.gov/news/news/press/2005/pr1105.html> for more details.)

For instance, consumers may mistakenly believe that the program is equivalent to a lower-costing line of credit or that fees charged do not reduce the overdraft limit. Also, some overdraft programs automatically include the amount of overdraft protection in an ATM-generated account balance accessed by a customer or do not alert the customer of an overdraft before completing an ATM transaction. Programs may also fail to disclose that a bank can decide whether or not to pay overdrafts.

According to the guidance, an overdraft program should have written policies and procedures and be managed to minimize credit risk, and the overdrafts should be risk-weighted for risk-based capital purposes. Also, banks should write off overdrafts after 60 days if they remain unpaid or have not been converted into a signed loan. Furthermore, overdrafts must be classified by banks as loans, although their related fees usually will not

IN THIS ISSUE:

- **Is Your Overdraft Protection Program Placing Your Institution at Risk?1**
- **Fed Confirms Capital Treatment of Trust Preferred1**
- **SEC Cites Merger Representation as Disclosure Failure2**
- **Does Your Company Have More Time to Comply?.....2**

trigger Truth in Lending Act disclosures to customers.

The guidance cautioned banks offering overdraft programs to be mindful of false advertising, deceptive practices, and state usury laws that could apply. The Truth in Savings Act would also apply, as would the Equal Credit Opportunity Act if certain types of customers are steered away from participating in the program.

Banks with overdraft programs should consider adopting the “best practices” suggested in the guidance and also consider a legal audit of their program now that they are on notice about possible problems.■

FED CONFIRMS CAPITAL TREATMENT OF TRUST PREFERRED

On March 1, the Federal Reserve adopted a final rule allowing the continued treatment of trust preferred securities as tier 1 capital for bank holding companies but placing stricter quantitative limits on their use and the use of other "restricted core capital elements". (www.federalreserve.gov/boarddocs/press/bcreg/2005/20050301)

Under the final rule, trust preferred securities and other "restricted core capital elements" may be included in tier 1 capital up to 25% of all core capital elements, net of goodwill less any associated deferred tax liability. For internationally active bank holding companies, the limit is 15% of all core capital elements, net of goodwill less any associated deferred tax liability (or 25% if the difference is made up with qualifying

mandatory convertible preferred securities).

"Restricted core capital elements" include:

- qualifying trust preferred securities;
- qualifying cumulative perpetual preferred stock (including surplus);
- minority interest related to

- qualifying cumulative perpetual preferred stock directly issued by a consolidated U.S. depository institution or foreign bank subsidiary; and
- minority interest related to qualifying common or qualifying perpetual preferred stock issued by a consolidated subsidiary that is neither a U.S. depository institution or foreign bank subsidiary.



The Federal Reserve Bank

Also, the final rule eliminates the requirement that trust preferred securities include a call option.

The final rule confirms that the current treatment of trust preferred securities will continue, but companies must comply with the stricter quantitative limitations by March 31, 2009.■

SEC CITES MERGER REPRESENTATION AS DISCLOSURE FAILURE

A recent \$28.5 million fine by the Securities and Exchange Commission against a company for providing a false representation about the Foreign Corrupt Practices Act (FCPA) in its merger agreement, and repeating it in its proxy statement, raises questions about too much disclosure in proxy statements.

A separately issued report, found at <http://www.sec.gov/litigation/investreport/34-51238.htm>, notes that the SEC will pursue enforcement action "if we determine that the subject matter of representations or other contractual provisions is materially misleading to shareholders because material facts necessary to make that disclosure not misleading are omitted."

The company, Titan Corporation, agreed to be acquired by Lockheed Martin under a merger agreement that included a number of standard

representations and warranties, including that it had not violated the FCPA. The representations were reprinted in the related merger proxy statement, and the merger agreement was attached to Titan's proxy statement.

The SEC alleged that Titan had indeed violated the FCPA by funneling \$3.0 million to its agent in Benin, of which \$2.0 million was



allegedly used for the re-election campaign of Benin's president. Although Titan publicly disclosed the FCPA matters after signing the merger agreement, it did not change this disclosure in the proxy statement.

The report notes that a company's disclosure responsibility includes documents "incorporated by reference," such as the merger agreement, even though it was prepared for a business transaction rather than as an SEC disclosure document.

While this new SEC policy continues to develop, companies involved in mergers should consider (i) whether to repeat representations from the merger agreement in the proxy materials and (ii) confirming that representations are still true prior to mailing the proxy materials. ■

DOES YOUR COMPANY HAVE MORE TIME TO COMPLY?

Certain companies that have been feverishly working around the clock in order to comply with the SOX Section 404 requirements can now breathe a sigh of relief.

On March 2, 2005, the SEC announced that the compliance dates for non-accelerated filers and foreign private issuers has been further extended to the company's first fiscal year ending on or after July 15, 2006.

Previously, the SEC extended the compliance date to July 15, 2005, so this extension gives these companies another full year to

comply with the regulations. (The accelerated filers deadline for 404 compliance was previously extended

45 days for the their first fiscal year ending November 15, 2004.)

Section 404 requires a company to include a report by management on the company's internal control over financial reporting and an accompanying auditor's report in its annual reports.

It is important to keep abreast of all of the new SEC compliance dates that apply to your company. ■

KEY DATES FOR 12/31 FILERS:

- **10-K (ACCELERATED FILERS)**
MARCH 16, 2005
- **10-K (ALL OTHERS)**
MARCH 31, 2005
- **SECTION 404 REPORTS (ACCELERATED FILERS)**
APRIL 30, 2005
- **10-Q (ACCELERATED FILERS)**
MAY 10, 2005
- **10-Q (ALL OTHERS)**
MAY 15, 2005

Kutak Rock LLP is a national law firm with 16 offices located throughout the United States. Our practice areas include:

- Corporate Governance
- Banking Law
- SEC Reporting and Compliance
- Mergers and Acquisitions
- Employment / Employee Benefits Law
- Stock Offerings

Please visit our website
www.kutakrock.com
to learn more, or contact:

Paul Borja.....202-828-2310
paul.borja@kutakrock.com

Jeremy Johnson....202-828-2463
jeremy.johnson@kutakrock.com

Editor:

Justa Schmidt202-828-2305
justa.schmidt@kutakrock.com