

# Commercial Financial Services Brief: January 2008

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Welcome to the inaugural edition of the Gray Plant Mooty Commercial Financial Services Brief! We created the Brief to provide information about new developments that we believe to be of interest to our clients. We hope that you will find this information to be of value.

We are planning to publish the Brief on a bi-monthly basis. We are committed to providing information that is relevant to you. In order to do that we need your feedback. We invite you to share your ideas about topics you would like to see us address in future issues by emailing George Meinz, editor of the CFS Brief, at [george.meinz@gpmlaw.com](mailto:george.meinz@gpmlaw.com).

We also encourage you to share the Brief with your colleagues. If you would like to sign up to receive this Brief, please send an email to [kiersta.halseth@gpmlaw.com](mailto:kiersta.halseth@gpmlaw.com) with "Sign Up CFS" in the subject line. We look forward to helping you stay well informed on financial services developments.

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## GARNISHING JOINT ACCOUNTS – PITFALLS FOR THE DEPOSITORY BANK

A recent Minnesota Supreme Court decision has created significant uncertainty regarding how a bank should respond to the garnishment of a joint account. The Court ruled that when a creditor sought to garnish a joint account owned by a debtor and the debtor's spouse, the garnishment only applied to the funds that were actually owned by the debtor. Determining which funds are owned by the debtor can be a challenge.

To read this article in full, please [click here](#).

## COMMERCIAL LENDING

### Importance of Accurate Description of Debtor on Financing Statements

A recent case from the Texas bankruptcy court demonstrates the importance of accurately describing the debtor on the financing statement in light of the use of computerized searches. In *In re Jim Ross Tires, Inc.* two creditors asserted competing security interests. The bankruptcy trustee challenged the effectiveness of both financing statements and prevailed against both lenders based on errors in the name of the debtor. The first creditor identified the debtor as "Jim Ross Tires, Inc. dba HTC Tires & Automotive Centers" in its financing statement. A computerized search of the records of the Secretary of State for "Jim Ross Tires, Inc." (the true corporate name of the debtor) did not identify the financing statement because the inclusion of the "dba" did not result in a name match. The second creditor misspelled the debtor's name by failing to include the letter "s" at the end of the word Tires ("Jim Ross Tire, Inc."). In both situations, the bankruptcy court held that the financings statements were ineffective because a computerized search of the records of the Secretary of State in the registered name of the borrower would not disclose the existence of either of the financing statements. When describing the debtor on a financing statement, be sure that you use the registered name for the entity as documented in its certificate of formation (Certificate of Incorporation, Certificate of Organization, etc.). *In re Jim Ross Tires, Inc.*, 2007 WL 2264701 (Bankr. S.D. Tex. 2007)

## FLOOD INSURANCE

### Mandatory Purchase of Flood Insurance - 2007 FEMA Booklet

The Federal Emergency Management Agency (FEMA) has released an updated electronic edition of its booklet Mandatory Purchase of Flood Insurance Guidelines. This booklet clarifies some of the complex issues that have arisen since the 1999 edition. It also highlights certain program changes, including:

- Processing of Letters of Map Change.
- Options for purchasing coverage for buildings under construction.
- Coverage under Residential Condominium Building Association Policies (RCBAP).
- A new requirement to list the Replacement Cost Value on the declarations page of each RCBAP.
- Updated Mortgage Portfolio Protection Program information.

<http://www.fdic.gov/news/news/financial/2007/fil07106.html>

## **DATA SECURITY, PRIVACY AND FAIR CREDIT REPORTING ACT**

### **Identity Theft Red Flags - Interagency Final Regulation and Guidelines**

The FDIC, along with the other federal financial institution regulatory agencies and the Federal Trade Commission, has issued the attached final rule and guidelines on identity theft "red flags" and address discrepancies. The rule requires that financial institutions and creditors implement a written identity theft prevention program, that card issuers assess the validity of change of address requests, and that users of consumer reports reasonably verify the identity of the subject of a consumer report in the event of a notice of address discrepancy. The prevention program must include policies and procedures for detecting, preventing and mitigating identity theft and enabling a financial institution to:

- identify activities that are "red flags" signaling possible identity theft and incorporate those red flags into the program;
- detect red flags that have been incorporated into the program;
- respond appropriately to any red flags that are detected; and
- periodically update the program to reflect changes in risks from identity theft.

<http://www.fdic.gov/news/news/financial/2007/fil07100.html>

### **Federal Trade Commission – Online Tool to Assist Businesses with Information Security**

The Federal Trade Commission has released an online guide to help businesses develop policies to protect personal information. The guide explains each of the basic principles of information security:

- Take stock. Know what personal information you have in your files and on your computers.
- Scale down. Keep only what you need for your business.
- Lock it. Protect the information you keep.
- Pitch it. Properly dispose of what you no longer need.
- Plan ahead. Create a plan to respond to security incidents.

The guide is available on the FTC's website at <http://business.ftc.gov/privacy-and-security/data-security>.

### **Final Rules on Affiliate Marketing**

The Federal Trade Commission and the banking regulators have issued rules on affiliate marketing that provides consumers with an opportunity to "opt out" before a person or company uses information provided by an affiliated company to market its products and services to the consumer. The final rule generally prohibits a person from using certain information received from an affiliate to make a solicitation to a consumer about the person's products or services, unless the consumer is given notice and a reasonable opportunity and a reasonable and simple method to opt out of the making of such solicitations, and the consumer does not opt out. The final rule applies to information obtained from the consumer's transactions or account relationship with an affiliate, the consumer's application, and credit reports and other third-party sources. The final rule (attached) becomes effective on January 1, 2008. All covered entities must comply with the rule no later than October 1, 2008. <http://www.ftc.gov/opa/2007/10/affiliate.shtm>

## BANK OPERATIONS

### Confidentiality Agreements

The Federal Reserve has issued a Supervisory Letter regarding confidentiality provisions in agreements between a banking organizations and third parties. It is contrary to Federal Reserve regulation and policy for agreements to contain confidentiality provisions that (1) restrict the banking organization from providing information to Federal Reserve supervisory staff; (2) require or permit, without the prior approval of the Federal Reserve, the banking organization to disclose to a counterparty that any information will be or was provided to Federal Reserve supervisory staff; or (3) require or permit, without the prior approval of the Federal Reserve, the banking organization to inform a counterparty of a current or upcoming Federal Reserve examination or any nonpublic Federal Reserve supervisory initiative or action. Banking organizations that have entered into agreements containing such confidentiality provisions are subject to legal risk.

<http://www.federalreserve.gov/boarddocs/srletters/2007/SR0719.htm>

### Information Technology – Risk Management Program

The FDIC has updated its risk-focused Information Technology (IT) examination procedures for FDIC-supervised financial institutions. As part of the revision, the IT Officer's Questionnaire was enhanced to provide greater coverage of vendor management and outsourcing topics, credit card and ACH (automated clearing house) payment system risks, and an institution's overall information security program. The IT Officer's Questionnaire must be completed and signed by an executive officer of the financial institution and returned to the FDIC examiner-in-charge prior to the on-site portion of the examination.

### Agencies Issue Joint Guidance on Pandemic Preparations

The Federal Financial Institutions Examination Council (FFIEC) issued guidance regarding continuity planning that should be in place to minimize the potential adverse effects of a pandemic. Accordingly, a financial institution's business continuity plan should include:

1. A preventive program to reduce the likelihood an institution's operation will be significantly affected by a pandemic event;
2. A documented strategy that provides for scaling pandemic efforts commensurate with the particular stages of a pandemic outbreak;
3. A comprehensive framework of facilities, systems, or procedures to continue critical operations if large numbers of staff members are unavailable for prolonged periods;
4. A testing program to ensure the institution's pandemic planning practices and capabilities are effective and will allow critical operations to continue; and
5. An oversight program to ensure ongoing review and updates to the pandemic plan.

<http://www.ffiec.gov/press/pr121207.htm>

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