

FDIC Proposes Comprehensive Overhaul of Brokered Deposit Regulation:

Proposal Would Significantly Reduce Deposits Treated as Brokered

December 18, 2019

On December 12th, 2019, the Federal Deposit Insurance Corporation’s (“FDIC’s”) Board of Directors approved a notice of proposed rulemaking (the “Proposal”) to reframe the definition and exceptions for “brokered deposits” in a significant departure from the FDIC’s interpretations over the past 30 years.¹ Since Section 29 of the Federal Deposit Insurance Act was adopted in 1989, the FDIC has broadly defined virtually any third party connecting a depositor with a bank as a “deposit broker” and the resulting deposits as “brokered deposits”. The Proposal responds to the long-standing industry criticisms seeking a more narrow definition of “deposit broker” to reflect both industry and technological innovation as well as a more practical view of the role of third parties in sourcing deposits.

In short, the Proposal would, if adopted, clarify and narrow the FDIC’s prior interpretations of “deposit broker” and permit substantially more deposits to be excluded from treatment as “brokered deposits”. The Proposal principally does so by refocusing the key definitions on third parties who are “engaged in the business of placing deposits” by taking an active role in opening accounts or controlling the depositor’s relationship with the bank. Similarly, the Proposal would expand interpretations of the statutory exceptions to “deposit broker” and, in particular, the “primary purpose” exception. In effect, the Proposal would greatly narrow the activities defining “deposit brokers” and expand the exceptions to this definition relative to previously issued FDIC advisory opinions.

The Proposal follows the FDIC’s December 18, 2018 advance notice of proposed rulemaking (the “Brokered Deposit ANPR”), which garnered more than 100 comment letters from affected banking organizations and industry groups.² Comments on the Proposal are due 60 days after publication in the Federal Register.

¹ FDIC, *Brokered Deposits Restrictions* (Dec. 12, 2019). Available at <https://www.fdic.gov/news/board/2019/2019-12-12-notice-dis-b-fr.pdf>.

² FDIC, *Unsafe and Unsound Banking Practices: Brokered Deposits and Interest Rate Restrictions*, 84 Fed. Reg. 2366 (Feb. 6, 2019).



Key Takeaways

- The Proposal marks a significant shift in the FDIC’s approach to brokered deposits. Previously, FDIC interpretations had defined virtually any third party participating in connecting a depositor with an insured depository institution (“IDI”) as a “deposit broker”. These standards had evolved over the past 35 years through an extensive series of FDIC staff advisory opinions generally published on the FDIC’s web site.
- Notably, the Proposal’s focus on business relationships between third parties and customers would shift the analysis to a focus on whether the third party is engaged in a business relationship with the depositor and takes an “active role” in placing the deposits. While the preamble to the Proposal leaves significant ambiguity on these interpretations, it clearly shifts the nature of the analysis compared with past FDIC opinions.
- The FDIC’s proposed approach to those “business relationships” streamlines the analysis by identifying key factors generally applicable across the definitions and exceptions. This is a significant shift from the case-by-case “common law” approach used by the FDIC in its advisory opinions. This is particularly evident in the two principal areas of focus in the Proposal:
 - **Narrowing the “deposit broker” definition.** The Proposal focuses on the third party’s business relationship with the depositor and the third party’s role with the IDI, including whether the third party has authority over the account or its terms, provides information, or acts as the intermediary between the depositor and the IDI.
 - **Expanding the scope of the “primary purpose” exception via application process.** The Proposal would significantly expand the “primary purpose” exception (the “Primary Purpose Exception”) by narrowing the circumstances previously considered to demonstrate a purpose to place deposits. In doing so, the FDIC has sought to create bright line tests to provide more clarity. For example, the Proposal assumes that an agent depositing less than 25% of total customer assets is not a deposit broker because the agent has a “primary purpose” other than placement of deposits. To address specific cases, the FDIC proposes to create a waiver application process to reach determinations on the availability of the Primary Purpose Exception.
- However, there are a number of latent issues in the Proposal that should be clarified in the final rule. Please review our discussion in Section V below. Among the more salient issues are (1) the remaining ambiguity on distinctions between activities that are or are not deemed to be “facilitating the placement of deposits”; (2) the treatment of activities addressed in prior FDIC advisory opinions, including those addressed in advisory opinions on the Primary Purpose Exception; and (3) greater clarity on the waiver application process and transparency of decisions under the Primary Purpose Exception application process, which itself could lead to the gradual regrowth of an ad hoc interpretative process.
- The Proposal emphasizes the need to modernize the current rule and interpretations to reflect technological changes and innovation. In addition, it is also clear that the Proposal addresses many long-standing concerns about the FDIC’s prior positions that are unrelated to technological changes. However, it is notable that the Proposal does not discuss in any detail many of the questions posed in the Brokered Deposit ANPR, nor does it address the discussion regarding the potential risks posed by brokered deposits in that ANPR or in the FDIC’s 2011 Study on Core Deposits and Brokered Deposits (a study mandated by the Dodd-Frank Act).

The Proposal

The Proposal would significantly liberalize the FDIC's treatment of deposits placed by third parties. The substance of the Proposal represents a rebalancing of the FDIC's goals of modernizing banking regulations and promoting safety and soundness.³

I. Statutory and Regulatory Framework

The restrictions on brokered deposits were initially enacted by Congress under the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 in Section 29 of the Federal Deposit Insurance Act (the "FDIA"), codified at 12 U.S.C. 1831, which created the framework for brokered deposit regulation that exists today. Two years later in 1991, Congress modified the framework to restrict the use of brokered deposits for less than well-capitalized IDIs under the Prompt Corrective Action ("PCA") regime.⁴ The legal framework for brokered deposit regulation was largely unchanged until 2018 when Congress adopted a limited exception for certain "reciprocal deposits" placed through bank networks in Section 202 of the Economic Growth, Regulatory Relief, and Consumer Protection Act of 2018.⁵

Well capitalized insured depository institutions are not restricted from accepting deposits from a deposit broker.

An "adequately capitalized" insured depository institution may accept deposits from a deposit broker only if it has received a waiver from the FDIC.⁶ In addition, IDIs relying extensively on brokered deposits pay higher assessment premiums for deposit insurance,⁷ and banking organizations subject to the minimum Liquidity Coverage Ratio Requirement must assume a higher outflow rate for many brokered deposits than for non-brokered deposits.⁸

The statutory text does not provide a definition for a "brokered deposit". Instead, under the FDIA and its implementing regulations, deposits are "brokered" if they are obtained by an IDI, directly or indirectly, through a deposit broker.⁹ A "deposit broker" includes "any person engaged in the business of placing deposits, or facilitating the placement of deposits, of third parties with insured depository institutions".¹⁰

The term "facilitating the placement of deposits" has been interpreted broadly by the FDIC to include actions taken by third parties to connect IDIs with potential depositors.¹¹ The FDIC has generally defined any person (with limited exceptions, such as for IDI employees¹²) or entity that places deposits in an IDI for a customer as a deposit broker unless a statutory exception applies. In

³ "Through these proposed changes, the FDIC would seek to balance the need to promote safe and sound practices while ensuring that the classification of a deposit as brokered appropriately reflects changes in the banking landscape since 1989, when the law on brokered deposits was first enacted." See Memorandum to the Board of Directors of the FDIC, *Notice of Proposed Rulemaking – Brokered Deposits Restrictions* (Dec. 12, 2019), at 2-3.

⁴ See generally 12 U.S.C. §1831f(a) and 12 C.F.R. § 337.6.

⁵ 12 U.S.C. § 1831f(i), as adopted in Section 202 of the Economic Growth, Regulatory Relief, and Consumer Protection Act, Pub. L. No. 115-174 (enacted May 24, 2018).

⁶ 12 U.S.C. § 1831f(c). The Proposal would narrow the scope of deposits considered "brokered deposits," which would allow IDIs rated less than well-capitalized to obtain such deposits without restriction. According to the FDIC, there are only 16 such IDIs which hold a total of approximately \$2.2 billion in assets. See Proposal at 48-49.

⁷ 12 C.F.R. §327.9(d)(3).

⁸ See 12 C.F.R. Part 249 (Federal Reserve Board); 12 C.F.R. Part 50 (Office of the Comptroller of the Currency); and 12 C.F.R. Part 329 (FDIC).

⁹ 12 C.F.R. § 337.6(a)(2). See also 12 U.S.C. § 1831f(a).

¹⁰ 12 U.S.C. § 1831f(g)(1). See also FDIC, *Identifying, Accepting and Reporting Brokered Deposits Frequently Asked Questions* (last revised July 14, 2016), A5. Available at <https://www.fdic.gov/news/news/financial/2016/fil16042b.pdf> (the "FDIC FAQs").

¹¹ FDIC FAQs, A2.

¹² See 12 U.S.C. § 1831f(g)(2)(B) (providing an exception from the definition of deposit broker for "an employee of an [IDI], with respect to funds placed with the employing depository institution"). See also 12 C.F.R. § 337.6(a)(5)(ii)(B); FDIC FAQs, E3 (noting that the exception applies only to "employees," defined in the FDIA to mean any employee (i) employed *exclusively* by the IDI, (ii) whose compensation is primarily in salary form, (iii) who does not share such compensation with a deposit broker and (iv) whose office space is used *exclusively* for the benefit of the IDI that employs that individual).

the past, the FDIC has emphasized that the analysis is highly fact specific.¹³

The statutory definition of “deposit broker” also includes nine statutory exceptions.¹⁴ The most significant statutory exception is the Primary Purpose Exception, as described in Section III below. The FDIC has sought to clarify uncertainties that have arisen among IDIs through staff interpretive letters issued publicly, confidentially or in a non-public staff advisory opinion.

As Chairman McWilliams acknowledged, quoting Federal Reserve Board Governor Randy Quarles, this method of communication mirrors the “subtle hermeneutics of Federal Reserve lore” developed with respect to the Bank Holding Company Act’s definition of “control”. The FDIC did issue frequently asked question guidance in 2016,¹⁵ but these FDIC FAQs were not subject to notice and comment, and did not modify or modernize the FDIC’s approach to brokered deposits.

The FDIC’s prior interpretations have been viewed by many as sweeping too broadly, particularly in light of the increasing role of online and mobile banking, and other new channels for banks and advertisers to interact with potential depositors. While the prior interpretations potentially could be adapted to update the standards to incorporate these new channels for delivering banking services, bankers and many market participants have sought a rethinking of the prior interpretations to provide greater clarity and update the standards.

The FDIC issued the Brokered Deposit ANPR and request for comment early in 2019, which presented relevant IDI performance data and requested public comments focused on the FDIC’s approach to brokered deposits and the interest rate restrictions that apply.¹⁶

II. Revised “Deposit Broker” Definition

The Proposal would expand the current definition of “deposit broker” by parsing 12 C.F.R. §

337.6(a)(5)(i)(A)-(B) into four enumerated prongs of proposed 12 C.F.R. § 337.6(a)(5)(i)(A)-(D), as follows:

- ***Any person engaged in the business of placing deposits of third parties with IDIs.***¹⁷ The preamble to the Proposal clarifies that the FDIC would find a deposit broker if “that person has a business relationship with its customers, and as part of that relationship, places deposits on behalf of the customer (*e.g.*, acting as custodian or agent for the underlying depositor).”¹⁸ The FDIC’s addition of the business relationship between the agent and the customer is the critical revision and would be key to the FDIC’s analysis. The proposed Primary Purpose Exception, discussed in detail in Section III below, would potentially form a key exclusion from this prong of the “deposit broker” definition.
- ***Any person engaged in the business of facilitating the placement of deposits.***¹⁹ The FDIC has traditionally viewed “facilitation” somewhat broadly to “include actions taken by third parties to connect insured depository institutions with potential depositors.”²⁰ As a result, a variety of activities were caught by the FDIC’s traditional approach.

The Proposal would constrict the scope of activities that would constitute “facilitating” to persons engaged in four enumerated types of activities, including a person sharing third party information, acting in a legal capacity for a depositor, setting rates or fees related to placement of deposits, or a non-administrative role.²¹ The preamble to the Proposal clarifies the FDIC’s intent for “facilitation” activities to require an indication that a person “takes an active role in the opening of an account or maintains a level of influence or control over the deposit account even after the account is open.”²²

Notably, the exception for persons providing administrative solutions and services could form the basis for enabling fintech firms to participate in the

¹³ See, *e.g.*, FDIC FAQs, A5.

¹⁴ 12 U.S.C. § 1831f(g)(2).

¹⁵ FDIC FAQs.

¹⁶ FDIC, *Unsafe and Unsound Banking Practices: Brokered Deposits and Interest Rate Restrictions*, 84 Fed. Reg. 2366, 2376 (Feb. 6, 2019).

¹⁷ Proposed 12 C.F.R. § 337.6(a)(5)(i)(A).

¹⁸ Proposal at 16.

¹⁹ Proposed 12 C.F.R. § 337.6(a)(5)(i)(B).

²⁰ Proposal at 17.

²¹ Proposed 12 C.F.R. § 337.6(a)(5)(ii).

²² Proposal at 19.

placement of deposits without qualifying as deposit brokers.²³

- ***Any person engaged in the business of placing deposits with IDIs for the purpose of selling interests in those deposits to third parties.***²⁴ This prong was contained within current 12 C.F.R. § 337.6(a)(5)(i)(a) and is intended to cover brokered certificates of deposit, which have historically been treated as brokered deposits and would remain so treated under the Proposal.²⁵
- ***An agent or trustee who establishes a deposit account to facilitate a business arrangement with an insured depository institution to use the proceeds of the account to fund a prearranged loan.***²⁶ This prong is the current text of 12 C.F.R. § 337.6(a)(5)(i)(B) and would remain unchanged in the Proposal.

III. Expanding the Scope of the Primary Purpose Exception

Historically the subject of extensive guidance and interpretation over the last few decades, the Primary Purpose Exception is defined by statute to exclude “an agent or nominee whose primary purpose is not the placement of funds with depository institutions” from the statutory definition of “deposit broker”.²⁷

The FDIC has historically considered the primary purpose of an agent or nominee on a case-by-case, fact-specific basis, to determine whether an agent’s placement of deposits is for a substantial purpose other than to provide deposit insurance or for a deposit-placement service.²⁸ In a series of advisory opinions dating back to 1989, the FDIC has previously concluded that the Primary Purpose Exception has been met where foreign affiliates of a U.S. IDI connected clients with deposit accounts at the U.S. IDI to be used for clearing U.S.

dollars;²⁹ where a broker-dealer swept client funds into money market deposit accounts at two affiliated banks to facilitate customers’ purchase of securities;³⁰ where a securities firm deposited client funds in a deposit account to satisfy a mandatory Securities and Exchange Commission “reserve account” requirement;³¹ and where a credit card bank connected customers with deposit accounts at another bank to take security interests in those accounts,³² among other examples. Conversely, the FDIC has declined to apply the Primary Purpose Exception, for example, where customers were connected with an IDI by an investor services or financial management business (without a regulatory or non-investment transactional purpose for opening the account).³³

In contrast, the Proposal would establish three broader and clearer interpretations using bright-line standards to apply the Primary Purpose Exception.³⁴ In addition, the FDIC would create an application process to assess whether a third-party relationship meets the requirements for this exception.

The three proposed interpretations are the following:

- ***Deposit placements of less than 25% of customer assets under management by a third party, for a particular business line of the third party.***
 - **Application Contents:**³⁵ An agent or nominee seeking to apply this interpretation, or an IDI acting on behalf of an agent or nominee, would be required to file an application including the total amount of customer assets under management for that business line; the total amount of deposits being placed; a description of the deposit placement arrangements with all involved entities; and any other relevant information.

²³ See Proposal at 19-20; Proposed 12 C.F.R. § 337.6(a)(5)(ii)(D).

²⁴ Proposed 12 C.F.R. § 337.6(a)(5)(i)(C).

²⁵ Brokered certificates of deposit would also be ineligible for the proposed Primary Purpose Exception waiver application process. See Proposed 12 C.F.R. § 303.243(b)(5).

²⁶ Proposed 12 C.F.R. § 337.6(a)(5)(i)(D).

²⁷ 12 U.S.C. § 1831f(g)(2)(I).

²⁸ FDIC FAQs, E8.

²⁹ FDIC Adv. Op. 16-01 (May 19, 2016).

³⁰ FDIC Adv. Op. 05-02 (Feb. 3, 2005).

³¹ FDIC Adv. Op. 94-39 (Aug. 17, 1994).

³² FDIC Adv. Op. 94-13 (Mar. 11, 1994).

³³ FDIC Adv. Op. 17-02 (June 19, 2017).

³⁴ Proposed 12 C.F.R. § 303.243.

³⁵ Proposed 12 C.F.R. § 303.243(b)(4)(i).

- **FDIC Review:**³⁶ The FDIC will approve an application where the total amount of customer funds placed by the third party are less than 25% of the total customer assets under management, for a particular business line.
- **Example:**³⁷ A customer holds \$1 million in total assets with a broker dealer. The customer holds \$200,000 in cash in their account, which the broker dealer sweeps to an IDI. The percentage of customer assets placed would be 20% (below the 25% threshold), therefore the FDIC would likely conclude that placing deposits is ancillary to the primary purpose of the broker dealer.
- **Placements of customer funds to enable the customer to make transactions.**
 - **Application Contents:**³⁸ An agent or nominee seeking to apply this interpretation, or an IDI acting on behalf of an agent or nominee, would be required to file an application including a description of the contracts with customers; details of interest, fees or other remuneration, if any; the deposit placement arrangements with all involved entities; and any other relevant information.
 - **FDIC Review:**³⁹ The FDIC will approve an application if (1) no interest, fees or other remuneration is provided or paid on customer accounts by the third party; or (2) if interest, fees or other remuneration is provided, the applicant demonstrates the primary purpose of the particular business line is to enable customers to make transactions. In the case of scenario (2), the FDIC “would more closely scrutinize the agent’s or nominee’s business to determine whether the primary purpose is truly to enable payments.”⁴⁰
- **Other applications to meet the Primary Purpose Exception.**
 - **Application Contents:**⁴¹ An agent or nominee seeking to apply this interpretation, or an IDI acting on behalf of an agent or nominee, would be required to file an application including a description of the deposit placement arrangements with all involved entities; the particular business line and its primary purpose; the total amount of deposits placed by the third party at all IDIs; the revenue generated from deposit placement activities relative to total revenue; the marketing activities of the third party; the reasons the third party meets the Primary Purpose Exception; and any other relevant information.
 - **FDIC Review:**⁴² The FDIC will approve an application that demonstrates, with respect to a particular business line, that the primary purpose of the third party in that business line is other than the placement of facilitation of placement of deposits.

The FDIC would then provide a determination within 120 days of receipt of a complete application, though that timeframe may be extended, if the FDIC determines an extension is necessary.⁴³

If an application were granted, the FDIC would describe ongoing reporting requirements to an FDIC office and the IDI’s primary federal regulator, as appropriate, as part of any written approval.⁴⁴

IV. Bank Subsidiaries and the IDI Exception

In addition to the Primary Purpose Exception, the Proposal would also expand the applicability of an exception for IDIs. The current text of 12 C.F.R. § 337.6(a)(5)(ii)(A) excludes an IDI from the definition of

³⁶ Proposed 12 C.F.R. § 303.243(b)(8)(i).

³⁷ Proposal at 26.

³⁸ Proposed 12 C.F.R. § 303.243(b)(4)(ii).

³⁹ Proposed 12 C.F.R. § 303.243(b)(8)(ii)-(iii).

⁴⁰ Proposal at 28.

⁴¹ Proposed 12 C.F.R. § 303.243(b)(4)(iii).

⁴² Proposed 12 C.F.R. § 303.243(b)(8)(iv).

⁴³ Proposed 12 C.F.R. § 303.243(b)(7).

⁴⁴ Proposed 12 C.F.R. § 303.243(b)(9).

brokered deposits “with respect to funds placed with that [IDI].”

The Proposal would expand this definition to affirmatively include an IDI’s wholly owned subsidiary to the extent such subsidiary meets defined criteria intended to demonstrate that the IDI subsidiary is, in substance, comparable to a division of the parent IDI.⁴⁵ However, it is unclear why an IDI subsidiary that is less than 100% owned, but is controlled and consolidated within the IDI should not qualify for the insured depository institution exception.

V. Open Questions for Commenters

Despite the much greater clarity and transparency that the Proposal would provide if adopted, some open issues remain. These include the following:

- ***Facilitating the Placement of Deposits.*** The preamble discussion on “facilitating the placement of deposits” does not clearly distinguish between “sharing” information with the bank (which is defined as a deposit broker function), the “active role” that is to distinguish deposit brokers, and the “purely administrative” functions permissible. It would be very helpful to clearly define activities that trigger “deposit broker” treatment in this area.
- ***Activities Addressed in Prior FDIC Advisory Opinions or by Commenters to the ANPR.*** Among the issues previously addressed in FDIC advisory opinions that are not addressed in the Proposal are the treatment of advertising and listing services;⁴⁶ endorsements by affinity groups;⁴⁷ and non-bank subsidiary affiliate transactions.⁴⁸ While the Proposal may provide interpretations that could resolve the treatment of such services by third parties, it would be helpful for the FDIC to clarify how those definitions or exceptions apply to these categories addressed in prior advisory opinions. The Proposal provides that the FDIC will evaluate existing staff advisory opinions and codify and make public those of “general applicability that continue to

be relevant and applicable” and rescind those that do not meet that criteria.

- ***Current Reliance on the Primary Purpose Exception and Other Exceptions.*** The Proposal creates a mandatory application process for entities seeking to rely on the expanded Primary Purpose Exemption. However, the Proposal does not address whether entities that currently rely on an exemption, whether on the basis of previous FDIC FAQs guidance or previous FDIC determinations, would be required to file a de novo application for a waiver under the Primary Purpose Exemption. In the event all entities are required to file an application, it is unclear how such deposits should be treated in call reports until the FDIC reviews such applications. The FDIC can resolve this uncertainty by expressing its intention to address the future validity of pre-existing FDIC advisory opinions.

This question is more problematic when applied to the statutory and regulatory exemptions other than the Primary Purpose Exemption, since the Proposal contains no defined process for waiver applications or any other FDIC consideration of current reliance on those exemptions.

- ***Process and Transparency for Waiver Applications.*** The Proposal does not clarify whether FDIC determinations will be made public. In the FDIC and Federal Reserve Board’s recent revisions to its joint 165(d) resolution planning regulations, these agencies indicated that waiver application decisions would be made public in some form.⁴⁹ The Proposal does not address whether the FDIC plans to provide the same transparency to IDIs and third parties considered involved in deposit placement activities.
- ***Assessments and Call Reports.*** The FDIC asserted that revisions to assessment rates and reporting requirements in call reports are outside the scope of the Proposal.⁵⁰ However, the FDIC indicated that these issues are under consideration for future

⁴⁵ Proposed 12 C.F.R. § 337.6(a)(iii)(A).

⁴⁶ 84 Fed. Reg. at 2369, 2373.

⁴⁷ 84 Fed. Reg. at 2371.

⁴⁸ 84 Fed. Reg. at 2372-3, 2376-7.

⁴⁹ Board of Governors of the Federal Reserve System and FDIC, *Resolution Plans Required*, 84 Fed. Reg. 59194, 59207 (Nov. 1, 2019).

⁵⁰ Proposal at 41.

rulemaking.⁵¹ FDIC Chairman Jelena McWilliams recently indicated that the FDIC was considering changes to make assessments more risk sensitive, including addressing funding concentrations at larger banks that present higher risks to the Deposit Insurance Fund (such as unaffiliated sweeps that rely on the Primary Purpose Exception).

- **Recommendations for Congressional Action.** Although the Proposal’s text and preamble do not include explicit recommendations for congressional action on brokered deposits, Chairman McWilliams has posed an alternative path in a recent speech. In particular, the Chairman suggested that Congress consider replacing the relevant statutory text in Section 29 of the Federal Deposit Insurance Act with “a simple restriction on asset growth for banks that are in trouble.”⁵² Alternatively, the Chairman suggested repealing the Primary Purpose Exemption and replacing it with a “more flexible exception based on actual risk to the [FDIC’s deposit insurance fund].”⁵³

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⁵¹ *Id.*

⁵² Remarks of Chairman Jelena McWilliams, *Brokered Deposits in the Fintech Age* (Dec. 11, 2019). Available at <https://www.fdic.gov/news/news/speeches/spdec1119.pdf>

⁵³ *Id.*

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