SULLIVAN & CROMWELL LLP

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Brokered Deposits

FDIC Proposes to Revise Its Brokered Deposits Regulation

SUMMARY

On July 30, 2024, the FDIC approved, by a vote of 3-2, a notice of proposed rulemaking and request for comment (the "Proposed Rule")[1] to revise its regulation governing brokered deposits, which is promulgated pursuant to Section 29 of the Federal Deposit Insurance Act ("Section 29").[2] The Proposed Rule would represent a significant departure from the current regulation governing brokered deposits that the FDIC adopted in 2020 (the "2020 Rule") and likely would increase significantly the amount of deposits that would be categorized and treated as "brokered deposits."[3]

Specifically, the NPR would significantly revise the 2020 Rule by:

- eliminating the carve-out from the "deposit broker" definition for exclusive deposit placement arrangements;
- expanding the scope of the "deposit broker" definition, including by replacing the "matchmaking" prong with a broader definition relating to "deposit allocation" services;
- revising the analysis and interpretation of the "primary purpose" exception to the "deposit broker" definition to revert to the FDIC's framework that was in place prior to the 2020 Rule, which considers a third party's intent in placing deposits at a particular insured depository institution ("IDI");
- amending the list of designated business relationships that meet the primary purpose exception, including by significantly narrowing the "25 percent test" exception and fully eliminating the "enabling transactions" exception; and
- revising the application and notice processes for the primary purpose exception, including by no longer permitting third parties to apply for a primary purpose exception and allowing only IDIs to apply.

Importantly, the Proposed Rule would apply retroactively such that an IDI currently relying on the "25 percent test" or "enabling transactions" designated business exceptions would no longer be permitted to rely on either of those exceptions. In addition, any approval the FDIC granted for a primary purpose exception under the application process in the 2020 Rule would be rescinded and IDIs would be required

to reapply for an exception under the Proposed Rule's revised application process. The FDIC would consider any such application for a primary purpose exception using the framework set forth in the Proposed Rule.

Comments on the Proposed Rule will be due 60 days after its publication in the *Federal Register*.

BACKGROUND

Section 29, enacted as part of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989, and the FDIC's implementing regulation place restrictions on the acceptance by less than well-capitalized IDIs of deposits that are obtained through "deposit brokers"[4] and are therefore deemed to be "brokered deposits."[5] IDIs that are not well capitalized may not solicit, accept, renew, or roll over brokered deposits. An IDI that is adequately capitalized may request a waiver of this prohibition.[6]

Beyond this specific statutory restriction, the designation of a deposit as "brokered" can have a number of negative effects. These include higher deposit insurance assessment rates, requirements to maintain additional liquid assets to offset the higher outflow rates assigned to brokered deposits under the liquidity coverage ratio, reduced ability to compete with non-bank competitors that are not required to factor liquidity costs into product offerings that would result in brokered deposits for a bank and, potentially, an adverse view by rating agencies, depositors, and investors.

Section 29 does not directly define "brokered deposits," but instead defines "deposit broker" and classifies as brokered any deposit obtained by or through a deposit broker.[7] Section 29 broadly defines a "deposit broker" as "any person engaged in the business of placing deposits, or facilitating the placement of deposits, of third parties with [IDIs] or the business of placing deposits with [IDIs] for the purpose of selling interests in those deposits to third parties."[8]

Prior to adoption of the 2020 Rule, the FDIC had interpreted the definition of a "deposit broker" provision expansively, potentially to include any third party that has any connection to a depositor. The FDIC adopted the 2020 Rule following a comprehensive review of the FDIC's regulatory approach. Among other changes, the 2020 Rule revised:

- the definition of "deposit broker" by providing that any person that enters into an "exclusive" deposit placement arrangement with one IDI, and does not place or facilitate the placement of deposits at any other IDI, will not be "engaged in the business" of placing, or facilitating the placement of, deposits;
- the definition of "deposit broker" by adding new definitions of "engaged in the business of placing deposits" and "engaged in the business of facilitating the placement of deposits," which clarified the activities that would cause the FDIC to view a third party to be a deposit broker; and
- the analysis of the primary purpose exception (*i.e.*, an exception to the "deposit broker" definition for "an agent or nominee whose primary purpose is not the placement of funds with [IDIs]"[9]) to focus on "the business relationship between the agent or nominee and its customers" and to establish bright-line tests for third parties to qualify for the exception, subject to notification

requirements for certain relationships, and supplemented by an application process for third parties to qualify for the exception in cases where they do not meet one of the bright-line tests.

In support of the Proposed Rule, the FDIC asserts that the 2020 Rule has resulted in the underreporting of brokered deposits,[10] and narrowed the types of deposits that would be considered brokered even though, in the FDIC's view, such deposits present the same risks as they did prior to the 2020 Rule. Citing these concerns, the Proposed Rule effectively would reverse the changes introduced in the 2020 Rule and would result in a return to a regulatory regime similar to that which existed prior to the 2020 Rule. Each of the key changes the Proposed Rule would introduce is described in more detail in the following section.

KEY CHANGES TO THE BROKERED DEPOSIT REGULATION

A. Revisions to the Regulatory "Deposit Broker" Definition

Under Section 29, a deposit broker is "any person engaged in the business of placing deposits, or facilitating the placement of deposits …"[11] The 2020 Rule included a four-pronged definition of "deposit broker" that includes:

- "any person engaged in the business of placing deposits of third parties with [IDIs];
- any person engaged in the business of facilitating the placement of deposits of third parties with [IDIs];
- any person engaged in the business of placing deposits with [IDIs] for the purpose of selling those deposits or interests in those deposits to third parties; and
- an agent or trustee who establishes a deposit account to facilitate a business arrangement with an [IDI] to use the proceeds of the account to fund a prearranged loan."[12]

The Proposed Rule would retain the last two prongs of the 2020 Rule's definition, but would combine the first two prongs to include "any person engaged in the business of placing or facilitating the placement of deposits of third parties with [IDIs]."[13] The combination of the first two prongs of the definition is not a substantive change to the 2020 Rule; however, the additional revisions to the definition that are described below would significantly affect the current brokered deposit framework.

1. Exclusive Business Arrangements

The 2020 Rule defined "engaged in the business of placing deposits" and "engaged in the business of facilitating the placement of deposits" such that the definitions included only persons that placed, or facilitated the placement of, deposits at "*more than one [IDI]*."[14] The Proposed Rule would eliminate this carve-out for exclusive business arrangements by defining "engaged in the business of placing or facilitating the placement of deposits" such that a person would meet this definition if the person engages in one or more specified activities[15] with respect to "one or more [IDIs]."[16] As a result, IDIs that negotiated exclusive business relationships in reliance on the 2020 Rule in order to obtain non-brokered deposits through a third party would be required to reclassify such deposits as brokered if the third party meets the Proposed Rule's

"deposit broker" definition. This could disturb existing business relationships and result in these deposits being reclassified and treated as brokered.

2. Elimination of the "Matchmaking" Prong

Under the 2020 Rule, a person is engaged in the business of facilitating the placement of deposits of a third party with an IDI if, "while engaged in business," the person, among other things, "engages in matchmaking activities," *i.e.*, "the person proposes deposit allocations at, or between, more than one bank based upon both (a) the particular deposit objectives of specific depositor or depositor's agent, and (b) the particular deposit objectives of specific banks," unless the deposits are placed by the depositor's agent at an IDI affiliate of the agent.[17]

The Proposed Rule would revise the "matchmaking" prong of the "facilitating" definition in two respects. First, citing its observations that "a number of IDIs and other stakeholders [are] incorrectly determining that a third-party deposit allocator is not a 'deposit broker' by misapplying the current 'matchmaking' definition,"[18] the FDIC proposes to replace the "matchmaking" prong with a "deposit allocation" prong. Under the proposed "deposit allocation" prong, a person would be engaged in the business of placing or facilitating the placement of deposits if "the person proposes or determines deposit allocations at one or more [IDIs] (including through operating or using an algorithm, or any other program or technology that is functionally similar)."[19]

Second, unlike the 2020 Rule's "matchmaking" prong, the "deposit allocation" prong does not include an exception for deposits placed by a depositor's agent at an affiliated IDI. Accordingly, IDIs that receive deposits from an affiliate with the involvement of a third party that is engaged in deposit allocations would be required to treat the deposits as brokered. For example, under the Proposed Rule, deposits that an IDI receives through a sweep program administered by a third party that proposes deposit allocations would be treated as brokered, even if the deposits were placed in the sweep program by a broker-dealer affiliated with the IDI.

3. Treatment of Fees and Other Remuneration

Under the 2020 Rule, "deposit broker" and related definitions do not include any reference to fees paid by an IDI to any person involved in the placement of deposits with the IDI. The Proposed Rule would, however, define "engaged in the business of placing or facilitating the placement of deposits" to include any person "that has a relationship or arrangement with an [IDI] or customer where the [IDI] or the customer pays the person a fee or provides other remuneration in exchange for deposits being placed at one or more [IDIs]."[20] The FDIC noted that this provision of the Proposed Rule would include "fees for administrative services provided in connection with a deposit placement arrangement."[21] Read literally, this prong of the "deposit broker" definition would capture nearly any party that has any involvement in deposit arrangements.[22]

B. Revisions to the Primary Purpose Exception

Under Section 29 and the FDIC's implementing regulation, there are several exceptions to the definition of "deposit broker."[23] One of these exceptions, the so-called "primary purpose exception," excludes from the definition of deposit broker "an agent or nominee whose primary purpose is not the placement of funds with depository institutions."[24] The Proposed Rule would significantly revise and narrow the regulatory framework for the primary purpose exception that the 2020 Rule introduced. Specifically, the Proposed Rule would:

- revise the framework for determining whether the primary purpose exception should apply;
- significantly narrow the "25 percent test" designated business exception;
- eliminate the "enabling transactions" designated business exception; and
- amend the application process for the primary purpose exception.

1. Analytical Framework for Determining the Applicability of the Primary Purpose Exception

Prior to the 2020 Rule, in determining an agent or nominee's "primary purpose," the FDIC focused historically on "the reason or intent of the third party" in placing or facilitating the placement of the deposit, and generally treated the agent or nominee's overall business purpose or the amount of revenue that the deposit placement activity generated as irrelevant factors. The result of this approach was to curtail severely the availability of the primary purpose exception.

In a departure from the FDIC's pre-2020 framework, the 2020 Rule instead interprets the primary purpose exception based on whether the primary purpose of a person's business relationships with its customers is the placement of deposits. The 2020 Rule also identifies several specific business relationships that qualify for the primary purpose exception, including the "25 percent test" and "enabling transactions" exceptions discussed below.[25]

The Proposed Rule would make the primary purpose exception available only if an agent or nominee's "primary purpose in placing customer deposits at [IDIs] is for a substantial purpose other than to provide a deposit-placement service or obtain FDIC deposit insurance with respect to particular business lines between the individual [IDIs] and the agent or nominee."[26] The FDIC clarified that this proposed interpretation of the primary purpose exception "would be similar to how the FDIC historically interpreted the exception before 2020,"[27] *i.e.*, the exception would apply "when the intent of the third party, in placing deposits or facilitating the placement of deposits, [is] to promote some . . . goal . . . other than the goal of placing deposits for others."[28]

The FDIC did not clarify how an agent or nominee could demonstrate that it has a goal other than the placement of deposits, but simply noted that its historical analysis of the exception includes consideration of whether fees are paid to the third party, as the FDIC historically considered the presence of fees as evidence that "the intent of the third party was to earn fees through the placement of deposits"[29] (and

therefore that the placement of deposits was the third party's primary purpose). As a result, the Proposed Rule calls into question whether many deposit brokers would have any possibility of qualifying for the primary purpose exception. Specifically, under the Proposed Rule, if fees are paid to the third party, the third party would meet the "deposit broker" definition. In addition, the FDIC indicated that, consistent with its historical analysis, it would also use the payment of fees to analyze the intent of the third party in determining whether the primary purpose exception applies. Prior to the 2020 Rule, a similar framework frequently resulted in the FDIC using the same factor (the payment of fees) to determine both that a person is a deposit broker and that the person cannot qualify for the primary purpose exception to the "deposit broker" definition. If the Proposed Rule were to represent, as the FDIC indicated it would, a return to the pre-2020 framework, it is likely that the primary purpose exception would apply narrowly and that the payment of fees to a third party would effectively end the analysis in most cases without any further consideration of the third party's business relationships with its customers and any related reasons the third party may have for placing deposits with IDIs.

2. "25 Percent Test" Designated Business Exception ("Broker-Dealer Sweep Exception")

The 2020 Rule identified several specific business relationships that qualify for the primary purpose exception, with respect to a specific business line (the so-called "designated business exceptions"). One such designated business exception provides that the primary purpose of an agent's or nominee's business relationship with its customers will not be considered to be the placement of funds at a depository institution if less than 25 percent of the total assets that the agent or nominee has under administration for its customers, in a particular business line, is placed at IDIs. Third parties relying on the 25 percent test, or an IDI on its behalf, are required to file a notice with the FDIC, and are permitted to rely on the exception upon receiving acknowledgment from the FDIC that the FDIC has received the notice.[30]

The FDIC cited concerns with the 25 percent test, including asserting that brokered deposits are in some cases misreported as non-brokered because certain broker-dealers, even those with valid primary purpose exceptions, outsource their deposit allocation functions to an intervening third party that engages in "matchmaking activities" and thus meets the "deposit broker" definition.[31] In light of these concerns, the Proposed Rule would rename the "25 percent test" designated business exception the "broker-dealer sweep exception" and would revise the existing exception by (1) significantly narrowing the exception to align it with the proposed analytical approach to the primary purpose exception; (2) revising the notice process for arrangements that do not involve additional third parties; and (3) requiring application to and approval of the FDIC before applying the primary purpose exception to arrangements that involve additional third parties. As noted above, the Proposed Rule's amendments would apply retroactively such that an IDI that currently relies on the 25 percent test exception would no longer be able to rely on that exception, and would be able to rely on the broker-dealer sweep exception only after complying with the applicable notice or application process described below.

Subject to the applicable notice and application requirements described below, the Proposed Rule would narrow the scope of the existing exception by making the broker-dealer sweep exception available only to a broker-dealer or investment adviser that is registered with the Securities and Exchange Commission. In addition, the exception would apply only if "less than 10 percent of the total assets that [the broker-dealer or investment adviser] has under management for its customers is placed at [IDIs], and no additional third parties are involved in the deposit placement arrangement."[32] For these purposes, "assets under management" would be defined as "securities portfolios and cash balances with respect to which an investment adviser or broker dealer provides continuous and regular supervisory or management services." Importantly, under the Proposed Rule, deposits placed by an unaffiliated broker-dealer or investment adviser would be treated the same as deposits placed by an affiliate, which, in conjunction with the changes to the "matchmaking" prong discussed above, would in many cases cause deposits placed by an affiliated broker-dealer or investment adviser through a sweep program to be treated as brokered.[33]

Under the Proposed Rule, for an IDI to rely on the broker-dealer sweep exception, the IDI must file a notice or application on behalf of broker-dealers that place deposits at the IDI. If no additional third party (*e.g.*, a party that provides deposit allocation services) is involved in the sweep program, the IDI must file a notice that includes:

- "a description of the deposit placement arrangement between the IDI and the broker-dealer or investment adviser for the particular business line;
- the registration and contact information for the broker-dealer or investment adviser;
- the total amount of customer assets under management by the broker dealer or investment adviser;
- the total amount of deposits placed by the broker-dealer or investment adviser on behalf of its customers at all IDIs; and
- a certification that no additional third parties are involved in the deposit placement arrangement."[34]

IDIs that submit a notice would be able to rely on the broker-dealer sweep exception if the FDIC has not provided a written disapproval within 90 days from submission of the notice.[35] The FDIC is permitted to extend the period for an additional 90 days to provide a written notice of disapproval to the IDI.[36] Notice filers would also be required to provide quarterly updates that demonstrate ongoing compliance with the exception. The Proposed Rule would permit the FDIC to revoke an effective broker-dealer sweep exception notice in certain circumstances.[37]

IDIs that cannot rely on the broker-dealer sweep exception because an additional third party is involved in the arrangement may file an application to obtain the FDIC's prior approval to rely on the primary purpose exception. The application would be required to include:

- "a description of the deposit placement arrangement between the IDI, the broker-dealer or investment adviser, and the additional third party, including the services provided by the additional third party, for the particular business line, and copies of contracts relating to the deposit placement arrangement, including all third party contracts;

- the total amount of customer assets under management by the broker-dealer or investment adviser;
- the total amount of deposits placed by the broker-dealer or investment adviser on behalf of its customers at all IDIs;
- information on whether the additional third party places or facilitates the placement of deposits at IDIs;
- information on whether the additional third party has legal authority, contractual or otherwise, to close the account or move the third party's funds to another IDI;
- information on fees and the amount of fees paid from any source to the additional third party with respect to its services provided as part of the deposit placement arrangement;
- information on whether the additional third party has discretion to choose the IDIs at which customer deposits are or will be placed; and
- any other information that the FDIC requires to initiate its review and render the application complete."[38]

Under the Proposed Rule, the FDIC generally would make a determination on an application within 120 days, but could extend its review by 120 additional days, or longer in the case of complex or novel arrangements or issues.[39] In view of the FDIC's general approach to brokered deposits, it is uncertain how receptive the FDIC would be to any such application.

Notwithstanding that the Proposed Rule would significantly narrow the 2020 Rule's 25 percent test, the FDIC is requesting comment on whether to rescind the 25 percent test entirely or to limit the broker-dealer sweep exception to apply only to deposits that a broker-dealer or investment adviser sweeps to an affiliated IDI.[40] These requests for comments indicate that the FDIC may seek to narrow this aspect of the 2020 Rule even further as part of its final rulemaking.

3. "Enabling Transactions" Designated Business Exception

The designated business exceptions in the 2020 Rule include an exception for an agent or nominee that places, or assists in placing, depositors' funds at IDIs if 100 percent of the funds are placed into transactional accounts that do not pay any form of remuneration to the depositor.[41] In light of the FDIC's proposed return to its pre-2020 framework for analyzing the primary purpose exception, the Proposed Rule would eliminate the "enabling transactions" exception: "the enabling transactions test would not satisfy the proposed primary purpose exception, because placing deposits into accounts with transactional features would not, by itself, prove that the substantial purpose of the deposit placement arrangement is for a purpose other than providing deposit insurance or a deposit-placement service."[42]

An IDI that currently relies on notices filed with the FDIC by third parties to qualify for the enabling transactions exception would no longer be permitted to rely on those notices and instead would be required to file its own application for a general primary purpose exception under the application process described below, or to treat as brokered those deposits that the IDI currently classifies as non-brokered in reliance on the enabling transactions exception. It is unclear whether the FDIC would approve applications by banks

that receive deposits in connection with prepaid card programs, which today place customer funds into transactional accounts in accordance with the "enabling transactions" exception.

4. Primary Purpose Exception Application Process

Under the 2020 Rule, if an agent or nominee does not meet a designated business exception, either it or the IDI at which it places deposits is permitted to apply to the FDIC to qualify for the primary purpose exception.[43] The FDIC cited two concerns with the 2020 Rule's application process. First, the FDIC noted that some third parties do not provide sufficient information for the FDIC to process an application, such as failing to provide required information on all parties within a deposit arrangement, including the receiving IDIs.[44] Second, the FDIC noted that some IDIs misunderstand primary purpose exception application approvals when they are provided to third-party applicants, because the IDI was not the applicant and the approval did not apply to its particular deposit placement activity with the third party.[45]

For these reasons, the Proposed Rule would eliminate the ability of third parties to apply for a primary purpose exception.[46] As proposed, each IDI seeking to rely on the primary purpose exception (other than pursuant to an enumerated designated business exception) would be required to submit an application for the specific deposit placement arrangement. This application would be required to include:

- "a description of the deposit placement arrangements between the third party and [IDIs] for the particular business line, including the services provided by any relevant third parties, and copies of contracts relating to the deposit placement arrangement, including all third-party contracts;
- a description of the particular business line;
- a description of the primary purpose of the particular business line;
- the total amount of customer assets under management by the third party with respect to the particular business line;
- the total amount of deposits placed by the third party at all [IDIs], including the amounts placed with the applicant, with respect to the particular business line [exclusive of brokered certificates of deposit] . . . ;
- information on whether the [IDI] or customer pays fees or other remuneration to the agent or nominee for deposits placed with the [IDI] and the amount of such fees or other remuneration, including how the amount of fees or other remuneration is calculated;
- information on whether the agent or nominee has discretion to choose the [IDI(s)] at which customer deposits are or will be placed;
- information on whether the agent or nominee is mandated by law to disburse funds to customer deposit accounts;
- a description of the marketing activities provided by the third party, with respect to the particular business line;
- the reasons the third party meets the primary purpose exception;
- any other information the applicant deems relevant; and
- any other information the FDIC requires to initiate its review and render the application complete."[47]

These proposed revisions would increase the complexity of primary purpose exception applications with respect to certain deposit arrangements, and may be designed to limit the availability of the exception through an application. For example, under the 2020 Rule, multiple IDIs at which an agent or nominee places deposits could rely on a primary purpose exception for which the agent or nominee had received approval. However, the Proposed Rule would require each IDI to apply separately in order to rely on the primary purpose exception. As a result, this aspect of the Proposed Rule may significantly increase the amount of applications filed with the FDIC, which Vice Chairman Hill does not believe the FDIC will be able process in a "timely or efficient manner."[48]

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ENDNOTES

[1] FDIC, Notice of Proposed Rulemaking, Unsafe and Unsound Banking Practices: Brokered Deposits and Interest Rate Restrictions, *available at* https://www.fdic.gov/system/files/2024-07/fr-npr-on-brokered-deposit-restrictions_1.pdf. The Proposed Rule would also revise the reciprocal deposits exception to provide guidance for determining how and when an IDI may regain "agent institution" status for purposes of the FDIC's reciprocal deposits regulation after the IDI loses such status. Revisions to the reciprocal deposits regulation are not discussed in this memorandum.

[2] 12 U.S.C. § 1831f. The FDIC's brokered deposit regulation that implements Section 29 is codified at 12 C.F.R. § 337.6.

[3] FDIC, Final Rule, Unsafe and Unsound Banking Practices: Brokered Deposits and Interest Rate Restrictions, 86 Fed. Reg. 6742 (Jan. 22, 2021), *available at* https://fdic.gov/sites/default/files/2024-03/2020-12-15-notice-dis-a-fr.pdf. For a discussion of the 2020 Rule, see our Memorandum to Clients (Dec. 29, 2020), *available at* https://www.sullcrom.com/insights/memo/2020/December/Brokered-Deposits-01-20-2023.

[4] 12 U.S.C. § 1831f; 12 C.F.R. § 337.6.

[5] In situations where IDIs that are less than well capitalized offer certain high interest rate deposits, the offering IDI itself is considered the "deposit broker," and such deposits are therefore "brokered deposits" even without third-party involvement. See 12 U.S.C. § 1831f(g)(3).

[6] Although well-capitalized IDIs can accept brokered deposits without restriction, as a result of regulatory developments since Congress enacted Section 29, the classification of deposits as brokered can have significant negative regulatory and other consequences even for well-capitalized IDIs. For example:

- The amount of brokered deposits held by an IDI can increase the IDI's deposit insurance assessment rate. *See* 12 C.F.R. §§ 327.16(b)(1)(A)(3) and (b)(2)(A)(3); 12 C.F.R. Part 327 App. A.VI; 12 C.F.R. §§ 327.16(a)(1) and (e)(3).
- For a banking organization subject to the federal banking agencies' minimum Liquidity Coverage Ratio ("LCR") requirement, the assumed outflow rate applied to many brokered deposits is higher than that applied to other deposits. *See* Sections 32(a) (retail funding outflow amount), 32(g) (brokered deposit outflow amount for retail customers or counterparties) and 32(h) (unsecured wholesale funding outflow amount) of the federal banking agencies' respective LCR rules, codified at 12 C.F.R. Part 50 (OCC), 12 C.F.R. Part 249 (Federal Reserve Board) and 12 C.F.R. Part 329 (FDIC).
- Because of the regulatory stigma that attaches to deposits classified as brokered, such deposits can harm an IDI's marketplace reputation.

[7] 12 U.S.C. § 1831f(g)(1); 12 U.S.C. § 1831f(a).

[8] 12 U.S.C. § 1831f(g)(1).

[9] *See* 12 U.S.C. § 1831f(g)(2)(I).

[10] Specifically, the FDIC noted that some IDIs are misreporting deposits under the 2020 Final Rule because of misunderstanding the "25 percent test" exception by relying on the exception if a third party had filed a notice with the FDIC without undertaking any analysis of whether an additional third party involved in the placement of deposits would meet the "deposit broker" definition. *See* Release at 5-6.

[11] *See* 12 U.S.C. § 1831f(g)(l)(A).

[12] *See* 12 C.F.R. § 337.6(a)(5)(i).

[13] Proposed 12 C.F.R. § 337.6(a)(5)(A).

ENDNOTES (CONTINUED)

14 *Id.* at 35-36.

15 Specifically, The Proposed Rule would define "engaged in the business of placing or facilitating the placement of deposits" to include any person that engages in one or more of the following activities:

- "the person receives third party funds and deposits those funds at one or more [IDIs];
- the person has legal authority, contractual or otherwise, to close the account or move the third party's funds to another [IDI];
- the person is involved in negotiating or setting rates, fees, terms, or conditions for the deposit account;
- the person proposes or determines deposit allocations at one or more [IDIs] (including through operating or using an algorithm, or any other program or technology that is functionally similar); or
- the person has a relationship or arrangement with an [IDI] or customer where the [IDI], or the customer, pays the person a fee or provides other remuneration in exchange for or related to the placement of deposits." Proposed 12 C.F.R. § 337.6(a)(5)(ii).

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

17 12 C.F.R § 337.6(a)(5)(iii)(C)(1).

18 Release at 31.

19 Proposed 12 C.F.R § 337.6(a)(5)(ii)(D). We note that the Proposed Rule's introduction of the "deposit allocation" prong should not affect the exception for reciprocal deposits. Under Section 29, as amended by the Economic Growth, Regulatory Relief, and Consumer Protection Act, and the FDIC's implementing regulations, subject to certain limitations, "reciprocal deposits" are not considered to be funds obtained by or through a deposit broker (*i.e.*, they are not brokered deposits). In relevant part, "reciprocal deposits" are defined as deposits received by an agent institution through a "deposit placement network" (*i.e.*, "a network in which an insured depository institution participates, together with other insured depository institutions, for the processing and receipt of reciprocal deposits"). 12 U.S.C. § 1831f(i); 12 C.F.R. § 337.6(e). Because the reciprocal deposits exception expressly contemplates the use of a deposit placement network, which generally engages in allocating deposits among the network's participant IDIs, the fact that the network may otherwise meet the "deposit broker" definition under the Proposed Rule should not affect IDIs' ability to rely on the reciprocal deposits exception.

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

21 *Id.* at 32.

22 The FDIC clarified, however, that consistent with its longstanding positions, this prong of the "deposit broker" definition would not apply to passive listing services because the fees paid to listing services are not, in the FDIC's view, in exchange for or related to the placement of deposits. "Instead passive listing services receive subscription fees paid by subscribers for information on the rates gathered by the listing service and listing fees paid by IDIs for the opportunity to list or 'post' the IDIs' rates." Proposed Rule at 35.

23 12 U.S.C. § 1831f(g)(2). The definition of "deposit broker" is subject to nine statutory exceptions:

- an IDI, with respect to funds placed with that IDI;
- an employee of an IDI, with respect to funds placed with the employing IDI;
- a trust department of an IDI, if the trust in question has not been established for the primary purpose of placing funds with IDIs;

ENDNOTES (CONTINUED)

- the trustee of a pension or other employee benefit plan, with respect to funds of the plan;
- a person acting as a plan administrator or an investment adviser in connection with a pension plan or other employee benefit plan provided that that person is performing managerial functions with respect to the plan;
- the trustee of a testamentary account;
- the trustee of an irrevocable trust (other than a trustee who establishes a deposit account to facilitate a business arrangement with an IDI to use the proceeds of the account to fund a prearranged loan), as long as the trust in question has not been established for the primary purpose of placing funds with IDIs;
- a trustee or custodian of a pension or profit sharing plan qualified under section 401(d) or 430(a) of the Internal Revenue Code of 1986; or
- an agent or nominee whose primary purpose is not the placement of funds with depository institutions.
- The FDIC's existing regulation includes these same exceptions, plus an exception for an IDI that is acting as an intermediary or agent of a U.S. government department or agency for a government-sponsored minority- or women-owned depository institution deposit program. 12 C.F.R. § 337.6(a)(5)(ii).

24 12 U.S.C. § 1831f(g)(2)(I).

25 The business relationships identified as designated exceptions in the 2020 Rule included, with respect to a particular "business line":

- "less than 25 percent of the total assets that the agent or nominee has under administration for its customers [is placed at IDIs];
- 100 percent of depositors' funds that the agent or nominee places, or assists in placing, at depository institutions are placed into transactional accounts that do not pay any fees, interest, or other remuneration to the depositor;
- a property management firm places, or assists in placing, customer funds into deposit accounts for the primary purpose of providing property management services;
- the agent or nominee places, or assists in placing, customer funds into deposit accounts for the primary purpose of providing cross-border clearing services to its customers;
- the agent or nominee places, or assists in placing, customer funds into deposit accounts for the primary purpose of providing mortgage servicing;
- a title company places, or assists in placing, customer funds into deposit accounts for the primary purpose of facilitating real estate transactions;
- a qualified intermediary places, or assists in placing, customer funds into deposit accounts for the primary purpose of facilitating exchanges of properties under section 1031 of the Internal Revenue Code;
- a broker dealer or futures commission merchant places, or assists in placing, customer funds into deposit accounts in compliance with 17 CFR 240.15c3-3(e) or 17 CFR 1.20(a);
- the agent or nominee places, or assists in placing, customer funds into deposit accounts for the primary purpose of posting collateral for customers to secure credit-card loans;

ENDNOTES (CONTINUED)

- the agent or nominee places, or assists in placing, customer funds into deposit accounts for the primary purpose of paying for or reimbursing qualified medical expenses under section 223 of the Internal Revenue Code;
- the agent or nominee places, or assists in placing, customer funds into deposit accounts for the primary purpose of investing in qualified tuition programs under section 529 of the Internal Revenue Code;
- the agent or nominee places, or assists in placing, customer funds into deposit accounts to enable participation in the following tax-advantaged programs: individual retirement accounts under section 408(a) of the Internal Revenue Code, Simple individual retirement accounts under section 408(p) of the Internal Revenue Code, and Roth individual retirement accounts under section 408A of the Internal Revenue Code;
- a Federal, State, or local agency places, or assists in placing, customer funds into deposit accounts to deliver funds to the beneficiaries of government programs; and
- the agent or nominee places, or assists in placing, customer funds into deposit accounts pursuant to such other relationships as the FDIC specifically identifies as a designated business relationship that meets the primary purpose exception." 12 C.F.R § 337.6(a)(5)(v)(I)(1).
- Other than the changes to the "25 percent test" and the "enabling transactions" exceptions discussed in this memorandum, the Proposed Rule would retain the designated business exceptions as included in the 2020 Rule.

[26] Proposed 12 C.F.R § 337.6(a)(5)(iv)(I).

[27] Release at 38.

[28] *Id.* at 38-39.

[29] *Id.* at 39.

[30] *Id.* at 44-45.

[31] *Id.* at 46.

[32] Proposed 12 C.F.R § 337.6(a)(5)(iv)(I)(1)(i).

[33] Release at 47.

[34] Proposed 12 C.F.R § 303.243(b)(3)(i).

[35] *Id.* at 49.

[36] *Id.* at 50.

[37] *Id.* at 50; Proposed 12 C.F.R § 303.243(b)(3)(viii). These circumstances include: (i) The broker-dealer or investment adviser no longer meets the criteria to rely on the Broker-Dealer Sweep exception; (ii) an additional third party is involved in the business line; (iii) the notice or subsequent reporting is inaccurate; or (iv) the notice filer fails to submit one or more required reports.

[38] Proposed 12 C.F.R § 303.243(b)(4)(i)(A)-(H).

[39] *Id.* at 52-53.

[40] *Id.* at 58.

[41] 12 C.F.R § 337.6(a)(5)(v)(I)(1)(ii).

[42] 2024 Release at 54.

ENDNOTES (CONTINUED)

43 Under the Final Rule, an applicant is required to provide, to the extent applicable: (1) a description of the deposit placement arrangements with all entities involved; (2) a description of the particular business line to which the primary purpose exception would apply; (3) a description of the primary purpose of that particular business line; (4) the total amount of customer assets under administration by the third party; (5) the total amount of deposits placed by the third party at all IDIs, including the amounts placed with the applicant, if the applicant is an IDI (including the total amount of term deposits and transactional deposits placed by the third party, exclusive of the amount of brokered certificates of deposit placed by that third party); (6) revenue generated from the third party's activities related to the placement, or facilitating the placement, of deposits; (7) revenue generated from the third party's activities not related to the placement, or facilitating the placement, of deposits; (8) a description of the marketing activities provided by the third party to prospective depositors; (9) the reasons the third party meets the primary purpose exception; (10) any other information the applicant deems relevant; and (11) any other information that the FDIC determines is necessary to complete its review.

44 Release at 39.

45 *Id.* at 39-40.

46 *Id.* at 40.

47 Proposed 12 C.F.R § 303.243(b)(4)(ii)(A)-(L).

48 Statement by Vice Chairman Travis Hill on the Notice of Proposed Rulemaking on Brokered Deposit Restrictions (July 30, 2024), *available at* https://www.fdic.gov/news/speeches/2024/statement-vice-chairman-travis-hill-notice-proposed-rulemaking-brokered-deposit.

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