

December 16, 2019

Brokered Deposits

FDIC Proposes to Revise Its Rules on Brokered Deposits

SUMMARY

On December 12, 2019, the FDIC approved a notice of proposed rulemaking and request for comment (the “NPR”)¹ to revise its regulations on brokered deposits promulgated pursuant to Section 29 of the Federal Deposit Insurance Act.² The NPR “would create a new framework for analyzing certain provisions of the ‘deposit broker’ definition, including ‘facilitating’ and ‘primary purpose.’”³ The NPR would also expand, through an application and reporting process, the availability of the “primary purpose” exception beyond what the FDIC has historically permitted.

Through the changes proposed in the NPR, the FDIC “intends to modernize its brokered deposit regulations to reflect recent technological changes and innovations that have occurred.”⁴ The FDIC anticipates that, under the proposed rule, “numerous categories of deposits that are currently considered brokered would instead be nonbrokered.”⁵

Comments on the NPR will be due sixty days after its publication in the Federal Register.

BACKGROUND

Section 29 of the Federal Deposit Insurance Act (“Section 29”), enacted in 1989, and the FDIC’s implementing regulations place restrictions on the acceptance by less than well capitalized insured depository institutions (“IDIs”) of deposits that are obtained through “deposit brokers”⁶ and are therefore deemed to be “brokered deposits.”⁷ 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.

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As a result of regulatory developments that have occurred since Congress enacted Section 29, the classification of deposits as brokered can have significant negative regulatory and other consequences even for well capitalized IDIs that are able to accept brokered deposits without restriction. For example:

- The amount of brokered deposits held by an IDI can increase the IDI's deposit insurance assessment rate.⁸
- For a banking organization subject to the federal banking agencies' minimum Liquidity Coverage Ratio ("LCR") requirement,⁹ the assumed outflow rate applied to many brokered deposits is higher than that applied to other deposits.¹⁰
- Where products are offered by both IDIs and nonbank entities (such as prepaid card products), higher liquidity costs for products involving brokered deposits may affect the ability of IDIs to offer competitive pricing.
- Because of the regulatory stigma that attaches to deposits classified as brokered, such deposits can harm an IDI's marketplace reputation.

Section 29 does not directly define "brokered deposits," but instead defines "deposit broker" and classifies any deposit obtained by or through a deposit broker as brokered.¹¹ Section 29 generally 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."¹² Since the passage of Section 29 and the FDIC's adoption of its implementing regulations, the FDIC has sought to provide clarity with respect to the definition of "deposit broker" by issuing staff advisory opinions, which later formed the basis for the FDIC's issuance of a collection of Frequently Asked Questions (the "FAQs") relating to brokered deposits.¹³ The FAQs included interpretations of Section 29 that could include in the definition of "deposit broker" virtually any third party with a connection to a depositor: "The definition of deposit broker applies to third parties engaged in . . . 'facilitating the placement of deposits.' The term 'facilitating the placement of deposits' is interpreted broadly to include actions taken by third parties to connect [IDIs] with potential depositors."¹⁴

Because of the resultant consequences for deposit-taking, the banking industry and others have been significantly focused on the topic of brokered deposits, particularly as a result of technological developments. On July 26, 2018, two members of Congress called for the FDIC to revisit the FAQs "in light of the rapid technological changes in the banking and payments industry."¹⁵ FDIC Chairman Jelena McWilliams also has noted that the "banking industry has undergone significant changes since [the brokered deposit] regulations were put into place"¹⁶ and that "the FDIC's brokered deposits regime has struggled to keep up."¹⁷

On December 18, 2018, the FDIC approved an advance notice of proposed rulemaking (the "ANPR") in connection with a "comprehensive review of the regulatory approach to brokered deposits and the interest rate caps applicable to banks that are less than well capitalized."¹⁸ The ANPR did not propose specific revisions to the brokered deposit regulations (or provide specific answers to interpretive questions), but set

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forth the history of the FDIC's current regulatory framework and summarized interpretive issues the FDIC has considered. The primary theme of the ANPR was the application of the FDIC's regulatory framework for brokered deposits in light of modern technology and business practices. For a detailed discussion of the ANPR, please refer to our [Memorandum to Clients, dated December 20, 2018](#).

In response to the ANPR, more than 130 comment letters were submitted, addressing nearly every aspect of the brokered deposit regulations.

On December 12, 2019, the FDIC approved the NPR.¹⁹ According to Chairman McWilliams, the NPR was crafted with four objectives in mind: to (1) develop a framework to encourage innovation within the banking industry; (2) adopt a balanced approach to the interpretation of Section 29; (3) minimize risk to the Deposit Insurance Fund while focusing on the core problem Congress sought to address through the passage of Section 29; and (4) establish an administrative process that focuses on "consistency and efficiency."²⁰

The NPR seeks to correlate the regulations more closely to the realities of modern bank-funding methods and reduce the current limitations on deposit-taking that do not implicate the "hot money" concerns that prompted the enactment of Section 29.

KEY CHANGES TO THE BROKERED DEPOSIT REGULATIONS

The NPR would revise the FDIC's regulations in several respects. Specifically, the NPR would:

- revise the definition of "deposit broker" and add a new definition of "engaged in the business of facilitating the placement of deposits," which would include an enumerated list of activities that would cause the FDIC to view a third party to be "engaged in the business of facilitating the placement of deposits";
- revise the primary purpose exception to focus on "the business relationship between the agent or nominee and its customers" and to establish an application and reporting process to qualify for the exception; and
- revise the treatment of an IDI's operating subsidiaries under the IDI exception.

A. REVISIONS TO THE "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..."²¹ The FDIC historically has applied this provision expansively, potentially to include any third party that has any connection to a depositor, with little or no discussion of whether or how that third party is "engaged in the business of" facilitating the placement of deposits. For example, the FAQs, without any reference to the statutory and regulatory requirement that a deposit broker be "engaged in the business of" placing or facilitating the placement of deposits, provide that "[w]hen a third party takes any actions that connect an [IDI] with depositors or potential depositors, the third party may be facilitating the placement of deposits. Hence, the third party may be a deposit broker."²² In the ANPR, however, the FDIC described a deposit broker as a third party "in the business of either (1) placing funds, or (2) facilitating the

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placement of funds . . . of another [third party] (such as its customers) . . .,” indicating a reevaluation of that view.²³

Consistent with the ANPR, the NPR proposes a revised definition of “deposit broker” clarifying when a deposit broker is “engaged in the business” of facilitating the placement of deposits.

Under the proposed rule, the definition of “deposit broker” would have four prongs:

- “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 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.”²⁴

The NPR provides that the FDIC would view a person as “engaged in the business of placing deposits” if the person “has a business relationship with its customers, and as part of that relationship, places deposits on behalf of the customer.”²⁵ Thus any person meeting these criteria would be a deposit broker, and, unless an exception applies, any deposits obtained by or through that person would be brokered deposits.²⁶

With respect to whether a person is engaged in the business of “facilitating” the placement of deposits, the NPR notes that some factors that have, in the past, led the FDIC to consider a person to be facilitating the placement of deposits may no longer be relevant in light of technological advances such as the proliferation of online marketing.²⁷ To address these issues, the NPR would revise the FDIC’s approach to the “facilitation” aspect of the deposit broker definition. Under the proposed rule, a person would be engaged in the business of facilitating the placement of deposits of a third party with an IDI if, while engaged in business:

- “The person directly or indirectly shares any third party information with the [IDI];
- “The person has legal authority, contractual or otherwise, to close the account or move the third party’s funds to another [IDI];
- “The person provides assistance or is involved in setting rates, fees, terms, or conditions for the deposit account; or
- “The person is acting, directly or indirectly, with respect to the placement of deposits, as an intermediary between a third party that is placing deposits on behalf of a depositor and an [IDI], other than in a purely administrative capacity.”²⁸

The NPR explains that these criteria are “intended to capture activities that indicate that the 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,” which, in turn, gives the third party the ability to influence the movement of funds between institutions and, according to the FDIC, makes the deposits less stable.²⁹ Thus,

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the NPR represents a significant evolution of the FDIC's historical analysis under which virtually any involvement by a third party in the deposit placement process could result in the deposit being classified as brokered.³⁰

The remaining prongs of the "deposit broker" definition are consistent with the FDIC's past interpretations. For example, the third prong of the definition is intended to capture brokered certificates of deposit, which the FDIC notes "have always been marketed and classified as brokered deposits."³¹

B. THE PRIMARY PURPOSE EXCEPTION

Under Section 29 and the FDIC's implementing regulations, there are several exceptions to the definition of "deposit broker."³² 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."³³ In practice, the FDIC has interpreted this exception extremely narrowly.³⁴ In determining an agent or nominee's "primary purpose," the FDIC historically has not analyzed the agent or nominee's overall business purpose or the amount of revenue that the deposit placement activity generates, but has instead focused on "the reason or intent of the third party" in placing or facilitating the placement of the deposit.³⁵ Under its current practice, unless the FDIC determines that the agent or nominee is placing a deposit for a substantial purpose other than obtaining deposit insurance coverage for a customer or providing a deposit placement service to a customer, the primary purpose exception is not available to the agent or nominee.³⁶

Under the proposed rule, the primary purpose exception would be based "on the business relationship between the agent or nominee and its customers,"³⁷ and would, therefore, potentially be available to far more deposit brokers than the FDIC has historically permitted. Specifically, the NPR notes that the proposed rule would apply the primary purpose exception when the primary purpose of the business relationship between an agent or nominee and its customers "is not the placement of funds with depository institutions."³⁸

The proposed rule would revise the primary purpose exception to provide that it is available to "[a]n agent or nominee whose primary purpose is not the placement of funds with depository institutions if and to the extent, the FDIC determines that the agent or nominee meets this exception under the application process in [the proposed rule]."³⁹ The proposed rule would provide for an application process, by the agent or nominee, or an IDI on behalf of the agent or nominee, through which the agent or nominee could qualify for the primary purpose exception under one of three prongs.⁴⁰ For each type of application, the FDIC would provide a written determination within 120 days of receipt of a complete application,⁴¹ and the NPR indicates that the expedited process would be available for certain applications that are "simple and straightforward."⁴²

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Under the first application prong, the primary purpose of an agent's or nominee's business relationship with its customers would not be considered to be the placement of deposits, and the FDIC would approve an application for the primary purpose exception, if, for a particular "business line" of the agent or nominee,⁴³ less than 25 percent of the total amount of customer assets that the agent or nominee has under management in that business line is placed at IDIs (the "25 Percent Prong").⁴⁴ To determine the amount of assets under management, the FDIC would "measure the total market value of all the financial assets (including cash balances) that the agent or nominee manages on behalf of its customers that participate in a particular business line."⁴⁵ In connection with the 25 Percent Prong, the NPR notes, by way of example, that a broker dealer that sweeps uninvested cash balances into depository accounts at IDIs would meet the primary purpose exception "if the amount of customer funds it places at deposit accounts represents less than a quarter of the total amount of customer assets it manages for its broker dealer business."⁴⁶ The FDIC has solicited a number of comments in connection with this proposal, including whether 25 percent is an appropriate threshold, and whether the final rule should provide more clarity regarding the meaning of assets under "management" and what will be considered a "business line."⁴⁷

Under the second application prong, the primary purpose of an agent's or nominee's business relationship with its customers would not be considered the placement of deposits if the agent or nominee places depositors' funds in "transactional accounts for the purpose of enabling payments" (the "Transaction Account Prong").⁴⁸ The FDIC will approve an application for the primary purpose exception under this application prong if the agent or nominee places 100 percent of its customer funds into transaction accounts at IDIs and "no interest, fees, or other remuneration, is being provided or paid on any customer accounts" by the agent or nominee or IDI.⁴⁹ The FDIC would also approve an application in cases where the agent or nominee or IDI is providing or paying interest, fees, or remuneration if the applicant demonstrates that the primary purpose of the particular business line is to enable customers to make transactions.⁵⁰

Under the third application prong, any agent or nominee that does not meet the conditions of the 25 Percent Prong or the Transaction Account Prong, including agents or nominees that place with IDIs more than 25 percent of customer assets under management for a particular business line, may apply for the primary purpose exception under a general application procedure.⁵¹ As part of the application process, the NPR indicates that the FDIC would consider a number of factors, including:

- the revenue structure for the agent or nominee (and whether the agent or nominee receives a majority of its revenue from deposit placement activity);
- whether the agent's or nominee's marketing activities are targeted at opening deposit accounts rather than providing some other service;
- whether opening the deposit account is incidental to another service (including whether it is necessary for a customer to open a deposit account to receive other services from the agent or nominee); and
- the fees and types of fees the agent or nominee receives for placing deposits.⁵²

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Under this application prong, the FDIC would approve an application if the applicant is able to demonstrate, with respect to the applicable business line, that the primary purpose for that business line is not the placement, or facilitation of the placement, of deposits.⁵³

Under the proposed application procedures, the primary purpose exception would not be available for brokered certificates of deposit (*i.e.*, those in which a broker purchases a certificate of deposit and sells shares or participations in the certificate of deposit to investors, or other deposit placement arrangements that the FDIC determines are arranged for a similar purpose). These activities would be considered a discrete and independent “business line” from other deposit placement businesses in which an agent or nominee may engage, and these deposits would always be considered brokered.⁵⁴ Similarly, in the NPR, the FDIC notes that it would not grant the primary purpose exception if the primary purpose is to place funds into deposit accounts to “encourage savings,” “maximize yield,” or “provide deposit insurance.”⁵⁵

Although the 25 Percent Prong and the Transaction Account Prong include bright-line standards for when an agent or nominee would qualify for the primary purpose exception, the proposed rule would still require the agent or nominee (or an IDI, on behalf of the agent or nominee) to complete an application and approval process for the agent or nominee to qualify for the primary purpose exception. In addition, the FDIC would make decisions about whether to approve applications under any of the three application prongs on a case-by-case basis, and would retain substantial discretion in many circumstances. For example, under the 25 Percent Prong, the determination of what constitutes a business line is a “facts and circumstances” analysis, and the FDIC would retain the discretion to determine the scope of the business line to which the primary purpose exception would apply.⁵⁶

In addition, under the proposed rule, any agent or nominee, or IDI that applies on behalf of an agent or nominee, would be subject to ongoing reporting requirements to the FDIC and, in the case of an IDI, its primary federal regulator, with respect to any application for the primary purpose exception that the FDIC approves.⁵⁷ The NPR suggests that this reporting likely would be required on a quarterly basis.⁵⁸ The NPR also states that IDIs would also be responsible for monitoring ongoing eligibility of nonbank third parties for the primary purpose exception.⁵⁹ Moreover, at any time, the FDIC would be permitted to require additional information to confirm that the primary purpose exception is still appropriate and could, in certain circumstances, modify or withdraw any approval.⁶⁰

C. THE IDI EXCEPTION AND DEPOSITS GENERATED THROUGH OPERATING SUBSIDIARIES

Section 29 and the FDIC’s regulations exclude from the definition of a deposit broker “an [IDI], with respect to funds placed with that [IDI].”⁶¹ In discussing the IDI exception, the ANPR noted that, for some purposes, “such as under the Bank Merger Act and for receivership purposes [, subsidiaries] are treated separately.”⁶² Such treatment, however, is generally confined to extraordinary, non-routine events, and treating operating subsidiaries the same as a division of the bank would more closely adhere to the general treatment of

operating subsidiaries by the OCC and the Federal Reserve.⁶³ In the NPR, however, the FDIC reiterates that the IDI exception is currently limited to the IDI and its divisions or departments, but does not include separately incorporated subsidiaries of the IDI.⁶⁴

The proposed rule would revise this approach. Specifically, the IDI exception would apply to subsidiaries of an IDI, provided that the following criteria are met: (1) the subsidiary is wholly owned by the IDI; (2) the subsidiary places deposits exclusively with its parent IDI; and (3) the subsidiary engages only in activities in which its parent IDI could permissibly engage.⁶⁵

ADDITIONAL CHANGES

A. CODIFICATION AND RESCISSION OF ADVISORY OPINIONS

As part of the FDIC's proposed framework for the primary purpose exception, the FDIC plans to reevaluate existing staff opinions relating to the primary purpose exception, and to codify and make public opinions of "general applicability that continue to be relevant and applicable," while rescinding those that are not.⁶⁶ The NPR does not indicate which advisory opinions would be codified or rescinded, but solicits comment on which opinions should be codified and why.

B. MODIFICATIONS TO THE FDIC'S ASSESSMENT REGULATIONS

The FDIC notes that it expects the proposed rule to result in some deposits no longer being considered brokered deposits and that, as part of a future rulemaking, it would consider modifications to its assessment regulations in light of any changes to the brokered deposit regulations.⁶⁷ Although the NPR does not detail the modifications the FDIC may make to the assessment regulations, Chairman McWilliams recently noted that the FDIC is considering addressing concentrations in funding at large banks that are correlated with higher losses to the Deposit Insurance Fund, including unaffiliated sweeps that qualify for the primary purpose exception under the NPR, by making assessment pricing more risk sensitive.⁶⁸

C. TREATMENT OF NON-MATURITY DEPOSITS

As part of the NPR, the FDIC is considering an interpretation under which non-maturity brokered deposits would be considered "accepted" for purposes of the brokered deposit restrictions at any time new non-maturity deposits are placed at an IDI by or through a deposit broker.⁶⁹ Brokered deposits in money market demand accounts, savings accounts and transactional accounts at an IDI would not be subject to the brokered deposit restrictions if the IDI were to become less than well capitalized, provided that the deposits were placed while the IDI was well capitalized; but, if any new brokered funds were subsequently placed into the account, the entire account balance would be subject to the brokered deposit restrictions. If, instead, a customer deposited brokered funds into a new account and the balance in that account were subject to the brokered deposit restrictions, the balance in the initial account placed while the IDI was well capitalized would remain not subject to the brokered deposit restrictions so long as no additional funds were placed

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into the initial account.

D. CALL REPORT REQUIREMENTS

The NPR notes that the FDIC will consider requiring banks to disclose, in their call reports, deposits that are excluded from being reported as brokered because of the primary purpose exception.⁷⁰ The purpose for this change would be to “assess the risk factors associated with [such] deposits and determine assessment implications, if any.”⁷¹

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ENDNOTES

- 1 Federal Deposit Insurance Corporation, Notice of Proposed Rulemaking and Request for Comment, *Unsafe and Unsound Banking Practices: Brokered Deposits Restrictions* (Dec. 12, 2019) (“NPR”), available at <https://www.fdic.gov/news/board/2019/2019-12-12-notice-dis-b-fr.pdf>.
- 2 12 C.F.R. § 337.6.
- 3 NPR at 1.
- 4 NPR at 3.
- 5 *Id.* at 43.
- 6 12 U.S.C. § 1831f; 12 C.F.R. § 337.6.
- 7 Certain high interest rate deposits offered by IDIs that are less than well capitalized are considered “brokered deposits” even without any third-party involvement. In those situations, the offering IDI itself is considered the “deposit broker.” See 12 U.S.C. § 1831f(g)(3).
- 8 The amount of an IDI’s brokered deposits can affect components of the IDI’s deposit insurance assessment rate, which can affect the aggregate applicable assessment rate. For a large or highly complex institution, it affects the IDI’s core deposits ratio. 12 C.F.R. §§ 327.16(b)(1)(A)(3) and (b)(2)(A)(3); 12 C.F.R. Part 327 App. A.VI. For a small institution (generally under \$10 billion in assets), it affects the IDI’s brokered deposit ratio. 12 C.F.R. § 327.16(a)(1). Finally, for certain new small institutions and for all large or highly complex institutions, except large and highly complex institutions that are well capitalized and have a CAMELS composite rating of “1” or “2,” there is an additional brokered deposit adjustment of up to 10 basis points, unless the institution’s ratio of brokered deposits to domestic deposits is not greater than 10%. 12 C.F.R. § 327.16(e)(3).
- 9 See 12 C.F.R. Part 50 (OCC), 12 C.F.R. Part 249 (Federal Reserve Board) and 12 C.F.R. Part 329 (FDIC). For additional information regarding the application of the LCR, see our Memorandum to Clients, *Regulatory Tailoring for Large U.S. Banking Organizations and Foreign Banking Organizations: Banking Agencies Finalize Significant Revisions to the Application of Enhanced Prudential Standards and Capital and Liquidity Requirements to Large U.S. and Foreign Banking Organizations*, dated October 18, 2019, available at <https://www.sullcrom.com/files/upload/SC-Publication-Banking-Agencies-Finalize-Tailoring-of-Enhanced-Prudential-Standards-and-Capital-and-Liquidity-Requirements.pdf>.
- 10 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 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). For example, brokered deposits for retail customers or counterparties that are not reciprocal brokered or brokered sweep deposits are assigned a 100 percent outflow rate if they mature within the LCR’s 30-day window; reciprocal brokered and brokered sweep deposits are assigned outflow rates of 10 percent, 25 percent and 40 percent; and retail deposits that are not brokered deposits are assigned outflow rates of three percent or 10 percent.
- 11 12 U.S.C. § 1831f(g)(1); 12 U.S.C. § 1831f(a).
- 12 12 U.S.C. § 1831f(g)(1).
- 13 Identifying, Accepting and Reporting Brokered Deposits Frequently Asked Questions (2016) (the “FAQs”), available at <https://www.fdic.gov/news/news/financial/2016/fil16042b.pdf>. For a collection of staff advisory opinions, please see <https://www.fdic.gov/regulations/laws/rules/4000-100.html#brok>. As was discussed in our Memoranda to Clients dated [January 14, 2015](#), and [July 5, 2016](#), the FAQs created significant industry concerns regarding the breadth of deposits the FDIC classified as “brokered.”

ENDNOTES (CONTINUED)

- 14 FAQs A5.
- 15 Letter to FDIC Chairman Jelena McWilliams from Representatives Scott Tipton and Blaine Luetkemeyer, dated July 26, 2018, available at <https://www.consumerfinancemonitor.com/wp-content/uploads/sites/14/2018/08/FDIC-Brokered-Deposits-2018-7-26.pdf>.
- 16 Statement of FDIC Chairman Jelena McWilliams on Implementation of the EGRRCPA, before the U.S. Senate Committee on Banking, Housing, and Urban Affairs (October 2, 2018), available at <https://www.banking.senate.gov/imo/media/doc/McWilliams%20Testimony%2010-2-18.pdf>.
- 17 Jelena McWilliams, Chairman, Federal Deposit Insurance Corporation, Keynote Remarks at the Brookings Institution, “Brokered Deposits in the Fintech Age” (Dec. 11, 2019) at 3.
- 18 84 Fed. Reg. 2,366 (Feb. 6, 2019).
- 19 The NPR was approved by a vote of three to one, with Director Gruenberg dissenting.
- 20 Chairman McWilliams, *supra* n. 15, at 4-5.
- 21 12 U.S.C. § 1831f(g)(1)(A).
- 22 FAQs B2 (emphasis added; internal quotation marks omitted); *see also* NPR at 17 (“Historically, the term ‘facilitating the placement of deposits’ has been interpreted by staff at the FDIC to include actions taken by third parties to connect [IDIs] with potential depositors.”).
- 23 84 Fed. Reg. at 2,371.
- 24 NPR at 72, proposed 12 C.F.R. § 337.6(a)(5)(i).
- 25 *Id.* at 16. Although the preamble of the NPR refers to a “proposed definition” for “engaged in the business of placing deposits” and discusses how the FDIC will interpret the phrase, the text of the proposed rule does not specifically define this term.
- 26 *Id.*
- 27 *Id.* at 17-18.
- 28 *Id.* at 72, proposed 12 C.F.R. § 337.6(a)(5)(ii).
- 29 *Id.* at 19.
- 30 One issue commenters raised is the treatment of certain employees of IDIs and/or their affiliates, which the NPR does not expressly address.
- 31 *Id.* at 21.
- 32 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;
 - 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

ENDNOTES (CONTINUED)

- an agent or nominee whose primary purpose is not the placement of funds with depository institutions.

The FDIC's existing regulations include 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).

33 12 U.S.C. § 1831f(g)(2)(I).

34 For example, in the earliest published version of the FAQs, the FDIC stated that “the primary purpose exception applies only infrequently and typically requires a specific request for a determination by the FDIC.” FIL-2-2015, Guidance on Identifying, Accepting and Reporting Brokered Deposits (Jan. 5, 2015) at question E6, available at <https://www.fdic.gov/news/news/financial/2015/fil15002a.pdf>. The FDIC revised the FAQs to remove this language, but did not meaningfully change its approach to the primary purpose exception.

35 84 Fed. Reg. at 2,372.

36 *Id.* (noting that in order for the primary purpose exception to apply, FDIC staff “has considered whether the deposit-placement activity is incidental to some other purpose”); see also FDIC Advisory Opinion No. 05-02 (Feb. 3, 2005) (describing the FDIC’s historical approach to analyzing the primary purpose exception).

37 NPR at 25.

38 *Id.*

39 *Id.* at 73, proposed 12 C.F.R. § 337.6(a)(5)(iii)(I).

40 See *Id.* at 25-29. Under the proposed application process, an agent or nominee can apply for the primary purpose exception, or an IDI can apply on behalf of the agent or nominee. The FDIC anticipates that an agent or nominee with relationships with multiple IDIs would likely apply on its own behalf because the agent or nominee would have the information needed to complete an application. See *Id.* at 34.

41 *Id.* at 70, proposed 12 C.F.R. § 303.243(b)(7).

42 *Id.* at 34.

43 The proposed rule does not define business line. The NPR, however, indicates that the term “business line” would “refer to the business relationships an agent or nominee has with a group of customers for whom the business places or facilitates the placement of deposits.” The NPR notes that the FDIC believes it is necessary to analyze an agent’s or nominee’s specific business lines to avoid evasion of Section 29 by, for example, an agent or nominee that combines its deposit brokering business with other businesses. The FDIC emphasizes that determining what constitutes a business line would “be a facts and circumstances” analysis, and that the FDIC would retain “discretion to determine the appropriate business line to which the primary purpose exception would apply.” NPR at 32. The FDIC specifically requests comment on whether it has “provided sufficient clarity regarding what will be considered a ‘business line.’” *Id.* at 33.

44 NPR at 26; NPR at 71, proposed 12 C.F.R. § 303.243(b)(8)(i). Under the 25 Percent Prong, as part of the application process, the applicant would be required to provide: (1) a description of the particular business line to which the primary purpose exception would apply; (2) the total amount of customer assets under management by the third party for that particular business line; (3) the total amount of deposits placed by the third party on behalf of its customers, for that particular business line, at all depository institutions (exclusive of the amount of brokered certificates of deposits being placed by the third party); (4) a description of the deposit placement arrangements with all entities involved; (5) any other information the applicant deems relevant; and (6) any other

ENDNOTES (CONTINUED)

- information the FDIC requires to initiate its review and render the application complete. NPR at 69, proposed 12 C.F.R. § 303.243(b)(4)(i).
- 45 *Id.* at 27.
- 46 *Id.* at 26.
- 47 *Id.* at 27 and 33.
- 48 *Id.* at 27; *see also* NPR at 71, proposed 12 C.F.R. § 303.243(b)(ii),(iii). Under the Transaction Account Prong, as part of the application process, the applicant would be required to provide: (1) contracts with customers that evidence the amount of interest, fees or other remuneration, accrued for all customer accounts, and that all customer deposits are in transaction accounts; (2) for third parties that pay interest, fees or other remuneration, (a) the average volume of transactions for all customer accounts and (b) an explanation of how customers use the third party's services for the purpose of making payments; (3) a description of the deposit placement arrangements with all entities involved; (4) any other information the applicant deems relevant; and (5) any other information the FDIC requires to initiate its review and render the application complete. NPR at 69-70, proposed 12 C.F.R. § 303.243(b)(4)(ii).
- 49 NPR at 71, proposed 12 C.F.R. § 303.243(b)(8)(ii). The 100 percent requirement is stated in the NPR but does not appear directly in the text of the proposed rule. ("The FDIC will approve an application . . . submitted under [the Transaction Account Prong] if no interest, fees, or other remuneration, is being provided or paid on any customer accounts by the third party.") Applications for the primary purpose exception under the Transaction Account Prong, however, must include contracts with customers that demonstrate, among other things, that "all customer deposits are in transaction accounts." *See infra* note 49.
- 50 *Id.*, proposed 12 C.F.R. §§ 303.243(b)(8)(ii) and (iii).
- 51 *Id.* at 70, proposed 12 C.F.R. § 303.243(b)(4)(iii).
- 52 *Id.* at 29; *see also* NPR at 70, proposed 12 C.F.R. § 303.243(b)(4)(iii). In addition to considering the above criteria, under the proposed rule the FDIC would also consider information that the applicant would be required to provide, including, 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 management 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; (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 requires to initiate its review and render the application complete.
- 53 NPR at 71, proposed 12 C.F.R. § 303.243(b)(8)(iv).
- 54 *Id.* at 70, proposed 12 C.F.R. § 303.243(b)(5); *see also* NPR at 30.
- 55 *Id.* at 31.
- 56 *Id.* at 32. The FDIC notes that offering brokerage accounts with a traditional cash sweep option would be considered a business line, but that offering brokerage accounts without a cash sweep option would not be considered part of that business line and that offering accounts in which customers are only able to place money in accounts at IDIs and not invest in other types of assets would similarly be considered a separate business line.

ENDNOTES (CONTINUED)

- 57 *Id.* at 71, proposed 12 C.F.R. § 303.243(b)(9)(ii).
- 58 *Id.* at 39.
- 59 *Id.* at 39-40. The NPR also notes that “[w]hen establishing a contractual relationship with a nonbank third party for the placement of deposits that maybe classified as nonbrokered due to the primary purpose exception, an IDI may wish to consider the reporting and monitoring requirements described [in the NPR].” The NPR does not discuss how IDIs would monitor a third party’s eligibility for the primary purpose exception, nor does the proposed rule include this requirement. The NPR solicits comments on whether it is appropriate for the FDIC to impose this requirement on IDIs.
- 60 *Id.* at 71, proposed 12 C.F.R. § 303.243(b)(10).
- 61 12 U.S.C. § 1831f(g)(2)(A).
- 62 84 Fed. Reg. at 2,372.
- 63 See, e.g., Office of the Comptroller of the Currency, Interpretive Letter No. 971 (Jan. 16, 2003); Board of Governors of the Federal Reserve System, FRB Interpretive Letter, 2000 WL 35539974, at *1 (Aug. 15, 2000).
- 64 NPR at 23; see also 84 Fed. Reg. at 2,372 (noting that FDIC staff “has consistently applied the [IDI] exception strictly to the IDI itself and not to separately incorporated legal entities such as subsidiaries or other affiliates”).
- 65 *Id.*; see also NPR at 73, proposed 12 CFR § 337.6(a)(5)(iii)(A).
- 66 NPR at 31-32.
- 67 *Id.* at 41.
- 68 Chairman McWilliams, *supra* n. 15, at 4-5.
- 69 NPR at 42.
- 70 *Id.* at 41.
- 71 *Id.*

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