BBVA Compass

Legal Department
15 South 20th Street, Suite 1802
Birmingham, AL 35233
Phone 800.239.2190
Fax 205.297.3043

December 28, 2015

VIA EMAIL - BrokeredDepositFAQs@fdic.gov

Ms. Doreen R. Eberley
Director, Division of Risk Management Supervision
Federal Deposit Insurance Corporation
550 17th Street, N.W.
Washington, D.C. 20429

Re: Financial Institutions Letter (FIL) 51-2015: Request For Comment on Frequently Asked Questions Regarding Identifying, Accepting, and Reporting Brokered Deposits

Dear Ms. Eberley:

Compass Bank ("BBVA Compass" or the "Company"), Birmingham, Alabama, greatly appreciates this opportunity to comment on the Federal Deposit Insurance Corporation's ("FDIC" or the "Corporation") proposal to update its frequently asked questions "Regarding Identifying, Accepting, and Reporting Brokered Deposits" (the "FAQs").[1] BBVA Compass commends the FDIC's efforts on this important subject and its consideration of industry comments as part of this process.

BBVA Compass is a Sunbelt-based, commercial bank wholly owned by BBVA Compass Bancshares, Inc. , Houston, Texas, a registered bank holding company which, in turn, is wholly owned by Banco Bilbao Vizcaya Argentaria, S.A., Madrid, Spain (NYSE: BBVA) (MAD: BBVA). BBVA Compass has approximately $85 billion in assets, operates more than 650 branches in Alabama, Arizona, California, Colorado, Florida, New Mexico and Texas, and is among the 25 largest U.S. insured depository institutions based on deposit market share.

Since the enactment, in 1989, of the Federal Deposit Insurance Act's (the "FDI Act") provision governing brokered deposits (Section 29[2]), the financial services industry and the regulation of it have

[1] Federal Deposit Insurance Corporation, Financial Institutions Letter (FIL) 51-2015 (FAQ), FDIC Comment on Frequently Asked Questions Regarding Identifying, Accepting, and Reporting Brokered Deposits (November 13, 2015), available at: https://www.fdic.gov/news/news/financial/2015/fil15051.html.

[2] 12 U.S.C. § 1831f.

undergone significant evolution, and the pace of change in this industry is only accelerating. It was difficult, even for the most forward-looking bank regulator or financial services executive, to imagine at the time of Section 29's enactment, which also happened to be the year in which a British computer scientist published a proposal for what would become the World Wide Web, the extent to which advancements in technology would affect the provision of banking services.

BBVA Compass is keenly aware of the impact that technology has had and will continue to have on the financial services industry. Rather than ignore or resist these inevitable effects, BBVA Compass embraces technological change and seeks to leverage it for the benefit of the Company's customers and those who may become the Company's customers through such technological developments. In so doing, not only does BBVA Compass expend considerable effort striving to develop new technologies and processes, it is constantly evaluating the products and services being developed by a new breed of financial services providers that are rapidly changing the financial services landscape. The Company's affiliation with so-called "fintech" companies, either through contractual partnerships or acquisitions, have been and are likely to continue to be an integral component of the Company's strategy of harnessing technology for the benefit of consumers, including the unbanked and underbanked.

There are two areas in which BBVA Compass is particularly concerned that the proposed FAQs go beyond the statutory provisions of Section 29 and risk stifling such innovation. The first is in the broad use of the term "affiliates" in the proposed FAQs, which we believe results in the inappropriate treatment of operating subsidiaries of insured depositary institutions ("IDIs") as deposit brokers.[3] The second relates to how the proposed FAQs impact the primary purpose exception.

Proposed FAQ E2 Should Clarify that Operating Subsidiaries of IDIs fit within the IDI Exception

Section 29 defines a "deposit broker" in relevant part as "any person engaged in the business of placing deposits, or facilitating the placement of deposits, of third parties with insured depository institutions."[4] For purposes of Section 29, a "brokered deposit" is, essentially, a deposit received by an IDI from a deposit broker. Explicitly excluded from the statutory definition of deposit broker is "an insured depository institution, with respect to funds placed with that depository institution" (the "IDI

[3] Designating deposits as brokered deposits can have material collateral consequences, such as negative impacts to the Liquidity Coverage Ratio, increased FDIC deposit insurance assessments, a higher net non-core funding dependency ratio and its effect on a bank's net debit cap, and negative impacts on credit ratings assigned to an institution by the credit rating agencies. As some of the more significant of these consequences have been described to the FDIC elsewhere, the Company will not discuss them here. *See, e.g.,* Letter to Charles Yi, General Counsel, Federal Deposit Insurance Corporation, from The Clearing House Association L.L.C., the American Bankers Association, and the Institute of International Bankers (August 11, 2015), available at: https://www.theclearinghouse.org/~/media/action%20line/documents/20150811%20tch%20letter%20to%20fdic%20re%20brokered%20deposits.pdf.

[4] 12 U.S.C. § 1831f(g)(1)(A).

Exception").[5] In addressing the IDI Exception, the proposed FAQs, in FAQ E2, conclude that the IDI Exception does not apply to a company affiliated with the IDI, including the IDI's "parent or subsidiary." BBVA Compass respectfully submits that this FAQ goes beyond the requirements of Section 29 and for at least one subset of "affiliates" of IDIs, operating subsidiaries ("Op Sub"),[6] the IDI Exception should be applicable because an Op Sub is substantively no different than an unincorporated division of the IDI for purposes of the brokered deposit issues.[7]

As contrasted with other types of IDI affiliates, an Op Sub is under the exclusive control of the IDI parent, engages only in activities in which the parent IDI is legally permitted to engage directly, is subject to the same regulatory oversight as the IDI parent, and consolidates its financials with those of its IDI parent. An Op Sub is, for all intents and purposes, the equivalent of an operating division of the IDI parent but which, for specific business reasons, is operated through a legal entity separate and distinct from its parent.[8] As the equivalent of an "operating division" of the IDI parent, it is our contention that deposits generated by an Op Sub are the equivalent of deposits generated by the IDI parent and that the IDI Exception should, therefore, be applicable.

Additionally, treating an Op Sub as a deposit broker when it places or facilitates the placement of deposits with its parent IDI achieves no substantive purpose. The only basis for such treatment would be the Op Sub's status as a separate legal entity. Without question, if the activities of an Op Sub were conducted through an unincorporated division of its parent IDI, rather than through a separate legal

[5] *Id.* § 1831f(g)(2)(A).

[6] For purposes of this comment letter, an Op Sub of an IDI is a company wholly owned by an IDI that engages only in activities that the parent IDI is permitted to engage in directly. *See, e.g.,* 12 C.F.R. § 225.22(e)(2) (Federal Reserve Board permits, without need for regulatory approval, a state bank "to [a]cquire or retain all (but, except for directors' qualifying shares, not less than all) of the securities of a company that engages solely in activities in which the parent bank may engage, at locations at which the bank may engage in the activity, and subject to the same limitations as if the bank were engaging in the activity directly").

[7] It is worth noting that in neither the advisory opinion cited in FAQ E2, Advisory Opinion No. 92-68 (October 21, 1992), nor in the Corporation's July 2011 Study on Core Deposits and Brokered Deposits, Section VIII.E, did the affiliations at issue involve an IDI – Op Sub relationship. In addition, in our review of applicable Corporation guidance we were unable to find an analysis of the brokered deposit issue in the IDI – Op Sub context.

[8] Other federal financial regulators equate an operating subsidiary (also known as an "operations subsidiary") to a division of the parent bank. *See, e.g.*, 12 C.F.R. § 250.141 ("The Board [the Federal Reserve Board] now considers that the incidental powers clause permits a bank to organize its operations in the manner that it believes best facilitates the performance thereof. One method of organization is through departments; another is through separate incorporation of particular operations. In other words, a wholly owned subsidiary corporation engaged in activities that the bank itself may perform is simply a convenient alternative organizational arrangement"); *see also*, 12 C.F.R § 7.4006 (interpreted to mean national bank operating subsidiaries are in effect incorporated departments of the bank by Office of the Comptroller of the Currency Letter from Julie L. Williams, First Senior Deputy Comptroller and Chief Counsel, to [] (February 2003), available at: http://www.occ.gov/static/interpretations-and-precedents/feb03/int954.pdf).

entity, the IDI Exception would apply. Thus, in the context of an existing parent IDI – Op Sub relationship that gives rise to brokered deposit issues under the Corporation's guidance contained in FAQ E2, such issues can be eliminated entirely by the relatively straightforward process of combining the Op Sub with the parent IDI.

In light of the strategy articulated previously, the Company's decisions concerning organizational structures are based upon material business considerations, and organizational flexibility is of great value as the Company strives to create new and better ways to provide financial services to its customers and effectively compete in the rapidly changing financial services marketplace. It would be unfortunate for such important business objectives to be frustrated as a result of interpretations contained in the FAQs that militate in favor of structures that have the potential to undermine these important business objectives while furthering no meaningful regulatory purpose.

In conclusion, it is our belief that the FDIC's position, as reflected in FAQ E2, has the effect of defining deposit brokers in the affiliate context too broadly, and more broadly than required by FDI Act Section 29, by overlooking the distinctions between Op Subs of IDIs and other types of affiliates. We therefore respectfully request that the Corporation consider clarifying in FAQ E2 that the IDI Exception applies to Op Subs of IDIs.

Proposed FAQ E7 Should Not Narrow the Primary Purpose Exception

Section 29 creates an exception to the definition of deposit broker for "[a]n agent or nominee whose primary purpose is not *the placement of funds* with depository institutions" (the "Primary Purpose Exception").[9] In addressing the Primary Purpose Exception, proposed FAQ E7 provides:

> "[t]his exception is applicable when the intent of the third party, in placing deposits *or facilitating the placement of deposits*, is to promote some other goal (i.e., other than the goal of placing deposits for others). The primary purpose exception is not applicable when the intent of the third party is to earn fees through the placement of the deposits" (emphasis added).

It is our belief that FAQ E7 inappropriately narrows the applicability of the Primary Purpose Exception in two ways: (1) by including "facilitating the placement of deposits" in its description of the exception; and (2) by foreclosing the exception's applicability when a third party intends to earn fees through deposit placement.

Section 29 and its implementing regulation differentiate "placing" deposits from "facilitating the placement of" deposits by including both activities in the definition of "deposit broker."[10] The FAQs also distinguish "placing deposits" from "facilitating the placement" of deposits by defining those

[9] 12 U.S.C. § 1831f(g)(2)(I) (emphasis added). *See also* 12 C.F.R. § 337.6(a)(5)(ii)(I).

[10] 12 U.S.C. § 1831f(g)(1)(A) ("any person engaged in the business of placing deposits, or facilitating the placement of deposits, of third parties with insured depository institutions"); *see also* 12 C.F.R. § 337.6(a)(5)(i)(A).

phrases.[11] By including the phrase "or facilitating the placement of deposits" when describing the applicability of the exception, the FAQs narrow its applicability in a manner that is contrary to the plain language of the statutory and regulatory text. Per the statutory and regulatory text, the exception applies to any "agent or nominee" whose primary purpose is not "the placement of funds." Thus, the exception should be available to an agent or nominee whose primary purpose is to "facilitate the placement of deposits."

It is important to note that the exception is only available to "agents or nominees" and is not available to any third party. It was reasonable for Congress to limit the Primary Purpose Exception's broad applicability to agents and nominees because those relationships expand the liability of the IDI and render the agent/nominee essentially a part of the IDI itself (with respect to the customers at issue).

The FAQs, as a result of the previously cited language contained in FAQ E7, would also foreclose the Primary Purpose Exception to any entity when "the intent of the third party is to earn fees through the placement of the deposits." This language is not part of the exception set forth in the statute or the regulation. Moreover, the statutory and regulatory definition of deposit broker explicitly provides that the agent or nominee is "*engaged in the business of* [*i.e.*, intentionally earning money from] placing deposits or facilitating the placement of deposits" (emphasis added).[12] In fact, the FDIC has applied the Primary Purpose Exception in instances where the relevant entity earned fees.[13] As a result, we believe that it is inappropriate for the FAQs to foreclose the availability of the exception to an entity simply because that entity intends to earn fees through the activity in question.

* * *

In conclusion, BBVA Compass is concerned about the interpretations contained in the FAQs that classify brokered deposits in an overly broad manner through overly narrow interpretations of the IDI Exception and the Primary Purpose Exception. We believe that this issue is more critical than ever in light of the innovation underway in the financial services arena, the great possibilities that innovation holds for consumers, and the negative impact that such classifications can have on the Company's ability to thrive in such an environment. We respectfully request, therefore, that the FDIC consider clarifications of the FAQs in a manner that would address the aforementioned concerns.

---

[11] In answering the question, "what activity qualifies as 'placing deposits'?", the proposed FAQs state that "[a] third party 'places deposits' for others when the third party actually delivers the funds to an insured depository institution." FAQs at B1. *Compare* FAQs at B2 ("[w]hen a third party takes any actions that connect an insured depository institution with depositors or potential depositors, the third party may be 'facilitating the placement of deposits'").

[12] 12 U.S.C. § 1831f(g)(1)(A); *see also* 12 C.F.R. § 337.6(a)(5)(i)(A).

[13] *See, e.g.*, Advisory Opinion No. 05-02 (February 3, 2005).

BBVA Compass appreciates the opportunity to comment on the FAQs. We welcome the opportunity to discuss these issues with you in greater detail if doing so would be of use to you in your consideration of proposed revisions of the FAQs generally or your consideration of the proposed clarifications requested herein.

Very truly yours,

Eric J. Dyas

Eric J. Dyas
Assistant General Counsel