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November 20, 2024

James P. Sheesley, Assistant Executive Secretary,
Attention: Comments RIN 3064-AF-99,
Federal Deposit Insurance Corporation
550 17th Street, N.W., Washington, D.C. 20429.

Dear Mr. Sheesley

The Electronic Transactions Association ("ETA") respectfully submits these comments in response to the Federal Deposit Insurance Corporation (FDIC) request for public comment on its proposed rule concerning brokered deposits.

ETA is the world's leading advocacy and trade association for the payments industry. Our members span the breadth of significant payments and fintech companies, from the largest incumbent players to the emerging disruptors in the U.S and in more than a dozen countries around the world. ETA members make commerce possible by processing more than $47 trillion in purchases worldwide and deploying payments innovation to merchants and consumers.

Receipt of Fees or Other Remuneration is Insufficient to Warrant Treatment as a Deposit Broker

Under the current FDIC rules, a person is engaged in "the business of facilitating the placement of deposits" if the person: (i) has legal authority, contractual or otherwise, to close the account or move a third party's funds to another IDI; (ii) is involved in negotiating or setting rates, fees, terms, or conditions for the deposit account; or (iii) engages in matchmaking activities (the "Three-Part Test").[1] Under the NPRM, the FDIC would expand this definition, among other things, to include a "person [that] has a relationship or arrangement with an [IDI] or customer where the [IDI] or customer pays the person a fee or provides other remuneration in exchange for deposits being placed at one or more [IDIs]."[2] The NPRM states that, even "assuming the third party does not meet one of the other parts of the 'deposit broker' definition," where an IDI pays fees to a third party relating to deposits, the third-party deposits "may be more likely to leave the IDI if another IDI were to offer more favorable terms or pay a higher fee."[3] In other words, the NPRM asserts that the receipt of a fee or other remuneration in connection with deposits, by itself, is sufficient to treat the deposit as less stable and more susceptible to being moved from one IDI to another. This change alone highlights the flaws in the FDIC's dramatic proposed change to its brokered deposit rules discussed above; a change for which the FDIC offers no supporting evidence and a

[1] Id. § 337.6(a)(5)(iii).
[2] 89 Fed. Reg. at 68,271 (proposed 12 C.F.R. § 337.6(a)(ii)(E)).
[3] Id.

fundamentally flawed rationale that ignores the statutory requirement that a deposit broker be "engaged in the business of placing or facilitating the placement of deposits."

Historically, the concern with brokered deposits is that they may be less stable sources of bank funding and therefore create greater risk for IDIs. As the FDIC explained in the NPRM, brokered deposits raised concerns by regulators and Congress because "(1) such deposits could facilitate a bank's rapid growth in risk assets without adequate controls; (2) once problems arose, a problem bank could use such deposits to fund additional risk assets . . . ; and (3) brokered and high-rate deposits were sometimes considered less stable because at the time, deposit brokers (on behalf of customers), or the customers themselves, were often drawn to high rates and prone to leave the bank quickly to obtain a better rate or if they became aware of problems at the bank."[4] The Three-Part Test was carefully designed to address these risks.

However, when the FDIC updated its brokered deposit regulation in 2020, it did not include the receipt of fees or remuneration as a factor in determining whether a person is a deposit broker. At that time, the FDIC concluded that the receipt of fees or other remuneration, in the absence of a person's authority to move deposits, set rates, or allocate deposits among IDIs, did not create the kinds of risks associated with brokered deposits. The NPRM, without evidence that the payment of fees to intermediaries has affected the stability of referred deposits, would reverse this position.

In particular, the NPRM cites not a single example to explain how, in the absence of the criteria in the Three-Part Test, the receipt of fees or other remuneration correlates to the risks associated with brokered deposits. Instead, the NPRM posits an unstable market in which IDIs are bidding for deposits by paying fees to intermediaries in a manner that results in dramatic swings in deposit availability that threaten IDI safety and soundness. If mere payment of compensation in connection with the administration of a referral program were sufficient to cause such instability, we assume the FDIC would have provided ample evidence of such results. The absence of such evidence is telling.

Indeed, it is not the receipt of a fee or other remuneration that makes a deposit riskier; rather, the increased risk associated with brokered deposits arises from the power of a person to control the movement of deposits on a day-to-day basis. That risk does not exist when IDIs pay a fee to a person for an arrangement in which the person <u>does not</u>: (i) have legal authority to close an account or move a third party's funds to another IDI; (ii) have any role in negotiating or setting rates, fees, terms or conditions of a deposit account; or (iii) engage in matchmaking. In other words, the receipt of fees cannot "incentiviz[e] referral volume of third-party deposits to" IDIs without satisfying another element of the existing Three-Part Test.

The flaws in the FDIC's rationale for this change are further highlighted by its overreach. For example, the FDIC asserts that the mere receipt of a fee somehow would result in a person being a deposit broker, even if the fee is merely "related to" the placement of deposits because receipt of a fee is somehow evidence that the intermediary is "engaged in the business" of facilitating the

[4] <u>Id.</u> at 68,245.

placement of deposits.[5] The FDIC asserts this is true even if the fees are merely for "administrative services provided in connection with a deposit placement arrangement."[6]

Not only is compensation for administration unrelated to the risks identified above, the FDIC itself recognized in the NPRM that the acceptance of fees, in the absence of the authority to move funds, does not make a deposit riskier. The NPRM states that a passive listing service that receives fees or remuneration would not be considered a deposit broker because passive listing services: (i) do not "receive or deposit third-party funds at one or more IDIs"; (ii) do not "have the legal authority to close a deposit account or move third party's funds to another IDI"; and (iii) "are not involved in negotiation or setting rates, fees, terms or conditions for the deposit account."[7] In other words, in the absence of meeting the other parts of the definition of a deposit broker, the receipt or payment of fees by a passive listing service, by itself, does not make the associated deposits more risky and does not result in such deposits being considered brokered deposits. The NPRM is thus inconsistent on this basic element of the rationale for treating receipt of fees automatically as a brokered deposit trigger.

Overall, the NPRM will result in a substantial amount of deposits being treated as brokered deposits rather than core deposits, based solely on the receipt of a fee or other remuneration, even where a third party does not otherwise satisfy the Three-Part Test, and thus do not present any of the risks associated with brokered deposits. This change will limit the number of banks that can accept these deposits and increase the cost to banks that are able to accept such deposits (e.g., through higher FDIC insurance premiums, higher funding costs for IDIs subject to certain liquidity requirements). The FDIC acknowledges that the NPRM is also likely to impact third parties that provide services to customers, who may now be considered deposit brokers, which may result in changes in fees and revenue structure that would have an impact on the cost to consumers.[8] All of

[5] Id. at 68,252.
[6] Id.
[7] Id.
[8] See, e.g., id. at 68,259 ("One likely aggregate effect of the proposed changes is that some deposits currently not reported as brokered would be reported as brokered deposits if the proposal is adopted. This may potentially affect IDIs, consumers, and nonbank firms that may be considered 'deposit brokers' under the proposal."); see also id. at 68,261 ("To the extent that consumers utilize deposits currently, or in future periods, which are not classified as brokered, but would be as a result of the adoption of the proposed rule, they might experience changes in interest rates on those funds, or costs associated with placing those funds with different entities.").

these changes will result from the NPRM, with no actual benefit in terms of limiting the risks associated with brokered deposits.

For these reasons, we respectfully urge the FDIC not to amend its brokered deposit regulations to define a deposit broker as a person who receives a fee or other remuneration in connection with the placement of a deposit.

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We appreciate your taking the time to consider these important issues. If you have any questions or wish to discuss any issues, please let me know.

Scott Talbott
EVP
Electronic Transactions Association