November 21, 2024

Via Electronic Submission
Federal Deposit Insurance Corporation
Attn: James P. Sheesley, Assistant Executive Secretary
RIN 3064-AF99
550 17th Street, N.W.
Washington, D.C. 20429

FTA Comment Letter re: the FDIC's Request for Comment on its Brokered Deposit Notice of Proposed Rulemaking (Docket No. FDIC-2024-0072-0001)

The Financial Technology Association ("FTA") appreciates the opportunity to respond to the Federal Deposit Insurance Corporation's ("FDIC") Notice of Proposed Rulemaking (the "Proposal") regarding brokered deposits.[1] FTA is a trade association representing industry leaders shaping the future of finance. We champion the power of technology-centered financial services and advocate for the modernization of financial regulation to support inclusion and responsible innovation.

Following the earlier submitted Joint Trades Request to Withdraw the Proposal, or in the Alternative, to Extend the Comment Period[2]—an unprecedented and coordinated effort across 11 fintech and bank trade organizations—FTA submits this comment letter and joins in the Joint Trades Response concurrently filed by seven trade associations (the "Joint Trades Comment"), representing a wide swath of the bank-fintech industry.

Our message is this: any final rule based on the Proposal would be ill-conceived. It would be arbitrary and capricious, violate the Administrative Procedure Act ("APA"), and raise serious legal and policy issues. The result: a chokepoint of bank-fintech partnerships that would have wide-ranging and significant impacts on businesses and put at risk consumers' access to financial services, without any benefit to safety and soundness. Therefore, the Proposal should either be withdrawn or reproposed in its entirety, consistent with the APA and based on recent and relevant data.

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[1] Unsafe and Unsound Banking Practices: Brokered Deposits Restrictions, 89 Fed. Reg. 68,244 (proposed Aug. 23, 2024) (to be codified at 12 CFR pts. 303, 337), https://www.federalregister.gov/documents/2024/08/23/2024-18214/unsafe-and-unsound-banking-practices-brokered-deposits-restrictions.

[2] *See* Joint Trades, Comment Letter on Proposed Rulemaking, Unsafe and Unsound Banking Practices: Brokered Deposits Restrictions; Request for Extension of Comment Period (Aug. 21, 2024) (the "Joint Trades Extension Request"), https://www.ftassociation.org/wp-content/uploads/2024/08/Joint-Trades-Brokered-Deposits-Extension-Request-8.21.24.pdf.

The Proposal would roll back the FDIC's laudable efforts in 2020 to modernize its treatment of brokered deposits (the "2021 Rule").[3] The 2021 Rule was the product of an extensive, multiyear process with several rounds of public comment, along with an extended comment period (from 60 days after publication in the Federal Register to 120 days).[4] FTA is highly concerned that the Proposal, if it were to become a final rule, would have a meaningful chilling effect on the bank-fintech ecosystem, significantly impacting a wide array of fintechs, banks, broker dealers and investment advisers, consumers, and businesses:

- Current and future banking partners—to the extent the latter could be sourced—could unduly restrict the onboarding of certain customers or significantly alter existing contractual arrangements, limiting product growth and introducing uncertainty in fintechs' ability to continue servicing consumers and businesses;

- Costs to fintechs would significantly increase—without any corresponding benefit—to the extent that they would be considered "deposit brokers" and partner banks are:

    - forced to pay higher deposit insurance assessments as a result of revamped brokered deposit treatment;
    - forced to offer a lower total cost of funds on certain deposits, consequently reducing the program interest rate that fintechs are able to offer on such deposit accounts;
    - forced to terminate the partnership because it is no longer economically viable for the bank;
    - forced to terminate the partnership because it is discouraged from a supervisory perspective; and/or
    - no longer able to rely on a primary purpose exception ("PPE") (or experience undue delay in obtaining FDIC approval).

- Costs to consumers would also meaningfully increase. Those consumers who depend on access to the financial services provided by bank-fintech partnerships could—as the FDIC acknowledges—"experience changes in interest rates on those funds, or costs associated with

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[3] Unsafe and Unsound Banking Practices: Brokered Deposits and Interest Rate Restrictions, 86 Fed. Reg. 6,742 (Jan. 22, 2021) (codified at 12 CFR pts. 303, 337).

[4] FDIC, FIL-34-2020, FDIC Extends Comment Period Related to the Proposed Revisions to the Brokered Deposits Rules (Apr. 3, 2020), https://www.fdic.gov/news/financial-institution-letters/2020/fil20034.html.

placing those funds with different entities," reducing the affordability of these products, including to the underbanked.[5]

- Community banks who partner with fintechs (i.e., those under $10 billion in assets) are likely to bear the greatest disproportionate impacts across the banking industry, both as a function of their relatively limited resources and the ongoing challenges the vast majority of them face in sourcing core deposits;[6]

- Well-rated, healthy banks would be discouraged from holding a diverse funding mix[7] and meeting the everyday needs of their customers, presenting broader safety and soundness risks; and

- Less than well-capitalized banks that today rely on low-cost, stable fintech-sourced deposits could face even greater liquidity stress if those deposits are later deemed brokered, presenting broader safety and soundness risks.

Given these various factors, there is a high likelihood that partner banks would be unwilling or unable to continue their partnership arrangements with fintechs, thereby disrupting the industry and negatively impacting customers' access to financial services. In fact, bank-fintech partnerships are a significant reason why eight in ten Americans can use a fintech app to send, manage, save, and invest their money with confidence. They also power tens of millions of small businesses that depend on fintech to access capital and the financial tools for success. Such partnerships are responsible for filling gaps in credit markets for underserved consumers and small businesses, reducing or

5 Proposal at 68,261; *see also* FDIC, HOW AMERICA BANKS: HOUSEHOLD USE OF BANKING AND FINANCIAL SERVICES 10 (2019), https://www.fdic.gov/analysis/household-survey/2019report.pdf ("[S]ome [unbanked] households do not have an account at a federally insured depository institution. Other households have an account but also use nonbank financial products or services."). An estimated 5.4 percent of U.S. households were "unbanked" in 2019 (or approximately 7.1 million U.S. households). *Id.* at 1. About half of unbanked households cited "[d]on't have enough money to meet minimum balance requirements" as a reason for not having a bank account, and approximately one-third of unbanked households cited "[d]on't trust banks" as a reason for not having an account. *Id*. at 3.

6 Vincent Brennan, *What Challenges Are Community Banks Facing in 2023?*, FED. RSRV. BANK ST. LOUIS (Dec. 20, 2023), https://www.stlouisfed.org/open-vault/2023/december/challenges-facing-community-banks-2023 (noting that nearly 84% of surveyed banks named core deposit growth as either an "extremely important" or "very important" risk).

7 *See* FDIC, FIL-39-2023, Updated Guidance: Interagency Policy Statement on Funding and Liquidity Risk Management on the Importance of Contingency Funding Plans (July 28, 2023), https://www.fdic.gov/news/financial-institution-letters/2023/fil23039.html (noting the importance of diversified funding sources as a primary tool for measuring and managing liquidity risk).

eliminating overdraft fees through greater competition, and reducing friction, time, and cost—while enhancing access—to payments services.[8]

Moreover, despite its strained comparisons, the Proposal does nothing to address any of the root causes of the 2023 bank failures, crypto company bankruptcies, or the evolving Synapse situation. The 2023 bank failures were primarily a result of supervisory lapses, interest rate risk, and large amounts of uninsured deposits.[9] The crypto company bankruptcies were primarily a result of fraud and gross mismanagement. And the Synapse bankruptcy is a result of, among other things, a highly complex business model, gross mismanagement, partner bank lapses, and account ledgering lapses, the latter of which form the basis of a separate FDIC notice of public rulemaking.[10] The FDIC acknowledges that neither deposit brokers[s] nor brokered deposits were at issue in the Voyager bankruptcy; official post-mortem reviews of the failures of Silicon Valley Bank and First Republic found that their failures were due to the mismanagement of interest rate, liquidity, and other risks rather than any brokered deposit problem.[11] Therefore any references to 2023 bank failures, crypto company bankruptcies, or the Synapse implosion appear to be—in the absence of any supporting data and analysis provided by the FDIC—a passing distraction.

As discussed below in Section I and detailed in the Joint Trades Comment, there are also material procedural deficiencies with the Proposal. At bottom, the Proposal lacks any recent or relevant qualitative data and analysis. It states (without evidence) that there is a low level of "stickiness" associated with exclusive deposit arrangements. On the contrary, funds held by fintech partner banks are typically stable deposits, both through exclusive and multiple bank deposit arrangements. This conclusion is not only supported by deposit behavior—it is also evidenced by the fact that moving a fintech program from one bank to another is an arduous, time-consuming process that can take at least one year. It involves, among other things, technical integrations and reconfiguring systems, negotiating new transactional documents and customer disclosures, supervisory engagement for the partner bank, satisfying due diligence and onboarding processes, gathering consumer consents, and in some instances, changing routing numbers and reissuing cards.

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[8] Plaid, *The Fintech Effect 2023: Consumer insights reveal growth opportunities ahead*, https://plaid.com/blog/consumer-insights-reshaping-finance/ (last visited Oct. 4, 2024).

[9] Michael J. Hsu, Acting Comptroller of the Currency, *Systemic Risk and Crossing the Hellespont* (Oct. 25, 2024) ("Last year's [2023] banking turmoil, for instance, was driven by three known knowns: ***interest rate risk***, ***liquidity risk***, and the ***concentration*** of both in certain banks.") (emphasis in original), https://www.occ.treas.gov/news-issuances/speeches/2024/pub-speech-2024-121.pdf.

[10] *See* Recordkeeping for Custodial Accounts, 89 Fed. Reg. 80,135 (Oct. 2, 2024).

[11] *See* FDIC, FDIC'S SUPERVISION OF FIRST REPUBLIC BANK, 2–3 (2023), https://www.fdic.gov/sites/default/files/2024-03/pr23073a.pdf.

Moreover, during the SVB and Signature failures in 2023, FTA members did not see meaningful outflows in these banks' deposits. On the contrary, for sweep programs offered by broker dealers and registered investment advisers ("RIAs"), the availability of FDIC insurance fostered stickiness in these deposits. Where accounts were subject to FDIC insurance, there was no logical reason for depositors to pull their funds. The only statistical analysis cited in the Proposal is the Study on Core and Brokered Deposits from 2011 ("FDIC Study"), with data updated through 2017, predating the 2021 Rule by three years.[12] In fact, the 2021 Rule largely got it right—it brought needed clarity to banks and fintechs that has allowed innovative products to come to market and benefit consumers and businesses, without creating any market-wide dislocation, safety and soundness, or financial stability concerns. Nevertheless, many banks' perception of brokered deposits have not changed—i.e., FTA members have had to continually deal with bank partners that are made unreasonably skittish by regulators, even though the FDIC previously went to great lengths to state that brokered deposits should not be disfavored.[13]

Section II below describes certain key provisions discussed in the Proposal, and their likely impacts on fintechs and bank-fintech partnerships broadly. In particular, FTA focuses on (i) amendments to the definition of "deposit broker"; (ii) elimination of the exclusive deposit arrangement exception; (iii) elimination of the enabling transactions designated business exception; and (iv) amendment of 25 percent of assets designated business exception to be for only entities with assets under management and the related reduction in threshold.

Section III answers specific questions posed by the FDIC, noting a common flaw and persistent theme throughout the Proposal: the FDIC's glaring admission that "the FDIC does not have the information to estimate [any of the] changes [in the organizational structure of IDIs] or attendant costs"[14] to the wide variety of stakeholders impacted by the Proposal.

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[12] Proposal at 68,246; FDIC, Study on Core Deposits and Brokered Deposits (July 8, 2011), https://www.fdic.gov/regulations/reform/coredeposit-study.pdf.

[13] FDIC Study at 3 ("FDIC examiner guidance states that there should be no particular stigma attached to the acceptance by well-capitalized banks of brokered deposits per se and that the proper use of such deposits should not be discouraged.").

[14] *See also* Proposal at 68,259–60 ("The FDIC does not have the data to estimate the amount of deposits that would be reclassified as brokered by the proposed rule at particular IDIs, nor how many IDIs, if any, might make changes to the structure of their liabilities"); *id.* at 68,260 ("The FDIC does not have the data to estimate the amount of deposits that would be reclassified as brokered by the proposed rule at individual IDIs, and thus cannot estimate how many IDIs, if any, may incur costs associated with maintaining compliance with, or maintaining management buffers relative to, these regulatory ratios because of the proposed rule."); *id.* ("The FDIC does not have the data to be able to reliably estimate the costs associated with these changes, but expects that they are likely to be modest."); *id.* at 68,261 ("The FDIC does not have the information necessary to quantify the potential changes in filings that are likely to occur if the proposed rule was adopted."); *id.* at 68,264 ("The FDIC does not have data to be able to reliably estimate the amount of deposits that would be re-classified as brokered under the proposed rule."); *id.* at 68,265 ("The FDIC does not have information on the number

In Section IV, FTA concludes by urging the FDIC to either withdraw the Proposal given the absence of data and sufficient rationale for upending the brokered deposit framework, or re-propose a new rule that complies with the APA. In the alternative, should the FDIC proceed with a final rulemaking despite the procedural and legal infirmities laid bare by the Proposal, FTA proposes the following changes:

1. Revise the definition of "deposit broker" in section 337.6 to restore the 2021 Rule's exclusion for exclusive deposit arrangements. Not only are these deposits stable, but also at the FDIC Board meeting where the Proposal was voted on, FDIC staff confirmed that the decision to no longer carve out exclusive deposit relationships was not based on data, but instead supervisory experience regarding "growth," "behaviors," and "legal and operational liquidity risk."[15] This change would entail deleting proposed section 337.6(a)(5)(ii)(A) in its entirety.

2. Eliminate the "catch all" language in section 337.6(a)(5)(ii)(E), which significantly broadens the "engaged in the business of" definition by covering receipt of fees or "other remuneration in exchange for deposits being placed at one or more [IDI]." This would include any type of fee or renumeration, including the receipt of fees for administrative services, which would effectively render all fintechs a "deposit broker" under section 337.6(a)(5)(ii).

3. Restore the original PPE language in section 337.6(a)(iv)(I), or alternatively clearly explain how a person's purpose in placing customer deposits at an IDI could be "primary" but not also "substantial." The proposed amendment is confusing and would be exceedingly difficult for parties to understand how the FDIC would implement it on any rational or consistent basis.

4. Restore the ability for fintechs and other third parties (collectively, "applicants") in section 303.243(b) to file PPE applications—but in consultation with their respective bank partners—to minimize the stated risk of applicants providing "insufficient information." This change would entail replacing the existing language in this section with "for an agent or nominee, in consultation with an insured depository institution . . ."

5. Grandfather previously approved PPE applications and notices under the 2021 Rule at least until updated PPE applications are reviewed and determined under any final rule stemming from the Proposal. Rescinding previously approved exemption applications upon the effective

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or size of potentially affected third parties; however, the FDIC believes it is likely that some affected third parties may be small entities.").

[15] *See FDIC Board Meeting*, at 00:48:00 (July 30, 2024), https://www.fdic.gov/news/board-matters/2024/board-meeting-2024-07-30-1open.

date of any final rule would upend banks' existing arrangements with fintechs and hamper parties' ability to transition their relationships in a safe and sound manner.[16]

6. Restore the "25% percent test" threshold from the 2021 Rule such that the primary purpose of an agent's or nominee's business relationship with its customers would not be considered 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. Despite the FDIC's stated concerns regarding IDIs misreporting or misapplying the 25 percent test, the FDIC has put forth no data to conclude why 10 percent is the appropriate test, or why the test needs to be changed at all. Indeed, to the extent there is any rational basis for including a threshold, that primary purpose percentage should be 50 percent—i.e., an entity's primary purpose cannot be placing deposits if more than half the total assets under administration are not funds at IDIs. Without more, the FDIC's proposal to lower the threshold (and thereby narrow the exception) is arbitrary and capricious and upsets existing reliance interests by parties since the issuance of the 2021 Rule.

7. Restore the enabling transactions designated exception from the 2021 Rule. The FDIC should allow deposits to remain exempt from being considered brokered deposits if 100 percent of customer funds placed at an IDI, for a particular business line, are placed into transaction accounts, and no fees, interest, or other remuneration is provided to the depositor. This exception is intended to apply to third parties whose business purpose is to place funds at IDIs to enable transactions or make payments. The FDIC has put forth no evidence to conclude that these third-party deposits are volatile or unstable. Instead, the FDIC seeks to justify elimination of the enabling transactions exception by relying on an unclear amendment to the PPE language in section 337.6(a)(iv)(I) (see above), which without more, would be confusing for parties to implement and would grant the FDIC potentially unfettered discretion to determine its scope.

8. Include a process by which banks and third parties request waivers from brokered deposit treatment. Adequately capitalized banks may request waivers from the FDIC to accept brokered deposits, which the FDIC may grant if such acceptance "does not constitute an unsafe or unsound practice with respect to such institution."[17] Similarly, banks and third parties should have the ability to request and receive waivers from brokered deposit treatment if the FDIC deems that the acceptance of the deposits does not constitute an unsafe or unsound practice with respect to the institution. The process for requesting these waivers should

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[16] Proposal at 68,257 ("Applications previously approved under this provision would be rescinded.").

[17] 12 CFR 337.6(c); *see also* Proposal at 68,249 n.64 (noting that the FDIC may "grant brokered deposit waivers for institutions that are classified as adequately capitalized").

parallel that of the process for requesting waivers to accept brokered deposits as outlined in 12 CFR 303.243.

I. The Proposal Significantly Alters the FDIC's Brokered Deposit Framework and Reverses Statutory Interpretations Without Providing Relevant Data or Analysis and a Reasoned Explanation for the Change.

The Proposal suffers from a lack of relevant data and analysis and a reasoned explanation for significantly changing the FDIC's existing brokered deposit framework. This is particularly concerning for at least two reasons: (i) there was an extensive, multiyear initiative that preceded the 2021 rulemaking—a process that included multiple rounds of public comment and outreach to industry, policymakers, and a variety of stakeholders; and (ii) if finalized, the Proposal is expected to have significant negative impacts on a wide range of banks, fintechs, businesses, and consumers.

In the absence of data and sufficient rationale for revising the brokered deposits framework, the Proposal should be withdrawn at least until the FDIC (i) engages in substantial gathering of information, conducts the necessary analysis, and makes both available to the public for comment; and (ii) completes its review of comments on the outstanding RFI on deposits[18] and RFI on bank-fintech arrangements.[19]

a. The Proposal, if Finalized, Cannot Carry the Force of Law Because the FDIC Has Neither Sufficiently Explained the Reasons Behind its Regulatory Policy Change--One that the Industry Has Relied on for the Past Four Years—Nor Relied on Relevant Data.

Regulations are procedurally defective where the underlying regulation undermines significant reliance interests in an industry without a sufficiently reasoned explanation. In *Encino Motorcars, LLC v. Navarro*, the Court found that the Department of Labor did not sufficiently explain the reasoning behind a regulatory policy change that had been relied upon by the retail automobile and truck dealership industry for decades.[20] In light of the serious interests at stake, the Court held that

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[18] Request for Information on Deposits, 89 Fed. Reg. 63,946 (Aug. 6, 2024) ("Deposits RFI"), https://www.federalregister.gov/documents/2024/08/06/2024-17298/request-for-information-on-deposits.

[19] Request for Information on Bank-Fintech Arrangements Involving Banking Products and Services Distributed to Consumers and Businesses, 89 Fed. Reg. 61,577 (July 31, 2024) ("Bank-Fintech RFI"), https://www.federalregister.gov/documents/2024/07/31/2024-16838/request-for-information-on-bank-fintech-arrangements-involving-banking-products-and-services.

[20] *Encino Motorcars, LLC v. Navarro*, 579 U.S. 211, 222–24 (2016) ("Encino Motorcars").

"[t]his lack of reasoned explication for a regulation that is inconsistent with the Department's longstanding earlier position results in a rule that cannot carry the force of law."[21]

One of the basic procedural requirements of administrative rulemaking is that an agency must give adequate reasons for its decisions.[22] Furthermore, the agency "must examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made."[23] That requirement is satisfied when the agency's explanation is clear enough that its "path may reasonably be discerned."[24] But where the agency has failed to provide even that minimal level of analysis, "its action is arbitrary and capricious and so cannot carry the force of law.[25]

Citing the FDIC Study, the Proposal states that "[t]he FDIC's statistical analyses and other studies have found that an IDI's use of brokered deposits in general is correlated with a higher probability of failure and higher losses to the DIF upon failure."[26] The statistical analyses (updated with data through 2017) and undefined "other studies" upon which the Proposal relies are neither current nor relevant to the deposit arrangements of today. In fact, the federal banking agencies' ("FBAs") Deposits RFI and Bank-Fintech RFI are a clear indication that the FBAs need additional current and relevant input on these deposit-placement related partnerships.[27] The Bank-Fintech RFI, for example, seeks to understand "the implications of such arrangements [and] whether enhancements to existing supervisory guidance may be helpful in addressing risks associated with these arrangements."[28]

The Proposal itself admits to a lack of current and relevant data that precludes any reasoned analysis. The Proposal puts the cart before the horse, unnecessarily risking an updated brokered deposits framework that the industry resoundingly agrees has worked safely and efficiently and that neither implicates safety and soundness or financial stability. At a minimum, should the FDIC seek to move forward with the Proposal, FTA strongly encourages the FDIC to provide additional data for public comment—i.e., relevant data to inform the public of the new facts and circumstances that, in the FDIC's view, support the Proposal.

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[21] *Id.* at 224.

[22] *Id*. at 221.

[23] *Id*. (quoting Motor Vehicle Mfrs. Assn. of United States, Inc. v. State Farm Mut. Automobile Ins. Co., 463 U.S. 29, 43 (1983)).

[24] *Id*. (quoting Bowman Transp., Inc. v. Arkansas-Best Freight System, Inc., 419 U. S. 281, 286 (1974)).

[25] *Id*.

[26] Proposal at 68,244.

[27] *See supra* notes 15–16 and accompanying text.

[28] Bank-Fintech RFI at 61,578.

As *Encino Motorcars* showed, when there is a regulatory policy change without even a minimal level of analysis, the agency's action is arbitrary and capricious. The Court explained:

> Agencies are free to change their existing policies as long as they provide a reasoned explanation for the change. When an agency changes its existing position, it need not always provide a more detailed justification than what would suffice for a new policy created on a blank slate. But the agency must at least display awareness that it is changing position and show that there are good reasons for the new policy. In explaining its changed position, an agency must also be cognizant that longstanding policies may have engendered serious reliance interests that must be taken into account. In such cases it is not that further justification is demanded by the mere fact of policy change; but that a reasoned explanation is needed for disregarding facts and circumstances that underlay or were engendered by the prior policy. It follows that an unexplained inconsistency in agency policy is a reason for holding an interpretation to be an arbitrary and capricious change from agency practice.[29]

b. The FDIC has Failed its General Obligation under the APA to Consider Costs, and Therefore any Final Rule Cannot be the Result of Reasoned Decisionmaking.

Agencies have a general obligation under the APA to consider costs when regulating. In *Michigan vs. Environmental Protection Agency et al. (Michigan v. EPA)*, the Court found that the EPA improperly excluded cost concerns from its decision to regulate hazardous air pollutants emitted from power plants.[30] The Court held that federal administrative agencies must engage in "reasoned decisionmaking," which requires the agency to consider costs when deciding to regulate.[31]

The FDIC states in at least 11 places that the agency "does not have the data" or "does not have the information" to estimate the cost, impact, or volume of changes that would be required.[32] For example, the Proposal acknowledges that the effects of the proposed changes may be significant, and that consumers who access services through affected relationships, "might experience changes in interest rates on those funds, or costs associated with placing those funds with different entities."[33] Yet the FDIC makes no effort to quantify those changes in rates and costs. By the FDIC's own glaring

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[29] *Encino Motorcars*, 579 U.S. at 221–22 (internal quotations and citations omitted).

[30] *Michigan v. EPA*, 576 U.S. 743 (2015).

[31] *Id.* at 750–51.

[32] *See* Proposal at 68,259–61, 68,264, 68,266; *see generally supra* note 14.

[33] Proposal at 68,261.

admission, the Proposal is bereft of relevant data on costs, and therefore, under *Michigan v. EPA*, cannot be the result of reasoned decisionmaking.

In short, the Proposal is arbitrary and capricious because it fails to (i) examine relevant and current data; (ii) articulate a satisfactory explanation for the Proposal; (iii) explain any rationale for disregarding the facts and circumstances that underlay the 2021 Rule; and (iv) consider the costs. The Proposal is based on conjecture and, read most generously, experience that the FDIC has presumably gained behind the scenes. The lack of any quantitative data undermines the integrity of the APA-mandated rulemaking process and hampers the ability of commenters to provide specific feedback. For these reasons alone, the Proposal, if finalized, cannot carry the force of law.

II. The Proposal Expands the Definition of "Deposit Broker" and Removes or Narrows the PPEs, Which Would Cause Massive Inefficiencies and Dislocation in the Market Without any Corresponding Benefit.

a. Exclusive deposit placement arrangements create stable deposits.

The current rule defines a "deposit broker" as a person engaged in the business of placing deposits or engaged in the business of facilitating the placement of deposits, among other prongs.[34] Each of those "engaged in the business" terms are further defined to mean activities involving deposits at "more than one insured depository institution."[35] Thus, if a person is engaged in placing or facilitating the placement of deposits at only one institution, that person would not be engaged in such business and, therefore, is not a deposit broker. This choice by the FDIC not to cover these activities is referred to as the "exclusive deposit placement arrangement exception."[36]

In 2020, after an extensive rulemaking process, the FDIC determined that:

> [A] number of entities, including some financial technology companies, partner with one insured depository institution to establish exclusive deposit placement arrangements. Under these arrangements, the third party has developed an exclusive business relationship with the IDI and, as a result, *is less likely to move its customer funds to other IDIs in a way that makes the deposits less stable*.[37]

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34 12 CFR 337.6(a)(5)(i).

35 12 CFR 337.6(a)(5)(ii)–(iii).

36 2021 Rule at 6,745; Proposal at 6,8263.

37 2021 Rule at 6,745 (emphasis added).

The Proposal makes no effort to address the agency's own previous finding. The FDIC engages in handwaving suggesting that somehow Voyager created brokered deposit related risk for its partner bank.[38] But there is no connection between Voyager's bankruptcy and the dollar deposits its customers had at the bank. Did those deposits exhibit any hot money characteristics? Did Voyager's partner bank, in fact, experience unusual rates of deposit outflows to other banks? The FDIC does not say, but instead asserts—contrary to the industry's experience—the risks to Voyager's partner bank were the same "as if it had, say two partner banks, and had been classified as a deposit broker."[39]

The fact remains that from a bank's perspective, the deposits derived from a fintech platform (or other third party) as part of an exclusive business arrangement are *significantly more sticky* than the deposits of a single entity in the business or organization ownership category. A fintech platform agreement for a custody or omnibus account takes several months (or even a year) to negotiate, while in contrast a corporate deposit account agreement can take only a few weeks to complete. If a fintech platform wants to move its customers' deposits to another bank, the effort involved in unwinding the existing arrangement while negotiating with the successor is enormous, and therefore, fintechs do not and cannot frivolously end their existing relationships. The real lesson from Silicon Valley Bank—which the Proposal uses as a fig leaf—is that unlike deposits subject to exclusive platform agreements, corporate owners with funds held under standard business deposit account agreements can remove billions in deposits from a bank in a single day.[40]

FTA members have over a decade of experience with exclusive deposit placement arrangements (although not always by that name). Had the FDIC engaged with the industry or collected data from the banks and companies that are active in this space, the agency would have confirmed its findings from 2020. Deposits sourced through exclusive deposit placement arrangements are stable, predictable, and relatively low-cost sources of funding and liquidity for banks. Instead, the Proposal rests on the 13-year-old FDIC Study that could not conceive of modern exclusive deposit placement arrangements. At that time, the FDIC said brokered deposits have no franchise value when a bank fails and bidders are not interested in brokered deposits because "deposit brokers, in whose name brokered deposits are held, would simply withdraw traditional brokered deposits and place the deposits elsewhere."[41] Partners in exclusive deposit placement arrangements cannot simply withdraw the deposits, and since the 2021 Rule, these deposits actually enhance the franchise value of banks.

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[38] Proposal at 6,8245.

[39] *Id.*

[40] BD. OF GOVERNORS OF THE FED. RSRV. SYS., MATERIAL LOSS REVIEW OF SILICON VALLEY BANK 15 (2023) ("On March 9, 2023, SVB customers withdrew deposits totaling $42 billion, nearly 25 percent of the bank's $166 billion total deposits."), https://oig.federalreserve.gov/reports/board-material-loss-review-silicon-valley-bank-sep2023.pdf.

[41] FDIC Study at 47 n.101.

It is inappropriate to categorize deposits sourced through exclusive deposit placement arrangements as brokered. In the 2021 Rule, the FDIC correctly acknowledged that in the modern bank-fintech ecosystem these deposits do not exhibit the types of risks associated with brokered deposits. The Proposal is an unjustified return to an antiquated understanding of the business of banking.

b. The five-prong definition of engaging in the business is overly broad, creates a series of nested categories that is subsumed by the fee prong, and is a sham that captures all business relationships.

As discussed above, a person is a deposit broker if they engage in the business of placing or facilitating the placement of deposits. Therefore, the definition of what it means to engage in the business determines what activities and arrangements will cause a person to be a deposit broker. The Proposal states that engaging in *any one* of the listed activities constitutes engaging in the business and will cause the person to be a deposit broker. These arrangements and activities are:

> (A) The person receives third-party funds and deposits those funds at one or more insured depository institutions;
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> (B) The person has legal authority, contractual or otherwise, to close the account or move funds of the third party to another insured depository institution;
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> (C) The person is involved in negotiating or setting rates, fees, terms, or conditions for the deposit account;
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> (D) The person proposes or determines deposit allocations at one or more insured depository institutions (including through operating or using an algorithm, or any other program or technology that is functionally similar); or
>
> (E) The person has a relationship or arrangement with an insured depository institution or customer where the insured depository institution or the customer pays the person a fee or provides other remuneration in exchange for deposits being placed at one or more insured depository institution.[42]

It is concerning that the leading phrase of the definition before these five prongs would drop the "while engaged in business" clause from the current definition.[43] By eliminating the "while engaged

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[42] 12 CFR 337.6(a)(5)(ii); Proposal at 68,251.

[43] *Compare* 2021 Rule at 6,789–90 ("A person is engaged in the business of facilitating the placement of deposits of third parties with insured depository institutions, by, *while engaged in business*, with respect to deposits placed at more than one insured depository institution, engaging in one or more of the following activities"), *with* Proposal at 68,271 ("A person is engaged in the business of placing or facilitating the placement of deposits of third parties if that person engages in one or more of the following activities.").

in business" phrase, the FDIC appears intent on capturing one-time actions or activities that take place outside a person's normal course of business, even though such actions or activities would not be the person's primary purpose.

These five prongs embed ambiguous phrases, permitting an expansive interpretation without guardrails. The legal authority prong (B) applies whether it is "contractual or otherwise," which effectively means any possible legal authority. The negation prong (C) does not require that the person be actively engaged in the negotiation, merely that the person is "involved negotiating or setting" terms. What is the scope of participation that constitutes being "involved" in the activity? The FDIC does not say.

The allocation prong (D) is triggered even if the person merely "proposes" deposit allocations, regardless of what actions the would-be depositor takes based on the proposal. The prong does not include any volume or frequency thresholds. Moreover, although the Proposal has a section dedicated to the supposed risks of deposit allocation, the FDIC does not define what it even means to "propose or determine deposit allocations."[44] If a person proposes that a third party place 100% of their deposits in Bank A, but the third party instead places 100% of their deposits in Bank B, does that still make the person a deposit broker? Are the deposits in Bank B now considered brokered deposits, even though the purported deposit broker had no impact on the placement of those deposits? The Proposal provides no explanation or guidance.

The fee prong (E) is the most expansive. It covers any "relationship or arrangement," which would include all manner of informal, temporary, or ad hoc circumstances. The fee prong covers these nebulous relationships and arrangements whether they are with the bank or the customer. And a person will be deemed a deposit broker if they receive any "fee or . . . other remuneration" from either the bank or the customer. In other words, according to the Proposal, any person who receives any money, service, or value of any kind for any action taken by the person that results in deposits being placed at any bank is a deposit broker.

By eliminating the matchmaking prong from the 2021 Rule, the rephrased prongs (A), (B), and (C) in the Proposal are all subsumed by (C). Prong (B), which covers a person with apparent legal authority to move funds or close an account, necessarily also covers a person who receives funds and deposits them for a third party in prong (A), because a person cannot receive and deposit funds without also having the legal authority to move funds. Thus, prong (A) is subsumed by prong (B). Prong (C), which covers a person who is involved in negotiating terms or conditions for a deposit account, necessarily also covers a person with legal authority to move funds or close an account in prong (B), because a person cannot have legal authority to close an account without being involved

[44] Proposal at 68,252–53.

in negotiating the terms and condition of that account. Thus, prongs (A) and (B) are subsumed by prong (C). In other words, the Proposal is eliminating the specificity in the 2021 Rule and replacing it with a broad "involved in" definition that is not limited to a person acting in the course of business.

But all analysis of the nature of the activities is rendered moot by prong (E) of the engaged in the business definition. Prong (E), as discussed above, covers any activity that results in the would-be deposit broker receiving any fee or remuneration. This makes prong (E) a catch-all that effectively causes the deposits connected with any business relationship to become brokered deposits. Whether the relationship is with the bank or the customer is irrelevant under the Proposal: if the person is getting compensated in any way—which is the essence of doing business—then the person is a deposit broker.

FTA strongly objects to the blanket characterization of all deposits that involve a business relationship outside the direct relationship between a bank and its depositors as inherently riskier. The current 2021 Rule does not embed the payment of fees in the deposit broker definitions because fees associated with deposits are not necessarily indicative of risk or volatility. The fees covered by prong (E) could have, for example, been limited to fees based on the interest rate being paid on the account. Data might show those kinds of fees do create volatility and potential liquidity issues. However, the FDIC does not provide any rationale or data to support a rule that converts the deposits associated with any outside business relationship into brokered deposits.

c. The definition of primary purpose exemption generally.

The statute is clear that a person is not a deposit broker if their "primary purpose is not the placement of funds with depository institutions."[45] Much of the FDIC's brokered deposits regulations, even before the 2021 Rule, have been focused on how to determine the purpose of various deposit arrangements. In all cases, however, once it was determined that the person's primary purpose is not the placement of funds, that person was deemed not to be a deposit broker. Now, the FDIC proposes to add a second layer to the PPE. Even if the person's primary purpose is not the placement of funds, the FDIC can still find that person to be a deposit broker if that person has a "substantial purpose . . . to provide a deposit-placement service or FDIC deposit insurance."[46] Aside from having no basis in the law, the Proposal's formulation is circular and nonsensical.

The Proposal does not define "a deposit-placement service," but presumably it is a service that offers "placing deposits" or "the placement of funds with depository institutions," which is how the statute

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[45] 12 U.S.C. § 1831f(g)(2)(I).

[46] Proposal at 68,253.

defines a deposit broker.[47] In other words, a deposit broker is a person who provides a deposit-placement service. Under the Proposal, therefore, the FDIC is stating that a person whose primary purpose is not to be a deposit broker is, nevertheless, still a deposit broker if they have a substantial purpose to be a deposit broker. This circular reasoning would effectively amend the statutory PPE into a substantial purpose exception. While there may be many purposes for a person's actions, there can be only one primary purpose. If a person's primary purpose is not the placement deposits, it is irrelevant whether that person also has a substantial purpose to place deposits. The statute is clear: if the person's primary purpose is not the placement of deposits that person is not a deposit broker.

Moreover, the FDIC intends to rope in any business that places customer deposits at an IDI with a substantial purpose to provide FDIC deposit insurance. The FDIC knows that non-banks cannot provide FDIC deposit insurance, so presumably when the Proposal repeatedly states that the placement "is for a substantial purpose other than to provide . . . FDIC deposit insurance," what the agency means is the deposits are placed in an IDI to ensure the funds are covered by FDIC deposit insurance. This condition in the PPE makes little sense because having funds covered by deposit insurance is always a substantial purpose of depositing funds in a bank. Does the FDIC want FTA members to leave their customers' funds uninsured? This substantial purpose condition added to the PPE appears intentionally designed to make sure no fintech company will qualify for the PPE.

d. Elimination of the enabling transactions designated PPE is not justified by policy or data.

When this exception for "enabling payments" was first proposed in the 2020 notice of proposed rulemaking, the FDIC said, it "would be construed to apply only to third parties whose business purpose is to place funds in transactional accounts to enable transactions or make payments."[48] When the FDIC finalized the 2021 Rule, it recognized that the primary purpose of a business relationship is not the placement of funds "if the agent or nominee places depositors' funds into transactional accounts for the purpose of enabling transactions."[49] The 2021 Rule established a test to show that the primary purpose of the account is for enabling transactions and not the placement of funds—*i.e.*, all funds are held in transactional accounts that pay no interest, fees, or other remuneration.[50]

The FDIC, at that time, understood the role such accounts play in delivering other financial products and services. Fintechs, which are not banks, rely on insured depository institutions to receive, hold,

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[47] 12 U.S.C. § 1831f(g)(1)(A), (g)(2)(I).

[48] Unsafe and Unsound Banking Practices: Brokered Deposits Restrictions, 85 Fed. Reg. 7453 (proposed Feb. 10, 2020).

[49] 2021 Rule at 6,751.

[50] 12 CFR 337.6(a)(5)(v)(I)(*1*)(*ii*) and 12 CFR 303.243(b)(3)(i)(B).

and send funds on behalf of their mutual customers. Having funds held in deposit accounts is a necessary component of the fintech industry, but unless a fintech is expressly looking to provide deposit products, placing deposits is rarely the primary purpose of a business relationship between a fintech and bank. The enabling transactions designated exception, therefore, has become essential for fintechs in working with their bank partners. This is evidenced by the 77 separate enabling transaction PPE notices reported by the FDIC, many of which are by or for FTA members.[51]

In the face of this clear case where the primary purpose is not the placement of funds with depository institutions and where an entire industry has come to rely on the FDIC's prior actions, the Proposal would eliminate the enabling transactions designated PPE without any justification. The FDIC claims, without evidence, that the exception is "overly broad and cover[s] a variety of different business lines rather than a narrow set of business lines intended by the FDIC's bright-line designated exceptions." This is despite the test for the enabling transactions designated PPE being, by definition, a bright line.

The only reasons the FDIC gives for eliminating the enabling transactions test is the fact that the Proposal is also seeking to change the definition of PPE. As discussed above, the Proposal would add a substantial purpose requirement on top of the primary purpose requirement to meet the exception. The Proposal states, "That current enabling transactions test . . . 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."[52] In other words, it is only because the FDIC is choosing to add an unwarranted and circular substantial purpose requirement that accounts for enabling transactions are no longer meeting the PPE.

The Proposal does not discuss how banks and companies have been using the enabling transactions designated PPE. It does not provide any examples of deposits in these accounts causing liquidity risks to insured depository institutions or having any role in the movement of hot money. The FDIC does not provide any data on the relative volatility of these accounts, which FTA members could have shown have aggregate deposit balances that are stable and predictable, even with large volumes of transactions. The Proposal provides no evidence to support the elimination of the enabling transactions designated PPE, but instead, it is simply because the "FDIC believes" the purpose of these arrangements is to be a deposit broker.[53]

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[51] Public Report of Entities Submitting Notices for a Primary Purpose Exception (PPE) As of 3/15/2024, FDIC, https://www.fdic.gov/resources/bankers/brokered-deposits/public-report-ppes-notices.pdf (last visited Oct. 20, 2024).

[52] Proposal at 68,257.

[53] *Id*.

e. Narrowing the 25 percent test to 10 percent and limiting it to only broker dealers and RIAs with assets under management.

FTA strongly objects to narrowing the 25 percent test to 10 percent and limiting this designated exception to only broker dealers with assets under management. Without any data supporting the lowering of the threshold, the FDIC's proposal to lower the threshold to 10 percent (and therefore narrow the applicability of this PPE) is arbitrary and capricious, and it upsets existing reliance interests by parties since the issuance of the 2021 Rule.

The Proposal recounts that prior to the 2021 Rule, a 10 percent threshold was used to analyze the PPE with respect to sweep deposits from broker dealers.[54] However, through a reasoned decisionmaking process, the FDIC affirmatively decided to use 25 percent as the threshold in the 2021 Rule.[55] The Proposal provides no reasoned justification for reversing the 2021 Rule to return the threshold to 10 percent. The FDIC states that there were "a number of challenges with the notice filings" and "reporting issues with the 25 percent test,"[56] yet the FDIC makes no connection between those "challenges and issues" and the level at which the Proposal sets the asset test. The FDIC suggests that "lowering the threshold to 10 percent may reduce potential risks to safety and soundness and to the [Deposit Insurance Fund] by providing more transparency regarding the characteristics of the deposits so placed."[57] However, the Proposal does not provide any evidence of increased risks associated with deposits from agents or nominees holding greater than 10 percent but less than 25 percent (the current threshold) of assets under administration as deposits, and the FDIC does not attempt to identify any mechanism by which the lower threshold would reduce such risks, assuming they exist.

Fundamentally, broker dealers are in the business of buying and selling securities, and therefore, they have a "primary purpose other than" placing deposits at banks.[58] The same is true for RIAs, which are in the business of and have the primary purpose of providing investment advice and managing financial portfolios. By definition, neither can be deposit brokers, regardless of whether deposits placed at IDIs constitute 10 percent or 25 percent of their assets under administration or management. Even if a rational basis existed for including a threshold, the primary purpose percentage threshold should be 50 percent—i.e., if more than half of the total assets under administration are not held as deposits at IDIs, then the primary purpose must be something other than placing deposits.

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54 *Id*. at 68,255.

55 2021 Rule at 6,751.

56 Proposal at 68,255.

57 *Id*. at 68,256.

58 12 U.S.C. § 1831f(g)(2)(I).

Furthermore, the proposed change to limit the designated exception to only broker dealers would prevent fintechs who have appropriately relied on the 2021 Rule from continuing to fall under this PPE. The proposed change from assets under administration to assets under management—and renaming the designated exception from the "25 percent test" to the "Broker-Dealer Sweep Exception"—is intended to cover only broker dealers or RIAs that provide "continuous and regular supervisory or management services."[59] The Broker-Dealer Sweep Exception would be limited to deposits placed by an unaffiliated broker dealer or RIA regulated by the federal securities laws, thereby excluding assets held in a custodial or fiduciary capacity.

The Proposal provides no reasons, evidence, or data to support why the designated exception should be limited to only broker dealers and RIAs or why assets under management should replace assets under administration. The FDIC simply asserts that "'customer assets under administration' is a more appropriate measure when including a broader group of business relationships and business lines, whereas 'assets under management' would be appropriate under the proposed rule to accurately reflect the scope of the types of services provided by broker dealers and investment advisers."[60] But the Proposal never explains why the designation exception should be narrowed to broker dealers and RIAs in the first place.

This unjustified narrowing of the 25 percent test to only broker dealers and RIAs is particularly troubling because the FDIC makes no attempt to rebut its own position in the 2021 Rule. There, the FDIC expressly rejected the narrower assets under management construction in favor of assets under administration when it stated:

> In response to comments indicating that the phrase "customer assets under management" is generally limited to certain broker dealer and investment advisor business, the FDIC is revising the term to "customer assets under administration." The revised phrase more accurately reflects the FDIC's intention that this test cover both customer assets managed by the agent or nominee and those customer assets for which the agent or nominee provides certain other services but may not exercise deposit placement or investment discretion.[61]

The FDIC determined in 2020 that the designated exception should cover broker dealers, RIAs, and other agents or nominees that act in a custodial or fiduciary capacity. Those other agents or nominees include many FTA members who rely on the 25 percent exception but are not broker dealers or RIAs.

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[59] *See* Proposal at 68,272 ("Assets under management" means securities portfolios and cash balances with respect to which an investment adviser or broker dealer provides continuous and regular supervisory or management services.).

[60] Proposal at 68,256.

[61] 2021 Rule at 6,751.

Had the FDIC engaged with FTA members and other similarly situated companies prior to issuing the Proposal, it would have been able to analyze the data showing such deposits are stable and predictable sources of funding for banks. Moreover, FTA members relying on the 25 percent designated exception are clearly agents and nominees whose primary purpose is not the placement of funds with depository institutions, and therefore, must be excluded from the definition of deposit broker.

Limiting this designated PPE to only broker dealers and RIAs with assets under management is inappropriate because it significantly narrows the scope of the exception in the absence of any supporting data. The FDIC neither justifies the reduction of the threshold from 25 percent to 10 percent nor addresses parties' reliance interests on the threshold and definitions effective since the date of the 2021 Rule. As such, the proposed transition from the 25 percent test to the Broker Dealer Sweep Exception in any final rule would be a violation of the APA.

III. FTA Responses to Specific Questions Raised in the Proposal[62]

a. Deposit Broker Definition

i. Question 1: Does the FDIC's proposed amendment to the "deposit broker" definition align more closely with the statutory language and purpose of section 29 of the FDI Act? Why or why not?

No, the proposed amendment to the "deposit broker" definition does not align in any way with the statutory language and purpose of the FDI Act. Section 29 was intended to restrict the weakest, least capitalized banks from paying exorbitant interest rates and using brokered deposits as a way to "grow out of their problems,"[63] not to discourage healthy banks from holding a diverse funding mix. The Proposal no longer includes any bright-line standards for determining whether any entity meets the statutory definition of "deposit broker." Instead, the Proposal contains a catch-all provision in section 337.6(a)(5)(ii)(E) that significantly broadens the "engaged in the business of" definition, effectively rendering all fintechs a "deposit broker" under section 337.6(a)(5)(ii).

This result is contrary to the spirit and purpose of Section 29—i.e., to address "brokered and high-rate deposits" that "were sometimes considered less stable."[64] As the Proposal and the FDIC's own advanced notice of public rulemaking notes, "historically, most institutions that use brokered deposits

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[62] Questions 1–16 are from the Proposal. *See* Proposal at 68,267–68.

[63] Jelena McWilliams, Chairman, FDIC, Keynote Remarks at the Brookings Institution, Washington, D.C.: Brokered Deposits in the Fintech Age (Dec. 11, 2019), https://www.fdic.gov/news/speeches/2019/spdec1119.html.

[64] Proposal at 68,245.

have done so in a prudent manner and appropriately measure, monitor, and control risks associated with brokered deposits."[65] That any final rule stemming from the Proposal would label all fintechs de facto "deposit brokers"—particularly where the deposits at issue have not been shown to have any "less stable" or "hot money" characteristics—does nothing to address the issues top of mind for the FDIC, stemming back to the early 1970s, regarding the statutory language and purpose of Section 29.

ii. Question 2: Is the FDIC's proposed change to remove "matchmaking activities" from the "deposit broker" definition and proposal to add a deposit allocation provision appropriate? Why or why not?

To the extent this proposed change eliminates the specificity requirements of the matchmaking prong and replaces it with a broad general definition of allocation, it is appropriate. But replacing "more than one" with "one or more" is not appropriate, for the reasons we state above regarding elimination of exclusive deposit arrangements –i.e., these funds represent stable deposits.[66]

iii. Question 3: Is the consideration of fees appropriate when determining whether a person is a "deposit broker"? Are there any additional factors the FDIC should consider adding to the "deposit broker" definition? Please explain and provide data to support your views.

The consideration of fees in determining whether a person is a "deposit broker" is relevant to the extent the person is involved in negotiating or setting fees for the deposit account (currently captured in the 2021 Rule in the second prong of the "facilitation" definition).[67] By contrast, the hairline trigger for "deposit broker" designation contained in section 337.6 (ii)(E) could easily be broadly interpreted by the FDIC and lead to non-commercially reasonable and absurd results. For example, under this proposed section of the Proposal, simply receiving a fee from an insured depository institution (e.g., a fee for wire transfer processing, a fee for advertising the relevant deposit product on the fintech's website, interchange revenue when consumers buy groceries or gas, or other transaction services) would automatically transform a fintech's primary intent from processing ordinary business transactions into brokered deposit activity. Therefore, just because fintechs may receive fees "in exchange for or related to the placement of [third-party] deposits" [68] should not, without more, be dispositive in the FDIC's "deposit broker" determination.

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[65] *Id*.

[66] *See infra* Section II.

[67] 12 CFR 337.6(a)(5)(iii)(B).

[68] Proposal at 68,251.

b. Primary Purpose Exception Analysis

i. ***Question 4: Is the proposed updated primary purpose exception analysis appropriate? Why or why not?***

As noted above, FTA requests, in the alternative, that the FDIC restore the original "primary purpose exception" language in section 337.6(a)(iv)(I), or alternatively explain how a person's purpose in placing customer deposits at an IDI could be "primary" but not also "substantial." The proposed amendment is confusing and would be exceedingly difficult for parties to understand how the FDIC would implement it on any rational or consistent basis.

ii. ***Question 5: Are the proposed changes to the primary purpose exception application process appropriate? Is it appropriate to limit the application process to IDIs? Is the proposed process sufficiently clear to allow IDIs to obtain the required information on all third parties within a deposit placement arrangement?***

No, the proposed changes to the primary purpose exception application process are both inappropriate and unnecessary for several reasons. First, the FDIC's claims that some insured depository institutions "misunderstand and misreport deposits" remains unsubstantiated by any data or analysis. Even taken at face value, the appropriate and targeted response in these instances is to deny such primary purpose applications until the information is corrected.

Second, to the extent greater clarity is needed for the broader industry's benefit, there is an existing Q&A document,[69] which has been periodically updated by FDIC staff, that serves as the appropriate vehicle for industry-wide clarification on the application process (and any questions relating to the 2021 Rule).

Third, should the FDIC nevertheless decide to abandon the current Q&A process (which has worked reasonably well), the proposed solution goes too far—instead, as noted above, FTA requests that the FDIC restore the ability for fintechs and other third parties (collectively, "applicants") in section 303.243(b) to file for PPE applications—in consultation with their respective bank partners—to minimize the stated risk of applicants providing "insufficient information." This change would entail replacing the existing language in this section with "for an agent or nominee, in consultation with an insured depository institution . . ."

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[69] *See* FDIC, *Questions and Answers Related to Brokered Deposits Rule – As of July 15, 2022*, https://www.fdic.gov/sites/default/files/2024-03/brokered-deposits-qa.pdf.

iii. Question 6: Are there any additional factors the primary purpose exception application process should consider?

No. As a general matter, the 2021 Rule—along with accompanying Q&As—have provided needed clarity on the brokered deposit designation as well as the primary purpose exception process, allowing both fintechs and partner banks to innovate and serve the market in a safe and sound manner. FTA sees no reason to substantively or procedurally depart from the 2021 Rule, particularly in the absence of any relevant data or analysis supporting the Proposal.

c. Designated Exceptions

i. Question 7: Should previously approved primary purpose exceptions be added to the regulatory list of "designated exceptions" as meeting the primary purpose exception under the proposed rule if they satisfy the proposed primary purpose exception?

To the extent the FDIC is referencing previously approved primary purpose exception applications, yes—as noted above, FTA requests, in the alternative, that the FDIC grandfather previously approved primary purpose exemption applications and notices under the 2021 Rule at least until updated primary purpose exception applications are reviewed and determined under any final rule stemming from the Proposal. Rescinding previously approved exemption applications[70] upon the effective date of any final rule would upend banks' existing arrangements with fintechs and hamper parties' ability to transition their relationships in a safe and sound manner.

ii. Question 8. Should any of the designated exceptions be removed, or new ones added? Please explain.

No. As noted above in response to Question 6, the 2021 Rule—along with accompanying Q&As—have allowed both fintechs and partner banks to innovate and serve the market in a safe and sound manner. The FDIC's removal of any of the designated exceptions included in the 2021 Rule would impose significant costs on regulated parties that have structured their businesses and relationships in reliance on these designated exceptions. As noted above and in the Joint Trades Comment, removing any of the designated exceptions in a Final Rule would be arbitrary and capricious on several grounds, in part because it would fail to give meaningful weight to reliance interests. The FDIC states, without more, that "[t]o the extent that third parties may have previously relied on exceptions that existed under [the 2021 Rule] but no longer will exist under the [Proposal]—such as the 'enabling transactions' exception—they may experience costs associated with transitioning their business

[70] Proposal at 68,257 ("Applications previously approved under this provision would be rescinded.").

models (including potentially revising fees, changing revenue structures, etc.) to reflect the new rule."[71]

In the absence of any relevant data or analysis supporting the Proposal (including from the Deposits RFI or Bank-Fintech RFI), FTA sees no reason to substantively or procedurally amend the 2021 Rule.

iii. Question 10. For the proposed Broker-Dealer Sweep Exception, is the use of "assets under management" appropriate? Is the definition of "assets under management" sufficiently clear under the proposed rule? Is it appropriate to request the total amount of deposits placed by the broker-dealer or investment adviser on behalf of its customers at all IDIs and the total amount of customer assets under management as of the last quarter and as of the date of the notice filing?

No, as noted above, "assets under management" is not appropriate because it significantly narrows the scope of the exception without any supporting data. Under the Proposal, assets under management means securities portfolios and cash balances with respect to which an RIA or broker dealer provides continuous and regular supervisory or management services. The Broker-Dealer Sweep Exception would prevent fintechs who have appropriately relied on the 2021 Rule from continuing to rely on this designated exception, in the absence of any data to support the change.

The FDIC provides no data supporting why assets under management—a narrower construct–should replace assets under administration. The FDIC should amend the Proposal to use the more general term–i.e., assets under administration. Such an amendment would cover assets held in managed accounts *and* accounts for which an RIA does not exercise investment discretion. Assuming this change were implemented, an agent or nominee would meet the designated exception 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 depository institutions.

d. Alternatives

i. Question 14: Would rescinding a designated exception for sweep deposits be appropriate? Why or why not?

No, doing so would be arbitrary and capricious because the FDIC would be acting in the absence of any data supporting such a change. Rescinding this designated exception would mean "IDIs would be required to report all sweep deposits as brokered because the broker-dealers [*sic*] or investment

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[71] Proposal at 68,261.

adviser would meet the 'deposit broker' definition since it would be placing or facilitating the placement of the third-party deposits."[72] While the FDIC posits that IDIs receiving sweep deposits could "apply the general primary purpose exception,"[73] such a process provides cold comfort for substantive and procedural reasons. The proposed amendment to the general primary purpose exception is confusing and would be exceedingly difficult for parties to understand. It is unclear how the FDIC would implement this general primary purpose on any rational or consistent basis. Relatedly, given its vagueness, it is not clear how long the FDIC would take to process these general PPE exceptions, particularly given the deluge of PPE applications[74] it would most certainly receive were the Proposal to become a Final Rule.

Rescinding the designated exception for sweep deposits would represent a reversal of the 2021 Rule and would impose significant costs on regulated entities that have structured their businesses and relationships in reliance on the designated exception included in the 2021 Rule.

ii. *Question 16: Are there any additional alternatives the FDIC should consider?*

FTA suggests eight reasonable alternatives in the Introductory section above.

IV. Conclusion

Beyond FTA's comments on the Proposal, we appreciate the FBAs' support of responsible innovation and acknowledgment that bank-fintech arrangements can provide benefits.[75] Bank-fintech partnerships are one of the most important innovations in financial services. Responsible innovation requires fintechs *and* banks pursuing bank-fintech arrangements in a manner consistent with safe and sound banking practices, and with applicable laws and regulations, including consumer protection requirements and those addressing financial crimes.[76] FTA members remain committed

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[72] Proposal at 68,258.

[73] *Id.*

[74] Travis Hill, Vice Chairman, FDIC, Statement on the Notice of Proposed Rulemaking on Brokered Deposit Restrictions (July 30, 2024) ("Given (1) the number of deposit arrangements that may be newly scoped in by the rule, (2) the more subjective standard by which the FDIC will judge applications, and (3) the lack of grandfathering of existing arrangements, I suspect an enormous avalanche of applications may hit the FDIC on day 1, which the agency is completely unequipped to process in any sort of timely or efficient manner."), https://www.fdic.gov/news/speeches/2024/statement-vice-chairman-travis-hill-notice-proposed-rulemaking-brokered-deposit.

[75] Bank-Fintech RFI at 61,578 ("The agencies support responsible innovation and support banks in pursuing bank-fintech arrangements.").

[76] *Id*.

to these objectives, while also taking note of the FBAs' supervisory experience regarding the potential risks associated with these partnerships.

As representatives of a vibrant and growing industry, we are confident that the bank-fintech partnership model is not broken, and that based on current and relevant data, the brokered deposit framework does not need fixing. We have seen these partnerships work well—not just for our members, but for our partner banks, consumers, and businesses—with rigorous, risk-based controls that satisfy both regulators and the public.

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Sincerely,

Penny Lee
President and Chief Executive Officer
Financial Technology Association