IntraFi Network

[redacted]

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comments@fdic.gov
James P. Sheesley, Assistant Executive Secretary
Attention: Comments – RIN 3064-AF99
Federal Deposit Insurance Corporation
550 17th Street, N.W.
Washington, D.C. 20429

Re: RIN 3064–AF99

I am writing on behalf of IntraFi LLC ("*IntraFi*")[1] to submit comments to the Federal Deposit Insurance Corporation ("*FDIC*") on the FDIC's Notice of Proposed Rulemaking on Brokered Deposit Restrictions published in the Federal Register on August 23, 2024 ("*NPR*").[2]

INTRODUCTION

IntraFi limits its comments in this letter to (1) the proposed rule's treatment of sweep deposits at banks that are affiliated with broker-dealers and (2) the proposed rule's attempt to clarify when agent institutions can receive reciprocal deposits. Our comments are summarized below and followed by a more detailed discussion of each topic.

SUMMARY

1. Affiliated Sweep Deposits

Under the proposed rule, if a broker-dealer sweeps customer deposits to a bank without using a service provider, the business relationship is eligible for a designated business exception from brokered treatment under the primary purpose exception.[3] If the broker-dealer uses a service provider, however, the proposed rule would treat the deposits as brokered unless the bank makes a special showing that the service provider is not a deposit broker.[4] The service provider, in turn, is a deposit broker even if it merely receives a fee and does nothing that affects deposit destinations

[1] Founded in 2002, IntraFi provides services to the banking and brokerage industries and operates a deposit network.

[2] 89 Fed. Reg. 68,244 (Aug. 23, 2024).

[3] The proposed rule deems a broker-dealer to be placing deposits at banks for a primary purpose that qualifies for the designated exception if the broker-dealer places less than 10% of total assets under management in a business line and "no additional third parties are involved in the deposit placement arrangement." Proposed Rule, § 337.6(a)(5)(iv)(I)(1)(i), 89 Fed. Reg. at 68,271.

[4] Proposed Rule, § 303.243(b)(4)(i), 89 Fed. Reg. at 68,270.

or balances.[5] *Therefore, as a practical matter, the proposed rule makes sweep deposits, including sweep deposits at affiliated banks, brokered whenever a service provider is involved.*

Because only the largest broker-dealers are likely to be able to operate sweep programs with no third-party assistance, the proposed rule would discriminate against banks (including smaller banks with affiliated broker-dealers) that receive sweep deposits from broker-dealers that are not among the largest. The proposed rule makes the brokered status of identical affiliated sweep deposits at different banks turn entirely on whether the financial organization is large enough to operate a sweep program on its own and finds it efficient to do so. There is no rational basis for this disparate treatment that would strongly disfavor smaller banks.

To address this discriminatory impact, we respectfully request the FDIC take at least the following three steps:

First, the FDIC should remove the "no additional third parties" clause from the designated exception.[6] If a third party's role in connection with affiliated sweep deposits excludes the types of activities that could make the third party a deposit broker, there is no reason not to afford the business arrangement the same treatment that it would receive without a third party.

Second, the FDIC should acknowledge that no "deposit allocation" occurs when a service provider assists a broker-dealer that sends all sweep deposits, or a predetermined portion of sweep deposits, to its affiliated bank.[7] In such arrangements, the service provider has no control over the amounts swept to the affiliated bank and cannot "steer" deposits to or from the affiliated bank.

Third, the FDIC should acknowledge, by appropriately limiting the remuneration provision in the proposed rule,[8] that receiving a fee does not make a person a deposit broker if the person has no control over which bank or banks receive deposits or in what amounts. When a broker-dealer sends all sweep deposits, or a predetermined portion of sweep deposits, to an affiliated bank, the service provider's receipt of a fee should not be a basis for treating it as a deposit broker.

2. Receipt of Reciprocal Deposits as Agent Institution

The proposed rule's changes in FDIC regulations that relate to a bank's "agent institution status" for purposes of reciprocal deposits is not supported by the text of the Federal Deposit

[5] Proposed Rule, § 337.6(a)(5)(ii)(E), 89 Fed. Reg. at 68,271.

[6] Proposed Rule, § 337.6(a)(5)(iv)(I)(1)(i), 89 Fed. Reg. at 68,271.

[7] The proposed rule makes a person a deposit broker if "[t]he person proposes or determines deposit allocations at one or more insured depository institutions . . . ,"[7] but does not define "deposit allocation." Proposed Rule, § 337.6(a)(5)(ii)(D), 89 Fed. Reg. at 68,271.

[8] Proposed Rule, § 337.6(a)(5)(ii)(E), 89 Fed. Reg. at 68,271.

Insurance Act ("*Act*"). The treatment of agent institutions in current FDIC regulations accurately tracks the statutory text and should not be altered so that it contradicts the Act.

The proposed rule presupposes that it is possible for a bank to receive an amount of reciprocal deposits that "results in its total reciprocal deposits exceeding its special cap."[9] According to the NPR, the bank then "no longer qualifies for the limited exception [from brokered treatment for reciprocal deposits] and must report all its reciprocal deposits as brokered deposits."[10] The language of the Act neither supports this conclusion nor permits this treatment.

The Act does not permit the FDIC to declare that the bank "no longer qualifies" for the exception or "must report all its reciprocal deposits as brokered deposits."[11] Nor does the Act authorize the FDIC to require that the bank wait "two successive reporting quarters," as stated in the proposed rule,[12] or until "the last day of the third consecutive calendar quarter," as stated in the NPR,[13] to receive non-brokered reciprocal deposits again.

On the contrary, the Act unambiguously states that a bank that places a covered deposit and receives matching deposits through a deposit placement network <u>is</u> an agent institution if the bank "does not receive" (in the present tense) an amount of reciprocal deposits that "causes" (also in the present tense) the bank to exceed its previous four-quarter average balance of reciprocal deposits (the special cap).[14] The Act does not permit the FDIC to change "does not receive an amount that causes," as stated in the Act, to "did not receive at any time in the past two [or three] quarters an amount that caused," as the proposed rule, in effect, seeks to do.

DISCUSSION

I. <u>The Proposed Rule's Treatment of Affiliated Sweep Deposits Should Be Changed.</u>

Since long before the brokered deposit rule that was adopted in 2020,[15] deposits that a broker-dealer places at an affiliated bank generally have not been brokered deposits, whether or

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[9] 89 Fed. Reg. at 68,258.

[10] *Id.*

[11] 89 Fed. Reg. at 68,258.

[12] Proposed Rule, § 337.6(e)(3)(iv)(B), 89 Fed. Reg. at 68,272.

[13] 89 Fed. Reg. at 68,258.

[14] 12 U.S.C. § 1831f(i)(2)(A)(iii); *accord* 12 C.F.R. § 337.6(e)(2)(i)(C).

[15] FDIC, *Unsafe and Unsound Banking Practices: Brokered Deposits and Interest Rate Restrictions Final Rule*, 86 Fed. Reg. 6,742 (Jan. 22, 2021).

not the broker-dealer uses a service provider to assist in administering the sweep program.[16] As a result, the broker-dealer can efficiently serve its customers while providing a stable source of non-brokered funding to its affiliated bank.

The proposed rule would alter this framework through three key provisions. As discussed below, the first of these provisions should be removed, and the second and third should be clarified.

A. The "No Additional Third Parties" Clause Should Be Removed.

Under the Act, a broker-dealer that sweeps customer deposits to banks is not a deposit broker if its "primary purpose is not the placement of funds with depository institutions."[17] Under the proposed rule, a business arrangement qualifies for a designated exception under the primary purpose exception if the broker-dealer places less than 10% of total assets under management in a business line at banks, but only if "no additional third parties are involved in the deposit placement arrangement."[18] If a third party is involved, the proposed rule requires an elaborate showing – with extensive information and documentation – concerning the third party's activities.[19] The proposed rule makes such a showing impossible when the third party is a service provider, because any service provider will receive a fee, and receipt of a fee automatically makes the service provider a deposit broker, regardless of what the service provider does.[20]

The "no additional third parties" clause should be removed, at least for affiliated sweep deposits, because the NPR does not support the need for different treatment. The NPR provides no evidence that affiliated sweep deposits behaved any differently when a third-party service provider administered the program during the recent bank failures or at any other time.[21]

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[16] *See* 12 C.F.R. § 337.6(a)(5)(iii)(C)(1) (matchmaking that triggers brokered deposit status involves "deposit allocations at, or between, more than one bank"); Letter from William F. Kroener, III, General Counsel, FDIC, to Unidentified Party (Feb. 3, 2005) (affiliated sweep deposits eligible for non-brokered status if certain conditions were met).

[17] 12 U.S.C. § 1831f(g)(2)(I); 12 C.F.R. § 337.6(a)(5)(v)(I).

[18] Proposed Rule, § 337.6(a)(5)(iv)(I)(1)(i), 89 Fed. Reg. at 68,271. For the designated exception, the proposed rule would change the current "assets under administration" standard to one based on "assets under management" and would change the current 25% percentage to 10% percent. Proposed Rule, § 337.6(a)(5)(iv)(I)(1)(i), 89 Fed. Reg. at 68,271. IntraFi defers to industry associations that have commented on the problems with these changes.

[19] Proposed Rule, § 303.243(b)(4)(i), 89 Fed. Reg. at 68,270.

[20] Proposed Rule, § 337.6(a)(5)(ii)(E), 89 Fed. Reg. at 68,271.

[21] The Supreme Court has declared that one of "the basic requirements of the rulemaking process" under the APA is that there be "a satisfactory explanation for [the] action including a rational connection between the facts found and the choice made." *Little Sisters of the Poor v. Pennsylvania*, 591 U.S. 657, 682 (2020) (quoting *Motor Vehicle Mfrs. Assn. v. State Farm Mut. Automobile Ins. Co.*, 463 U.S. 29, 43 (1983)). That test is not met here. The NPR cites no facts showing that the broker-dealer's primary purpose can be established without an application process for both affiliated and unaffiliated sweep deposits, but that the service provider's status cannot be, even when the broker-dealer

Additionally, the proposal denies access to the designated exception under the primary purpose exception not because of anything having to do with the broker-dealer's actual primary purpose, but merely because the broker-dealer relies on assistance from a service provider to achieve that purpose.

B. The "Deposit Allocation" Provision Should Be Clarified.

Under the proposed rule, a person is a deposit broker if "[t]he 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) . . . ."[22] If the deposit allocation standard is included in a final rule, the FDIC should clarify that a person that provides services for a program in which a predetermined amount, such as a predetermined amount per depositor or a predetermined total amount, of deposits are sent to a single predetermined destination institution is not proposing or determining deposit allocations.

For example, when a broker-dealer sends all customer deposits to the broker-dealer's affiliated bank and sends none to any other bank or non-bank, the service provider is not involved in "allocating" deposits, because it is not dividing a whole amount of deposits into parts and is not determining what the disposition of any part will be. Likewise, if a broker-dealer sends a predetermined part of each customer's deposit balance to the broker-dealer's affiliated bank, a service provider performs no deposit allocation for that part. The service provider performs deposit allocation, if at all, only for remaining customer funds that are divided and sent in variable amounts elsewhere.[23]

The proposed clarification best fits the FDIC's stated rationale for the allocation provision, which centers on the belief that a service provider, in proposing or determining deposit allocations, may "steer" deposits to or from particular banks.[24] If a broker-dealer sends all customer deposits, or a predetermined portion of customer deposits, to its affiliated bank, it is impossible for the service provider to steer deposits to or from particular banks. The affiliated bank's balance is determined by the predetermined portion, which the service provider is powerless to change.

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sends the affiliated bank all its sweep deposits or a predetermined portion of the sweep deposits that the service provider cannot change.

[22] Proposed Rule, § 337.6(a)(5)(ii)(D), 89 Fed. Reg. at 68,271.

[23] For example, if a broker-dealer determines in advance that the first $240,000 of every customer's deposit balance, or a specified part of total customer deposits, will be sent to the broker-dealer's affiliated bank, a service provider for the sweep program is not proposing or determining anything that can appropriately be considered a "deposit allocation" for the customer funds that are sent to the affiliated bank.

[24] *See* 89 Fed. Reg. at 68,253 (a third party may "be steering its customers to particular IDIs in an effort to maximize its own fees for the placement of customer deposits").

C. The Remuneration Provision Should Be Clarified.

The proposed rule defines as a deposit broker any person who has "a relationship or arrangement" in which a bank or customer "pays the person a fee or provides other remuneration in exchange for deposits being placed at one or more insured depository institution[s]."[25] The proposed rule does not define what it means for remuneration to be "in exchange for deposits being placed at one or more" banks, and it does not require that the recipient of the remuneration have any ability to determine whether or in what amounts a bank receives deposits.

As with the "deposit allocation" standard, there is no basis to say that merely receiving "remuneration" of any kind makes a person a deposit broker with respect to deposits at a broker-dealer's affiliated bank when the person has no control over the amount of deposits sent to the affiliated bank and does not engage in any other activities, such as negotiating interest rates, that give rise to deposit broker status.[26]

Therefore the remuneration provision of the proposed rule should clarify that, if a bank or a customer pays a person a fee or provides other remuneration in connection with the placement of deposits, but the arrangement is one in which all or a predetermined portion of deposits is placed at a destination institution that the person does not select, then the person's receipt of a fee or other remuneration should not cause the person to be a deposit broker with respect to such deposits.

D. Discouraging the Use of Service Providers Would Reduce Market Stability by Increasing the Amount of Uninsured Deposits

Without the changes described above, the proposed rule might be construed as follows: Sweep deposits are non-brokered when the broker-dealer places them without any assistance from a service provider, whether at an affiliated bank or at unaffiliated banks. But sweep deposits are brokered when the broker-dealer places them with assistance from a service provider, even though the broker-dealer places all or a predetermined portion of the deposits at an affiliated bank. This result would arbitrarily disfavor banks that receive sweep deposits from a broker-dealer that does not operate a sweep program entirely on its own.

As a practical matter, only the largest broker-dealers will be likely to have the internal infrastructure to operate sweep programs without service provider assistance.[27] As a result, the proposed rule in its current form means that banks receiving deposits from the largest broker-

[25] Proposed Rule, § 337.6(a)(5)(ii)(E), 89 Fed. Reg. at 68,271.

[26] Proposed Rule, § 337.6(a)(5)(ii)(C), 89 Fed. Reg. at 68,271.

[27] Many broker-dealers, large and small, use service providers to support sweep programs, because doing so enables them to operate the programs more efficiently, which benefits their customers. If so incentivized by the FDIC, however, only the very largest broker-dealers are likely to have the technological capacity that most other broker-dealers lack to operate sweep programs in-house.

dealers will benefit from non-brokered treatment that other banks, receiving otherwise identical deposits, will not enjoy. This disparate treatment based solely on the size and technological capacity of the broker-dealer does not serve any valid policy goal, and there is no rational basis for doing so.

Moreover, rather than reducing risk, the proposed rule in its current form exacerbates risk by discouraging broker-dealers from using "hybrid" sweep programs that cause most sweep deposits to be insured. A service provider can enable a broker-dealer to offer a hybrid program in which the broker-dealer sweeps customer deposits to its affiliated bank only up to the point at which they can be insured at the affiliated bank and then sweeps additional amounts to unaffiliated banks so that they are eligible to be insured at the unaffiliated banks. A broker-dealer thus funds its own bank to a predetermined extent without placing uninsured deposits at the affiliated bank.

If the rule operates so that any use of a service provider automatically transforms otherwise non-brokered deposits into brokered deposits, the rule will incentivize a broker-dealer with an affiliated bank simply to sweep all customer deposits to its own bank without using a service provider, *even though a significant amount would be uninsured*, so that all the deposits are eligible to be non-brokered. By increasing the uninsured portion, this result will replace what could have been brokered but insured deposits at other banks with deposits at the affiliated bank that are non-brokered, but less stable because they are uninsured.

E. <u>The NPR Does Not Support Treating Affiliated Sweep Deposits as Brokered.</u>

The FDIC has stated that there have been 568 bank failures in the United States since 2001.[28] Of these 568 bank failures, the NPR cites only one – the failure of First Republic Bank on May 1, 2023 – in support of the proposed change in how affiliated sweep deposits are treated. The NPR states that the failure of First Republic Bank "suggests that in the case of First Republic, affiliated sweeps were no more 'sticky' than unaffiliated sweeps . . . ."[29] A footnote in the NPR provides data showing that affiliated sweep deposits at First Republic declined during the first quarter of 2023.[30] But even this data point from one period, which ended one month before First Republic failed, does not support the NPR's broad claim.

When a broker-dealer sweeps customer deposits to an affiliated bank, the deposits directly result from the relationship between, on one hand, the financial entity that includes both the broker-dealer and the affiliated bank and, on the other hand, the customers of that financial entity. As a result, the deposits are relationship deposits of the financial entity, which includes the affiliated

[28] FDIC, *Bank Failures in Brief – Summary*, https://www.fdic.gov/resources/resolutions/bank-failures/in-brief/index.

[29] 89 Fed. Reg. at 68,245.

[30] *Id.* n.13.

bank. Of course, there is no guarantee that a bank's uninsured relationship deposits will never run. But the possibility that uninsured relationship deposits may run does not make them brokered.

The reduction in affiliated sweep deposits at First Republic Bank occurred not because of any action by a third party, but as a small part of a far larger run on uninsured deposits at First Republic. From December 31, 2022, to March 31, 2023, aggregate uninsured deposits at First Republic declined by about 83%, whereas uninsured affiliated sweep deposits declined by about 87%.[31] This effect shows that relationship deposits of any kind are less stable when they are uninsured. Treating these relationship deposits as brokered would not have affected the result in any way.[32] The outflow of uninsured affiliated sweep deposits at First Republic, rather than supporting the proposed rule, underscores the value of a hybrid sweep arrangement, offered with a service provider's assistance, that reduces uninsured deposits at affiliated banks.

II. The FDIC Should Withdraw the Proposed Rule's Agent Institution "Clarification."

The NPR states that the FDIC is proposing to "clarify" when an insured depository institution that has "lost its agent institution status" for purposes of reciprocal deposits can "regain its agent institution status."[33] The "clarification" in the proposed rule has no support in the language of the Act and is harmful as a matter of policy. It should therefore be withdrawn, and the existing FDIC regulations on the matter, which accurately track the statutory text, should remain in effect.

A. The Agent Institution Language in the Proposed Rule Conflicts with the Act.

The NPR asserts that a situation can arise in which a bank "receives [an amount of] reciprocal deposits that results in its total reciprocal deposits exceeding its special cap."[34] The

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[31] *See* FDIC, *FDIC's Supervision of First Republic Bank*, Sept. 8, 2023, https://www.fdic.gov/sites/default/files/2024-03/pr23073a.pdf, at 7, 11. The FDIC did not find that sweep deposits had anything to do with First Republic's failure. *Iid* at 2-3 (no mention of sweep deposits under "Causes of Failure and Material Loss").

[32] First Republic Bank remained well capitalized at relevant times, which means that brokered treatment of the affiliated sweep deposits would have had no effect. The Material Loss Review of First Republic Bank, performed for the FDIC by Cotton & Company Assurance and Advisory, LLC ("*Cotton*"), states as follows:

> The FDIC found that First Republic was well-capitalized throughout each examination cycle based on defined capital measures. Accordingly, the FDIC had not taken any action with respect to PCA requirements. Cotton found that FDIC examiners assessed Capital appropriately based on the PCA framework. We did not identify any exceptions in this area.

FDIC Office of Inspector General, *Material Loss Review of First Republic Bank*, Report No. EVAL-24-03 (Nov. 28, 2023), https://www.fdicoig.gov/sites/default/files/reports/2023-12/EVAL-24-03.pdf, at 32.

[33] 89 Fed. Reg. at 68,258.

[34] *Id.*

NPR states that, in such a situation, the bank "is no longer an agent institution." The NPR further states that "the bank no longer qualifies for the limited exception [from brokered treatment for reciprocal deposits] and must report all its reciprocal deposits as brokered deposits."

According to the NPR, a bank to which the special cap applies that has "lost its agent institution status" can "regain its agent institution status" under the proposed rule only if the bank "can demonstrate that it did not receive any reciprocal deposits that caused its total reciprocal deposits to exceed its special cap" for three consecutive calendar quarters.[35] The proposed rule itself refers to "two successive reporting quarters."[36] In either case, the proposal contemplates a lengthy period in which a bank is denied non-brokered treatment for reciprocal deposits that the Act makes non-brokered.

1. The Statutory Language Governs.

By definition, both under the Act and under existing FDIC regulations, "reciprocal deposits" are deposits that are received through a deposit placement network "by an agent institution."[37] The received deposits must match – in maturity, if any, and in amount – covered deposits that the agent institution places through the network.[38]

The Act and existing regulations define "agent institution" as a bank that "places a covered deposit through a deposit placement network" if the bank satisfies any one of three conditions[39]:

(i) the bank when most recently examined was found to be outstanding or good and is well capitalized,[40] or

(ii) the bank has obtained an FDIC waiver,[41] or

[35] *Id.*

[36] Proposed Rule, § (e)(3)(iv)(B), 89 Fed. Reg. at 68,272.

[37] 12 U.S.C. § 1831f(i)(2)(E); 12 C.F.R. § 337.6(e)(2)(v).

[38] *Id.*

[39] 12 U.S.C. § 1831f(i)(2)(A); 12 C.F.R. § 337.6(e)(2)(i).

[40] 12 U.S.C. § 1831f(i)(2)(A)(i); 12 C.F.R. § 337.6(e)(2)(i)(A).

[41] 12 U.S.C. § 1831f(i)(2)(A)(ii); 12 C.F.R. § 337.6(e)(2)(i)(B)

(iii) the bank "does not receive an amount of reciprocal deposits that causes" the bank's reciprocal deposits balance to exceed a prior four-quarter average (referred to by the FDIC as the "special cap").[42]

Because reciprocal deposits are defined as deposits received by an agent institution, a bank that places a deposit must satisfy one of these conditions in the agent institution definition when it receives matching deposits for those matching deposits to be reciprocal deposits.

When the special cap applies, the Act protects a bank's ability to continue to receive reciprocal deposits that satisfy the third condition. The Act does not permit the FDIC to restrict a bank from receiving reciprocal deposits in amounts *under* the special cap.

2. The Special Cap Determines Whether Deposits Are Reciprocal Deposits or Not.

The plain meaning of the statutory language is as follows: When a bank that does not satisfy either of the first two conditions above places an otherwise covered deposit, and the bank receives deposits that match the placed deposit, the bank is an agent institution, and those matching deposits are reciprocal deposits, if they do not cause the bank's reciprocal deposits balance to exceed the so-called special cap.

For example, assume that Bank A becomes less than well capitalized and has not obtained an FDIC waiver. Assume Bank A's special cap is $10 million and its current reciprocal deposits balance is $8 million. If Bank A places an otherwise covered deposit of $3 million, and Bank A receives $3 million in deposits that match the placed deposit, Bank A is not an agent institution when it receives the $3 million in matching deposits. The matching deposits that Bank A receives therefore are not reciprocal deposits. However, if Bank A's amount of reciprocal deposits declines naturally to an amount below $10 million, it can receive additional reciprocal deposits up to a total of $10 million because, when Bank A receives the deposits, it satisfies the condition in the agent institution definition that it "does not receive an amount of reciprocal deposits that causes" its reciprocal deposits balance to exceed the $10 million special cap.

This plain meaning interpretation recognizes that the statutory language that creates the special cap (which does not use the term "special cap") is a condition in a definition, not a behavioral prohibition. The language does not say, "A bank shall not . . . ." Nor does the Act suggest that the special cap can be "violated" or prescribe any penalty for "violating" it. Rather, when the special cap applies, it determines whether particular matching deposits, when received, are reciprocal deposits or not.

Viewed in light of the plain statutory language, the special cap operates by preventing deposits that would exceed it from qualifying as reciprocal deposits. If a bank receives deposits

[42] 12 U.S.C. § 1831f(i)(2)(A)(iii); 12 C.F.R. § 337.6(e)(2)(i)(C).

that match a placed deposit, but the bank is not an agent institution when it receives them, those matching deposits are non-reciprocal brokered deposits, subject to brokered deposit restrictions.[43]

3. The NPR's Interpretation Is Not Supported by the Statutory Language.

The NPR gives the Act a different reading not supported by the language of the Act. The proposed rule states that, after exceeding the special cap, a bank to which the special cap applies "may regain its status as an agent institution [only] after complying with paragraph (e)(3)(iv)(A) of this section continuously for two successive reporting quarters."[44] The NPR describes the proposed rule as stating that a bank that has exceed the special cap cannot become an agent institution again until "the last day of the third consecutive calendar quarter during which the bank did not at any time receive reciprocal deposits that caused its total reciprocal deposits to exceed its special cap."[45]

There is no legal basis for the waiting period that the proposed rule would impose on a bank for receiving deposits in excess of the special cap. To the contrary, the Act requires that the question whether a bank is an agent institution be evaluated as of the time at which the bank receives the deposits. To be an agent institution when it receives the deposits, a bank to which the special cap applies must meet the condition that the bank "does not receive" – in the present tense, when the bank receives the deposits – "an amount of reciprocal deposits amount that causes" – also in the present tense, when the bank receives the deposits – its reciprocal deposits balance to exceed the special cap.[46]

Under the proposed rule, however, if a bank received, on a single occasion in six (or nine) months, an amount of reciprocal deposits that caused the bank's balance to exceed the special cap, the bank is deemed not to be an agent institution when it receives entirely different deposits at entirely different times. In effect, the proposed rule would alter the Act's text to require that the bank, when it receives deposits, "did not receive in the past six months" – in the past tense – a

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[43] If the bank does not satisfy the first condition in the agent institution definition (rating and capital) because, when last examined, the bank was not found to be outstanding or good, but the bank is well capitalized, the bank is still permitted to receive brokered deposits. 12 C.F.R. § 337.6(b)(1).

If the bank is not well capitalized, the bank is prohibited from accepting brokered deposits without a waiver. 12 U.S.C. § 1831f(a); 12 C.F.R. § 337.6(b)(2),(3). In that case, if the bank receives the deposits, any "noncompliance" is not with the special cap, which is a definitional condition, not a rule of behavior. Rather, it is with the prohibition on receiving brokered deposits. *Id.* Nothing in the Act empowers the FDIC to punish a bank for accepting brokered deposits by withholding reciprocal deposits treatment that the Act separately grants.

[44] Proposed Rule, § (e)(3)(iv)(B), 89 Fed. Reg. at 68,272.

[45] 89 Fed. Reg. at 68,258.

[46] 12 U.S.C. § 1831f(i)(2)(A)(iii); 12 C.F.R. § 337.6(e)(2)(i)(C).

reciprocal deposits amount that "caused in the past six [or perhaps nine] months" – in the past tense – its reciprocal deposits balance to exceed the special cap.

The FDIC cannot change statutory text in this manner from the present tense to the past.[47] The use of the present tense in the Act must be given its plain meaning.[48] This meaning requires that the determination be made as of the time at which the deposits in question are received, not when some other deposits were received at some other time.[49]

The NPR further errs when stating that a bank, after losing agent institution status, "no longer qualifies for the limited exception [for reciprocal deposits] and must report all its reciprocal deposits as brokered deposits."[50] Nowhere does the Act provide for this consequence.

B. The Agent Institution Provision Does Not Serve Sound Policy.

The NPR states that the agent institution provision in the proposed rule is designed to "provide clarity" on the application of the agent institution definition.[51] However, the proposed rule's inconsistency with the plain meaning of the statutory text is more likely to diminish clarity.

More fundamentally, the provision would not advance sound FDIC policy. If the provision is adopted and a bank, even inadvertently, receives an amount of matching deposits that, if treated as reciprocal, causes a single instance in which the bank is viewed as having a reciprocal deposits balance that exceeds the special cap, the proposed rule would harm the bank by deeming it not to be an agent institution, and not to qualify for the exception for reciprocal deposits, for six (or more) months. The proposed rule imposes this penalty without regard to why the bank received the amount and without regard to the potential adverse effect of the penalty on the bank's liquidity or more broadly on its safety and soundness. Such a penalty is highly counterproductive.

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[47] *See Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Foundation, Inc.*, 484 U.S. 49, 57 (1987) (''Congress could have phrased its requirement in language that looked to the past, but it did not choose this readily available option''); *accord Carr v. United States*, 560 U.S. 438, 448 (2010) ("[c]onsistent with normal usage, we have frequently looked to Congress' choice of verb tense to ascertain a statute's temporal reach") (citations omitted). Rendering the condition in the present perfect tense ("has not received") would likewise refer to an act completed in the past, which disregards the Act's use of the present tense. *See Carr v. United States*, 560 U.S. at 447-48 (past and present perfect tenses refer to act completed in the past).

[48] *See Carr v. United States*, 560 U.S. at 448 ("normal usage"); *Lamie v. U.S. Trustee*, 540 U.S. 526, 536 (2004) (requiring use of "plain meaning" when not absurd).

[49] *Loper Bright Enterprises v. Raimondo*, – U.S. –, 144 S.Ct. 2244, 2273 (2024) (no special deference to statutory interpretation by agency).

[50] 89 Fed. Reg. at 68,258.

[51] *Id.*

When a bank's rating or capital position causes the special cap to apply, and the bank is deemed not to satisfy the special cap, the proposed rule would not merely affect the reciprocal status of deposits that, if reciprocal, would cause the balance to exceed the special cap. Rather, according to the NPR, the proposed rule would convert all the otherwise non-brokered reciprocal deposits that the bank receives during six (or nine) months into non-reciprocal brokered deposits. The bank's brokered deposit amounts would artificially increase, potentially by a large amount, causing what could be a precipitous decline in liquidity.

Why, when the FDIC is no doubt requiring that the bank obtain additional capital or be acquired, would the FDIC want to hobble the bank in this way and discourage either result? And if, despite the punitive period, the bank is acquired or obtains a large capital infusion, what public policy purpose is served by keeping the bank's liquidity position weak, with heightened assessments? From a policy perspective, these effects do not make sense.

Given these considerations, we respectfully request that the FDIC confirm that, if a bank to which the special cap applies receives an amount of otherwise reciprocal deposits through a deposit placement network and "does not receive" an amount that "causes" its reciprocal deposits balance to exceed the special cap, the deposits are reciprocal deposits, regardless of any amount received in the past. If the bank receives an amount of deposits through the network that would cause its reciprocal deposits balance to exceed the special cap, those deposits are not reciprocal deposits.

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Please do not hesitate to contact the undersigned at bbergin@intrafi.com or 703-292-3489 if you have any questions or need further information.

Sincerely,

William Bergin
Senior Vice President and General Counsel