TEXAS BANK AND TRUST
MEMBER FDIC EQUAL HOUSING LENDER

P.O. Box 3188
Longview, Texas 75606
903-237-5500
1-800-263-7013
www.texasbankandtrust.com

November 18, 2024

VIA EMAIL to comments@fdic.gov

Re: Comments on Proposed Rule Regarding Brokered Deposits (RIN 3064–AF99)

Federal Deposit Insurance Corporation

To Whom It May Concern:

This comment is submitted in response to the proposed rule regarding brokered deposits (the "Proposed Rule") promulgated by the Federal Deposit Insurance Corporation ("FDIC").[1] There are significant issues with the Proposed Rule that would negatively impact Texas Bank and Trust, Longview, Texas (the "Bank"), and the general safety and soundness of the U.S. banking system. The Bank strongly opposes many aspects of the Proposed Rule and hopes that the FDIC takes the Bank's concerns into consideration in formulating a final rule or, ideally, rescinding the Proposed Rule. To finalize the Proposed Rule substantially as written would be arbitrary and capricious.

I. The Bank's Concerns Regarding the Proposed Rule

The Bank echoes the concerns and sentiments expressed by Vice Chairman Travis Hill in his statement on the Proposed Rule.[2] The Bank believes that the Proposed Rule would do more harm than good because it paints with too broad of a brush and does not account for the many nuances among various deposit placement arrangements. As a general matter, the Proposed Rule would reduce banks' access to many stable sources of deposits and restrict their ability to diversify their funding mix, thereby increasing liquidity risk and adversely impacting the general safety and soundness of the banking system. This will also negatively impact banks' ability to fund lending activities in their local communities.

The Bank interprets the Proposed Rule as an improper attempt by the FDIC to disincentivize bank-fintech partnerships, given that essentially all fintech-related deposits would be classified as brokered deposits under the Proposed Rule; in particular, as a result of the proposed new deposit allocation prong and fee-based prong of the "deposit broker" definition, and as a result of the elimination of the "enabling transactions" exception and the "exclusive deposit placement arrangement" exemption. When fintechs and neobanks first entered the banking sphere, many feared they would pose an existential threat to traditional banks, and especially community banks. At that time, it was thought that fintechs would be direct competitors to community banks. However, over time, many community banks learned that partnering with fintechs was an effective way for banks to market their deposit products and reach a broader deposit base, which in turn helped such banks continue to meet the lending needs of their communities.

The Proposed Rule will exacerbate the challenges experienced by community banks in gathering deposits (e.g., technology and marketing costs and competition from the bigger banks) and thereby exacerbate the gap between the biggest banks and community banks. Additionally, increased regulatory pressure on banking-as-a-service and bank-fintech partnerships, including the Proposed Rule, is prompting

[1] 89 Fed. Reg. 68244, 68261 (Aug. 23, 2024).

[2] *Statement by Vice Chairman Travis Hill on the Notice of Proposed Rulemaking on Brokered Deposit Restrictions* (July 30, 2024), available at https://www.fdic.gov/news/speeches/2024/statement-vice-chairman-travis-hill-notice-proposed-rulemaking-brokered-deposit.

fintechs to explore obtaining bank charters and reducing their reliance on partner banks.[3] This could result in a return to an environment of competition (rather than partnership and collaboration) between fintechs and community banks.[4] FDIC Chairman Martin Gruenberg recently highlighted the increasing competition of banks with credit unions and non-bank financial technology companies: "The ongoing consolidation within the banking industry and especially between community banks themselves further speaks to the pressures of being a small institution in the current environment. The pandemic and subsequent rise in interest rates tested the U.S. banking industry."[5]

Treating third-party fintech deposits at partner banks as brokered deposits, but simultaneously treating deposits obtained directly by a fintech through its own bank charter as non-brokered deposits, is illogical and creates bad incentives. Such a rule appears to shift the brokered versus non-brokered designation of deposits based on where such deposits are insured (e.g., at a fintech's own bank charter or at a fintech's partner bank). Bank-fintech relationships can be executed prudently and in a safe and sound manner. Such relationships provide opportunities that enable banks to remain competitive and provide enhanced services to their customers. Even for banks that do not currently partner with fintechs or other similar third parties, the Proposed Rule would eliminate such banks' optionality to do so in the future, including as a potential method to diversify funding. Given the ever-evolving modern U.S. banking industry, the Bank is concerned that the Proposed Rule eliminates many potential sources of stable funding (including fintech partnerships, but far beyond that as well) without any rational factual basis for doing so.

Importantly, the Proposed Rule would reduce access to financial services for unbanked and underbanked consumers and increase costs for consumers. The Proposed Rule only cursorily acknowledges that consumers who access banking services through affected relationships may be impacted.[6] However, the FDIC does not even begin to attempt to understand the magnitude of that impact, or its spillover effects, let alone to quantify the impact with any precision. Rather, the FDIC states that it "does not have the information necessary to estimate such changes, and therefore, discusses these effects qualitatively."[7] That "qualitative" discussion consists of merely one paragraph.

Relatedly, the Proposed Rule further incentivizes consumers to place their funds in nonbank accounts, such as money market mutual funds ("MMMFs"). The FDIC should work with other regulators to educate the public that MMMFs are placed in assets of higher risk. The Proposed Rule would push more savers out of the banking system if MMMFs will offer better rates. This will be exacerbated by the costs imposed on banks that are not applicable to nonbank providers, including the tendency of the FDIC and other prudential regulators to treat as "hot money" all deposits when banks seek to pay rates that approximate this nonbank competition. This concept is codified in the interest rate restrictions under the brokered deposit rules, which treat certain deposits as brokered if rates exceed the applicable caps, even if

---

[3] *Fintechs mull bank charters as regulatory pressure on partnerships ramps up*, Yizhu Wang and Gaby Villaluz, S&P Global (Sep. 18, 2024).

[4] *Tailoring, Fidelity to the Rule of Law, and Unintended Consequences*, Speech, Michelle W. Bowman (March 5, 2025), available at https://www.federalreserve.gov/newsevents/speech/bowman20240305a.htm ("Regulatory costs that are disproportionate to a firm's risk create incentives for activities to migrate out of the banking system entirely, which we have seen as a consequence of past regulatory reform efforts. In my view, implicit in the statutory mandate to promote safety and soundness, and financial stability, is that we allow banks to continue serving their role in the U.S. financial system and in support of the economy. Fidelity to the law does not require regulators to create a bank regulatory framework that eliminates risk: banking is inherently about managing, not eliminating, risk.").

[5] *Remarks by FDIC Chairman Martin Gruenberg at the 12th Annual Community Banking Research Conference* (Oct. 2, 2024), available at https://www.fdic.gov/news/speeches/2024/remarks-fdic-chairman-martin-gruenberg-12th-annual-community-banking-research.

[6] 89 Fed. Reg. at 68261.

[7] *Id.*

no third party is involved.[8] The moral hazard resulting from the government's support of nonbank accounts should be corrected; otherwise, such entities have implicit backing without cost.

While the Bank acknowledges that the FDIC has many valid concerns relating to certain of the 2023 bank failures and the recent Synapse debacle, the Bank does not believe the Proposed Rule would address those concerns. Third-party risk management, recordkeeping and reconciliation requirements, operational issues, liquidity risk (including uninsured deposit levels, deposit concentrations and risks associated with competitors' pricing) and imprudent asset growth are distinct areas of risk that should be regulated and supervised on a separate, bespoke basis. Brokered deposits should not be used as a proxy for those distinct risk areas. To do so creates even more risk for the banking system. Regulations that are more focused on direct risks, like the FDIC's proposed rule regarding recordkeeping for custodial deposit accounts (even if flawed in certain respects), will be much more effective in achieving the FDIC's objectives while simultaneously reducing harm to banks and consumers.

The Bank agrees with FDIC Director Jonathan McKernan's statement that, although the Proposed Rule "does a good job of marshalling evidence of the risks posed by brokered deposits," it "does not, however, offer any evidence that some of the deposits that this proposal would re-classify as brokered deposits actually present the same or similar risks."[9] In the Bank's experience, many of the deposit categories that would be considered brokered deposits under the Proposed Rule are, in fact, extremely stable and sticky.

In this modern age, deposits can be withdrawn directly by a depositor with the click of a button. As a result, it is the Bank's experience that "core deposits" can be just as volatile, if not more so, than deposits obtained through a third party. It is not the presence of a third party that makes deposits less stable, but rather the internet that gives depositors ready access to their funds and the ability to accelerate withdrawals. In fact, it is the Bank's experience that the existence of a third party in a deposit relationship can often slow or prevent a rapid outflow of funds.

The Bank is particularly concerned that the Proposed Rule builds in too much subjectivity and fact-specific analysis – for example, in the analysis for whether a particular fee paid to a third party is "in exchange for placing deposits" or with respect to primary purpose exception ("PPE") application determinations. As a result, the FDIC would have almost unlimited latitude under the Proposed Rule to deem as brokered any deposits that it disfavors or perceives as risky. This in contrast to the FDIC's changes to the rules promulgated in 2020 (the "2020 Rule"), which attempted to instill more clarity and objective criteria into the rules (and into the primary purpose exception, in particular).[10] The changes in the 2020 Rule provided banks with a much more coherent and workable set of rules than existed prior to 2020, when subjectivity and fact-intensive analyses ruled the day. The Bank fears that the Proposed Rule is a step backwards into the "fragmented, opaque legal regime that exists outside of the FDIC's public-facing regulations, understood by only a select few."[11]

The brokered deposit statute was enacted in 1991. The Bank believes the FDIC should evaluate Congressional intent at that time. Congress gave the FDIC the authority to define "brokered deposits" from

[8] 12 CFR 337.7.

[9] *Statement by Jonathan McKernan, Director, FDIC, Board of Directors, on the Proposed Brokered Deposit Restrictions* (July 30, 2024), available at https://www.fdic.gov/news/speeches/2024/statement-jonathan-mckernan-director-fdic-board-directors-proposed-brokered.

[10] 86 Fed. Reg. 6742 (Jan. 22, 2021).

[11] *Statement by FDIC Chairman Jelena McWilliams on the Combined Final Rule on Brokered Deposits and Interest Rate Restrictions at the FDIC Board Meeting* (Dec. 15, 2020), available at https://www.fdic.gov/news/speeches/2020/spdec1520b.html.

the standpoint of preventing banks from using such funding to add risky assets and pay excessive interest rates, not to discourage healthy banks from holding a diverse funding mix or meeting the needs of their customers in a modern banking environment. The FDIC and other prudential regulators have recently been adding growth limits to administrative actions; thus, the need to use an extremely broad brush here is not necessary.

II. Procedural Shortcomings of the Proposed Rule

The FDIC is moving far too quickly on the Proposed Rule, especially when compared to the robust, multi-year factfinding and rulemaking process that preceded the 2020 Rule. The 2020 Rule resulted in what the Bank agrees was "a major overhaul of the long-standing framework that is practical, sensible, and a definite improvement over the existing regime."[12] The rulemaking process here stands in direct contrast with the deliberate process followed by the FDIC for the 2020 Rule. Critically, the FDIC does not address or engage with the record that the FDIC developed in connection with the 2020 Rule or the reasons and rationale that the FDIC provided in adopting the 2020 Rule. In fact, the FDIC appears to completely ignore and overlook such record.

What is also missing from the Proposed Rule is an in-depth discussion of the original purposes of the brokered deposit statute, which was discussed heavily in the 2020 Rule record. The FDIC asks if its "proposed amendment to the 'deposit broker' definition align[s] more closely with the statutory language *and purpose* of section 29 of the FDI Act" (emphasis added).[13] The Bank believes the answer to that question is a resounding "no"; at best, the answer to that question is unclear given the lack of data supporting the Proposed Rule.

As the 2020 Rule preamble noted, "[n]othing in the [2020 Rule] is intended to limit the FDIC's ability to review or take supervisory action with respect to funding-related matters, including funding concentrations, that may affect the safety and soundness of individual banks or the industry generally . . . [or] changes the FDIC's or other federal regulators' authorities under section 8 or section 39 of the FDI Act."[14] This statement highlights the fact that, regardless of whether or not certain deposits had been deemed brokered during the 2023 banking turmoil, the FDIC and other regulators continued to retain the authority to take supervisory action based on identified funding risks. The FDIC uses the crypto company Voyager as justification for the Proposed Rule.[15] The regulators did not sufficiently foresee the funding risk that Voyager posed to its partner banks. This is true regardless of whether or not Voyager is considered a "deposit broker." Thus, the FDIC's implication that the Voyager issues might not have occurred "but for" the 2020 Rule (or the implication that the risks might have been prevented or mitigated if Voyager had been deemed a deposit broker) is a red herring. The same applies to Silicon Valley Bank, First Republic Bank and the other 2023 bank failures.

The FDIC does not show how the Proposed Rule would achieve the purpose of the brokered deposit statute or the FDIC's stated goals, restricting troubled banks from seeking volatile and high-cost deposits to enable imprudent asset growth, and does not sufficiently consider whether alternative approaches would be better suited for achieving such goals. In the short "Need for Rulemaking" section of the preamble to the Proposed Rule, the FDIC states that the current regulations "do not fully consider important safety and soundness considerations" which "in turn raises the risk that *less than well-capitalized IDIs may rely on less stable third-party deposits for rapid growth that could ultimately expose the DIF to increased losses*"

---

[12] McWilliams, *Statement on the Combined Final Rule on Brokered Deposits and Interest Rate Restrictions at the FDIC Board Meeting.*

[13] 89 Fed. Reg. at 68267.

[14] 86 Fed. Reg. at 6761.

[15] 89 Fed. Reg. at 68245.

(emphasis added).[16] This is the primary justification provided by the FDIC for the Proposed Rule. Yet, the FDIC has failed to demonstrate that the deposits which would be reclassified from non-brokered to brokered under the Proposed Rule are, in fact, less stable – conversely, as discussed in this letter, the Bank believes that the Proposed Rule would actually restrict banks from accessing many stable sources of deposits.

The timing of the Proposed Rule, four years after the issuance of the 2020 Rule, feels like political whiplash. [17] Banks have expended significant time and resources structuring their businesses and relationships based on the 2020 Rule. There are many deposit arrangements that banks would likely not have entered into (or, at least, would have entered into with different pricing and terms) *but for* the refined "deposit broker" definition and broadened designated exceptions available under the 2020 Rule. To change the rules of the game so drastically and so soon, especially without providing for any sort of grandfathering, is akin to a government taking and an *ex post facto* law.

Importantly, it is clear that the FDIC did not conduct a sufficient cost-benefit analysis of the Proposed Rule. Firstly, the FDIC did not conduct a sufficient analysis of the potential effects of the Proposed Rule on community banks. The brokered deposit restrictions impose costs on the system because banks must pay more for core deposits. This premium is especially harmful for community banks that do not have as many choices for funding, and thus, will see their cost structure increase as bigger banks with online tools bid for the same funding.

In fact, it was not possible for the FDIC to conduct a sufficient cost-benefit analysis because the FDIC does not have the necessary data to adequately analyze and support the Proposed Rule, including data and other information that will be submitted in response to the Deposit RFI and the Fintech RFI. In its preamble to the Proposed Rule, the FDIC states at least 11 times that it "does not have the data/information necessary" to analyze the potential impact of the Proposed Rule. Further, the limited data that the FDIC *does* rely on in support of the Proposed Rule is flawed. For example, the FDIC relies on data from the 2011 core deposit study, updated through 2018, which is obviously stale at this point. Moreover, such data only ever showed correlation, and not causation.[18]

The FDIC cites to the 2023 bank failures and other "recent events" (e.g., Synapse and Voyager) but does not assess how the Proposed Rule would have led to different outcomes. As a result, the FDIC does not adequately demonstrate how the proposal is appropriately calibrated to the identified risks. The FDIC appears to turn a blind eye to the fact that brokered deposits generally proved to be the least volatile when banks suffered a liquidity crisis during the 2023 bank failures. For example, the FDIC states that "First Republic Bank, which failed in May of 2023, saw rapid growth in reported brokered deposits in the quarters leading up to its failure" but does not acknowledge that high levels of uninsured deposits and deposit concentrations (not brokered deposits) were the primary issues at play there; nor does the FDIC acknowledge the fact that many of First Republic Bank's brokered and similar deposits ended up being

---

[16] *Id.* at 68250.

[17] "Consensus is a powerful tool. When there is broad policy agreement, there tends to be moderation in approach, acting as a check on wild swings of the regulatory pendulum and providing banks and holding companies with an important degree of stability in their regulatory and supervisory expectations. While it is important for regulators to adapt to changing conditions, and to evolve in the face of new and emerging risks, this incremental approach tends to produce better policy and better outcomes in the banking system. . . Regulatory reform should not be a "shock" to the banking system, and meaningful discussion and consensus act as a check on dramatic swings of the regulatory pendulum." Bowman, *Building a Community Banking Framework*.

[18] The FDIC states that its "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" and that "statistical analysis found that brokered deposit use *is associated with* higher probability of an IDI's failure and higher DIF loss rates" (emphasis added). 89 Fed. Reg. at 68244 and 68247.

significantly stickier than the bank's retail deposits.[19] This is why the release of the brokered deposit data from the 2023 failures, as requested earlier in this letter, would provide further insight on the appropriateness of the Proposed Rule.

The FDIC also does not analyze the Proposed Rule's potential effects on banks that do not currently have funds that would be considered brokered deposits under the proposal but who will have reduced optionality for funding strategies as a result of the Proposed Rule. Rather, the FDIC focuses primarily on banks that are less than well capitalized, on the basis that the brokered deposit restrictions technically do not apply to well capitalized banks. However, this does not show the whole picture, as well-capitalized banks are, of course, very much impacted by the brokered deposit rules. Examiners review all banks' brokered deposit levels and scrutinize banks with higher levels of such deposits. Additionally, all banks are required to accurately report brokered deposit levels on their Call Reports, and brokered deposit levels also impact FDIC assessment amounts. Further, examiners evaluate the liquidity CAMELS component partly in light of overall wholesale funding levels, including brokered deposits. As part of the analysis, examiners also require banks to assume that they are subject to prompt corrective action, and thus limits on brokered deposits. As a result, higher levels of brokered deposit levels may result in lower liquidity ratings.

Perhaps most importantly, the FDIC does not sufficiently analyze how the Proposed Rule would affect the availability and costs of services available to consumers and other banking customers. The "Potential Effects on Consumers" section of the preamble is a mere two paragraphs long and cursory in substance. The short section states that consumers whose deposits may be reclassified as brokered "might experience changes in interests rates on those funds, or costs associated with placing those funds with different entities" but goes on to state that "[t]he FDIC does not have the information necessary to estimate such changes."[20] Bank-fintech partnerships have greatly expanded financial access to unbanked and underbanked consumers, including low-income and diverse populations. As noted by the Federal Reserve, "notable gaps in access to financial services still exist, particularly among those with low income, Black and Hispanic adults, and those with a disability."[21] The Bank believes that the Proposed Rule would significantly decrease consumers' access to financial services and significantly increase consumers' costs. In this regard, the FDIC seems solely focused on the impact to consumers with existing arrangements that would be reclassified as brokered deposits under the Proposed Rule; it does not evaluate the impact of the Proposed Rule's chilling effect on bank-fintech partnerships and third-party deposit placement arrangements in general, thereby ignoring the broader policy effects of the proposal.

By not conducting a fulsome evaluation (or even attempting such an evaluation), the FDIC ignores important consequences of the Proposed Rule and throws the baby out with the bathwater. The above-referenced procedural issues make the Proposed Rule arbitrary and capricious. The Administrative Procedure Act ("APA") authorizes a court to "hold unlawful and set aside agency action, findings, and conclusions" if they are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with

---

[19] "By sheer happenstance, First Republic Bank was clearly under stress during the first quarter but was not formally seized until May 1, after it had filed first quarter financials reflecting that stress. So, we have both 'before' and 'after' snapshots — and what that data shows about how different types of deposits are actually performing in the modern world is strikingly at odds with longstanding industry and regulatory presumptions about how those deposits 'should' behave. Brokered and similar deposits, presumed to be the epitome of 'hot money,' were actually more than eight times stickier than favored retail deposits. Time deposits were more than twice as sticky as transaction accounts. And noninterest-bearing deposits ran out the door 30% faster than the presumably problematic interest-bearing deposits." *Are we totally wrong about which types of deposits are risky?*, Brian Graham, American Banker (June 21, 2023).

[20] 89 Fed. Reg. at 68261.

[21] Report on the Economic Well-Being of U.S. Households in 2022 - May 2023, Federal Reserve, available at https://www.federalreserve.gov/publications/2023-economic-well-being-of-us-households-in-2022-banking-credit.htm.

law, "and to "compel agency action unlawfully withheld or unreasonably delayed."[22] It is well settled that a rule is arbitrary and capricious if the agency has not provided a reasoned explanation for its actions.[23] In addition, an 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.'"[24] Agency action is arbitrary and capricious where the agency has "offered an explanation for its decision that runs counter to the evidence before the agency" or "entirely failed to consider an important aspect of the problem."[25] The FDIC's various conclusory statements provided as justification for the Proposed Rule, based purely on speculation or outdated data, fails to consider important aspects of what is at issue and runs "counter to the evidence" proffered by the industry participants that provided comments on the 2020 Rule.[26]

Although the FDIC has styled its action as a proposal and an invitation for public comment, it is clear that the FDIC is operating under pre-judged conclusions regarding the types of deposits that the FDIC proposes to treat as brokered, including those resulting from bank-fintech partnerships and other third-party deposit placement arrangements. Consequently, the analysis underpinning the Proposed Rule is unfairly biased, and therefore, unreliable.

III. <u>The Bank's Recommendations</u>

A. ***The FDIC should (1) withdraw the Proposed Rule and wait until it has received data provided in response to its Deposit RFI and Fintech RFI (defined below) to evaluate which changes to the brokered deposit rules are necessary, if any, and (2) publicly release data from the 2023 bank failures***

In its preamble to the Proposed Rule, the FDIC states at least 11 times that it "does not have the data/information necessary" to analyze the potential impact of various aspects of the Proposed Rule. If that is the case, the Bank questions whether now is the right time for the FDIC to consider changes to the brokered deposit rules.

On August 6, 2024, the FDIC approved a request for information "soliciting comments on deposit data that is not currently reported in the Call Report or other regulatory reports, including for uninsured deposits to gather information on the characteristics that affect the stability and franchise value of different types of deposits and whether more detailed or more frequent reporting on these characteristics or types of deposits could enhance offsite risk and liquidity monitoring; inform analysis of the benefits and costs associated with additional deposit insurance coverage for certain types of deposits; improve risk sensitivity in deposit insurance pricing; and provide analysts and the general public with accurate and transparent data" (the "Deposit RFI").[27]

---

[22] 5 U.S.C. § 706. A regulation is defeated upon APA review if "the agency has relied on factors which Congress has not intended it to consider, [or] entirely failed to consider an important aspect of the problem." *Motor Vehicle Mfrs. Ass'n of U.S. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

[23] *See id. State Farm* requires that agencies engage in reasoned decision-making and that they provide contemporaneous explanations of their reasoning so reviewing courts can evaluate whether the agency has satisfied the reasoned decision-making requirement. Rulemaking must be "reasonable and reasonably explained" with concrete examples of why the existing rules are not working; making a loose connection between the desired rulemaking and an abstract or conjectural problem is not sufficient. *See Ohio v. Environmental Protection Agency*, 603 U.S. __ (2024) (citing *FCC* v. *Prometheus Radio Project*, 592 U. S. 414, 423).

[24] *See Motor Vehicle Mfrs. Ass'n of the U.S., Inc. v. State Farm Mut. Ins. Co.*, 463 U.S. 29, 43 (1983).

[25] *See id.*

[26] *Id.*

[27] 89 Fed. Reg. 63946, 63947 (Aug. 6, 2024).

The Deposit RFI provided for a 60-day comment period, ending on October 7, 2024; however, on October 4, 2024, in response to requests to extend the comment period, the FDIC extended the comment period until December 6, 2024 to allow interested parties additional time to prepare information and comments.[28] On October 8, 2024, the FDIC extended the comment period for the Proposed Rule to November 21, 2024.[29] This means that the comment period for the Proposed Rule will end before the comment period for the Deposit RFI ends.

In addition to the Deposit RFI, the FDIC issued a joint statement with the Federal Reserve and OCC on July 25, 2024 regarding bank arrangements with third parties to deliver deposit products, and an interagency request for information with the Federal Reserve and OCC on July 25, 2024 regarding bank-fintech arrangements involving banking products and services distributed to consumers and businesses (with comments due October 30, 2024) (the "Fintech RFI").[30] The Bank applauds the FDIC for soliciting this feedback from, and engaging with, industry participants. However, the Bank does not understand why the FDIC would proceed with issuing the Proposed Rule before reviewing the comments provided in response to the Deposit RFI and the Fintech RFI. Given the questions posed by the FDIC in both the Deposit RFI and Fintech RFI, the FDIC will be receiving information and data that will be directly relevant to, and should inform the FDIC's thinking with respect to, the brokered deposit rules.[31] The Bank shares the following sentiment recently expressed by Federal Reserve Governor Bowman: "When faced with regulatory change, how does bank management review and provide meaningful comment on voluminous concurrent regulatory proposals that may build upon proposed, but not finalized regulations?"[32] This is an extremely difficult landscape for banks (and especially community banks, like the Bank) to navigate.

The Bank echoes the concerns and requests articulated in the comment letter, dated August 21, 2024, submitted by The American Bankers Association, the Independent Community Bankers of America, and nine other trade associations in response to the Proposed Rule. Specifically, the Bank requests that the FDIC publicly release relevant data regarding the role of brokered deposits, if any, in the 2023 banking turmoil (including brokered deposit data from First Republic Bank, Signature Bank and Silicon Valley Bank). The Bank also requests that the FDIC make available the data that supports the FDIC's stated bases for the Proposed Rule, including information as to deposits at First Republic Bank, Signature Bank and Silicon Valley Bank that were not reported as brokered under the existing rules but would have been reported as brokered under to the Proposed Rule and/or prior to the 2020 Rule, and information as to how such changes in brokered classification would have prevented those banks' respective issues and subsequent failures. At the very least, the Bank requests that the FDIC withdraw the Proposed Rule until after it has received and digested the information and data provided in response to the Deposit RFI and the Fintech RFI, and that such information informs any changes that the FDIC proposes to the brokered deposit rules.

B. *The proposed new deposit allocation prong of the "deposit broker" definition should be removed or narrowed*

The FDIC proposes to replace the current "matchmaking activities" prong of the "deposit broker" definition with a prong that applies to a person who "proposes or determines deposit allocations at one or

[28] 89 Fed. Reg. 80899 (Oct. 4, 2024).

[29] 89 Fed. Reg. 82537 (Oct. 11, 2024).

[30] FIL-45-2024, *Joint Statement on Banks' Arrangements with Third Parties to Deliver Bank Deposit Products and Services* (July 25, 2024); 89 Fed. Reg 61577 (July 31, 2024); 89 Fed. Reg. 76913 (Sep. 19, 2024).

[31] For example, the FDIC asks the following in the Fintech RFI: "How are risks resulting from these arrangements, including those concerning credit, liquidity, concentration, compliance, and operational risk, as well as concerns regarding negative end-user experience managed? What techniques or strategies are most effective in managing the impact of rapid growth, particularly related to deposit-taking and payment-related arrangements?" 89 Fed. Reg. at 61584.

[32] Bowman, *Building a Community Banking Framework for the Future*.

more insured depository institutions (including through operating or using an algorithm, or any other program or technology that is functionally similar)."[33]

This proposed prong is far too broad, especially when considered together with the proposed removal of the "exclusive deposit placement arrangement" exemption. The Proposed Rule does not define what "proposes or determines" means. If a third party partners with only one IDI, does its decision to partner with that specific IDI mean that the third party is "proposing or determining" deposit allocations, even if the customers (and not the third party) control their deposits? If a third party partners with more than one IDI, and certain deposit account types are held by one IDI and other deposit accounts by another IDI, has the third party "proposed or determined" deposit allocations? The FDIC should remove this proposed deposit allocation prong. If the FDIC does not remove the proposed deposit allocation prong, it should, at the least, narrow it to encompass only those situations where *solely* the third party "controls" or "directs" deposit allocations, without any involvement from the customer – or, to borrow language from the FDIC's preamble to the Proposed Rule, where the third party is "directing the flow" of funds.[34] A third party should have meaningful, substantial control over an account in order to be considered a deposit broker. Additionally, the FDIC should clarify that a third party's decision to partner with a particular bank or banks on a program level would not, without more, trigger the deposit allocation prong.

C. The "exclusive deposit placement arrangement" exemption should not be eliminated

As justification for the elimination of the "exclusive deposit placement arrangement" exemption, the FDIC provides that the exemption allows a bank to rely for 100% of its deposits on an unaffiliated third party without any of those deposits being considered brokered.[35] Here, it is clear that the FDIC is using brokered deposits as a proxy for concentration risk. While there admittedly could be significant risks or concerns associated with a bank solely relying on a third party for all of its deposits, the Bank does not believe the brokered deposit regulations are the appropriate means to regulate those risks.

The Bank agrees with the justifications provided for this exemption in the preamble to the 2020 Rule, including that a third party which has developed an exclusive business relationship with one bank "is less likely to move its customer funds to other IDIs in a way that makes the deposits less stable."[36] Additionally, the exemption prevents the FDIC from being "inundated with applications from banks and third parties seeking the primary purpose exception under the proposed application process."[37] As discussed below, the Bank believes the primary purpose exception application review process is far too lengthy and prevents banks from timely making critical liquidity decisions. The Bank shares Vice Chairman Hill's concern that, as a result of the Proposed Rule, "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."[38] Moreover, as discussed in the preamble to the 2020 Rule, the "exclusive deposit placement arrangement" exemption is consistent with the plain language of the brokered deposit statute, as well as the legislative intent of the statute. For these reasons, the "exclusive deposit placement arrangement" exemption should be retained.

---

[33] 89 Fed. Reg. at 68251-68252 and 68271.
[34] *Id.* at 68252.
[35] 89 Fed. Reg. at 68253.
[36] 86 Fed. Reg. at 6745.
[37] *Id.*
[38] Hill, *Statement on the Notice of Proposed Rulemaking on Brokered Deposit Restrictions.*

D. *The proposed new fee-related prong of the "deposit broker" definition should be removed or narrowed*

The FDIC proposes to add a prong to the "deposit broker" definition that applies to a person that has a relationship or arrangement with an IDI or customer where the IDI or the customer pays the person a fee or provides other remuneration in exchange for deposits being placed at one or more IDI.[39]

While it may be appropriate to consider fees as one factor when evaluating a primary purpose exception application, the Bank does not believe that fees should be dispositive, either in determining whether a third party is a "deposit broker" or in determining whether a third party qualifies for the primary purpose exception. Thus, the Bank requests that the FDIC remove the proposed new fee-related prong.

If the fee-related prong is retained, it should be significantly narrowed. The prong should only apply to fees paid by a bank to a third party that are truly in exchange for the placement of deposits.[40] The FDIC should establish objective criteria for the types of fees that will qualify. For example, the FDIC acknowledges that it has historically considered "whether a person receives fees from IDIs based upon the number of accounts opened or the volume of deposits placed."[41] Fees paid in exchange for other services (i.e., other than in exchange for the placement of deposits), including true administrative services and services provided to support accounts operationally (i.e., handling complaints, disputes, processing transactions, etc.), should not be included.[42] Additionally, transaction-based fees (including, but not limited to, interchange fee sharing arrangements between a bank and a third party) should not be included.

Along the same lines, if the FDIC promulgates the fee-based prong substantially as proposed, the FDIC should define what exactly "in exchange for the placement of deposits" means, so that banks and third parties are not forced to guess and make subjective judgment calls as to whether certain fees are, in fact, in exchange for the placement of deposits (as opposed to in exchange for other services). Further, fees paid by the customer to the third party should not be included in the analysis because such fees are not relevant to the FDIC's stated concern about such deposits being "more likely to leave the IDI if another IDI were to offer more favorable terms or pay a higher fee."[43]

---

[39] 89 Fed. Reg. at 68252 and 68271.

[40] If the fee-related prong is retained, the FDIC should clarify why its preamble to the Proposed Rule references fees "in exchange for *or related to*" the placement of deposits, whereas the text of the actual Proposed Rule only references fees "in exchange for" the placement of deposits. The Bank does not believe that it is appropriate for the prong to reference fees "related to" the placement of deposits, as such language is too ambiguous and subjective. The fees should be squarely "in exchange for" the placement of deposits in order to trigger the prong.

[41] 89 Fed. Reg. at 68252.

[42] This is consistent with the notion of excluding "subscription fees paid by subscribers [of deposit listing services] for information on the rates gathered by the listing service and listing fees paid by IDIs for the opportunity to list or "post" the IDIs' rates," which the FDIC does not object to. *Id.* It is also consistent with the FDIC's historical position that third parties that merely design deposit products, such as reward accounts, and do not receive volume-based fees should not be classified as deposit brokers, as well as consistent with the FDIC's historical position that the purpose of the fees (i.e., whether the fees are intended to reward the third party for placing deposits as opposed to rewarding the third party for providing some other service) should be considered. *See* FIL-42-2016, *Frequently Asked Questions on Identifying, Accepting and Reporting Brokered Deposits*. Note, the Bank understands that the foregoing was moved to inactive status under the 2020 Rule but is citing it as support for the FDIC's historical interpretation, as the FDIC does throughout its preamble to the Proposed Rule.

[43] 89 Fed. Reg. at 68252.

E. The "enabling transactions" designated PPE should not be eliminated

In proposing to eliminate the "enabling transaction" designated primary purpose exception, the FDIC flatly asserts that it "believes that there is no relevant difference between an agent or nominee's purpose in placing deposits to enable transactions and placing deposits to access a deposit account and deposit insurance," but provides no discussion of the risks of these deposits.[44] The FDIC further justifies its elimination of the "enabling transactions" designated exception based on the FDIC's proposed changes to the primary purpose exception definition which, as discussed below, is overly broad and goes beyond the statutory language.

The Bank strongly believes that a designated exception needs to exist for arrangements where the primary purpose of the third party is facilitating or processing payments or transactions. Such arrangements clearly fit within the statutory primary purpose exception, which only requires that the third party's "primary purpose is not the placement of funds with depository institutions."[45] As Vice Chairman Hill discusses: "For example, a prepaid card network places its customer funds in a bank, not because it is in the business of helping customers open or put money in bank accounts, but because it needs the banking system to move money from place to place. The prepaid card network's primary purpose is to provide customers a mechanism to make payments and transactions, not to help customers place their funds at banks."[46] The Bank requests that the FDIC retain the existing "enabling transactions" designated exception.

Alternatively, if the FDIC is not willing to retain the exception as it currently exists, the Bank requests that the FDIC merely narrow the exception rather than eliminate it altogether. For example, the exception could be narrowed to transactional accounts that satisfy certain objective criteria or metrics which the FDIC believes are sufficient to demonstrate that the purpose of the subject accounts is truly to enable transactions or make payments. More pointedly, the FDIC could promulgate an exception that applies to limited purpose or limited use cards and corporate cards (direct deposit, corporate funding, government funding) issued by a bank. Or, as an even narrower alternative, the FDIC could promulgate an exception for payroll cards, for example. Other options include expressly defining the types of transactional accounts that would meet the exception, through objective and quantifiable criteria – for instance, through the average number of transactions in the accounts over a certain period, or the nature of the transactions (e.g., intraday transactions would appear to clearly meet the exception). If the FDIC is concerned that the "enabling transactions" designated exception is currently too broad, it should replace the exception with one or more narrower exceptions rather than simply eliminating it in its entirety.

F. The "25% test" designated PPE should not be narrowed

The FDIC proposes to narrow the existing "25% test" designated exception in a number of ways, including, among other things, to make it available only to registered broker-dealers and investment advisers, to reduce the threshold from 25% to 10% of the total assets that the broker-dealer or investment adviser has under management for customers in a particular business line, to require that the funds be placed into non-maturity accounts, and to require that a primary purpose exception application be filed (as opposed to a primary purpose notice) for sweep arrangements where an additional third party is involved.[47]

---

[44] *Id.* at 68257.

[45] 12 USC 1831f(g)(2)(I).

[46] Hill, *Statement on the Notice of Proposed Rulemaking on Brokered Deposit Restrictions.*

[47] 89 Fed. Reg. at 68255-68257 and 68271. The Bank notes that the requirement regarding non-maturity accounts appears to only be discussed in the Preamble to the Proposed Rule and does not appear to be included in the actual text of the Proposed Rule.

The FDIC does not provide adequate justification for reducing the threshold from 25% to 10%. Additionally, by limiting the exception to broker-dealers and investment advisers, the FDIC eliminates a reasonable and quantifiable way for other types of third parties to demonstrate that their primary purpose is not the placement of deposits, and that the placement of deposits is merely incidental to their primary purpose. This, in turn, increases the FDIC's broad discretion to deny the primary purpose exception to any deposits it views as risky. As mentioned above and discussed in more detail below, the Bank is concerned that the Proposed Rule builds in too much ambiguity, subjectivity and fact-specific analysis, allowing the FDIC to apply the "brokered deposit" designation to virtually any deposit arrangement that involves a third party. Conversely, the "25% test" designated exception adopted under the 2020 Rule provides a reasonable and objective metric to determine whether a third party's primary purpose is placing or facilitating the placement of deposits.

The Bank finds it difficult to understand how a third party's primary purpose could be considered the placement of deposits if less than 25% of the assets in a specific business line are placed at IDIs. In proposing to narrow the 25% test, the FDIC simply asserts 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" (emphasis added) but, again, offers no justification for such statements or discussion regarding the risks that would be addressed through such narrowing.[48] The Bank does not believe there is any justification for the FDIC's proposed narrowing of this exception and requests that the FDIC retain the existing exception without any revisions.

G. To the extent that any changes are made to the designated exceptions, PPE notices and applications submitted under the existing rules should be grandfathered in under the final rule

If the Proposed Rule is finalized as proposed, a bank that relies on (1) an existing approved primary purpose exception application. (2) a 25% test designated exception notice, or (3) an enabling transactions designated exception notice or application, would no longer be able to rely on the exception. Instead, these banks would be required to submit a new primary purpose exception application based upon updated criteria, or assert a new designated business exception that meets the primary purpose exception.

The Bank expended significant time, effort and funds in reviewing and analyzing the 2020 Rule and applying it to the Bank's deposit relationships. Like all community banks, the Bank has limited resources, and additional costs, time and paperwork resulting from regulatory changes inevitably results in tradeoffs. In the Bank's view, resources that will need to be devoted to preparing new notices or applications under new rules (issued merely four years after the significant overhaul effected by the 2020 Rule) could be better spent on efforts that more directly and effectively address the risks the FDIC is concerned with, including, for example, third-party risk management.

The Bank, like many other industry players, built a business model in reliance on the designated exceptions in the 2020 Rule. Accordingly, the Bank requests that, in the event the FDIC makes any changes to the existing designated exceptions, the final rule include a grandfathering provision for PPE notices and applications filed under the current rules. To not provide for such grandfathering would be akin to a government taking.

---

[48] *Id.* at 68256. The FDIC states that a 10% threshold is "more indicative that the primary purpose for broker dealers and investment advisers in placing customer funds at IDIs is to temporarily safe-keep customer free cash balances (*e.g.*, uninvested funds) that are awaiting reinvestment" but does not discuss why a company that, for example, places 12% of its customer funds at banks should not qualify for the primary purpose exception (given that 88% of those funds are placed elsewhere) whereas a broker-dealer placing 10% of customers funds should qualify. The distinction seems arbitrary, and the Bank does not believe the FDIC has sufficiently demonstrated how risks to safety and soundness and the DIF would be reduced through the proposed narrowing of the exception.

H. The proposed revised PPE definition is not appropriate, and the existing PPE definition should be retained

Under the brokered deposit statute, "an agent or nominee whose primary purpose is not the placement of funds with depository institutions" is excluded from the "deposit broker" definition.[49] The primary purpose exception in the current brokered deposit regulations parrots the statutory language exactly.[50] However, in the Proposed Rule, the FDIC proposes that, instead of parroting the statutory language, the primary purpose exception will apply to "[a]n agent or nominee whose primary purpose in placing customer deposits at insured depository institutions is for a substantial purpose other than to provide a deposit-placement service or to obtain FDIC deposit insurance with respect to particular business lines between the individual insured depository institutions and the agent or nominee."[51]

The Bank believes that the FDIC's proposed PPE standard exceeds the PPE standard set forth in the statute. The statute only requires that the third party's primary purpose is not the placement of funds with depository institutions. The statute does <u>not</u> require that the third party must demonstrate that it has a substantial purpose other than providing deposit insurance or a deposit-placement service. The FDIC is not authorized under the statute to require a third party to meet this heightened standard. Accordingly, the Bank requests that the FDIC does not make any changes to the existing PPE definition under the current rules.

I. The proposed PPE notice and application processes should be simplified and streamlined to reduce additional unnecessary burdens on banks

The proposal to require all PPE notices and applications to be submitted by banks, not third parties, should be removed. Both banks and third parties should be permitted to submit such notices and applications, at their discretion. For third parties that partner with multiple banks, information required to complete such filings will often be in the possession of the third party, and not the bank.

Additionally, the FDIC proposes to add several new factors to be considered as part of the PPE application, making the process more onerous for banks. One such factor relates to fees or other remuneration paid to the third party by the bank or the customer. Including fees in the definition of "deposit broker" and as a factor for consideration in evaluating a primary purpose exception application is both circular and redundant. Under the proposal, banks would also be required to provide copies of all contracts relating to the deposit placement arrangement. The Bank requests that the FDIC streamline the PPE notice and application processes in an effort to reduce costs and burdens to banks.

Finally, the PPE application process should be simplified, and the review period should be shortened substantially. A review period of 120 days (and potentially longer) is simply not workable and prevents banks for making timely liquidity decisions.

J. The FDIC should incorporate more objective criteria into the brokered deposit rules

As discussed above, the Bank is concerned that the current brokered deposit rules, and especially the Proposed Rule, contain elements that are too subjective and provide the FDIC with too much discretion in interpreting the rules. This includes, for example, the proposed new deposit allocation prong of the "deposit broker" definition and the proposed updated PPE definition, both discussed above. As a result, the FDIC has free rein to determine that essentially any deposit arrangement involving a third party yields brokered deposits (other than those which obviously qualify for a designated exception). The rules could

[49] 12 USC 1831f(g)(2)(I).

[50] *See* 12 CFR 337.6(a)(5)(v)(I).

[51] 89 Fed. Reg. at 68271.

be made more objective both through the narrowing of the "deposit broker" definition and through the creation of additional designated exceptions.

Along the same lines, the FDIC's proposed revisions to the anti-evasion provision should be abandoned. The FDIC proposes to revise such provision to read as follows: "A person that structures a deposit placement arrangement in a way that evades meeting the *deposit broker* definition in this section, including a structure involving more than one person engaged in activities that result in placing or facilitating the placement of third-party deposits, while still playing an ongoing role in placing or facilitating the placement of third-party deposits or providing any function related to the placement or facilitating the placement of third-party deposits, may, upon a finding by and with written notice from the FDIC, result in the person meeting the *deposit broker* definition."[52] In the Bank's view, this language provides the FDIC with essentially unlimited discretion regarding brokered deposit classifications.

Without injecting more objective standards into the rules, the Bank worries that we are reverting to the pre-2020 approach, where, "[p]rior to the 2020 rule, the FDIC did not have a consistent standard or framework; instead, the agency generally decided whether to apply the exception based on a subjective value judgment of the underlying motivation behind the deposit arrangement at the time the arrangement was first presented before the FDIC."[53]

For decades, the brokered deposit rules have been marred by intensive "facts and circumstances" analyses. This has bred uncertainty for banks, especially community banks, which feel like they must rely upon outside advisors for what should be simple assessments regarding deposit classifications. The 2020 Rule was a step in the right direction. The Proposed Rule would be a significant step backwards. The Bank asks that the FDIC attempt to instill more objective criteria into the brokered deposit rules in an effort to promote clarity and predictability for banks and industry participants and to reduce costs and regulatory burden.

K. As a general matter, there should be more tailoring and "right sizing" of the brokered deposit rules for community banks that do not present systemic risk

Community banks lack the sophistication and resources to address many aspects of the Proposed Rule, such as the increased burden on all banks to file PPE notices and applications. This is especially true because the Bank believes the FDIC has significantly underestimated the added cost, time and paperwork burden of the Proposed Rule on banks, including under the Paperwork Reduction Act. The FDIC does not address the fact that such costs will result in tradeoffs, especially for community banks with limited resources – for example, less resources to devote to third-party risk management efforts that could more directly and effectively address the risks that the FDIC is concerned about. As Federal Reserve Board Member Miki Bowman stated in a speech earlier this year: "One of the core principles for effective regulation and supervision—to reduce the incremental burden, especially for the smaller regional and community banks—is tailoring. While important for all institutions, tailoring is particularly important for community banks. Effective and efficient regulation and supervision must be calibrated to the activities and risks of the community banking model, and the tradeoffs and unintended consequences carefully considered."[54] One-size-fits-all regulation, such as the Proposed Rule, will inhibit the ability of smaller

---

[52] *Id.*

[53] Hill, *Statement on the Notice of Proposed Rulemaking on Brokered Deposit Restrictions*.

[54] *Defining a Bank*, Speech, Michelle W. Bowman (Feb. 12, 2024), available at https://www.federalreserve.gov/newsevents/speech/bowman20240212a.htm. *See also Building a Community Banking Framework for the Future*, Speech, Michelle W. Bowman (Oct. 2, 2024), available at https://www.federalreserve.gov/newsevents/speech/bowman20241002a.htm ("Tailoring helps us calibrate regulation and supervision to the activities and risks at every tier within our oversight framework, but it is particularly

banks from offering services and products, forcing such institutions out of the market, which will ultimately lead to large banks attainting greater scale and reach, thereby diminishing competition.

L. The existing brokered deposit rules should be revised to enable community banks to access stable and diversified sources of funding

1. Reciprocal deposits should never be considered brokered deposits, even above the applicable caps set forth in the current rules

Banks use reciprocal deposits as a tool in their diversified funding and liquidity management programs. Banks use reciprocal deposits primarily to assist their core customers in accessing FDIC insurance coverage on deposits exceeding the FDIC insured level. This is particularly important for customers after the 2023 bank failures. Reciprocal deposits allow banks to retain and grow their core consumer and business deposits that otherwise may be withdrawn and placed with other financial institutions.

Importantly, the reciprocal deposit product also allows banks to attract new core deposit relationships. The reciprocal deposit product is an especially valuable tool in obtaining public fund deposits. State laws require banks to collateralize public funds deposits in excess of the FDIC insured limit. Through the use of reciprocal deposits, banks can provide deposit services to public fund entities and grow their core deposit levels without having to use secured funding sources, thus retaining secured funding sources for liquidity purposes. Banks also use reciprocal deposits to reduce the percentage of uninsured deposits they hold, thereby de-risking their deposit portfolios. Core customers increasingly look for this tool when placing deposits, and it is an important deposit strategy for many banks.

Given that reciprocal deposits are primarily used to strengthen core deposit relationships and to de-risk banks' deposit base by reducing uninsured deposit levels, the Bank does not believe that reciprocal deposits should ever be considered brokered deposits, even above the applicable caps set forth in the existing rules. Treating any amount of reciprocal deposits as brokered runs counter to the purpose and intent of the brokered deposit statute and the FDIC's goal of restricting troubled banks' access to "hot money." The Bank recognizes that the FDIC is restrained by the text of Section 29 of the FDI Act, as amended by Section 202 of the Economic Growth, Regulatory Relief, and Consumer Protection Act, with respect to reciprocal deposits. Nevertheless, the Bank requests that the FDIC revisit the reciprocal deposit rules to determine if any changes can be made to assist banks that rely on these deposits to build core customer relationships and reduce uninsured deposit levels.

2. There should be no restrictions on the aggregate account balance of existing nonmaturity brokered accounts for less than well capitalized banks, so long as no funds for new depositors (beneficial owners) are credited to such accounts after the institution falls to adequately capitalized

Under the current brokered deposit rules, a nonmaturity brokered deposit is accepted by an institution that is less than well capitalized (A) at the time a new nonmaturity account is opened by or

---

important when we think about the application of prudential tools to community banks. Tailoring our approach helps with the allocation of finite resources—among both banks and regulators. It enables us to right-size the approach to regulation and supervision to the complexity of banks, acknowledging that community banks that pose manageable risks in the event of their failure, and no real risk to financial stability, simply do not warrant the same treatment as larger, more complex, and more systemically interconnected banking institutions. . . To be clear, tailoring is not only an efficient way to allocate resources, but the lack of tailoring poses a longer-term threat to the viability of community and smaller banks. . . A community banking regulatory framework that enables small banks to thrive must prioritize tailoring.").

through any deposit broker; or (B) in the case of an existing nonmaturity brokered account, or accounts, that had been opened by or through a particular deposit broker: (1) when the aggregate account balance increases above the amount(s) in the account(s) at the time the institution falls to adequately capitalized; or, for agency or nominee accounts, when funds for a new depositor are credited to the nonmaturity account or accounts.[55]

While the Bank believes it is reasonable to prohibit a less-than-well-capitalized bank from opening new nonmaturity brokered accounts and from crediting funds for a new depositor (beneficial owner) to existing nonmaturity brokered accounts, the Bank does not believe that it is appropriate to limit the aggregate account balance of existing nonmaturity brokered accounts to the amount in the account(s) at the time the banks falls to adequately capitalized. Such a restriction prevents a bank's existing deposit relationships from continuing to operate in the ordinary course, and thereby creates liquidity risk for the bank and potential harm for customers who, as a result, cannot transact normally with their existing accounts and who are restrained from making ordinary course deposits into such accounts. Accordingly, the Bank requests that the FDIC remove this limitation under the current brokered deposit rules and evaluate whether it is necessary given the restriction on adding new beneficial owners to existing brokered agency or nominee accounts.

3. There should be a designated exception that applies to arrangements with third parties when a bank has a direct deposit account agreement with the customer or when customers control all the decisions regarding deposits and withdrawals, the bank controls all the decisions regarding rates and terms of deposits and the third party takes no actions to control depositor conduct

Under such circumstances, the depositors are customers of the bank, so it does not make sense for the fintech or other third party to be deemed a deposit broker. In these types of arrangements, banks are often merely outsourcing marketing and other services related to the deposit accounts. There is no need for the third party which provides such marketing and other services to be considered a "deposit broker" when the bank owns and controls the customer relationship and sets the rates and terms of the deposit accounts, and when the customer must initiate or approve withdrawals from the customer's account or the closing of the customer's account. Such an exception would be consistent with the original purpose and intent of the brokered deposit statute.

4. Banks should not be considered "deposit brokers"

The Bank believes that it is inappropriate for an IDI to be considered a "deposit broker." Banks are not in the business of brokering deposits – they are in the business of banking. There should be a designated exception that applies to banks (or at least community banks) that directly offload excess deposits to other banks as a method of balance sheet management, including managing deposit levels and liquidity as well as resulting capital ratios. Alternatively, there could be a narrower exception that applies to banks (or at least community banks) that directly offload excess deposits to other banks as a form of balance sheet management and remain administrative trustee or custodian of such funds at the receiving institution. By no stretch of the imagination is the primary purpose of such banks the placement of funds with depository institutions; rather, such banks' placement of funds with depository institutions is incidental to the banks running their business.

[55] 12 CFR 337.6(b)(4).

5. *The FDIC should reevaluate whether brokered CDs should be classified as brokered deposits*

The FDIC has historically considered brokered CDs to be the prototypical brokered deposit. In the preamble to the 2020 Rule, the FDIC acknowledged that the brokered CD market has evolved since the 1980s.[56] Nevertheless, the FDIC stated that brokered CDs would continue to be classified as brokered, without exception and regardless of any future innovations or restructuring in the brokered CD market, because they were specifically intended to be included as part of the original brokered deposit statute.[57] The FDIC contends that brokered CDs are more rate sensitive and less stable.[58] While the former may be true, the latter is not. Certainly, a bank may lose brokered CDs *upon maturity* if higher rates are available elsewhere. However, prior to maturity, brokered CDs are extremely "sticky" and stable because early withdrawal is only permitted upon the death or adjudication of incompetence of the depositor. This was illustrated during the 2023 banking turmoil, when brokered CDs proved to be much more stable than certain retail and noninterest-bearing demand deposit accounts which are often considered the epitome of core deposits.[59]

Banks use brokered CDs to manage their liquidity in a precise and bespoke manner. Unlike transaction account deposits which can be withdrawn without warning, the fixed duration of brokered CDs allows banks to plan ahead and arrange for alternative funding sources upon maturity, without the risk of early withdrawal in the interim, as discussed above. Brokered CDs offer banks a predictable and stable way to manage gaps in their liquidity needs, because banks can carefully manage volume, rates and maturities of the brokered CDs they purchase, and because the brokered CD market is well-developed and robust, making it simple and cost-effective to replace maturing brokered CDs with new brokered CDs at rates and terms consistent with a bank's funding policies and liquidity needs. Thus, the Bank does not believe that brokered CDs really pose the same risks that the regulators are concerned with or that the original brokered deposit statute intended to address. For these reasons, we respectfully request that the FDIC revisit its stance on brokered CDs and explore ways in which its regulations may be amended to provide community banks with more funding flexibility in this area.

IV. Conclusion

When issuing new regulations, the Bank believes "[r]egulators should always ask (1) what problem does this new regulation solve, (2) what are costs of this approach, and (3) are there alternative approaches?"[60] The Bank does not believe that the FDIC has adequately examined those questions here.

---

[56] 86 Fed. Reg. at 6748.

[57] *Id.*

[58] *Id.* at 6762.

[59] *Remarks by FDIC Vice Chairman Travis Hill at the Cato Institute on "Insights on the FDIC's Agenda"* (Sept. 21, 2023), available at https://www.fdic.gov/news/speeches/2023/spsept2123.html ("On a related note, while some uninsured deposits, at risk of loss in the event of failure, moved extremely quickly this spring, perhaps the stickiest of deposits proved to be brokered certificates of deposit. As an example, Silvergate Bank had no brokered deposits prior to the fall of 2022, but as the bank began experiencing outflows of crypto-related deposits, it replaced the departing deposits with brokered CDs. By the time the bank announced plans to self-liquidate in March, more than 98 percent of the bank's non-brokered deposits had run off, while its brokered CDs all remained through maturity, and some remain on the balance sheet even now. From the FDIC's perspective, the main downsides to brokered CDs are that they are costly for the bank and have no value in resolution. The flipside is that because the depositors have no relationship with the bank, earn high rates, are fully insured, and generally cannot withdraw before maturity, the deposits are extremely sticky, and the depositors are indifferent to whether the bank has a future or not. Far from being 'hot money,' these deposits are so cold they are virtually frozen in place.") (footnotes omitted).

[60] Bowman, *Building a Community Banking Framework for the Future*.

As Vice Chairman Hill noted in his statement on the Proposed Rule, "[t]he term 'brokered deposits' encompasses many different types of deposits with very different characteristics and risks." To continue to arbitrarily place these varied and nuanced arrangements into one ever-expanding "brokered deposit" bucket could unintentionally decrease the safety and soundness of banks by restricting their access to certain funding sources that are actually, in practice, less volatile than many of those that fall in the ever-shrinking "core deposit" bucket.

For these reasons, the Bank respectfully requests that the FDIC consider the Bank's concerns and either withdraw the Proposed Rule or issue a final rule that incorporates the Bank's proposed recommendations set forth in this comment letter.

Respectfully,

Rogers Pope, Jr.
Vice Chairman & Chief Executive Officer
Texas Bank and Trust
Longview, Texas