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Mr. Robert E. Feldman, Executive Secretary
Attention: Comments
Federal Deposit Insurance Corporation
550 17th Street, N.W.
Washington, D.C. 20429

Re: RIN 3064-AE33

Ladies and Gentlemen:

On behalf of Promontory Interfinancial Network, LLC ("*Promontory*"),[1] I write to comment on the Notice of Proposed Rulemaking on Recordkeeping for Timely Deposit Insurance Determination issued by the Federal Deposit Insurance Corporation (the "*FDIC*") on February 26, 2016 (the "*NPR*").[2] Promontory incorporates by reference its previous comments on the related Advance Notice of Proposed Rulemaking on Large Bank Deposit Insurance Determination Modernization issued by the FDIC on April 28, 2015 (the "*ANPR*").[3]

INTRODUCTION AND SUMMARY

The Proposed Rule set forth in the NPR would amend the FDIC's regulations by requiring that insured depository institutions with two million or more deposit accounts maintain records containing specified information for each deposit account.[4] If the account holder is not the beneficial owner of the funds, as is typically the case for brokered deposits, the specified information would include each beneficial owner's name, interest, and balance.[5]

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1 Founded in 2002, Promontory provides services to the banking and brokerage industries. Promontory's deposit allocation and sweep services include CDARS®, the Certificate of Deposit Account Registry Service®, for time deposits, ICS®, the Insured Cash Sweep® service, for non-time deposits, and IND®, the Insured Network Deposits® service, for non-time deposits swept to banks primarily by broker-dealers.

2 FDIC, *Notice of Proposed Rulemaking on Recordkeeping for Timely Deposit Insurance Determination*, 81 Fed. Reg. 10,026 (February 26, 2016).

3 FDIC, *Advance Notice of Proposed Rulemaking on Large Bank Deposit Insurance Determination Modernization*, 80 Fed. Reg. 23,478 (April 28, 2015).

4 *See* Proposed Rule §§ 370.2(a), 370.3; NPR, 81 Fed. Reg. at 10,050-51.

5 *See* Proposed Rule § 370.3(e); NPR, 81 Fed. Reg. at 10,051.

The Proposed Rule would fundamentally change the law of brokered deposits as applied to covered institutions. The Federal Deposit Insurance Act (the "*FDI Act*") places no restrictions on the acceptance of brokered deposits by well-capitalized depository institutions,[6] and it contains no requirement that a bank's deposit account records include the name, interest, or balances of each beneficial owner.[7] By imposing onerous new requirements for maintaining beneficial owner data, the Proposed Rule would penalize well-capitalized covered institutions for lawfully accepting brokered deposits, as well as other deposits placed on a "pass-through" insurance basis, and penalize community banks for lawfully placing deposits at covered institutions.

Current FDIC regulations on custodial recordkeeping faithfully implement the FDI Act and protect the interests of depositors, banks, and the FDIC. The Proposed Rule presents a number of issues that, in Promontory's view, have not been adequately considered. These issues include significant concerns about privacy, burden, and cost. Promontory respectfully submits that the FDIC should withdraw the Proposed Rule. If the FDIC does not withdraw the Proposed Rule, it should modify and clarify the Proposed Rule as outlined in this letter.

<u>The Proposed Rule</u>

The "general mandate" of the Proposed Rule "is that each covered institution must obtain from each of its account holders the information needed to calculate the amount of deposit insurance available for each owner of deposits."[8] Under the Proposed Rule, the covered institution's information technology ("*IT*") system must be capable of completing the insurance calculation "within 24 hours after the FDIC's appointment as receiver for the covered institution."[9]

When the beneficial owner of funds on deposit is not the account holder, the Proposed Rule requires that the covered institution be capable of generating, "upon request by the FDIC," a record for each beneficial owner of funds on deposit[10] that includes:

(1) the beneficial owner's name,

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6 FDIC, FREQUENTLY ASKED QUESTIONS REGARDING IDENTIFYING, ACCEPTING, AND REPORTING BROKERED DEPOSITS A4 (2015) ("*FDIC FAQ*") (attached to FDIC, FIN. INSTITUTION LETTER, FIL-51-2015, FDIC SEEKING COMMENT ON FREQUENTLY ASKED QUESTIONS REGARDING IDENTIFYING, ACCEPTING, AND REPORTING BROKERED DEPOSITS (2015)).

7 For pass-through deposit insurance claims, in keeping with the FDI Act, the bank's deposit account records need only disclose the existence of an agency or custodial relationship, as long as other necessary information is ascertainable from "records maintained, in good faith and in the regular course of business, by the depositor or by some person or entity that has undertaken to maintain such records for the depositor." 12 C.F.R. § 330.5(b)(2).

8 NPR, 81 Fed. Reg. at 10,039.

9 Proposed Rule § 370.3(h), NPR, 81 Fed. Reg. at 10,051.

10 Proposed Rule § 370.3(e), NPR, 81 Fed. Reg. at 10,051.

(2) a unique identifier, assigned by the covered institution's IT system, for the beneficial owner,[11]

(3) the balance of the beneficial owner's share of each deposit account in which the beneficial owner has funds within an applicable right and capacity,[12] and

(4) the aggregated balance of each beneficial owner's deposits within each ownership right and capacity, broken down by insured and uninsured amounts.

The Proposed Rule indicates that the covered institution must assign the unique identifier to each beneficial owner of funds on deposit, and thus also obtain the beneficial owner's name, in advance of possible failure.[13] In addition, it indicates that the institution must assign account ownership right and capacity codes in advance of possible failure.[14]

The Proposed Rule also indicates that the covered institution must obtain current balances for each beneficial owner on a daily basis. For example, the Proposed Rule says that the institution must "maintain" the required information "in its records,"[15] and the requirement to generate records upon request by the FDIC, when effective, could be triggered at any time.[16] Similarly, the NPR refers to a concept described in the ANPR in which the covered institution obtains and maintains data sufficient to allow an insurance determination "at the end of any business day (since

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[11] The Proposed Rule states that "[a] unique identifier could be the social security number, taxpayer identification number, or other government-issued identification number of an individual or entity . . . ." Proposed Rule § 370.2(e); NPR, 81 Fed. Reg. at 10,051. Using a government-issued identification number adds a second major piece of sensitive identifying data to the required records, along with the beneficial owner's name, compounding the potential damage to privacy in the event of a security breach.

[12] The Proposed Rule, in stating item (3), refers to "[t]he balance of each of the account holder's deposit accounts within the applicable ownership right and capacity or, if the owner of the funds on deposit is not the accountholder, the balance of the owner's share of deposit accounts within the applicable ownership right and capacity." *Id.* We assume that the latter part of the quoted language means "the balance of the owner's share of each deposit account in which the owner has funds," rather than "the balance of the owner's share of [all] deposit accounts . . .," because the latter seems to be covered by item (4), which refers to aggregate balances. *See id.*

[13] *See* Proposed Rule § 370.3(c), NPR, 81 Fed. Reg. at 10,051 (covered institution must assign unique identifier to each beneficial owner "[w]ithin two years after either the effective date of this part or becoming a covered institution, whichever is later . . .").

[14] *See* Proposed Rule § 370.3(d), NPR, 81 Fed. Reg. at 10,051 (covered institution must assign code to each deposit account "[w]ithin two years after either the [EFFECTIVE DATE OF THE FINAL RULE] or becoming a covered institution, whichever is later . . .").

[15] Proposed Rule § 370.3(a), NPR, 81 Fed. Reg. at 10,051.

[16] Proposed Rule § 370.3(e), NPR, 81 Fed. Reg. at 10,051.

failure can occur on any business day)."[17] On the basis of such provisions, Promontory understands that the FDIC would expect daily transmission and storage of beneficial owner data.

<u>Overview of Argument</u>

If applied to deposits placed through Promontory's deposit allocation and sweep services and others like them, Section 370.3 of the Proposed Rule would multiply by <u>a factor of more than 19 million</u> – increasing by <u>seven orders of magnitude</u> – the amount of beneficial owner data transmitted over the Internet to receiving banks. It would mandate this exponential increase in the transmission of highly sensitive personal data, and newly require that receiving banks store billions of units of such data, at the height of a worldwide computer attack on banks. In doing so, it would violate the elementary, federally-recognized security principle that the collection of personally-identifiable information ("*PII*") should be limited to that which is truly essential.[18] This violation would improvidently introduce a dangerous new data breach risk where none currently exists.

The Proposed Rule would also impose immense monetary costs. The NPR concedes that the Proposed Rule would cost covered institutions a third of a billion dollars,[19] or two thirds of a billion dollars, and possibly more.[20] The NPR relies for this estimate on a cost model in a report by an outside consulting firm, which has since been identified as Deloitte Development LLC ("*Deloitte*").[21] The report to the FDIC by Deloitte (the "*Deloitte Report*")[22] reveals that changing just a single assumption of the cost model could increase the estimated cost for covered institutions <u>more than fivefold</u>, to $1.8 billion. Even that amount, however, falls far short of capturing the Proposed Rule's costs, which would fall not only on covered institutions, but also on other market participants and, ultimately, on millions of depositors.

The NPR asserts that the Proposed Rule is "crafted in a manner that affects only large banks," with no costs or other "negative consequences for small banks,"[23] but in fact thousands of <u>community banks could suffer serious adverse effects</u>. Deposit allocation services are a vital tool for community banks. The Proposed Rule would force a community bank that participates in a deposit allocation service to share its crown jewels – beneficial owner data for the community

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17 ANPR, 80 Fed. Reg. at 23,480; *see* NPR, 81 Fed. Reg. at 10,028.

18 NAT'L INSTIT. OF STANDARDS AND TECH., U.S. DEPT. OF COMMERCE, SPECIAL PUBLICATION 800-122, GUIDE TO PROTECTING THE CONFIDENTIALITY OF PERSONALLY IDENTIFIABLE INFORMATION 4-3 (2010) (describing the "basic privacy principle" that "PII collections should only be made where such collections are essential to meet the authorized business purpose and mission of the organization").

19 NPR, 81 Fed. Reg. at 10,044.

20 *See id.*

21 *See id.* at 10,043.

22 Posted at https://www.fdic.gov/regulations/laws/federal/2016/2016_recordkeeping_3064-AE33_report.pdf.

23 *Id.* at 10,045.

bank's large-dollar customers – on a daily basis with every covered institution to which the funds of such customers are allocated. The Proposed Rule would also force a community bank to incur the steep costs and potential customer disaffection that would result from having to comply with demands by covered institutions for beneficial owner data from every customer of the community bank that is not itself the beneficial owner of funds being placed, such as an agent or trustee. The wholly discretionary exception to this requirement that the NPR cites,[24] which itself would impose costs and uncertainty on community banks, provides no reliable relief.

Even as limited to the costs to covered institutions, the credibility of the NPR's stated cost estimate is undermined in multiple respects, as detailed later in this letter, by circumstances reflected in the FDIC's response in May 2016 to a Freedom of Information Act ("*FOIA*") request by Promontory.[25] For example, the NPR states that the FDIC engaged the consulting firm later identified as Deloitte "to estimate the expected costs of complying with this proposed rule."[26] The FDIC's response to Promontory's FOIA request reveals, however, that Deloitte was not, and could not have been, estimating the costs of "this proposed rule" – *i.e.*, the Proposed Rule issued in February 2016 – because Deloitte completed its cost model almost a year earlier, in April 2015, at a time when, according to the NPR itself, the Proposed Rule had not yet been developed.[27]

The April 2015 ANPR described a process requiring ownership information only for "closing night deposits,"[28] making possible the exclusion of "pass-through" and other accounts for which the information was not readily available.[29] It was only later, as stated in the February 2016 NPR, that the FDIC signficantly "adjusted its approach" to require ownership information "for all deposit accounts."[30] Because Deloitte relied on what were the pending requirements when it prepared the April 2015 cost estimate, that estimate could not reflect the amounts by which the costs were increased as a result of the FDIC's subsequent expansion in the scope to encompass the costliest determinations.

Dismissing the data breach risks and relying on a limited and incomplete estimate of costs, the NPR – although conceding that the putative benefits of the Proposed Rule cannot be "monetize[d]" – maintains that the Proposed Rule would benefit "the public as a whole."[31]

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24 *See id.* at 10,030.

25 *See* Appendix 1, Statement of Charles A.T. Molluzzo, and exhibits thereto.

26 NPR, 81 Fed. Reg. at 10,043 (emphasis added).

27 *Id.* at 10,038 ("the ANPR presented various options and general concepts"; development of the FDIC's proposal was "at a very early stage," and "no specific regulatory text was offered for consideration").

28 ANPR, 80 Fed. Reg. at 23,480.

29 *See* NPR, 81 Fed. Reg. at 10,032-33.

30 *Id.* at 10,033 (emphasis in original).

31 *Id.* at 10,043.

Because the FDIC would use the enhanced technical capabilities required by the Proposed Rule "to make deposit insurance determinations only <u>after</u> the failure of a covered institution,"[32] however, the vast amounts of beneficial owner data that the Proposed Rule would require a covered institution to obtain every day would be <u>almost entirely unused</u>.

If a covered institution were to enter receivership, beneficial owner data could be used for the deposit insurance determination only if it reflected current beneficial owners and current balances as of the end of the day of failure. As a result, the covered institution would not receive the necessary beneficial owner data under the Proposed Rule materially earlier than it would if the data were transmitted promptly after the receivership was announced, as already occurs with Promontory's services. For such services, the Proposed Rule's benefit to the public or anyone else would be nil.

Possibly in recognition of the cost and chaos that a blanket application of the beneficial owner data requirements of Section 370.3 would create, the Proposed Rule includes provisions for an exemption and three exceptions. If the FDIC is determined to impose the beneficial owner data requirements of Section 370.3, it should at a minimum clarify and modify the exemption and exceptions to address the Proposed Rule's adverse effects.

For example, the exemption in Section 370.4(a) for deposits that do not exceed the standard maximum deposit insurance amount ("*SMDIA*") applies by its terms only if the covered institution does not accept deposits that exceed the SMDIA from "any" account holder.[33] It is unlikely that any covered institutions have <u>no</u> account holders from which they accept deposits that exceed the SMDIA. To be meaningful, the exemption should explicitly be made available for deposits received through a deposit allocation or sweep service in amounts that do not exceed the SMDIA. Later in this letter, we present a simple modification of the exemption to accomplish this purpose.

The exceptions should also be modified as discussed below. The exception in Section 370.4(c)(1)(i) for refusal to provide information should explicitly apply to any class or sub-class of deposits. The exception in Section 370.4(c)(1)(ii) for information protected from disclosure by law should explicitly acknowledge that protection from disclosure by law includes protection by legally-binding contract. The exception in Section 370.4(c)(1)(iii) for information that changes frequently should explicitly extend to time deposit allocation services when, overall, changes are frequent, even if particular time deposits change less often.

Section 370.4(f) of the Proposed Rule provides that, if a covered institution's exception or extension application is granted, the institution must, among other things, "[e]nsure that its information technology system is capable of creating files in the format and layout specified in Appendix B" to the Proposed Rule and capable of receiving additional information from the FDIC

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[32] *Id.* at 10,029 (emphasis added).

[33] Proposed Rule § 370.4(a); NPR, 81 Fed. Reg. at 10,051.

in the event of a failure.[34] If retained, these requirements should be modified to clarify that, as in all other bank IT operations, the covered institution may use the services of a third-party processor, so that the creation of such files and receipt of additional information may be accomplished either by an IT system that the covered institution operates or by an IT system that a third-party processor operates to produce the files for the covered institution. Requiring otherwise could only diminish accuracy and efficiency, for no plausible purpose.[35]

More fundamentally, the NPR states that the FDIC will determine "in its sole discretion" whether to approve an application for an exemption or any of the three exceptions.[36] This assertion of discretion indicates that the FDIC might deny an application – or condition or time-limit the approval of an exception[37] – even when the stated factual predicate for the exemption or exception was met. Such an exercise of discretion, if sustained, would give the FDIC virtually unlimited power to use the Proposed Rule, and the heavy burden of its blanket application, to discourage or prohibit well-capitalized covered institutions from accepting brokered and other pass-through deposits, as they are permitted by law to do.

Chairman Gruenberg has affirmed in congressional testimony that the FDIC lacks the authority to attempt to discourage or prohibit banks from engaging in lawful activities and banking relationships.[38] The FDIC explicitly acknowledges that a well-capitalized institution "is not restricted by Section 29 [of the FDI Act] in accepting or renewing brokered deposits."[39] The high costs and burdens of the Proposed Rule give rise to concern that the Proposed Rule might effectively shut down, in whole or in part, the perfectly lawful acceptance of brokered or other pass-through deposits by well-capitalized covered institutions. For the FDIC to appear to be granting itself the power to do so, through the discretionary denial of an exemption or exception for which the factual predicate is met, would be inappropriate.

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34 Proposed Rule § 370.4(f)(2); NPR, 81 Fed. Reg. at 10,052.

35 Section 370.4(f) also requires that the covered institution "disclose to the account holder . . . that . . . payment of deposit insurance may be delayed." Proposed Rule § 370.4(f)(4); NPR, 81 Fed. Reg. at 10,052. The required disclosure as written would be affirmatively misleading when a covered institution is in fact capable of obtaining current beneficial owner data promptly after the FDIC announces the receivership, as is the case with Promontory's services. It could also suggest to depositors that the FDIC might deprioritize the payment of deposit insurance claims on brokered deposits, which the FDIC is not authorized to do. For these reasons the FDIC should consider qualifying or removing this requirement.

36 NPR, 81 Fed. Reg. at 10,042.

37 *See* Proposed Rule § 370.4(d); NPR, 81 Fed. Reg. at 10,052.

38 *The Fed. Deposit Ins. Corp.'s Role in Operation Choke Point: Hearing Before Subcomm. on Oversights and Investigations of the H. Comm. on Fin. Servs.*, 114th Cong., at 18-19 (2015) (question from Rep. Poliquin, Member House Comm. on Fin. Servs., and answer from Martin Gruenberg, Chairman, FDIC).

39 FDIC FAQ, *supra* note 6, at A4.

DISCUSSION

1. Section 370.3 of the Proposed Rule, if applied to services such as Promontory's, would exponentially increase the transmission and storage of highly sensitive personal data.

For purposes of this discussion, we refer to a bank at which customer funds are placed through a deposit allocation or sweep service, such as Promontory's CDARS, ICS, or IND service, as a "destination institution." We refer to an instance in which a particular customer has funds on deposit at a particular destination institution on a given business day as a "deposit unit." We refer to the name, government-issued identification number, and account data of a particular customer that has funds on deposit at a particular destination institution on a given business day as a "unit of beneficial owner data."[40]

When participating institutions place customer funds through Promontory's CDARS and ICS services, the customer's name and taxpayer identification number ("*TIN*") are securely maintained by The Bank of New York Mellon ("*BNYM*") as sub-custodian and recordkeeper.[41] In the IND service, each custodial agent, which is ordinarily a registered broker-dealer, securely maintains the names and account numbers of customers and provides innominate account data – stripped of customer identities – to Promontory for processing. In all three services, only if a destination institution enters receivership are the customer names and TINs transmitted, along with account balances, to the failed institution.[42]

Since Promontory launched its first service in 2003, six destination institutions have entered receivership while holding deposits placed through a Promontory service. In each case, the service was CDARS; no destination institution has failed while holding deposits placed through ICS or IND. Across the six destination institutions that have entered receivership, the total number of deposit units at the time of failure was 892. Because the transmission of beneficial owner data to a destination institution has been required only when the FDIC has been appointed as receiver, only 892 units of beneficial owner data have been transmitted to destination institutions since 2003. This amount represents an average of 69 units per year from 2003 to 2015, inclusive, a period of unusually high bank failure rates. No pre-failure storage of such data at such institutions has been required, and no data breach has occurred.

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[40] For example, if one funds owner has funds on deposit at seven destination institutions on a given business day, and another funds owner has funds on deposit at five destination institutions on a given business day, there are 12 deposit units and 12 units of beneficial owner data across the two sets of placements.

[41] BNYM maintains PII of a participating institution's customers on behalf of that participating institution. BNYM is not free to provide such PII to other institutions without that participating institution's specific instructions to do so. Such instructions are not given in the absence of a destination institution's failure or other special circumstances.

[42] BNYM is responsible for this transmission in CDARS and ICS, and the broker-dealer or other custodial agent is responsible for it in IND.

If each IND destination institution with two million or more deposit accounts were required to obtain up-to-date beneficial owner data for each beneficial owner of funds on deposit, the number of units of beneficial owner data required to be transmitted would exponentially increase the moment the requirement took effect.[43] During the first quarter of 2016, for the IND service, the average month-end number of deposit units at covered institutions was 5,271,819.[44] There are at least 250 business days per year. With more than 5.27 million deposit units per business day, obtaining current beneficial owner data on each business day of a year would require the transmission of more than 1.3 billion units of beneficial owner data per year to covered institutions.[45] The Proposed Rule would increase the number of units of beneficial owner data transmitted per year, now 69, by a factor of more than 19 million,[46] increasing the transmission risk by seven orders of magnitude. Covered institutions that participate in other deposit sweep services could be expected to experience similar increases in sensitive data transmission.

Moreover, each of the millions of units of beneficial owner data transmitted each business day to covered institutions would have to be stored at the covered institution after receipt. Banks are required to retain deposit account records for five years.[47] With a storage period of five years, the total number of units of beneficial owner data stored at any given time would eventually be the total number of units transmitted in one year multiplied by five. IND covered institutions would eventually be required to store more than 6.5 billion units of beneficial owner data at any given time.[48] In contrast, at present, because receiving banks are not required to obtain the beneficial owner data unless and until they fail and the FDIC is appointed as receiver, there is no need for covered institutions to store any such data in the absence of failure.

Although most destination institutions in CDARS and ICS are community banks or mid-sized banks, nine CDARS destination institutions and four ICS destination institutions are covered institutions. Despite the relatively small number of covered institutions in CDARS and ICS, the Proposed Rule if applied to deposits placed through those services would require the transmission

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[43] Given that any beneficial owner's balance could change on any business day, the covered institution would have to obtain from each agent or custodian on each business day a file that contained beneficial owner data for beneficial owners on that business day.

[44] For purposes of this analysis, depository institutions that had two million or more deposit accounts as of December 31, 2015, are treated as covered institutions.

[45] 5,270,000 * 250 = 1,317,500,000.

[46] 1,317,500,000 / 69 = 19,094,203.

[47] 31 C.F.R. § 1010.430(d). The NPR makes clear that the beneficial owner data that the Proposed Rule would require covered institutions to obtain would be collected as part of the institution's "deposit account recordkeeping." NPR, 81 Fed. Reg. at 10,028.

[48] 1,317,500,000 * 5 = 6,587,500,000.

of more than 3.9 million units of beneficial owner data per year for those services[49] and the storage by covered institutions of more than 19.5 million units of such data.[50] A large portion of the transmission and storage would contain units of competitively-sensitive beneficial owner data on deposits placed at covered institutions for customers of community banks.

2. Exponentially increasing the transmission and storage of highly sensitive personal data would exponentially increase the risk of data breach.

In comments on the ANPR, Promontory pointed out, in the words of the NPR, that "requiring covered institutions also to maintain beneficial ownership information that presently resides with financial intermediaries such as deposit brokers would needlessly increase the exposure of depositor information to cyber-attack and identity theft."[51]

The NPR dismisses this concern in three sentences. The sentences, numbered here for ease of reference, are as follows:

> [1] [Insured depository institutions ("*IDIs*")] already maintain significant amounts of sensitive data such as PII that could be a target for cyber-attack or identity theft.
>
> [2] However, [IDIs] have cybersecurity defenses in place and are continuously enhancing those defenses.
>
> [3] The FDIC believes that the benefits of conducting the deposit insurance determination using the covered institutions' own IT systems would outweigh the risk of the beneficial ownership information being exposed to cyber-attack or identity theft.[52]

These three sentences dismiss critical security concerns in far too much haste. If not revisited, this dismissal may call into question the FDIC's statement to Congress that "[t]he FDIC treats data security as a significant risk area due to its potential to disrupt bank operations, harm consumers, and undermine confidence in the banking system and economy."[53]

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[49] During the first quarter of 2016, the average month-end number of deposit units at covered institutions for CDARS and ICS was 15,654, and there are at least 250 business days per year. 15,654 * 250 = 3,913,500.

[50] 3,913,500 * 5 = 19,567,500.

[51] NPR, 81 Fed. Reg. at 10,030.

[52] *Id.*

[53] *Oversight of Financial Stability and Data Security Before the Senate Comm. on Banking, Hous., and Urban Affairs*, 113th Cong. (Feb. 6, 2014) (statement of Martin J. Gruenberg, Chairman, FDIC).

a. The NPR violates the "basic privacy principle" of minimizing the exposure of PII.

The first sentence of the NPR's dismissal of the data security concern – which points out that banks "already maintain significant amounts of sensitive data such as PII that could be a target for cyber-attack or identity theft"[54] – is a *non sequitur*. That banks currently maintain some sensitive data does not justify requiring the unnecessary transmission and storage of massively more such data.

On the contrary, as recognized by the National Institute of Standards and Technology, "[t]he practice of minimizing the use, collection, and retention of PII is a basic privacy principle."[55] The reason is readily discerned:

> The likelihood of harm caused by a breach involving PII is greatly reduced if an organization minimizes the amount of PII it uses, collects, and stores. . . . When PII is accessed more often or by more people and systems, or the PII is regularly transmitted or transported offsite, then there are more opportunities to compromise the confidentiality of the PII.[56]

As a result, "PII collections should only be made where such collections are essential to meet the authorized business purpose and mission of the organization."[57] Obtaining beneficial owner data is essential only if and when a covered institution actually fails and enters receivership. Mandating the transmission of more than 1.3 billion units of beneficial owner data per year and the storage of more than 6.5 billion units of such data is neither essential nor prudent.

b. Enhancements in bank defenses are a response to more frequent and costlier attacks, warranting increased – not reduced – concern.

The second sentence of the NPR's dismissal of the data security concern – stating that depository institutions "have cybersecurity defenses in place and are continuously enhancing those defenses" – overlooks the reason for the enhancement efforts that it cites: Banks are continuously attempting enhancement because cyberattacks are continuously becoming more frequent and damaging. This fact, far from being a reason to adopt the Proposed Rule, underscores the heightened risk that the FDIC would create by doing so.

In The Global State of Information Security® Survey 2015, PriceWaterhouseCoopers reports that the number of detected and reported security incidents rose from 3.4 million in 2009

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54 NPR, 81 Fed. Reg. at 10,030.

55 NAT'L INSTIT. OF STANDARDS AND TECH., U.S. DEPT. OF COMMERCE, *supra* note 18, at 4-3.

56 *Id.* at ES-2, ES-3.

57 *Id.* at 4-3.

to 42.8 million in 2014, a more than twelvefold increase in five years.[58] This increase occurred despite the security enhancements to which the NPR refers. That security measures do not guarantee security is precisely why the minimum-necessary principle is basic.

A 2015 Ponemon Institute report states that, for organizations surveyed, "the likelihood of a data breach involving a minimum of 10,000 records is estimated at approximately 22 percent over a 24-month period."[59] Using data from Ponemon research, IBM has developed the IBM Data Breach Risk Calculator (http://www.ibmcostofdatabreach.com/). According to the IBM calculator, there is a 10.8% probability that a data breach will occur during a given year in a U.S.-based financial services institution that employs the most stringent information security protocols allowable within the calculator.

Last month, the New York Times reported a second major attack on "what was thought to be the most secure financial messaging system in the world," Swift.[60] The Times article states that the attack appears to be part of a "wider and highly adaptive campaign targeting banks."[61] The article also notes: "The security problems are not necessarily with the messaging network but with security controls at Swift's bank customers. Criminals have found ways to exploit loopholes in bank security to gain computer access and dispatch fraudulent Swift messages."[62] In other words, the problems are with the very kinds of bank security controls that the NPR assumes are sufficient. Given the ever-increasing attacks on banks, the Proposed Rule's introduction of more heightened security risk comes at the worst possible time.

c. The NPR's evaluation of the data security risk is arbitrary and incorrect.

The third and final sentence of the NPR's dismissal of the data security concern states the FDIC's belief that "the benefits of conducting the deposit insurance determination using the covered institutions' own IT systems would outweigh the risk of the beneficial ownership information being exposed to cyber-attack or identity theft."[63] This conclusion is not justified because – as the NPR shows – the FDIC has not taken into account the exponential increase in sensitive data transmission and storage that Section 370.3 of the Proposed Rule would require if applied to allocation and sweep services. Having failed to consider that increase, the FDIC cannot have properly addressed the consequences of the increase in weighing the risk.

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58 PriceWaterhouseCoopers, *The Global State of Information Security® Survey 2015*, at 7 (2015).

59 Poneman Institute, LLC, *2015 Cost of Data Breach Study: Global Analysis*, at 19 (May 2015). The Ponemon Institute report also that "[t]he average cost paid for each lost or stolen record containing sensitive and confidential information increased from $145 in 2014 to $154 in this year's study." *Id.* at 1.

60 Michael Corkery, *New Attack Reported by Global Bank Network*, N.Y. TIMES, May 12, 2016.

61 *Id.* (quoting letter from Swift).

62 *Id.*

63 NPR, 81 Fed. Reg. at 10,030.

Moreover, in suggesting that the deposit insurance determination can be made using the covered institutions' own IT systems only if each covered institution obtains current beneficial owner data every business day, the NPR presents a false dichotomy. As discussed in a later section, if the covered institution receives beneficial owner data only if and when the FDIC has been appointed as receiver, a timely deposit insurance determination can still be made using the bank's own IT systems without exposing covered institutions to extraordinary new risks. Such an approach obviates a choice between security and prompt access to data.

3. The Proposed Rule would impose immense costs on banks, other market participants, and, ultimately, the depositing public.

The NPR acknowledges that compliance with the Proposed Rule would cost covered institutions at least hundreds of millions of dollars.[64] This cost estimate is taken from the Deloitte Report, which is posted as a single PDF file on the FDIC website.[65] The PDF file contains title pages at page 1 for "FDIC Large Bank Deposit Insurance Determination Cost Estimation Methodology," dated April 2, 2015 ("*Estimation Methodology*"), and at page 15 for "Large Bank Deposit Insurance Determination Cost Model," dated April 1, 2015 ("*Cost Model*").

Even the hundreds of millions of dollars estimated in the Cost Model falls short of capturing the costs that the Proposed Rule would impose, not only on covered institutions, but also on other market participants and, ultimately, on millions of depositors. Community banks would be especially hard-hit. Although the NPR asserts that Deloitte was estimating the cost of compliance with the Proposed Rule, it could not have been, because Deloitte had completed the Cost Model when the FDIC was only beginning to develop the Proposed Rule. Moreover, the FDIC expanded the scope of the required process after the Cost Model was complete.

a. The cost estimate presented in the NPR does not capture the true costs of the Proposed Rule for covered institutions and other parties, including depositors.

The NPR itself, although citing and relying on Deloitte's estimate that compliance costs for covered institutions would be "just under $328 million,[66] shows little confidence in that number. The NPR concedes that the costs to covered institutions could be lower or higher,[67] and it discusses the effect if "actual compliance costs turned out to be $650 million, twice the amount estimated in the consulting firm's analysis . . . ."[68] This casual concession that the margin of error

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64 *Id.* at 10,049.

65 Deloitte Report, *supra* note 22.

66 NPR, 81 Fed. Reg. at 10,044 (emphasis added).

67 *Id.*

68 *Id.* at 10,045.

in the estimate could be as much as 100% – doubling the cost to two-thirds of a billion dollars – in and of itself warrants skepticism.

The Deloitte Report reveals that small changes in assumptions could produce large changes in costs. The Cost Model estimated very different costs depending on a characterization of "complexity" as "high," "medium," or "low."[69] Only four of 36 institutions addressed in the Deloitte Report were assigned "high" complexity ratings, and those four institutions accounted for $201,117,082, more than $50 million per bank, of the estimated $327,865,823 overall cost.[70] If all the institutions in the Deloitte Report turned out to be "high" complexity with costs exceeding $50 million – and, by definition, covered institutions are at least complex enough to have two million or more deposit accounts – this one change in the assumptions would increase the overall cost estimate for covered institutions by a factor of more than five, to a total of more than $1.8 billion. Other changes in the assumptions would have other large effects.

The stated cost estimate for covered institutions also fails to take into account any of the costs that the Proposed Rule would impose on parties other than covered institutions, including administrators, custodians, sub-custodians, other participating institutions, and, ultimately, the millions of depositors for which beneficial owner data would be required. As a matter of good public policy, excluding all these affected parties from the cost estimate makes the purported weighing of costs against benefits manifestly incomplete.

The NPR explicitly acknowledges that "[c]overed institutions could pass at least some of the costs of the proposed rule to their stakeholders (customers, creditors, shareholders)."[71] This acknowledgment contradicts the NPR's assertion, in the very next sentence, that the Proposed Rule is "crafted in a manner that affects only large banks."[72] The potential passing on by covered institutions to customers of "at least some" of hundreds of millions of dollars or billions of dollars in regulatory costs makes indefensible the NPR's suggestion that the depositing public will see only the putative benefits and none of the costs.

b. The Proposed Rule would impose substantial costs on community banks.

The NPR insists that "the FDIC neither intends nor anticipates negative consequences for small banks,"[73] but such effects would be the Proposed Rule's predictable result. Thousands of community banks are participating institutions in deposit placement networks. Applying Section 370.3 of the Proposed Rule would mean that, when funds of a community bank's customer were placed at a covered institution, the covered institution would be required to obtain beneficial owner

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69 Deloitte Report, *supra* note 22, PDF file at 18, Cost Model at 4.

70 *Id.*

71 NPR, 81 Fed. Reg. at 10,045 (emphasis added).

72 *Id.* (emphasis added).

73 *Id.*

data from the community bank or its sub-custodian every business day. Forcing a community bank to share confidential data on this most vital competitive asset – its large-dollar depositors – with its largest and most resource-rich competitors would penalize community banks for successfully using deposit allocation services to build and strengthen customer relationships.

Applying Section 370.3 of the Proposed Rule would also harm community banks by making it necessary for them to comply with daily demands for beneficial owner data on deposits placed by the community bank for any customer, such as an agent or trustee, that was not itself the beneficial owner of the funds being placed. To do so, the community bank would be forced make such demands on its customers, at high cost and considerable risk of customer dissatisfaction.

The NPR dismisses such concerns about the Proposed Rule's effect on community banks in two sentences, stating that "[a] community bank could refuse to provide information on its best customers if it so chooses" pursuant to Section 370.4(c)(i)(1) of the Proposed Rule and that "the recipient covered institution would then be able to apply to the FDIC for an exception to the proposed rule's requirements for that particular account."[74] On its face, however, the ability to apply for an exception – the granting or denial of which, according to the NPR, would be entirely within the FDIC's sole discretion – provides no assurance that the interests of community banks would be adequately protected.

Rather than ameliorating concerns, the NPR casts doubt on the suggestion that the exception in Section 370.4(c)(i)(1) would protect community banks from having to turn over information on their large-dollar depositors to their large-bank competitors. The NPR suggests that, even if the sub-custodian refused on behalf of the community bank,[75] the FDIC would limit approval for the exception to a "particular account."[76] Requiring an exception application for every customer account, with asserted FDIC discretion to grant or deny any application regardless of its merit, would make the attempted use of Section 370.4(c)(i)(1) far too costly and uncertain to offset Section 370.3's adverse effects on community banks.

c. In preparing the cost estimate described in the NPR, the consultant was not, and could not have been, estimating the cost of compliance with the Proposed Rule.

The NPR states that the FDIC has "address[ed] the requirements of the Paperwork Reduction Act," 44 U.S.C. § 3501 *et seq.*, by providing "its own estimates of the potential costs and burden to the covered institutions" from the Proposed Rule.[77] The NPR further states:

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[74] *Id.* at 10,030.

[75] Section 370.4(c)(i)(1) requires a refusal by "the account holder," but the account holder at the covered institution typically is a sub-custodian, not the community bank. Proposed Rule § 370.4(c)(i)(1); NPR, 81 Fed. Reg. at 10,051.

[76] NPR, 81 Fed. Reg. at 10,030.

[77] NPR, 81 Fed. Reg. at 10,038 (footnote omitted).

> [T]he FDIC conducted an analysis to estimate the various costs for covered institutions in the event that the requirements are adopted as proposed. The total projected cost of the proposed rule for covered institutions amounts to just under $328 million or approximately 3.2 million total labor hours over two years.[78]

Elsewhere, the NPR acknowledges that the cost analysis was conducted not by the FDIC, but by an outside consultant, later identified as Deloitte.[79] Nevertheless, the NPR maintains that the consultant was estimating "the expected costs of complying with <u>this proposed rule</u>."[80] This assertion is contrary to fact.

In response to a FOIA request by Promontory for, among other things, the cost estimate described in the NPR, the FDIC provided links to the Deloitte Report, which was posted as a single PDF file on the FDIC website on or about May 20, 2016.[81] The Deloitte Report, including its Cost Model of April 1, 2015, predates the issuance of the Proposed Rule by almost a year and was not released to the public until more than a year after it was prepared.[82]

The Deloitte Report also predates the ANPR, which the FDIC issued on April 28, 2015. According to the NPR, when the FDIC issued the ANPR, the FDIC was "at a very early stage in the development of [the FDIC's] proposal" and, "[f]or this reason, no specific regulatory text was offered for consideration."[83] Unless the FDIC, contrary to what it says in the NPR, actually prepared the Proposed Rule before April 2015 and then set it aside for a year, Deloitte could not have been estimating the cost of "complying with this proposed rule" (as the NPR states it was), because when Deloitte prepared the estimate, "this proposed rule" did not yet exist.

In April 2015 – when the cost estimate was completed – the FDIC contemplated, according to the ANPR, a process in which deposit insurance determinations would be made on closing night only for a subset of deposits, known as "closing night deposits."[84] Later, however, when the FDIC

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78 *Id.* at 10,049.

79 *Id.* at 10,043.

80 *Id.* (emphasis added).

81 Deloitte Report, *supra* note 22.

82 An FDIC notice in the Federal Register announcing the extension of the comment period conceded that the FDIC "retained" the firm later identified as Deloitte "[i]n connection with the development of the [ANPR]." FDIC, Extension of Comment Period, 81 Fed. Reg. 33,424 (May 26, 2016). The FDIC notice did not acknowledge, however, that – contrary to what is stated in the NPR – Deloitte did not estimate "the costs of complying with this proposed rule." *See id.*; NPR, 81 Fed. Reg. at 10,043.

83 NPR, 81 Fed. Reg. at 10,038.

84 ANPR, 80 Fed. Reg. at 23,480. According to the Estimation Methodology portion of the Deloitte Report dated April 2, 2015, the Deloitte team had "[m]et with FDIC team," apparently in March 2015, "to understand pending rule-making and model requirements," Deloitte Report, *supra* note 22, PDF file at 2, Estimation Methodology at 2.

developed the NPR, it expanded the scope of the process. The NPR states that, after the ANPR, the FDIC "adjusted its approach for identifying the deposit accounts for which a covered institution should have complete and accurate ownership information" so as to pursue the FDIC's "ultimate goal," which was "for a covered institution's IT system to be able to calculate deposit insurance on all deposit accounts promptly upon the covered institution's failure."[85] As a result, "[r]ather than rely on the notion of 'closing night deposits,' the proposed rule generally requires covered institutions to obtain and maintain the deposit account information for all deposit accounts."[86]

This expansion in scope is highly pertinent to costs, because limiting the scope to closing night deposits would have excluded some of the costliest determinations. The NPR acknowledges that "[t]he majority of the commenters [on the ANPR] expressed the opinion that certain types of accounts, such as formal trust accounts, brokered deposits, time deposits, foreign deposits, prepaid cards and other omnibus accounts entitled to pass-through deposit insurance coverage should not be closing night deposits."[87] As the NPR notes, "for most covered institutions, the deposit accounts or deposit insurance rights and capacities that the commenters would prefer be identified as closing night deposits were those for which the requisite deposit ownership information was readily available."[88]

Because the FDIC had not yet "adjusted its approach" to eliminate the closing night deposits concept and expand the scope to all deposits when Deloitte prepared the cost estimate, and because Deloitte by its own account relied on what were then the "pending" requirements,[89] the cost estimate could not have reflected the amounts by which the costs were increased as a result of the FDIC's subsequent expansion in the scope to encompass the costliest determinations.[90] Promontory's FOIA request gave the FDIC the opportunity to provide the materials that it gave to

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85 NPR, 81 Fed. Reg. at 10,026 (emphasis in original).

86 *Id.* (emphasis in original). The NPR acknowledges "that it may prove difficult, and in some cases, impossible, for covered institutions to obtain the requisite depositor information for certain deposit insurance categories and/or types of deposit account," *id.*, but addresses that issue through the availability of extensions, which merely delay costs without avoiding them, and the exemption and exceptions, which, for reasons stated elsewhere in this letter, are wholly discretionary and, as drafted, do not provide reliable relief.

87 *Id.* at 10,033.

88 *Id.*

89 *See* Deloitte Report, *supra* note 22, PDF file at 2, Estimation Methodology at 2 (the Deloitte team, no later than April 2, 2015, had "[m]et with FDIC team to understand pending rule-making and model requirements").

90 A further indication that Deloitte relied on the then-pending requirements, which allowed for non-closing night deposits to be paid later, is that, according to the Deloitte Report, Deloitte used in its analysis information concerning "[t]he UK Fast Payout reform of 2008," which, according to Deloitte, "required banks to have the data necessary to provide depositors with [Financial Services Compensation Scheme] compensation payments within 7 days of bank failure." Deloitte Report, *supra* note 22, PDF file at 7, Estimation Methodology at 7 (emphasis added).

Deloitte, but the FDIC declined to do so, leaving nothing to suggest that Deloitte could have somehow anticipated the FDIC's later change in approach.[91]

Further, the Cost Model in the Deloitte Report appears to have used a definition of covered institutions that differs substantially from the one in the Proposed Rule. Nine of the 36 banks that were included in the Cost Model – fully one-fourth of the studied banks – <u>were not</u>, as of December 31, 2015, banks that would be covered institutions under the Proposed Rule.[92] Nine banks that were not included in the Cost Model <u>were</u>, as of December 31, 2015, banks that would be covered institutions under the Proposed Rule.[93]

According to statistics reported in the Cost Model, some of the banks that were included in the Cost Model fell far short of the two million deposit accounts required to be covered under the Proposed Rule. For example, the Cost Model included State Street Bank and Trust Co. to which it attributed only 14,596 deposit accounts, The Bank of New York Mellon to which it attributed only 45,881 deposit accounts, and The Northern Trust Co. to which it attributed only 163,536 deposit accounts.[94] It seems clear from the inclusion of such banks that the Cost Model employed a previously-considered and subsequently-rejected definition of covered institution rather than the one used in the Proposed Rule.

The FDIC's reliance on a cost estimate that was not in fact estimating the cost of the Proposed Rule in itself warrants withdrawal of the Proposed Rule. As the Supreme Court declared earlier this week, "[o]ne of the basic procedural requirements of administrative rulemaking is that an agency must give adequate reasons for its decisions."[95] To do so, "[t]he agency 'must examine the <u>relevant</u> data and articulate a satisfactory explanation for its action including <u>a rational</u>

91 *See* Appendix 1. It would be inappropriate – and prejudicial to the affected parties – if the FDIC were now to attempt to address this point and proceed with the Proposed Rule by relying on information not in the NPR or the Deloitte Report, such as information in materials that were not provided in response to the FOIA request. *See Chamber of Commerce of the United States v. SEC*, 443 F.3d 890, 901 (D.C. Cir. 2006) (rejecting, pursuant to the Administrative Procedure Act, 5 U.S.C. § 553(c), "[t]he Commission's extensive reliance upon extra-record materials in arriving at its cost estimates" without opportunity for comment).

92 The following nine banks were included in the Cost Model, but were not, as of December 31, 2015, banks that would be covered institutions: Ally Bank, American Express Centurion Bank, Bank of the West, Charles Schwab Bank, Goldman Sachs Bank, HSBC Bank USA, NA, State Street Bank and Trust Co., The Bank of New York Mellon, and The Northern Trust Co. *See* Deloitte Report, *supra* note 22, PDF file at 19, Cost Model at 5. Six of these banks, according to the Cost Model, did not have two million deposit accounts even then. *See id.*

93 The following nine banks were not included in the Cost Model, but were, as of December 31, 2015, banks that would be covered institutions: Barclays Bank Delaware, BofI Federal Bank, Customers Bank, Synchrony Bank, TCF National Bank, TD Bank USA, NA, UBS Bank USA, Webster Bank, NA, and WEX Bank. *See id.*

94 *Id.*

95 *Encino Motorcars, LLC v. Navarro*, 579 U.S. – (June 20, 2016), Opinion of the Court, slip op. at 9.

connection between the facts found and the choice made.'"[96] The NPR, which presents the 2015 Deloitte Report as having estimated the cost of the 2016 Proposed Rule, fails to establish such a rational connection, and the FDIC's failure to produce the materials it provided to Deloitte warrants the inference that the requisite showing could not be made.[97] In sum, the deficiencies in the cost estimate and the process that produced it raise substantial questions of administrative law, including the Paperwork Reduction Act.

d. Other aspects of the FDIC's response to the FOIA request further undermine the credibility of the cost estimate in the NPR.

The Deloitte Report reveals that the Cost Model went through six versions in just two weeks.[98] According to the Estimation Methodology, at least three "Working Sessions," two conducted in person, were held during that two-week period.[99] In response to Promontory's FOIA request, however, the FDIC failed to produce any of the first five versions of the Cost Model.[100] This prevents the public from seeing the changes in the multiple versions of the Cost Model that Deloitte made at the FDIC's behest.

The FDIC's response to the FOIA request further establishes the following:

- When the FDIC issued the ANPR on April 28, 2015, seeking comments on, among other things, "various options and general concepts,"[101] the FDIC already had the Deloitte Report in hand, but did not disclose its existence or its findings. This omission prevented the public from scrutinizing or commenting on the Cost Model in response to the ANPR.[102]

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

97 *Cf. Chamber of Commerce of the United States v. SEC*, 412 F.3d 133, 144 (D.C. Cir. 2005) ("uncertainty may limit what the Commission can do, but it does not excuse the Commission from its statutory obligation to do what it can to apprise itself – and hence the public and the Congress – of the economic consequences of a proposed regulation before it decides whether to adopt the measure").

98 Deloitte Report, *supra* note 22, PDF file at 16, Cost Model at 2. Deloitte prepared a first version of the Cost Model dated March 18, 2015, a second version dated March 23, 2015, a third version dated March 25, 2015, a fourth version dated March 26, 2015, a fifth version dated March 27, 2015, and a sixth and final version dated April 1, 2015. *Id.*

99 *Id.*, PDF file at 3, Estimation Methodology at 3.

100 *See* Appendix 1.

101 NPR, 81 Fed. Reg. at 10,038.

102 The NPR complains that "[c]omments on the ANPR provided little indication of implementation and ongoing costs for covered institutions," NPR, 81 Fed. Reg. at 10,049, but that fact should not have been surprising, given that the FDIC gave commenters no proposed regulatory text and, despite having obtained the Cost Model, withheld it.

- When the FDIC issued the NPR on February 26, 2016, the FDIC disclosed the Deloitte estimate's existence (without naming Deloitte), but did not make the Deloitte Report available. This omission prevented the public from scrutinizing or commenting on the Deloitte Report until the FOIA request finally required the FDIC to produce it.

- Given that the FDIC had the Deloitte Report in hand more than 14 months ago, before the FDIC issued either the ANPR or the NPR, and given that Deloitte provided six versions of the Cost Model to the FDIC in two weeks,[103] the FDIC would be reasonably expected to have in its possession numerous emails, including emails between FDIC personnel and Deloitte personnel, discussing the cost estimate. The FOIA request specifically requested documents discussing the cost estimate. In response, the FDIC failed to produce a single email. It is unlikely that not a single responsive email exists.

These circumstances further warrant withdrawal of the Proposed Rule.

4. The billions of units of beneficial owner data that the Proposed Rule would require covered institutions to obtain would almost never be used.

The NPR contends that the Proposed Rule would benefit "the public as a whole," but concedes that "monetiz[ing]" the putative public benefits of the Proposed Rule is "not possible."[104] Despite the high risks and costs that would flow from the Proposed Rule, however, applying the Proposed Rule to services such as Promontory's would provide <u>no</u> significant benefits to the FDIC or to depositors, because the billions of units of beneficial owner data that would be transmitted to and stored by covered institutions would rarely if ever be used.

As the NPR acknowledges, the FDIC would use the capabilities required by the Proposed Rule "to make deposit insurance determinations <u>only</u> after the failure of a covered institution."[105] It could not do otherwise, because deposit insurance determinations are based on <u>end-of-day</u> ledger balances at a failed institution.[106] Beneficial owner data must be current as of the end of the day of failure to be usable in making the determination. It follows that, even in the unlikely event that a covered institution failed and entered receivership, the vast amount of beneficial owner data that

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[103] As previously noted, when the FDIC finally produced the Deloitte Report, the FDIC declined to produce the materials that the FDIC gave Deloitte, on which Deloitte relied, and declined to produce five of the six versions of the Cost Model, the existence of which was first revealed when the Deloitte Report was produced.

[104] NPR, 81 Fed. Reg. at 10,043.

[105] *Id.* at 10,029 (emphasis added). According to a recent FDIC interpretive letter, "[t]he FDIC's 'pass-through' requirements are not applied by the FDIC except in paying deposit insurance following the failure of an insured depository institution." If a depository institution "has not failed," then "the FDIC's regulations (including the rules for 'pass-through' insurance coverage) are inapplicable." Letter of August 20, 2015, by Christopher L. Hencke, FDIC Counsel, addressee redacted.

[106] *See* 12 C.F.R. § 360.8(c)(1).

the Proposed Rule would have required the covered institution to obtain on a daily basis before that day would be completely superfluous.[107]

The balance of the beneficial owner's share of each deposit account in which the beneficial owner has funds within an applicable right and capacity, and the aggregated balance of each beneficial owner's deposits within each ownership right and capacity, can change on a given business day until final settlement of outstanding transactions on that day. Accordingly, beneficial owner data becomes current as of the end of the day of failure only after final settlement. Beneficial owner data that is current only as of settlement on the previous business day (or any earlier settlement) cannot produce an accurate deposit insurance determination.[108]

Final settlement for deposit allocation and sweep services typically occurs through the Fedwire Funds Service, which ordinarily ends its business day at 6:30 PM Eastern time, although that time can be extended. With Promontory's services, settlement ordinarily occurs between noon and 5:30 PM Eastern time, depending on the service, but settlement processing can also be extended. Deposit allocation or sweep services can choose to schedule settlement for any time up to the end of the Fedwire business day. As a result, there is no guarantee that current balance information will be available before the end of a covered institution's business day.

Because final settlement may occur at or only shortly before the end of a covered institution's business day, transmitting current beneficial owner data every business day would provide little or no more time for the covered institution to import and use the data, in the event of failure, than does transmitting it only if and when the bank actually fails and the FDIC is appointed as receiver. Promontory's experience confirms that, without any prior transmission of beneficial owner data to a bank, up-to-date data for the customers of relationship institutions can be sent to the bank before midnight on the day the FDIC announces its appointment as receiver.[109]

The NPR, in discussing comments on the ANPR, cites the comment that "daily closing balances would be established by the FDIC after the failed covered institutions [sic] normal daily processing runs to completion, usually not before the early morning hours of the following day."[110] Only "[t]hen" would "the augmented system developed pursuant to the proposed rule . . . calculate

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[107] For example, if the institution failed on the last business day of a year, only 1/1,000 (0.1%) of the millions or tens of millions of units of beneficial owner data obtained over the four years leading up to the failure would ever be used. If it did not fail, none of the data would ever be used.

[108] Although some information from a previous business day may not have changed, there is no way without a time machine to identify the unchanged information in the absence of current data.

[109] For deposits placed through a service such as Promontory's, the administrator, custodian, or sub-custodian can assign unique identifiers and right and capacity codes when deposits are initially placed in accordance with the same standards that a covered institution would apply.

[110] NPR, 81 Fed. Reg. at 10,036.

deposit insurance coverage . . . ."[111] On that timetable, transmitting current beneficial owner data before midnight on the day of the announcement would provide the information in ample time to be used in calculating deposit insurance coverage beginning in the early hours of the next day.[112]

5. If the beneficial owner data requirements are imposed, the Proposed Rule's exemption and exception provisions should be clarified and modified.

The requirements of Section 370.3 of the Proposed Rule, by default, apply to all deposits at covered institutions. The exemption and exception provisions in Section 370.4 are narrowly drafted and not always entirely clear. At a minimum, the FDIC should revise these provisions to provide reliable relief from the Proposed Rule's adverse effects.

a. The exemption should be available for deposits placed through a deposit allocation or sweep service in amounts that do not exceed the SMDIA.

The Proposed Rule states that a covered institution may apply to the FDIC for an exemption "if it demonstrates that it has not [taken] and will not take deposits from any account holder which, when aggregated, would exceed the SMDIA for any owner of the funds on deposit."[113] Because this exemption requires that the covered institution not accept deposits in excess of the SMDIA from "any" account holder, however, it appears that few if any covered institutions would be eligible to apply for it.[114]

If the Proposed Rule is adopted, it should specify that the exemption is available for deposits received through a deposit allocation or sweep service in amounts that do not exceed the SMDIA. Proposed revised language for Section 370.4(a) is as follows:

Exemptions. A covered institution shall be exempt from this part:

(i) with respect to all deposits at the covered institution if it has not taken and will not take deposits from any account holder which, when aggregated, would exceed the SMDIA for any owner of such funds, or

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111 *Id.*

112 In CDARS and ICS, the beneficial owner data referred to in the text is data for the relationship institution's customer, which is the beneficiary of the custodial relationships that apply as a result of the use of CDARS or ICS. If the relationship institution's customer is a custodian or trustee for other beneficial owners, the records of the relationship institution or its customer would be needed to determine the ultimate owners.

113 Proposed Rule § 370.4(a); NPR, 81 Fed. Reg. at 10,051.

114 *See* NPR, 81 Fed. Reg. at 10,032 ("the covered institution would not have any deposit accounts and does not intend to have any deposit accounts (when aggregated) which would exceed the standard maximum deposit insurance amount . . . ") (emphasis added).

(ii) with respect to deposits that the covered institution receives through a deposit placement network or cash sweep program in amounts that do not exceed the SMDIA for the custodian's customer.

Because customer funds are placed through deposit placement networks and cash sweep programs at least in part for access to FDIC insurance, customers rarely if ever permit the placement of their funds in a manner that, through aggregation, would deprive them of that very FDIC insurance. Promontory's services and others like them enable a custodian's customers to designate banks at which they have other deposits as ineligible to receive deposits through the network or sweep program.[115] As a result, although it is theoretically possible that a custodian's customer might have other deposits at a covered institution in the same right and capacity, as a practical matter any such deposits are likely to be nonexistent or *de minimis*.[116] In addition, given the capability described earlier in this letter to provide beneficial owner data to the covered institution promptly after a receivership announcement, any overlap with other deposits would be promptly determinable.

Whereas revising the exemption as described above would pose no meaningful risk of insurance overpayment, it would eliminate, for Promontory's IND service alone, the unnecessary transmission of more than <u>1.3 billion</u> units of beneficial owner data per year to covered institutions and the unnecessary storage of more than <u>6.5 billion units</u> of beneficial owner data by covered institutions. Likewise, it would eliminate, for Promontory's CDARS and ICS services, the unnecessary transmission of more than <u>3.9 million</u> units of beneficial owner data per year to covered institutions and the unnecessary storage of more than <u>19.5 million units</u> of beneficial owner data by covered institutions.

For other deposit allocation and sweep services that qualified for the exemption, similar benefits could be expected. Across the industry, the revised exemption would remove from the Proposed Rule not only the costs of the transmission and storage of billions of units of beneficial owner data, but also the high risk of data breach that mandating such transmission and storage would spawn.

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[115] Promontory's CDARS and ICS services also make available in advance the proposed allocations and enable a custodian's customers to reject placement even at institutions that the customer has not previously excluded. Promontory's IND service shows a custodian's customers the sequence of banks in which their funds will be deposited, according to balance amounts, thus enabling them also to know in advance the allocations that will occur.

[116] In addition, the average customer account size for cash sweep programs supported by Promontory's IND service is approximately $14,000, and customer funds are typically allocated to banks that are not located in the same part of the country as the custodian's customer. These additional features make it even less likely that a customer would have aggregate deposits in excess of the SMDIA.

b. The exceptions should also be modified to provide effective relief.

The Proposed Rule specifies three possible exceptions to the requirements of Section 370.3 for which a covered institution may apply.[117] As with the exemption, the provisions on exceptions would not mitigate adverse effects of the Proposed Rule without changes.

i. Section 370.4(c)(1)(i)

In commenting on the ANPR, Promontory pointed out that, for deposits placed by a community bank through a service such as CDARS or ICS, a proposal similar to the one embodied in the Proposed Rule would force the community bank to provide sensitive information on its best customers to covered institutions that are its much larger competitors. In response, the NPR cites the exception in Section 370.4(c)(1)(i) and states: "A community bank could refuse to provide information on its best customers if it so chooses."[118] The Proposed Rule itself states that a covered institution may apply for an exception if it does not maintain, but has requested, the required information from the account holder and "certifies that the account holder has refused to provide such information or has not responded to the covered institution's request for information . . . ."[119]

As discussed earlier in this letter, the exception as written provides no assurance that it would protect the interest of community banks. Section 370.4(c)(i)(1) merely permits a covered institution to apply for the exception; FDIC approval, according to the NPR, is entirely discretionary. Moreover, the NPR suggests that the exception, if granted, would be limited to a "particular account." Requiring an exception application for every customer account, with no assurance of a favorable result even when the stated requirement is met, would make the exception essentially a dead letter.

If the Proposed Rule is adopted, the exception should be clarified to state that the exception is available on a multiple-account basis for a class or sub-class of deposits. Customers that have large deposits warranting the use of a deposit allocation service typically are, as a group, among the best customers of the institutions that place the deposits, but requiring particularized showings for each customer would make the process so burdensome as to destroy the exception's value. The Proposed Rule should make explicit that a custodian or sub-custodian, as account holder, can refuse to provide beneficial owner data for all deposits placed through a depost placement network

[117] *See* Proposed Rule § 370.4(c)(1); NPR, 81 Fed. Reg. at 10,051.

[118] NPR, 81 Fed. Reg. at 10,030.

[119] Proposed Rule § 370.4(c)(1)(i); NPR, 81 Fed. Reg. at 10,051. In CDARS and ICS, the account holder at destination institutions is a service-wide sub-custodian, BNYM. In IND, the account holder is a broker-dealer or other custodial agent. When the account holder is a service-wide sub-custodian, the Proposed Rule would permit a covered institution to apply for an exception if the sub-custodian, as account holder, refused to provide the information. When the account holder is a broker-dealer or other custodial agent, the Proposed Rule would permit a covered institution to apply for an exception if the custodial agent, as account holder, refused to provide the information.

or cash sweep program and that when such a refusal is established, the FDIC will grant the exception, without requiring a particularized showing for each of the custodian's customers.

ii. Section 370.4(c)(1)(ii)

Section 370.4(c)(1)(ii) of the Proposed Rule states that a covered institution can apply for an exception on the basis of "a reasoned legal opinion that the information needed to complete the requirements set forth in § 370.3(a) for accounts of a certain type is protected from disclosure by law . . . ."[120] The scope of this exception would depend on the FDIC's construction of the term "protected from disclosure by law," as well as on how the FDIC would apply the exception in deciding whether to grant applications that invoke it.

When the participating institutions in a network contractually agree that destination institutions will not receive personally-identifiable beneficial owner data except in the event of an FDIC receivership (or another special circumstance), the resulting contractual prohibition imposes a legal duty on the parties. The beneficial owner data is therefore "protected from disclosure by law." It might be suggested, however, that the protection must be one that arises by law independent of contractual obligations. To avoid doubt, the provision should read, "protected from disclosure by law, including by contract."

iii. Section 370.4(c)(1)(iii)

Section 370.4(c)(1)(iii) states that a covered institution may seek an exception by providing "an explanation of how the information needed to complete the requirements set forth in § 370.3(a) changes frequently and updating the information on a continual basis is neither cost effective nor technologically practicable."[121] The NPR further states, with respect to this exception: "The FDIC would consider the nature of the deposit relationship to determine how frequently the information would need to change in order for a covered institution to be granted an exception, but anticipates that the rate would need to be on a daily or near daily basis."[122]

Depending on how the FDIC applied the "daily or near daily basis" requirement, the FDIC might narrowly construe this exception. For example, the FDIC might assert that the exception is unavailable when funds are placed through time deposit allocation services such as CDARS, because CD balances do not change on a "daily or near daily basis." But even though data relating to a particular beneficial owner might change relatively infrequently, data for the beneficial owners as a whole could still change every day. The exception would be of little or no value if it required that the covered institution obtain data for some beneficial owners of funds on deposit by an account holder, but not others, on a given business day. Accordingly, if the Proposed Rule is

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[120] Proposed Rule § 370.4(c)(1)(ii); NPR, 81 Fed. Reg. at 10,051.

[121] Proposed Rule § 370.4(c)(1)(iii); NPR, 81 Fed. Reg. at 10,051.

[122] NPR, 81 Fed. Reg. at 10,041.

adopted, the exception should apply to the information, as a whole, that is needed to complete the requirements of Section 370.3(a).[123]

6. The Proposed Rule's requirements for covered institutions that have been granted an exemption or exception should be modified to clarify that, as in all other IT operations, the covered institution may use the services of a third-party processor.

Section 370.4(f) of the Proposed Rule provides that, if a covered institution's exemption or exception application is granted, the institution must:

(1) Ensure that its information technology system is, in the event of the covered institution's failure, capable of placing an effective restriction on access to all funds in deposit accounts identified in the request for exception or extension;

(2) Ensure that its information technology system is capable of creating files in the format and layout specified in Appendix B listing all accounts for which it is granted an exception or an extension under this section;

(3) Ensure that its information technology system is, in the event of the covered institution's failure, capable of receiving additional information collected by the FDIC after failure and repeatedly performing the requirements set forth in § 370.3; and

(4) In the case of an exception, disclose to the account holder reported with the application that in the event of the covered institution's failure, payment of deposit insurance may be delayed and items may be returned unpaid until all of the information required to make a deposit insurance determination has been provided to the FDIC."[124]

Item (1), the capability of placing holds on funds, appears consistent with current regulations[125] and with the capability of covered institutions as Promontory understands them.

Item (2), which requires that the covered institution's IT system be capable of creating files in the specified format and layout, may be appropriate in principle, but should be modified to clarify that the creation of such files may be accomplished either by an IT system that the covered institution operates or by an IT system that a third-party processor operates to produce the files for

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[123] Another problem with this exception is that the FDIC's judgment about what is "cost effective" or "practicable" may be radically different from a market-based judgment. The NPR indicates that the estimated compliance costs, which according to the Cost Model for some covered institutions will exceed $50 million per bank, are justified by the objectives of the Proposed Rule. The NPR does not say what the FDIC would require for a showing by a bank that compliance is not cost effective.

[124] Proposed Rule § 370.4(f); NPR, 81 Fed. Reg. at 10,052.

[125] *See* 12 C.F.R. § 360.9(c).

the covered institution. In the latter case, the covered institution would have to be capable of importing the files, but should not be required to re-create files that had already been created. Such a requirement would be manifestly wasteful and likely to introduce errors. A third-party processor could provide such files for multiple account holders and multiple covered institutions and, in doing so, achieve greater efficiency, reliability, and uniformity than would likely result from forcing each covered institution to create the files itself.

Likewise, item (3), which requires that the covered institution's IT system be capable of receiving additional information collected by the FDIC after failure and repeatedly performing the requirements, may be appropriate in principle, but should be modified to clarify that the receiving of additional information may be accomplished either by an IT system that the covered institution operates or by an IT system that that a third-party processor operates to produce the files for the covered institution.[126] Again, a third-party processor could provide the necessary capability on a broader basis and thereby achieve greater efficiency, reliability, and uniformity.

Item (4), the delay disclosure, if included at all, should not be required across the board. As the NPR notes, the FDIC is obligated by statute to pay deposit insurance claims "as soon as possible."[127] In services such as CDARS, ICS, and IND, beneficial owner data sufficient to make a deposit insurance determination can be promptly provided after the announcement that the FDIC has been appointed as receiver. For such services, a mandatory delay disclosure would be affirmatively misleading. The disclosure therefore should not be required when the administrator, custodian, or sub-custodian will provide current beneficial owner data before midnight on the day a covered institution enters receivership.

More broadly, mandating a disclosure in all cases, regardless of circumstances, that "payment of deposit insurance may be delayed" would imply that the FDIC will treat deposits subject to an exception with less urgency, whether or not delay would actually occur. In addition, such a requirement would discriminate against and could stigmatize brokered deposits, because payment of deposit insurance can be delayed for other reasons in other circumstances in which no such disclosure is required.

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[126] With the clarifications in items (2) and (3), covered institutions could also be required to obtain benign test data, without obtaining actual beneficial owner data, at an initial time and periodically, such as once per year, to provide a basis for confidence that current beneficial owner data would be transmitted and could be imported into the covered institution's systems on receipt. The processor could also be required to cooperate with the covered institution in the testing process.

[127] NPR, 81 Fed. Reg. at 10,026; 12 U.S.C. § 1821(f)(1).

7. The exemption and exceptions should not solely depend on the FDIC's discretion, but should be granted whenever the stated factual predicate is met.

The NPR states: "The FDIC would review a covered institution's application . . and determine, in its sole discretion, whether to approve the application."[128] As a result, the covered institution would bear the cost and burden of submitting an application for exemption or exception with no assurance that the FDIC would grant the application, regardless of its merits. Rather, the FDIC could deny the application, or condition or time-limit a grant of approval, [129] even if the stated factual predicate for the exemption or exception were fully met.

The asserted discretion to deny even an application that complies with the stated factual predicate would have perverse consequences. For example, if a covered institution applied for an exception pursuant to Section 370.4(c)(1)(ii) because the necessary information was protected from disclosure by law, the FDIC according to the NPR would have discretion to deny the exception, and therefore could demand compliance, even when compliance would result in violation of the law.

A larger issue is that the asserted discretion, if sustained, would vest the FDIC with essentially unlimited power to discourage or prohibit the lawful acceptance by well-capitalized covered institutions of brokered deposits and other deposits placed on a pass-through insurance basis through deposit allocation or sweep services. The FDIC would be able to exercise this power by withholding an exemption or exception despite the covered institution's full satisfaction of the legal predicate for its application.

There can be no doubt that the acceptance of brokered deposits by a well-capitalized institution is lawful and proper. As the FDIC states, a well-capitalized institution "is not restricted by Section 29 [of the FDI Act] in accepting or renewing brokered deposits."[130] The FDIC also acknowledges that "brokered deposits do not themselves cause failure"[131] and that they "can be a valuable funding source when banks manage them well and use them to grow prudently."[132]

Nevertheless, recent regulatory actions by the FDIC and other federal banking agencies have raised strong concerns among bankers about the attitude of the agencies with respect to the use of brokered deposits even by well-capitalized institutions. The Proposed Rule's requirement for massive exposure of beneficial owner data, and the concomitant increased costs for all parties

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[128] NPR, 81 Fed. Reg. at 10,042 (emphasis added).

[129] *See* Proposed Rule § 370.4(d); NPR, 81 Fed. Reg. at 10,052.

[130] FDIC FAQ, *supra* note 6, at A4.

[131] FDIC, STUDY ON CORE DEPOSITS AND BROKERED DEPOSITS, at 39 (2011). Likewise, after reviewing Material Loss Reviews and Summaries of Office of Inspector General Semiannual Reports to Congress, the Core Deposit Study noted that "none of these MLRs and Reports determined that brokered deposits directly caused failure." *Id.* at 68.

[132] *Id.* at 34.

involved, gives rise to understandable concern that the Proposed Rule might be used in an effort to dissuade covered institutions from accepting brokered deposits in the first place despite having every right to do so.[133]

In congressional testimony, Chairman Gruenberg has affirmed that the FDIC does not have the "right or authority" to try to shut down "businesses who are operating legally in this country."[134] He has described as a "misperception" the belief that "some deposit accounts or banking relationships with specific categories of merchants were prohibited or discouraged" by the FDIC.[135] The FDIC should likewise refrain from creating any misperception that it seeks to discourage lawful deposit brokerage relationships by making them too costly or burdensome for banks to pursue. If the Proposed Rule is not withdrawn, an exemption or exception should apply whenever the stated factual predicate is met.

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133 This concern is amplified by the FDIC's pointed insistence that, although "the FDIC does not <u>intend</u> to penalize the covered institutions' depositors for the possible inadequacies of the covered institutions' records or IT systems," the FDIC would be "justified" in doing so, NPR, 81 Fed. Reg. at 10,031 (emphasis added), and therefore presumably could do so at any time.

134 *The Fed. Deposit Ins. Corp.'s Role in Operation Choke Point, supra* note 38, at 18-19.

135 *Id*. App. at 48 (Statement of Martin J. Gruenberg).

Thank you for consideration of our comments. Should you wish to discuss them further, please contact the undersigned at (703) 292-3333 (mjacobsen@promnetwork.com).

Sincerely,

Mark P. Jacobsen
President and Chief Executive Officer

Attachments

STATEMENT OF CHARLES A.T. MOLLUZZO

June 24, 2016

I am Assistant General Counsel for Promontory Interfinancial Network, LLC ("*Promontory*"). On April 29, 2016, Promontory submitted a Freedom of Information Act ("*FOIA*") request to the Federal Deposit Insurance Corporation ("*FDIC*"). A copy of the request, which was submitted electronically and assigned FDIC FOIA Log Number 16-0261, is reproduced in the FDIC's response, which is attached as Exhibit 1.

On May 26, 2016, Natasha Smith, Government Information Specialist in the FOIA/Privacy Act Group of the FDIC provided the FDIC's response (Exhibit 1), which contained three links to a single portable document format ("*PDF*") file that was posted on the FDIC's website on or about May 20, 2016. The FDIC produced no other responsive materials.

On May 27, 2016, I sent an email to Ms. Smith stating that the FDIC response was incomplete in specified respects and asking that the FDIC provide a complete response as soon as possible. A copy of my email to Ms. Smith is attached as Exhibit 2. Materials within the scope of the FOIA request that were not produced include the following:

- the "information that, according to the FDIC notice, 81 Fed. Reg. at page 10,043, the FDIC gave to the independent consulting firm to prepare the cost estimates,"

- the consultant's "Initial Model," which, according to the consultant's presentation, the FDIC and the consultant discussed before completion of the "Final Model,"

- documents from the Working Sessions at which the FDIC gave the consultant its feedback on the Initial Model and other key aspects of the study, and

- other documents, such as emails, that discuss the consultant's work on the cost estimates.

On June 2, 2016, I spoke by telephone concerning the matter with FDIC Supervisory Counsel Hugo Zia. Ms. Smith also joined the call, but did not speak. When I asked Mr. Zia why materials such as those listed above were not produced, Mr. Zia:

- asserted that providing a link to a single document (the PDF file) was fully responsive,

- refused to explain the FDIC's failure to produce the materials that the NPR states were given to the consulting firm to prepare the estimates, despite the materials having been specifically requested,

- refused to say whether there are other documents that discuss the consultant's work, despite such documents also having been specifically requested, and

- stated that the FOIA request had been "closed out" by the FDIC's response and that nothing further would be said.

The call then ended.

Charles Molluzzo

FDIC
Federal Deposit Insurance Corporation
550 17th Street, NW, Washington, DC 20429-9990
Legal Division

May 26, 2016

Charles Molluzzo
Promontory Interfinancial Network, LLC
1300 17th Street North, Suite 1800
Arlington, Virginia 22209-3810

Re: FDIC FOIA Log Number 16-0261

Dear Mr. Molluzzo:

This will respond to your Freedom of Information Act (FOIA) request, in which you requested the following:

> Documents consisting of (a) the cost estimates by the independent consulting firm referred to in the FDIC's Notice of Proposed Rulemaking regarding "Recordkeeping for Timely Deposit Insurance Determination," 81 Fed. Reg. 10,026 (Feb. 26, 2016), at page 10,043, and any associated report, study, tables, or other presentation of the estimates, (b) the information that, according to the FDIC notice, 81 Fed. Reg. at page 10,043, the FDIC gave to the independent consulting firm to prepare the cost estimates, and (c) all other documents created, prepared, or sent to or from the FDIC or its staff that discuss the work completed by the independent consulting firm, including documents relating to cost estimates of the activities described in the Rule, as well as documents providing, summarizing, or otherwise discussing the independent consultant's analysis.

With regard to the first two items of your request, please be advised that the responsive information is now publicly available on the FDIC's website at:
https://www.fdic.gov/regulations/laws/federal/index.html
https://www.fdic.gov/regulations/laws/federal/2016/2016_recordkeeping_3064%E2%80%93ae33.html
https://www.fdic.gov/regulations/laws/federal/2016/2016_recordkeeping_3064-AE33_report.pdf

Regarding the remaining item of your request, please be advised that the FOIA requires that each request reasonably describe the requested records and comply with an agency's published rules. The FOIA does not provide for an agency to undertake research, to establish subjective criteria pursuant to which determinations of relevance may be made, or to speculate as to what information may or may not be of interest to a requester. The FDIC's FOIA regulations provide, at 12 C.F.R. §309.5(b)(3), that: "A request for identifiable records shall reasonably describe the records in a way that enables the FDIC's staff to identify and produce the records with reasonable effort without unduly burdening or significantly interfering with any of the FDIC's operations."

While a FOIA request need not specifically identify each requested record, it must describe the information sought with sufficient particularity so that an agency may determine precisely which information is being requested and be able to locate that information following a record search reasonably calculated to lead to the retrieval of all requested information. This item of your request does not reasonably describe the information that you would like to obtain, thereby creating an undue burden on the FDIC. Descriptions such as "all other documents…" are ambiguous, overbroad, and place an unreasonable burden on FDIC personnel who must speculate as to what information may be responsive to a request.

Therefore, having carefully considered this item of your request in light of the requirements of the FOIA and the FDIC's FOIA regulations, I have determined that this item of your request does not reasonably describe the information you seek and cannot be further processed at this time.

The FDIC's FOIA regulations provide, at 12 C.F.R. §309.5(c):

> *Defective requests.* The FDIC need not accept or process a request that does not reasonably describe the records requested or that does not otherwise comply with the requirements of this part. The FDIC may return a defective request, specifying the deficiency. The requester may submit a corrected request, which will be treated as a new request.

This completes the processing of your request. If you have any questions about this response, you may reach me at NatSmith@fdic.gov or by telephone at 703-562-2067.

Sincerely,

Natasha Smith
Government Information Specialist
FOIA/Privacy Act Group

Doug Phillips

From: Charles Molluzzo
Sent: Friday, May 27, 2016 3:45 PM
To: Doug Phillips
Subject: FW: FDIC FOIA Log # 16-0261

FYI.

Charles Molluzzo
Promontory Interfinancial Network, LLC
703.292.3420

From: Charles Molluzzo
Sent: Friday, May 27, 2016 3:45 PM
To: 'Smith, Natasha' <efoia@fdic.gov>
Subject: RE: FDIC FOIA Log # 16-0261

Dear Ms. Smith,

I am replying to your letter of May 26, 2016, which provides the FDIC's response to the Freedom of Information Act ("FOIA") request identified by FDIC FOIA Log Number 16-0261 (the "Request"). Your letter of May 26 (the "FDIC Response") provides links to a recently-posted document, but provides no other responsive information. We respectfully submit that the FDIC Response is incomplete. Because the due date for the FDIC Response has already passed, and because the requested information is pertinent to a proposed rule on which comments will soon be due, we kindly ask that the FDIC provide a complete response as soon as possible.

The Request was as follows:

> Documents consisting of (a) the cost estimates by the independent consulting firm referred to in the FDIC's Notice of Proposed Rulemaking regarding "Recordkeeping for Timely Deposit Insurance Determination," 81 Fed. Reg. 10,026 (Feb. 26, 2016), at page 10,043, and any associated report, study, tables, or other presentation of the estimates, (b) the information that, according to the FDIC notice, 81 Fed. Reg. at page 10,043, the FDIC gave to the independent consulting firm to prepare the cost estimates, and (c) all other documents created, prepared, or sent to or from the FDIC or its staff that discuss the work completed by the independent consulting firm, including documents relating to cost estimates of the activities described in the Rule, as well as documents providing, summarizing, or otherwise discussing the independent consultant's analysis.

<u>Items (a) and (b)</u>

The FDIC Response states: "With regard to the first two items of your request, please be advised that the responsive information is now publicly available on the FDIC's website" at three specified links, all of which appear to link directly or indirectly to a single presentation by Deloitte Development LLC. Since the Request was submitted, Deloitte has been identified as the consulting firm referred to in the Request.

By stating that "the responsive information" is now available, the FDIC Response indicates that there is no other information responsive to items (a) or (b) of the Request. It does not appear, however, that this can be correct.

Rather, the Deloitte presentation itself points to the existence of other documents, which have not been provided, that are responsive to the second part item (a), which requests "any associated report, study, tables, or other presentation of the estimates . . . ." For example, page 3 of the presentation gives the dates of submission not only of a "Final Model," but also of an "Initial Model," as well as in-person "Working Session[s]." The Initial Model, any documents from the Working Sessions, and any other materials responsive to the second part of item (a) are within the scope of the Request, but are missing from the FDIC Response.

In addition, the Deloitte presentation does not contain the information responsive to item (b), which is the "information that, according to the FDIC notice, 81 Fed. Reg. at page 10,043, the FDIC gave to the independent consulting firm to prepare the cost estimates." At page 2 the presentation confirms that Deloitte "[u]sed FDIC-provided data" to run the cost estimate model, but the presentation does not identify or attach what the FDIC gave Deloitte. This material, on which Deloitte says it relied, is pertinent to the evaluation of the cost estimates, but is also missing from the FDIC Response.

Item (c)

The FDIC Response declines to produce any documents in response to item (c) of the Request on the ground that item (c) "does not reasonably describe the information that you would like to obtain" because "[d]escriptions such as 'all other documents…' are ambiguous, overbroad, and place an unreasonable burden on FDIC personnel who must speculate as to what information may be responsive to a request."

This statement, however, uses the ellipsis to omit the specific content of the Request that the FDIC Response asserts is missing. The Request did not seek "all other documents" period. Rather, it specified other documents "that discuss the work completed by the independent consulting firm [which has since been identified as Deloitte], including documents relating to cost estimates of the activities described in the Rule, as well as documents providing, summarizing, or otherwise discussing the independent consultant's analysis."

It is true that the Request does not specify, for example, "the email of Ms. X to Mr. Y dated March 15, 2015, regarding the Deloitte work," because it would be impossible for a requester to do so without prior knowledge of the email. But this fact does not justify denying the request; if it did, FOIA requesters would be subject to an impossible Catch-22. The other documents to which item (c) refers are expressly stated to be documents concerning the Deloitte work and therefore can be readily retrieved. We therefore reiterate our request that responsive documents be produced as soon as possible.

Yours very truly,

Charles Molluzzo

Charles Molluzzo
Assistant General Counsel
Promontory Interfinancial Network, LLC
1300 17th St. N, Suite 1800
Arlington, VA 22209

703.292.3420 (Telephone)
703.528.5700 (Fax)

From: Smith, Natasha [mailto:efoia@fdic.gov]
Sent: Thursday, May 26, 2016 11:31 AM
To: Charles Molluzzo <cmolluzzo@promnetwork.com>
Subject: FDIC FOIA Log # 16-0261

May 26, 2016

FDIC FOIA Log #16-0261

Attached please find a response from the FDIC concerning your above-referenced FOIA request.