May 6, 2019

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

RE: Brokered Deposits RIN 3064-AE94

Dear Mr. Feldman,

We support the FDIC's review of the brokered deposit and interest rate regulations, per the Advance Notice for Proposal Rulemaking (ANPR), considering significant changes in technology and operating platforms, business models, customer preferences, product and service offerings, and the economic environment since the regulations were adopted. It's evident that the need for ongoing interpretation of these regulations continues to present an encumbrance for insured depository institutions (IDIs) as they develop platform and deposit gathering strategies and that likely, the FDIC policy group that is challenged with setting regulatory precedence with each case reviewed.

In response to the ANPR, we present the following for the FDIC's consideration.

(A) Lack of Definitional Clarity

Section 29 of the Federal Deposit Insurance (FDI) Act: Brokered Deposits, does not clearly define Brokered Deposit – instead, deferring to a very broad definition of Deposit Broker, allowing for significant regulatory latitude and subjective interpretation. A fundamental element to qualify as a Deposit Broker, the purpose of bringing deposits must be "selling interests in those deposits".

The well-intended ruling, to stop the selling interests in deposits to fund undisciplined loan growth by troubled IDIs following the Savings & Loan crisis in the 1980s, proved effective to drastically reduce or even eliminate the number of true Deposit Brokers remaining. However, with the absence of a clear and narrow definition of Brokered Deposits, there is evidence that regulators have settled into the most conservative stance, considering any/most deposits that involve a third party to be Brokered. As a result, terms of third-party agreements that involve deposits generally characterize services as administrative or marketing, avoiding full description of

Live Oak Bank
1741 Tiburon Drive
Wilmington, NC 28403

payment for services that may more properly translate to payment for deposits, making identification of true Brokered Deposits very difficult to uncover.

(B) Modernization of Regulation Needed to Meet Current Innovation and Technology
A combination of innovation and technology to reach customers and deliver financial products and services and the customer's evolving preferences to how they desire to conduct their personal and business activities, is not adequately considered in the existing deposit guidance. As services or offerings become more specialized, new partnerships and alliances are developing and the market is unclear how regulators will interpret those activities.

Modernizing the regulations and regulatory interpretation regarding third party arrangements is needed to allow IDIs to leverage innovation. FinTech firms are quickly moving to develop new banking platforms and services to improve the customer experience. IDIs look to participate through partnering with these firms to provide the bank operations and oversight. Expanded services and product offerings through advanced technology will increase access to banking offerings, flexibility and convenience, and reduce the cost for customers while providing a better reach for Community Banks in particular, that do not have the same resources available as the larger IDIs. However, because current FDIC interpretation trends to any third-party intervention equates to a Brokered Deposit determination, these partnerships have become increasingly difficult to navigate. Although the primary purpose of such partnerships is clearly not the "placing of deposits or facilitating the placement of deposits of third parties", narrow interpretations regarding third-party involvement impede IDIs participation.

(C) Relationship Deposits Assumed to be Brokered Deposits
IDIs broaden their business model offerings for the purpose of increasing share of wallet for each customer, in some cases creating affiliate organizations for purposes of providing specific products and services. This generates additional revenue for the institution and provides needed services, convenience, and cost advantages for the customer. However, according to Section 29, affiliates of the IDI are not included in the Exclusions listing and may be assumed to be deposit brokers despite clearly distinct business purposes, e.g., wealth management or broker-dealer affiliates. In the example of a broker-dealer affiliate, the relationship deposits are those that may be swept between an affiliated broker-dealer into a depository account at the IDI. These broker accounts generally offer options for customer deposits, including the IDI affiliate, which may also include additional benefits i.e., interest, check writing, debit cards, online bill pay.

Including affiliate deposit transactions or referrals as brokered deposits, disadvantages both the customer and the IDI. Section 29 does Exclude an "agent or nominee whose primary purpose is not the placement of funds with depository institutions". We suggest that affiliate transactions qualify for this Exclusion, therefore all affiliate transactions should be considered as relationship deposits. Rather than assuming the deposits are brokered, the burden of proof that they are not should come as a result of normal regulatory examination that identifies some elevated concern that brings into question the customer relationship. Affiliates of an IDI are by definition, under common control with the IDI. In general, deposits brought through the IDI's organizational affiliates are therefore likely less volatile.

IDIs also enter into a number of corporate customer relationships wherein the customer may also request banking service benefits for their employees or members. Examples of these relationships are workplace banking products to provide access to employees, in some cases may be otherwise unbanked; or Health Savings Accounts (HSAs). In cases such as these, the deposits are held in the customer's names and any transactions are for their benefit alone and should not be classified as brokered.

(D) Use of Primary Purpose Exemption (PPE) Waiver Authority and Deposit Classification Determinations

Although the PPE waiver authority is granted under Section 29, there is little evidence that it is being utilized and when review is requested, the process is arduous with a lack of transparency in the decision-making. There are also instances where despite numerous requests for final determination, significant time passed before the decision was made and communicated. Understanding the concern that FDIC decisions may establish precedence for subsequent determinations, unclear process and unnecessary regulatory delays can adversely impact IDI strategic decisions in addition to the burden placed on the regulatory policy decision-makers.

(E) Disparate Regulator Treatment

The lack of specificity and transparency of the brokered deposit determination, whether through a request for PPE or classification of certain deposits, result in field determinations that create inconsistency in treatment. There are differences in Regional and examiner understandings and determinations that don't even elevate to Washington for a national perspective. The same deposit types may be identified as brokered in one market and not in another. Large and Community Banks do not face the same evaluation in part, because there is also the added perspective of different regulators.

There have been broadly advertised and used deposit gathering products that would be characterized as brokered by examiners but were purposely not identified as such as the FDIC elected to work with the product developer to alter terms that would avoid the brokered classification. While we appreciate efforts such as these, it demonstrates how challenging the current regulation and interpretations are for all parties involved.

(F) Liquidity, Prompt Corrective Action, Regulator Differences

Under Section 38 of the FDI Act: Prompt Corrective Action (PCA), regulatory agencies *may* reclassify an IDI that is well capitalized as adequately capitalized if the agency determines the institution is in an unsafe or unsound condition, or, pursuant to an order issued under Section 39 8(b)(8) of the FDI Act. There is inconsistent application of this hammer between agencies, markets, and bank size creating unfair imbalance. The ability to downgrade capital, driven by inclusion of a capital clause in a regulatory order, is not utilized by each agency. Side-agreements may be entered into for purposes of monitoring capital while avoiding risks to an IDI's liquidity caused by prohibitions that follow the downgrade. Aside from the negative implications to some institutions and not all, this inconsistency may also incent charter flips due to the unequal interpretation. The difference in interpretation can, and does, result in uneven liquidity requirements and potentially, create a liquidity crisis for institutions that have sufficient capital and would be otherwise classified as well-capitalized.

(G) National Rate Cap

Section 29 directs the FDIC to calculate a national rate cap on the interest rates that weaker institutions may offer on deposits. Recent history points to IDIs that face deposit rate restrictions also face liquidity crises without regulatory forbearance with requirements of this Section. The current methodology does not work properly in the current market environment and highlight the need to establish a dynamic methodology. The methodology should consider the variety of factors that will include a view to differing markets and economic conditions.

We understand that there is no single method that will satisfy all circumstances but recommend that a common benchmark that is transparent and robust, such as the local FHLB advance rate or similar, plus a dynamic add-on factor, may be used. The necessity to improve the current methodology is both important to IDIs that are well-capitalized and those that are weaker.

Well-capitalized IDIs are not subject to rate restrictions unless or until they are deemed to be less than well-capitalized by the FDIC for safety and soundness concerns. The well-capitalized IDI then becomes a Deposit Broker if they pay rates that exceed the national rate cap. For all IDIs subject to rate restrictions, the current rules, with the current rate cap calculations, can hamper the IDIs access to market funds and create a liquidity crisis, including those that hold significant capital.

The ANPR reminds readers that the regulations restricting use of brokered deposits arose because such deposits *could* facilitate rapid growth in risky assets without adequate controls or they *could* be used to fund additional risky assets to grow out of problems and finally, brokered deposits *could* be volatile. The ANPR also notes that historically, *most* institutions that use brokered and higher-rate deposits have done so in a prudent manner and appropriately measure, monitory, and control risks associated with brokered deposits. Moreover, *well-capitalized institutions are not subject to* restrictions on accepting brokered deposits or setting interest rates. However, these reminders only highlight the fact that these deposit restrictions are off the mark. The problems - shareholder and FDIC losses - were caused by poor management and not the funding vehicles themselves. At the very least, the lack of clarity and regulatory discretion create a path to disparate treatment.

We appreciate the FDIC issuing the ANPR and its interest in modernizing the brokered deposit rules and policies. If you have any questions, please contact the undersigned.

Susan N. Janson, EVP
Chief Risk Officer
Susan.janson@liveoak.bank
910.227.4323