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Via E-Mail to [comments@fdic.gov](mailto:comments@fdic.gov)

Federal Deposit Insurance Corporation  
550 17<sup>th</sup> Street N.W.  
Washington, D.C. 20429

RE: RIN 3064-AE94, Brokered Deposits

To Whom it May Concern:

Compass Bank (“BBVA Compass”) appreciates the opportunity to comment on the Advance Notice of Proposed Rulemaking (“ANPR”) from the Federal Deposit Insurance Corporation (“FDIC”) regarding Section 29 of the Federal Deposit Insurance Act (the “FDI Act”). We are pleased to see that the FDIC recognizes that the banking industry has experienced significant changes in technology, business models, and product types since the FDIC’s adoption of its brokered deposit regulation nearly 30 years ago, and would like to take this opportunity to comment on the FDIC’s regulatory approach to Section 29 by responding to selected questions within the ANPR.

### **About BBVA Compass**

BBVA Compass is a Sunbelt-based commercial bank wholly owned by BBVA Compass Bancshares, Inc., Houston, Texas, a registered bank holding company which, in turn, is wholly owned by BBVA, S.A., Madrid, Spain. BBVA Compass operates 644 branches, including 331 in Texas, 89 in Alabama, 63 in Arizona, 61 in California, 45 in Florida, 37 in Colorado, and 18 in New Mexico. BBVA Compass ranks among the top 30 largest U.S. commercial banks based on deposit market share and ranks among the largest banks in Alabama (2nd), Texas (4th) and Arizona (5th). BBVA Compass also owns several operating subsidiaries that offer financial products to customers digitally throughout the United States.

### **The Implementation of Section 29 Can be Improved While Maintaining the Safety and Soundness of the Banking System**

In the ANPR, the FDIC asked whether there are ways the FDIC can improve its implementation of Section 29 of the FDI Act while continuing to protect the safety and soundness of the banking system. We believe that FIL-42-2016, Frequently Asked Questions on Identifying, Accepting and Reporting Brokered Deposits (June 30, 2016, rev. July 14, 2016) (the “FAQs”) broadened the scope of deposits treated as volatile “hot money” in a manner well beyond the original intent of Congress when it adopted Section 29. Implementation could be improved by eliminating unnecessary confusion and inefficiencies. For example,

the FAQs require application of the primary purpose exception to be determined on a case-by-case basis.<sup>1</sup> The FDIC should consider codifying exemptions for those categories of deposits for which advisory opinions and determination letters are regularly issued. This would create certainty and provide more efficiency, for banks as well as the FDIC, than making these determinations on a case-by-case basis.

In addition, it is our view that treating certain forms of deposits as core deposits rather than as brokered deposits – specifically, those generated by wholly-owned subsidiaries – would in no way diminish the safety and soundness of the banking system. In our experience, deposits generated through subsidiaries have not shown a tendency to be less stable than comparable deposits generated by a parent insured depository institution (“IDI”).

### **An Overview of Significant Changes to the Banking Industry’s Technology, Business Models, and Product Types**

In the ANPR, the FDIC asked if there are specific changes that have occurred in the financial services industry since the brokered deposits regulation was adopted that the FDIC should be cognizant of as it reviews the regulations. There have been numerous changes in the industry over the past few decades that are significant to this discussion, a few of which are mentioned below.

Technological advances may be the most obvious change, including the development of smartphones and the advent of online and mobile banking, channels for providing banking services that were not yet contemplated when Section 29 was enacted. Since 1989, we have also seen the emergence of a much more diverse financial services model and the rise of the fintech industry. Many fintech and neobank models that collaborate with, or compete with, IDIs were not even contemplated when Congress adopted the statute or when the FDIC adopted its implementing rule. Customers now demand a more comprehensive suite of product types as well as efficiencies in how these products are marketed and delivered.

Federal regulations, including the brokered deposit rule, must be applied in a way that provides for the safety and soundness of the banking system that Congress intended to protect, and leaving antiquated rules in place does not ensure safety and soundness. In fact, if banks are not allowed to change and evolve while their competitors do so, bank safety and soundness may be compromised. The banking industry needs to be allowed to continue to grow, compete and adapt in an ever-changing environment.

Finally, we note that it is not just business models and customer expectations that have changed since adoption of the FDIC’s brokered deposit regulations. Regulatory schemes have changed too. The result is that additional implications now arise when the FDIC deems stable deposits to be “hot money.” For example, banks may now be required to pay additional deposit insurance assessments or ratings agencies may downgrade banks based on such a characterization.

### **Certain Types of Deposits Should Not Be Considered Brokered**

In the ANPR, the FDIC asked whether there are types of deposits that are currently considered brokered that should not be considered brokered.

Section 29 of the FDI Act defines a “deposit broker” in relevant part as “any person engaged in the business of placing deposits, or facilitating the placement of deposits, of third parties with insured

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<sup>1</sup> FAQs, question E9.

depository institutions.”<sup>2</sup> For purposes of Section 29, a “brokered deposit” is, essentially, a deposit received by an IDI from a deposit broker.<sup>3</sup> We believe that the current interpretations and FAQs go far beyond the scope of Section 29 and sweep in several categories of deposits as brokered that should be treated as core deposits.

While others<sup>4</sup> have addressed various types of deposits that should not be considered brokered, this section highlights three specific situations where we believe the deposits should be treated as core deposits and not brokered deposits.

### Bank Subsidiaries

It is our view that deposits held at an IDI and arising out of an IDI’s relationship with a wholly-owned subsidiary should not be classified as brokered deposits. Explicitly excluded from the statutory definition of deposit broker is “an insured depository institution, with respect to funds placed with that depository institution”— the “IDI Exception.”<sup>5</sup> In addressing the IDI Exception, the FAQs, in FAQ E2, conclude that the IDI Exception does not apply to a company affiliated with the IDI, including the IDI’s “parent or subsidiary” while recognizing that a parent or subsidiary “might not be a deposit broker for other reasons.”<sup>6</sup>

This FAQ does not specifically address the status of an operating subsidiary.<sup>7</sup> Operating subsidiaries of an IDI are under the exclusive control of the parent IDI, engage only in activities permissible for an IDI and are treated as a division of the IDI for an array of regulatory purposes. In general, operating subsidiaries are subject to the same regulatory oversight as the parent IDI and its financial statements are consolidated with those of the IDI. Such subsidiaries are, for all intents and purposes, the equivalent of operating divisions of the IDI but, for specific business reasons, are operated through a legal entity that is a direct subsidiary of the IDI.<sup>8</sup> Because an operating subsidiary is the equivalent of an operating division

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<sup>2</sup> 12 U.S.C. § 1831f(g)(1)(A).

<sup>3</sup> 12 U.S.C. § 1831f; 12 C.F.R. § 337.6(a)(2).

<sup>4</sup> See, e.g., letters from the American Bankers Association (referred to as “ABA Letter”), Bank Policy Institute (referred to as “BPI Letter”), and the Consumer Bankers Association (referred to as “CBA Letter”) submitted to the FDIC in response to the ANPR.

<sup>5</sup> 12 U.S.C. § 1831f(g)(2)(A).

<sup>6</sup> See FAQs.

<sup>7</sup> In concluding that the IDI Exception does not apply to affiliates of the IDI, the FAQ relied in part on FDIC Advisory Opinion 92-68, which is not related to operating subsidiaries specifically, but instead addresses the placement of deposits in excess of the insurance limits with affiliated depository institutions in order to maximize the customer’s deposit insurance. Unlike an IDI’s placement of excess deposits with an affiliated IDI, placement of funds by an operating subsidiary with its parent IDI does not affect the obligations of the insurance fund differently than the customer placing deposits directly with the IDI.

<sup>8</sup> Other federal financial regulators equate an operating subsidiary (also known as an “operations subsidiary”) to a division of the parent bank. See, e.g., 12 C.F.R. § 250.141(c) (“The [Federal Reserve] Board now considers that the incidental powers clause permits a bank to organize its operations in the manner that it believes best facilitates the performance thereof. One method of organization is through departments; another is through separate incorporation of particular operations. In other words, a wholly owned subsidiary corporation engaged in activities that the bank itself may perform is simply a convenient alternative organizational arrangement”); see also, Office of the Comptroller of the Currency, Interpretive Letter No. 971 (Sept. 2003) (“Because the activities of an operating subsidiary are limited to activities in which the parent bank could engage directly, an operating subsidiary is in practice a separately

of the bank, deposits generated by the operating subsidiary are appropriately viewed as the equivalent of deposits generated by the bank. As a result, the IDI Exception should be applicable, and bank deposits originated through operating subsidiaries should not be classified as brokered deposits.

We note that operating subsidiaries could be made operating divisions of the IDI by merging them into the IDI and operating them as an unincorporated division. There is no doubt that the IDI Exception would then be applicable and that the deposits resulting from their activities would not be brokered deposits for purposes of Section 29. However, there are a range of business reasons for utilizing a subsidiary structure including, but not limited to, brand recognition, maintaining a separate corporate culture, or financial considerations.

We are not aware of any substantive rationale supportive of, or regulatory purpose furthered by, a determination that deposits generated an operating subsidiary should be treated differently depending upon the corporate structure for operations chosen by an IDI.

### Marketing Arrangements

Interpretation of Section 29 related to marketing arrangements should be narrowed to exclude marketing partners that are not engaged in the business of placing or facilitating the placement of deposits, and the FDIC should take into account vast advances in the area of marketing technology, including online and social media advertising, among others. Customers prefer to explore bank products in a much different manner than when Section 29 was enacted, and banks now have opportunities to serve customers through innovative partnerships and referral arrangements. Furthermore, deposits acquired from customers entering into a direct relationship with the IDI are not more volatile simply because the customer was made aware of the bank's products through a relationship with a marketing partner. The need to comply with outdated and overbroad interpretations of Section 29 is needlessly interfering with arrangements that do not pose increased risks to the insurance fund and have the potential to benefit both banks and consumers.

More examples of why current guidance is more broad than required by Section 29 and how the FDIC's interpretations of marketing arrangements should be modernized to reflect changes in this area have been separately described to the FDIC.<sup>9</sup> BBVA Compass will not discuss them in detail here, but we would like to emphasize the need for changes in the current regulatory guidance on this topic, and we are especially supportive of the approach advocated by BPI that requests the FDIC (a) "exclude marketing and advertising partners (including affinity groups) that market deposits on behalf of, or otherwise refer potential customers to, IDIs from the definition of 'deposit broker,' regardless of the fee arrangement, unless such partners are, in fact, engaged in the business of either (1) placing or (2) facilitating the placement of deposits" and (b) "similarly narrow its interpretation of 'facilitating' to exclude marketing and referral partnerships that result in the customer entering into a direct banking relationship with the IDI."<sup>10</sup>

### Dual and Affiliate Employees

Similarly, others have also written extensively on how current interpretations with regard to dual-hatted and affiliate employees are much more broad than Section 29 requires.<sup>11</sup> These employees are not in

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incorporated division or department of the parent bank.)), available at <https://www.occ.gov/topics/licensing/interpretations-and-actions/2003/int971.pdf>.

<sup>9</sup> See ABA Letter, BPI Letter, and CBA Letter.

<sup>10</sup> BPI Letter, Section III.B.

<sup>11</sup> See ABA Letter and BPI Letter.

the business of placing deposits with the IDI, but are in the business of serving the needs of their customers. Referrals made by such employees are ancillary to these services and, because of the customer's existing relationship with the affiliate, are more stable and do not reflect the type of "hot money" deposits Section 29 was enacted to regulate.

The specifics of how and why interpretations related to dual-hatted and affiliate employees should be modernized to reflect changes in this area have been separately described to the FDIC.<sup>12</sup> BBVA Compass will not discuss them in detail here, but we would like to emphasize the need for changes in the current regulatory guidance on this topic, and we are supportive of the approach advocated by BPI that the FDIC "revise its regulations to clarify that dual, dual-hatted and affiliate employees are not engaged in the business of placing or facilitating the placement of deposits, *i.e., are not deposit brokers*, unless they are employed by an affiliate whose primary business is the placement of deposits with IDIs."<sup>13</sup>

### **The FDIC Has the Authority to Effect These Changes Without the Need for Statutory Changes**

The FDIC asked whether there are areas where changes might be warranted but could not be effectuated under the current statute.

We believe that, with respect to the topics addressed in this letter, the FDIC has the authority to broadly interpret the statute consistently with congressional intent and the interpretation of other banking laws generally, and in a manner that takes into account the changes in the financial services industry and the low level of risk these types of deposits pose to the banking system.<sup>14</sup> In the event that the FDIC feels statutory changes are warranted, then we welcome and request the FDIC's support of appropriate legislation.

Thank you for the opportunity to share our comments on the ANPR. We would be pleased to answer any questions you may have and to further assist the FDIC in its effort to modernize the federal rules to reflect the changing landscape within the banking industry.

Sincerely,

A solid black rectangular box redacting the signature of Jennifer S. Gisi.

Jennifer S. Gisi

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<sup>12</sup> *Id.*

<sup>13</sup> BPI Letter, Section III.A.

<sup>14</sup> For an in-depth discussion of this topic, see American Bankers Association, Letter to The Honorable Jelena McWilliams (Feb. 28, 2019), available at <https://www.aba.com/Advocacy/LetterstoCongress/Documents/fdic-mcwilliams-brokered-deposit-policies-022819.pdf>.