May 7, 2019

Via E-mail (comments@fdic.gov)
Robert E. Feldman
Executive Secretary
Federal Deposit Insurance Corporation
550 17th Street NW
Washington, DC 20429

Re: Unsafe and Unsound Banking Practices: Brokered Deposits and Interest Rate Restrictions RIN 3064–AE94

Dear Secretary Feldman:

MidFirst Bank ("MidFirst") appreciates the opportunity to submit this comment letter in response to the Federal Deposit Insurance Corporation's ("FDIC") Advance Notice of Proposed Rulemaking ("ANPR") on brokered deposits. MidFirst strongly supports the FDIC's efforts to modernize the regulatory framework that governs brokered deposits.

The framework has evolved since its establishment three decades ago to encompass customer relationships that do not resemble the brokered deposits of original concern to legislators and regulators. This, in turn, has deterred banks from offering deposit services to a broad range of customers that are interested in core banking services and have deposits that should be treated as core deposits.

MidFirst has three specific recommendations for the FDIC to consider as it seeks to modernize the regulatory framework for brokered deposits:

1. A university that partners with a banking organization to offer banking services to students, faculty, and staff on campus should not be considered a deposit broker.

2. The FDIC should preserve its longstanding position regarding online listing services.

3. The FDIC should establish a national rate cap for deposits offered by troubled institutions that is based on real and comprehensive deposit data or alternatively, an established benchmark rate, with appropriate adjustments for the deposit maturity and timing of rate establishment.

Each of these three recommendations is discussed in greater detail below. More generally, the FDIC should not define the term "deposit broker" expansively to include conceivably any third party involved in the establishment of a deposit account for a customer, especially in light of the significant technological advances driving innovation in deposit products. Instead, the term "deposit broker" should be defined narrowly to cover the use of a third party to secure volatile,

rate-sensitive funding that fuels rapid asset growth. Finally, MidFirst urges the FDIC to develop a unified regulatory framework for brokered deposits that consists of clear and focused regulations, so that banks do not have to rely on the sizable volume of advisory opinions, Frequently Asked Questions ("FAQs"), and studies that have been issued over the years and that form a patchwork regulatory framework.

1. University Banking Programs Should Not Result in Brokered Deposits

Many universities contract with a bank to provide banking services to students, faculty, and staff on campus and to alumni who may be interested in certain university-branded banking products and services (e.g., university-branded credit cards). These long-term relationships often entail a comprehensive suite of services to be provided by the bank to the university and require major investments of the university's and bank's time and resources.[1] One of the banking services may be a student ID card with payment functionality that is an option available to students, faculty, and staff to use for identification purposes, to access campus buildings and to function as a debit card.

Deposits originating from a university banking program should not be classified as brokered deposits under the FDIC's regulatory framework because: (A) the university is not acting as a "deposit broker", as it is not in the business of placing or facilitating the placement of deposits; (B) the university's primary purpose is not the placement of funds with the bank; (C) the university qualifies as an "affinity group" under FDIC advisory opinions; and (D) the deposits do not present the supervisory concerns associated with traditional brokered deposits.

A. The university is not in the business of placing or facilitating the placement of deposits.

A "deposit broker" is any person engaged *in the business* of placing deposits, or facilitating the placement of deposits, of third parties with insured depository institutions (emphasis added). A university is not engaged in this business, and the mere fact that the university may receive a fee from the bank in connection with the university banking program generally or the deposits sourced through the program in particular should not itself be sufficient to determine that the university is engaged in the business of placing or facilitating the placement of deposits. Rather, universities are public or private research institutions or institutions of higher education that contract with a bank for the bank to provide services through on-campus banking centers to student, faculty, staff, and alumni for their convenience and benefit. The university is not entering into the relationship to obtain deposit insurance or provide deposit-placement services.

Though it seems clear that a university is not in the business of placing or facilitating the placement of deposits, the FDIC, in determining whether an entity is in this business and therefore qualifies as a deposit broker, has identified factors that enable the FDIC to broadly

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[1] For example, MidFirst has a relationship with Arizona State University ("ASU") under which MidFirst has been granted the exclusive rights to offer and market retail banking products and services to ASU patrons, participate in sponsorships involving ASU sports teams and sports merchandise, establish on-campus branches, establish an exclusive, on-campus automated teller machine ("ATM") network, and participate in other ASU programs and activities.

include any third party, including a university, if the third party receives a fee from the bank and has any conceivable connection to the depositor.

University banking programs generally involve payment of fees to the university in exchange for the bank's exclusive right to market its products and services on campus and to use the university's marks in university-specific products and services. All marketing is provided by the bank, and the university does not perform any marketing itself. Moreover, deposit accounts under the program are opened and serviced by bank employees located at on-campus branches or other locations or via the bank's electronic and telephone channels. The university does not serve as an intermediary between the bank and customer and will not possess customer funds or have access to funds that are being deposited at the bank. For these reasons, the FDIC's regulatory framework should not be designed to classify a university in these circumstances as a deposit broker.

B. <u>The university's primary purpose is not the placement of funds with the bank.</u>

The FDIC's regulations expressly except from the definition of deposit broker "an agent or nominee whose primary purpose is not the placement of funds with depository institutions." A university's primary purpose under a university banking program plainly is not the placement of funds with the bank.[2] Accordingly, the primary purpose exception should cover a university in these circumstances and should not be worded in such a restrictive manner so as to rarely apply.

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[2] In the FAQ document issued by the FDIC in 2016, the FDIC analyzed a student ID card with payment functionality in a university banking program in the context of the primary purpose exception. See Federal Deposit Insurance Corporation, FIL-42-2016, Identifying, Accepting and Reporting Brokered Deposits: Frequently Asked Questions, E. 12 (June 30, 2016).

> For example, in the case of a debit card distributed to students by a college, the stated primary purpose of the card might be to promote education. In making this argument, the college (or the insured depository institution) might rely upon the fact that the card will serve as the cardholder's student identification card and vehicle for access to student loan funds. Other factors such as the reloadability of the card and the permanency of the account, however, might indicate that the primary purpose of the card is to provide access to the account at the insured depository institution. This conclusion would be confirmed by the payment of fees or commissions to the college by the insured depository institution as compensation for distributing or marketing the cards. Under these facts, the primary purpose exception would be inapplicable. Therefore, the college would be a deposit broker, and the associated funds would be brokered deposits.

This FAQ is difficult to parse and uncertain in its application to most university banking programs, and MidFirst would encourage the FDIC to withdraw this FAQ and instead include a provision in section 337.6 describing the circumstances in which the primary purpose exception applies. The FAQ bases the primary intent of the university on characteristics of the products and services offered by the bank (e.g., reloadability, permanence), thereby suggesting that any deposit account with these characteristics (i.e., most demand and savings accounts) will be brokered without regard to the actual intent of the university. The FAQ also unduly focuses on the payment of fees by the bank to the university.

A university's primary purpose is to provide students, faculty, and staff an on-campus option for convenient retail banking products and services, including financial literacy. Even though the university may receive royalty or fee payments from the bank based on the number of deposit accounts opened or the amount of funds in such accounts, these payments are only one component of many that constitute the consideration paid by the bank to the university in exchange for the bank's exclusive rights to market and offer the retail banking products and services. To focus singularly on the royalty payments is to lose sight of the overall relationship.

The FDIC should reframe the primary purpose exception so that it covers third parties that clearly are not acting with the intent to place deposits at a bank, including the university in a university banking program.

C. The university qualifies as an "affinity group" under FDIC advisory opinions.

The FDIC previously has determined in advisory opinions that deposits originating from an affinity group are not considered brokered deposits. The advisory opinions identified the following criteria across affinity groups that were determined to not be deposit brokers:

1. All of the affinity groups were non-financial institutions, and the vast majority were non-profit organizations;
2. None of the affinity groups directly marketed the deposit products for the bank;
3. Affinity group members who decided to place deposits with the bank did so directly with the bank (the affinity groups did not receive funds from their members for deposit with the bank or otherwise process any member deposits);
4. The affinity groups had exclusive relationships with the bank, and they did not endorse deposit products of other institutions;
5. Most, but not all, of the affinity groups received royalties for endorsing the bank's deposit products, the amount of which represented a small fraction of the market rates paid to others who are considered deposit brokers within the meaning of the brokered deposit statute;
6. The deposits were regarded by the bank as core deposits of the bank and were not used to replace core deposit run-off — the deposits had a high retention rate;
7. The Affinity Groups did not know which members made deposits with the bank, nor did they keep any records of the amounts, rates, or maturities of the deposits.[3]

Deposits from university banking programs should satisfy each of these seven criteria. In particular, the university is typically a non-profit organization and not a financial institution. The university does not directly market any of the bank's deposit products. Students, faculty, and staff who open deposit accounts with the bank do so directly with the bank. The university banking program is exclusive. The university receives fees in exchange for the bank's exclusive

[3] See FDIC Advisory Opinion 93-30 (June 15, 1993).

right to market its banking products and services. Deposits originating from the relationship are core deposits of the bank. The university generally should not have access to the bank's customer information, including transaction information.

The FDIC's regulatory framework should incorporate some form of the affinity group exception in recognition of the role that such groups can play in directing long-term, core deposits to a bank.

D. Deposits from university banking programs do not present the supervisory concerns associated with traditional brokered deposits.

Deposits originating from university banking programs have, like core retail deposits, high retention rates and are insulated from consumer rate-shopping influences characteristic of brokered deposits. These deposits will be less rate-sensitive given (1) the low rate structures (if interest bearing at all) associated with demand accounts, (2) demand accounts' primary objective of facilitating transactions rather than maximizing returns to customers, and (3) the propensity of the student depositor to retain the account throughout his or her four years of education in order to facilitate electronic payments at the university and the propensity of all university depositors to retain their accounts due to loyalty to their university. In sum, these deposits tend to be economically rate inelastic.

In fact, funds originating from university relationships have genuine franchise value for a bank. The overarching goal is to establish long term customer relationships as a result of the university relationship. Additionally, banks anticipate that accounts opened as part of a cobranded ID card program or Affinity Program will enable the cross-selling of other deposit products and banking services, thereby enhancing a bank's franchise value.

2. Online Listing Services Should Not Be Deposit Brokers if a Fee is Paid for Preferential Placement on the Listing Service Website

The emergence of online deposit platforms has created significant competition for online deposits. Banks are using many tools to reach customers on the internet, and some tools have been classified by the FDIC as deposit brokers. Listing services are not traditionally considered deposit brokers based in large part on their fee structure. The ANPR inquires whether the payment of a fee by a bank to receive a preferred location on the listing service website should result in the website being a deposit broker. This payment should not have this effect and is no different from an institution paying a higher fee to a newspaper to be on the front page.

The FDIC's current approach to listing services correctly recognizes that paying a flat rate advertising fee or a "per click" fee to a listing service should not result in the service being a deposit broker. The same should hold true regardless if an institution has paid for premium positioning with that service.

3. The National Rate Cap Should Be Based on Actual Deposit Data or an Established Benchmark Rate.

Section 29 of the Federal Deposit Insurance Act directs the FDIC to set a national rate cap ("NRC"), which limits the rates that troubled institutions may offer to customers. While the NRC does not affect the majority of institutions, close attention should be paid to this rate cap to manage the liquidity risk associated with its applicability in the event of a stress event. Currently, the cap is determined by calculating the current national average rate of a number of products and adding 75 basis points. The current formula does not accurately reflect the current rate environment. The national average is set by a third party that collects available data from institutions on their offered rates.

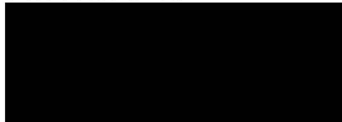
MidFirst suggests that the NRC should be based on real and comprehensive deposit data, such as that contained on Call Reports or provided by bank data vendors (e.g., SNL or Novantas) Alternatively, the FDIC could consider utilizing an established benchmark (e.g., Treasury rates or swap rates). Call Report deposit balance and interest expense data are aggregated by transaction accounts, savings accounts, and time deposits. As such, Call Report data do not reflect and are not associated with time deposit maturities, thereby requiring some type of adjustment. Rather than expansion of the Call Report to reflect deposit balance and interest expense of deposits varying maturities, the FDIC could consider data such as a single weighted average maturity for all time deposits which would provide context and allow for the development of a national rate across the maturity spectrum. Additionally, the Call Report data, if aggregated across the entire industry, would then be an average interest expense national rate, and a spread above that average as reflected in the current rule continues to be appropriate. The FDIC would still need to develop an approach to incorporate noninterest premiums paid by some institutions to attract deposits; these premiums, which can be material in relation to the interest paid on the deposits, are not reported in Call Report interest expense lines. This approach offers the potential to be more definitive than the current survey process.

Alternatively, utilizing a published benchmark that adjusts for risk premiums between deposits could be established by the FDIC. Either option has the benefit of being more relevant and would minimize the undue impact of restricting rates based on potentially irrelevant data. Having a NRC that is so divergent from the actual rate environment is counterintuitive to the purpose it was initially created to solve. If a troubled institution becomes subject to the NRC, it will only be further hampered in its ability to secure stable funding when it is immediately placed at a competitive disadvantage in raising deposit funding.

Conclusion

MidFirst is very appreciative of the FDIC's initiative to revisit its regulatory framework for brokered deposits. If you have any questions or requests for additional information, please contact the undersigned at 405 767-7322.

MidFirst Bank



Charles R. Lee
Vice President and
Director of Regulatory Affairs