NFIB

555 12th St. NW, Suite 1001
Washington, D.C. 20004

Via comments@fdic.gov
and U.S. First Class Mail

April 28, 2020

Hon. Jelena McWilliams
Chairman of the Board of Directors
Attn: R. E. Feldman, Executive Secretary
Federal Deposit Insurance Corporation
550 17th Street NW
Washington, DC 20429

Dear Madam Chairman:

RE: Federal Deposit Insurance Corporation (FDIC) Notice titled "Unsafe and Unsound Banking Practices: Brokered Deposits Restrictions," RIN 3064-AE94, 85 *Fed. Reg.* 7453 (February 10, 2020) and 85 *Fed. Reg.* 19706 (April 8, 2020) (extension of comment period)

This letter presents comments of the National Federation of Independent Business (NFIB) in response to the FDIC notice of proposed rulemaking titled "Unsafe and Unsound Banking Practices: Brokered Deposits Restrictions" and published in the *Federal Register* of February 10, 2020. NFIB recommends changes to: (1) the brokered deposits waiver provisions of the proposed rule, to comply with the U.S. Constitution and the Federal Deposit Insurance Act, (2) the primary purpose exclusion provisions of the proposed rule, to comply with the Act, and (3) the brokered deposits definition provisions of the proposed rule, to permit third party introductions and advice to depositors who then make stable deposits in a direct relationship between the depositor and an insured depository institution.

NFIB is an incorporated nonprofit association with about 300,000 small and independent business members across America. NFIB protects and advances the ability of Americans to own, operate, and grow their businesses and, in particular, ensures that the governments of the United States and the fifty states hear the voice of small business as they formulate public policies. Small businesses have a substantial interest in laws and regulations adopted to regulate financial institutions, upon which small businesses depend for financial services. Small businesses need access to a full range of banking services at safe and sound insured depository institutions. Small businesses also share with all Americans a strong interest in federal agency compliance with the law.

1. Changes to Conform the Brokered Deposits Waiver Provisions to the Federal Deposit Insurance Act and the Due Process Clause of the Fifth Amendment

Section 29 of the Federal Deposit Insurance Act governs brokered deposits.[1] Congress enacted section 29 to protect the safety and soundness of banks and savings associations whose deposits the FDIC ensures ("insured depository institutions" or IDI) from the risks of highly volatile deposits.[2] Section 29 divides insured depository institutions into three categories: (1) well capitalized, (2) adequately capitalized, and (3) undercapitalized (including significantly undercapitalized and critically

---

[1] Section 29 of the Act (12 U.S.C. 1831f) provides, in parts pertinent to the proposed rule:

> (a) IN GENERAL.--An insured depository institution that is not well capitalized may not accept funds obtained, directly or indirectly, by or through any deposit broker for deposit into 1 or more deposit accounts. . . .
>
> (c) WAIVER AUTHORITY.--The Corporation may, on a case-by-case basis and upon application by an insured depository institution which is adequately capitalized (but not well capitalized), waive the applicability of subsection (a) upon a finding that the acceptance of such deposits does not constitute an unsafe or unsound practice with respect to such institution. . . .
>
> (f) ADDITIONAL RESTRICTIONS.--The Corporation may impose, by regulation or order, such additional restrictions on the acceptance of brokered deposits by any institution as the Corporation may determine to be appropriate.
>
> (g) DEFINITIONS RELATING TO DEPOSIT BROKER.--
>
> (1) DEPOSIT BROKER.--The term "deposit broker" means--
>
> (A) any person engaged in the business of placing deposits, or facilitating the placement of deposits, of third parties with insured depository institutions or the business of placing deposits with insured depository institutions for the purpose of selling interests in those deposits to third parties; and
>
> (B) an agent or trustee who establishes a deposit account to facilitate a business arrangement with an insured depository institution to use the proceeds of the account to fund a prearranged loan.
>
> (2) EXCLUSIONS.--
>
> The term "deposit broker" does not include--
>
> (A) an insured depository institution, with respect to funds placed with that depository institution; . . . or
>
> (I) an agent or nominee whose primary purpose is not the placement of funds with depository institutions.

[2] Committee on the Judiciary, U.S. House of Representatives, "Financial Institutions Reform, Recovery, and Enforcement Act of 1989," H.R. Rept. No. 101-54(I) to accompany H.R. 1278 of the 101st Congress, p. 96 ("Many failed thrifts relied on volatile funding, such as brokered deposits controlled by a few individuals, which could be quickly withdrawn, paralyzing the institution.").

undercapitalized).[3] An IDI in the first category, well capitalized, may accept brokered deposits. An IDI in the third category, undercapitalized, cannot accept brokered deposits. The FDIC-proposed rule deals with the second category of IDIs, those adequately capitalized, who can apply to the FDIC for a waiver of the statutory provision that otherwise prohibits any institution but a well capitalized one from accepting brokered deposits.

Section 29(a) provides that an IDI that is not well capitalized cannot accept funds obtained by or through a deposit broker. Section 29(c) then provides that the FDIC "may, on a case-by-case basis and upon application by an insured depository institution which is adequately capitalized (but not well capitalized), waive the applicability of subsection (a) upon a finding that the acceptance of such deposits does not constitute an unsafe or unsound practice with respect to such institution."

The FDIC's proposed subsection 303.243(a)(7) of title 12 of the Code of Federal Regulations, concerning brokered deposit waivers, provides:

> (7) *Conditions for approval.* A waiver issued pursuant to this section shall: (i) Be for a fixed period, generally no longer than two years, but may be extended upon refiling; and (ii) May be revoked by the FDIC at any time by written notice to the institution.

Proposed subsection 303.243(a)(7) has two flaws: (1) it fails to conform to the standard for issuance of a waiver set forth in section 29(c) of the Federal Deposit Insurance Act, and (2) it provides for a standardless revocation of a waiver without any opportunity to be heard.

Section 29(c) provides that the FDIC may grant a waiver to an adequately capitalized IDI-applicant "upon a finding that the acceptance of such deposits does not constitute an unsafe or unsound practice with respect to such institution," but proposed subsection 12 CFR 303.243(a)(7) on approval of waivers fails to provide for such a finding. Also, assuming without conceding that the grant by section 29(c) to the FDIC of authority to issue brokered deposit waivers carries with it implied authority to revoke an already-granted waiver, any such implied authority must comply with the "unsafe or unsound practice" standard specified in that section.[4] Further, if the FDIC is to take away from an IDI a commercially valuable, already-granted, and relied-upon waiver that allows the IDI to take brokered deposits, mere notice of revocation of the waiver is not enough to

---

[3] For definitions of the categories, see section 38 of the Federal Deposit Insurance Act (12 U.S.C. 1831o) and 12 CFR 324.403.

[4] See *Ivy Sports Medicine, LLC v. Burwell*, 767 F. 3d 81, 86 (D.C. Cir. 2014) (". . . [A]dministrative agencies are assumed to possess at least some inherent authority to revisit their prior decisions, at least if done in a timely fashion," but "any inherent reconsideration authority does not apply in cases where Congress has spoken."), *rehearing en banc denied* (D.C. Cir. 2015).

provide the due process required by the Fifth Amendment to the U.S. Constitution. The FDIC should afford the IDI an opportunity to be heard before the revocation.[5]

For the foregoing reasons, NFIB recommends that the FDIC revise proposed 12 CFR 303.243(a)(7) to read:

> **(7) *Conditions for approval.* (i) After consideration of a completed application properly filed by an insured depository institution for a waiver of the applicability of the prohibition on acceptance of brokered deposits, if the FDIC finds that the acceptance of such deposits does not constitute an unsafe or unsound practice with respect to such institution, the FDIC shall grant the waiver.**
>
> **(ii) Any grant of a waiver under subsection (a) shall be for an appropriate fixed period, which shall be two years unless the FDIC determines that good reason exists for a period of a different length.**
>
> **(iii) After the grant of a waiver under subsection (a), the FDIC may revoke the waiver if the FDIC:**
>
> **(A) has reason to believe that acceptance of brokered deposits by the institution under the waiver would constitute an unsafe or unsound practice;**
>
> **(B) affords written notice to the institution of the FDIC intention to revoke the waiver;**
>
> **(C) affords the institution a pre-revocation opportunity to be heard in opposition to the revocation; and**
>
> **(D) after taking account of all information available to the FDIC relevant to the matter, the FDIC finds that continued acceptance of brokered deposits under the waiver would constitute an unsafe or unsound practice with respect to such institution.**

---

[5] *Memphis Light, Gas, and Water Division v. Craft*, 436 U.S. 1,19 (1978) ("Ordinarily, due process of law requires an opportunity for "some kind of hearing" prior to the deprivation of a significant property interest."); *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976) (". . . identification of the specific dictates of due process generally requires consideration of three distinct factors: First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.").

## 2. Changes to Conform the Primary Purpose Exclusion Provisions to the Federal Deposit Insurance Act

Section 29(g)(2)(I) of the Federal Deposit Insurance Act, commonly called the "primary purpose exclusion," provides: "The term 'deposit broker' does not include-- . . . (I) an agent or nominee whose primary purpose is not the placement of funds with depository institutions." The statute has one -- and only one -- requirement for the agent or nominee to qualify for the primary purpose exclusion: the agent's or nominee's primary purpose is not the placement of funds with depository institutions. Under section 29, if the agent's or nominee's primary purpose is not the placement of funds with depository institutions, then automatically by operation of section 29(g)(2)(I) without more, the agent or nominee is not a "deposit broker."

Regrettably, the FDIC's proposed 12 CFR 303.243(b) provides for an agent or nominee to apply for "the FDIC's determination that it . . . is excluded from the definition of deposit broker pursuant to the primary purpose exception." The proposed regulation purports to require the approval of the FDIC before an agent or nominee is qualified for the primary purpose exclusion, as is clear, for example, from the definition of Applicant in proposed section 303.243(b)(2)(ii) as a specified person "that is applying . . . to be excluded from the definition of deposit broker pursuant to the primary purpose exception."

The proposed rule to require FDIC approval to qualify for the primary purpose exclusion is beyond the FDIC's power and flatly contrary to section 29.[6] Note also that FDIC authority under subsection 29(f) to impose additional restrictions the FDIC finds appropriate applies only to "acceptance of brokered deposits by any institution" and does not extend to adding conditions, such as a requirement for FDIC approval, to the primary purpose exclusion from the definition of "deposit broker" in section 29(g)(2)(I).

The FDIC cannot issue subsection 303.243(b) in its proposed form due to its inconsistency with the Federal Deposit Insurance Act, but the FDIC should revise the subsection to convert it into a safe harbor provision that guides FDIC enforcement of section 29. Financial institutions benefit from regulatory certainty and stability and would find helpful the reduction of enforcement risks through a process by which the FDIC recognizes that the agent's or nominee's primary purpose is not the placement of funds with depository institutions.

---

[6] *Louisiana Public Service Commission (PSC) v. Federal Communications Commission (FCC)*, 476 U.S. 355, 374 (1986) ("First, an agency literally has no power to act, let alone pre-empt the validly enacted legislation of a sovereign State, unless and until Congress confers power upon it."); *White v. United States*, 543 F. 3d 1330, 1338 (Fed. Cir. 2008) ("Since Congress has spoken on the issue, the agency is not free to regulate. When Congress says a beneficiary is entitled to benefits if they survive the officer's death, the agency is not free to say only if they survive the officer's death plus 1 year or 5 years or until we process your claim and issue your check or until you receive and cash the check. Since the agency interpretation of its regulation would change precisely what Congress has already decided, it must be rejected."), *rehearing and rehearing en banc denied* (2009).

For the foregoing reasons, the FDIC should revise proposed subsection 303.243(b) to be a safe harbor provision, with changes in parts of the provision as set forth below:

§303.243 Brokered deposits.

. . .

(b) *Application for recognition of qualification for primary purpose exception*--(1) *Scope and Reliance.*

(i) Section 29(g)(2)(I) of the Federal Deposit Insurance Act (12 U.S.C. 1831f(g)(2)(I)), commonly called the "primary purpose exclusion," provides that "The term 'deposit broker' does not include-- . . . (I) an agent or nominee whose primary purpose is not the placement of funds with depository institutions." Under the primary purpose exclusion, an agent or nominee whose primary purpose is not the placement of funds with depository institutions is, by operation of law and without any action by the FDIC, not a deposit broker.

(ii) To help provide regulatory certainty and stability to the regulated community with respect to the primary purpose exception, this subsection provides a procedure through which an agent or nominee may obtain recognition by the FDIC that the agent or nominee is not a deposit broker pursuant to the primary purpose exclusion.

(iii) The FDIC shall recognize that an agent's or nominee's primary purpose is not the placement of funds with depository institutions if the FDIC concludes, based on the information submitted in the application under this subsection for recognition and other relevant information available to the FDIC, that:

(A) the total amount of customer funds placed at insured depository institutions by the agent or nominee is less than 25 percent of total customer assets under management by the third party, for purposes of a particular business line;

(B) either (I) no interest, fees, or other remuneration is being provided or paid on any customer accounts by the agent or nominee, or (II) interest, fees, or other remuneration is being provided or paid on any customer accounts by the agent or nominee and the primary purpose of the particular business line under which customer accounts are offered is to enable its customers to make transactions;

(C) with respect to the particular business line under which the agent or nominee places or facilitates the placement of deposits, the primary purpose

of the third party, for the particular business line, is a purpose other than the placement or facilitation of placement of deposits; or

(D) another situation exists in which the agent's or nominee's primary purpose is not the placement of funds with depository institutions.

(iv) When the FDIC has issued a recognition under this subsection, the FDIC shall not, as long as the recognition remains in effect, treat the agent or nominee as a deposit broker, unless the FDIC concludes by a preponderance of the evidence, after notice to the agent or nominee and an opportunity to be heard, that the agent or nominee obtained the recognition by fraud, knowing failure to provide material information, or knowing provision of false material information.

(v) After giving written notice and an opportunity to be heard to the agent or nominee concerned, the FDIC may revoke a recognition if, based on information provided by the agent or nominee and other relevant information available to the FDIC, the FDIC concludes that the agent's or nominee's primary purpose is the placement of funds with depository institutions.

(2) *Definitions*. For purposes of this subsection (b):

(i) *Third party* means an agent or nominee that is applying to be recognized as excluded from the definition of deposit broker pursuant to the primary purpose exception.

(ii) *Applicant means* a third party as defined in paragraph (b)(2)(i) of this section, or an insured depository institution that is applying on behalf of a third party for that third party to be recognized as excluded from the definition of deposit broker pursuant to the primary purpose exception.

. . .

(3) *Filing procedures*. (i) A third party may submit a written application to the appropriate FDIC office seeking recognition by the FDIC that the third party is not a deposit broker pursuant to the primary purpose exclusion.

(ii) An insured depository institution may submit a written application, on behalf of a nonbank third party, to the appropriate FDIC office of the insured depository institution, seeking recognition by the FDIC that the third party is not a deposit broker pursuant to the primary purpose exclusion.

(4) *Content for filing*.

**(i) Applications that seek recognition under subsection (b)(1)(iii)(A) (relating to total amount of customer funds) shall contain the following information: . . .**

**(ii) Applications that seek recognition under subsection (b)(1)(iii)(B) (relating to remuneration) shall contain the following information: . . .**

**(iii) Applications that seek recognition under subsection (b)(1)(iii)(C) (relating to placement or facilitation of placement) shall include, to the extent applicable: . . .**

**(iv) Applications that seek recognition under subsection (b)(1)(iii)(D) (relating to another situation) shall set forth in detail information that would support a conclusion that the third party's primary purpose is not the placement of funds with depository institutions and any other information that the FDIC requires to initiate its review and render the application complete.**

**. . .**

**[Strike paragraphs (b)(8), (b)(9), and (b)(10).]**

3. Changes to Permit Beneficial Involvement of Third Parties in Attracting Stable Deposits to Banks

The FDIC rightly concerns itself with the safety and soundness of the banks it regulates. The FDIC regulations protect depositors from loss of their deposits (to a point) and protect the FDIC from excessive outlays to cover lost deposits. In the context of a third party's involvement in the creation of relationships between depositors and their banks, the interest of the FDIC is in the directness of the depositor-bank relationship and the stability of the associated deposits.

If the depositor-bank relationship is direct and the deposits are stable, it should not matter whether a third party introduced the depositor to the bank or advised the depositor to deposit funds in the bank. The mere involvement of a third party does not, in and of itself, mean that the deposits concerned are volatile -- so-called "hot money" that could depart the bank suddenly -- which could detract from the safety and soundness of the bank. The FDIC should distinguish between (1) beneficial third party involvement that brings stable deposits into the bank that the bank might otherwise not attract by its own efforts and thereby contributes to the bank's safety and soundness, and (2) detrimental third party involvement that moves another person's money into and out of the bank rapidly and so may injure its safety and soundness.

A universal conclusion, or even a rebuttable presumption, that a third party's involvement is detrimental, would reflect a policy choice favoring big banks over smaller rural or community banks. The latter often need help from third parties in attracting

stable deposits; the former less often need it. FDIC rules should not treat as a "deposit broker" a third party who introduces a depositor to a bank, or advises a depositor to deposit money in a bank, when the result is that the depositor places stable deposits in the bank in connection with a direct relationship between the depositor and the bank. Such provision of information or advice is not a business of facilitating the placement of deposits, but rather of giving a potential depositor and an insured depository institution an opportunity to decide independently whether to establish a sound banking relationship.

**For the foregoing reasons, the FDIC should revise proposed 12 CFR 337.6 by inserting before the semicolon at the end of subsection (a)(5)(i)(B): ", except that for purposes of this subsection (a)(5)(i)(B) and subsection (a)(5)(ii)(A) the term 'business of facilitating' shall not include introducing a person to an insured depository institution, or advising a person to make a deposit in an insured depository institution, if any resulting deposit is made pursuant to a direct relationship between the depositor and the insured depository institution and the deposit is no less stable in amount or duration than deposits in the insured depository institution made without such an introduction or advice."**

* * * * *

NFIB urges the FDIC to conform its proposed rule to the Federal Deposit Insurance Act and the Fifth Amendment Due Process Clause and to permit beneficial third party introductions and advice that brings stable deposits into an insured depository institution through a direct relationship between the depositor and the institution. Thank you for the opportunity to comment on the proposed rule.

Sincerely,

[redacted]

David S. Addington
Executive Vice President
and General Counsel