June 3, 2020

Via Email (comments@fdic.gov)

Mr. Robert E. Feldman
Executive Secretary
Federal Deposit Insurance Corporation
550 17th Street, N.W.
Washington, DC 20249

RE: RIN 3064-AE94; Unsafe and Unsound Banking Practices: Brokered Deposits Restrictions

Dear Mr. Feldman:

WEX Inc. ("WEX") submits this comment letter to the Federal Deposit Insurance Corporation (the "FDIC") in response to its Notice of Proposed Rulemaking on Unsafe and Unsound Banking Practices: Brokered Deposit Restrictions (the "Proposal").[1] We support the FDIC's efforts to make revisions to the brokered deposit regulations. However, as discussed herein, we strongly encourage the FDIC to incorporate in the final rule an unqualified exclusion from the meaning of "brokered deposit" for deposits associated with health savings accounts ("HSAs").

Background on WEX

WEX is a global leader in payment solutions. Our healthcare payment products provide consumer-directed payments in the complex healthcare market. We partner with employers, health plans, third-party administrators, financial institutions, payroll companies and the public sector to provide a software-as-a-service product to support healthcare benefit programs and administer flexible spending, health saving and reimbursement accounts, COBRA and other healthcare related employee and dependent benefits. We currently have relationships with approximately 390,000 employers, reaching approximately 32 million consumers.

Background on HSAs

An HSA is a type of savings account that lets a person set aside money on a pre-tax basis to pay for qualified medical expenses. By using untaxed dollars in an HSA to pay for deductibles, copayments, coinsurance, and other qualified healthcare expenses, a person has a strong financial incentive to find lower-cost care, ultimately lowering overall health care costs. Because most consumers see increased healthcare costs as they get older, the ability to save and invest these dollars in younger years in order to pay for future healthcare costs, creates a great benefit for consumers. A person may only contribute to an HSA if he or she has a High

[1] 85 *Fed. Reg.* 7,453 (Feb. 10, 2020).

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Deductible Health Plan ("HDHP")—a health plan that only covers preventative services before a minimum qualifying deductible. For 2020, if a person has an HDHP, that person may contribute up to $3,550 for individual coverage and up to $7,100 for family coverage into an HSA. HSA funds roll over year to year if they are not spent, and an HSA may earn interest or investment returns on the HSA funds that are not taxable. HSAs were specifically designed so that employees who move from job to job can associate their HSA with their new employer's HSA-qualifying health plan or simply access the funds to pay for healthcare. This is possible because HSAs are owned by individuals, in all cases, not employers or any other third party. As a result, HSAs have become an important way for individuals and families to pay for health care expenses as well as plan for retirement

Comments

WEX believes that the FDIC should incorporate into the final rule an express unqualified exemption from the meaning of "brokered deposit" for all HSA deposits. Based on the plain meaning of the Federal Deposit Insurance Act (the "FDIA"), HSA administrators, HSA brokers, insurance plans and employers (collectively, "HSA Third Parties") are an example of entities that should be exempt under the "primary purpose" exemption as agents or nominees of a depository institution whose primary purpose is not the placement of funds with depository institutions. Moreover, based on legislative history and current public policy arguments, deposits associated with HSAs are not the type of deposits that are intended to be subject to restrictions under the FDIA.

WEX recognizes that the FDIC has provided a process under the Proposal for depository institutions and third parties to apply for a "primary purpose" exemption from the definition of "brokered deposit."[2] However, each depository institution would have to go through the application process for each HSA Third Party or, alternatively, each HSA Third Party would have to go through the application process for its relationship with each such depository institution. Moreover, the application review period would be four months or longer and would introduce uncertainty despite that the policy behind the brokered deposit regulation unambiguously favors treating HSAs as core deposits. While we appreciate that the FDIC has proposed an exemption that could be used in the case of HSA deposits, we are concerned that the application process is impractical, uncertain and would likely be burdensome for, and inconsistently applied to, depository institutions and HSA Third Parties.

As such, WEX is requesting that the FDIC expressly exempt HSA Third Parties from the definition of "deposit broker" under newly-designated Section 337.6(a)(5)(iii) of its regulations. If the FDIC declines to include in the final regulations a exemption for HSA Third Parties, then, at a minimum, we urge the FDIC to clarify that HSA Third Parties are eligible for a primary purpose exception under the FDIC's final regulations by making the following change to new Section 303.243(b)(4)(ii) (proposed language is underlined):

> Applications that seek the primary purpose exception for third parties based on the placement of customer funds, with respect to a particular business line, at insured

[2] 85 *Fed. Reg.* at 7,461; proposed 12 C.F.R. § 303.243(b)(3).

depository institutions to enable its customers to make transactions, including health savings account transactions, shall contain the following information:

I. HSA Third Parties Do Not Have a Primary Purpose of Placing Funds with Depository Institutions

Section 29 of the FDIA does not define "brokered deposits" but instead puts limitations on depository institutions that are not well capitalized from "accept[ing] funds obtained, directly or indirectly, by or through any *deposit broker* for deposit into 1 or more deposit accounts."[3] Section 337.6 of the FDIC's regulations defines a "brokered deposit" consistent with this provision of the FDIA to mean "any deposit that is obtained, directly or indirectly, from or through the mediation or assistance of a *deposit broker*."[4]

Under Section 29 of the FDIA, a "deposit broker," in relevant part, means "any person engaged in the business of placing deposits, or facilitating the placement of deposits, of third parties with insured depository institutions."[5] The statute also contains nine express exclusions from the definition of "deposit broker," including "an agent or nominee whose primary purpose is not the placement of funds with depository institutions."[6] The FDIC's regulation adopted the statutory definition of "deposit broker" and the exclusions therefrom.[7]

Based upon the plain meaning of the statute and regulation, an HSA Third Party should be exempt from the definition of "deposit broker" on the basis of the primary purpose exemption. HSA Third Parties offer tax-advantaged programs to individuals for their healthcare expenditures and, in some cases, manage those programs both directly to consumers and in partnership with other third parties. These services are valuable to consumers, and some HSA Third Parties collect fees for the services that they provide to HSA participants. Participants select HSA programs based on various factors, including, fees and convenience, as well as investment options. Quite simply, an HSA Third Party has a primary purpose to provide clients with a full service way to manage their healthcare expenses, not to place funds with depository institutions.

II. HSA Program Deposits Are Not the Type of Deposits Intended to be Covered by the FDIA

Section 29 of the FDIA was first added as part of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 ("FIRREA") and subsequently modified two years later by the Federal Deposit Insurance Corporation Improvement Act of 1991. FIRREA was enacted in the wake of the savings and loan crisis of the 1980s. When debating earlier drafts of FIRREA, the Senate Committee on Banking, Housing, and Urban Affairs recognized brokered deposits as

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[3] 12 U.S.C. § 1831f(a) (emphasis added). The FDIA also prohibits "the renewal of an account in any troubled institution and any rollover of any amount on deposit in any such account." 12 U.S.C. § 1831f(b).

[4] 12 C.F.R. § 337.6(a)(2) (emphasis added).

[5] 12 U.S.C. § 1831f(g)(1)(A).

[6] 12 U.S.C. § 1831f(g)(2)(I).

[7] 12 C.F.R. § 337.6(a)(5). The FDIC also adopted one additional exclusion from the definition of "deposit broker," which is not relevant for purposes of this letter.

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having been common among troubled depository institutions because of "the ready availability of brokered funds, obtained through the payment of above-market rates, to [be used to] support risky and speculative asset investment by weak and insolvent institutions."[8]

Senator Frank Murkowski of Alaska reiterated this sentiment when he testified in front of the Subcommittee on General Oversight and Investigations of the House Committee on Banking, Finance and Urban Affairs. He remarked that "financially troubled institutions frequently use brokered deposits as a means of attracting new deposits and providing short-term liquidity."[9] Senator Murkowski had previously introduced an amendment to the bill that would become FIRREA to further restrict abuses of brokered deposits, but his amendment also included the text of the primary purpose exemption that would eventually be enacted into law.[10] During his House testimony, Senator Murkowski stated that the purpose of his amendment was "to rein in the abuses of brokered deposits by troubled institutions [but that it was] not a blanket prohibition on the use of brokered deposits, [and was] a narrowly drawn provision that specifically targets the most flagrant abusers."[11] This statement shows that the true intent of Section 29 of the FDIA was to limit reckless use of brokered deposits by troubled depository institutions. From this, one can infer that the prohibitions should be interpreted narrowly and deference should be given to the exemptions.

Senator Murkowski also remarked that the intent of his amendment was "to protect the taxpayers of this country."[12] In connection with this point, the FDIC is charged with the duty of managing the deposit insurance fund (the "Fund"), which is used to insure deposits and resolve failed banks. In this regard, the FDIC has taken a view on various types of brokered deposits that could be harmful to the Fund. For example, in the Proposal, the FDIC commented that brokered certificates of deposit have caused significant losses to the Fund.[13] In the Advance Notice of Proposed Rulemaking and Request for Comment on brokered deposits issued last year, the FDIC discussed these deposits in more detail.[14] In fact, the FDIC cited to its study of core and brokered deposits and listed characteristics of brokered deposits that have posed the greatest risk to the Fund.[15] These characteristics include:

1. Rapid growth—the extent to which deposits can be gathered quickly and used imprudently to expand risky assets or investments;

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[8] S. Rep. No. 101-19, at 38 (Jan. 3, 1989).

[9] *Insured Brokered Deposits and Federal Depository Institutions Hearings before the Subcommittee on General Oversight and Investigations of the Committee on Banking, Finance and Urban Affairs of the House of Representatives*, Statement of Hon. Frank H. Murkowski, a United States Senator from the State of Alaska, at *6 (May 17, 1989) (the "Murkowski Testimony").

[10] 135 Cong. Rec. S. 4451 (daily ed. Apr. 19, 1989) (Sen. Murkowski proposing an amendment to S. 774 on behalf of himself and Sen. Exon).

[11] Murkowski Testimony at *8.

[12] *Id*.

[13] 85 *Fed. Reg.* at 7,460.

[14] 84 *Fed. Reg.* 2,366 (Feb. 6, 2019).

[15] 84 *Fed. Reg.* at 2,369.

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2. Volatility—the extent to which deposits might flee if the institution becomes troubled or the customer finds a more appealing interest rate or terms elsewhere; and

3. Franchise value—the extent to which deposits will be attractive to the purchasers of failed banks, and therefore not contribute to losses to the Fund.[16]

However, deposits associated with HSA programs do not exhibit high-risk characteristics. With respect to rapid growth, HSA deposits are deducted from a participant's pay on a pre-tax basis, with annual contributions capped at either $3,550 or $7,100,[17] and an average accountholder balance of $2,328.[18] This approach results in deposit amounts that are <u>not</u> gathered quickly in large sums. As to volatility, an HSA Third Party may move deposits periodically from one depository institution to another, but it is not the type of business that moves money frequently or rapidly to chase more favorable rates. For this same reason, in terms of franchise value, HSA deposits are likely to be attractive to, and have value for, a purchaser of a failed bank as HSA Third Parties do not regularly move deposits as is the case with true brokered deposits.

The legislative history discussed above demonstrates that Congress sought to protect the taxpayers and the Fund from abuses of brokered deposits by some depository institutions and deposit brokers. The brokered deposit limitations were never intended, however, to apply to stable sources of funding that are in fact beneficial to depository institutions. Stable sources of funding for depository institutions, such as HSA deposits, do not exhibit the characteristics of brokered deposits that the FDIC has sought to limit in the past in an effort to protect the Fund.

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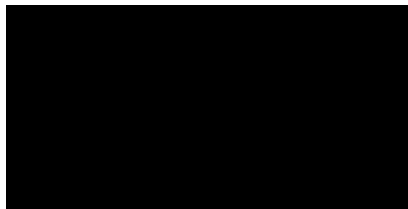
WEX appreciates the opportunity to provide comments to the Proposal. If there are any questions regarding our comments, please feel free to contact the undersigned at 860-978-1515 or chris.byrd@wexinc.com.

Sincerely,



Christopher M. Byrd
Executive Vice President

[16] *Id*.
[17] Internal Revenue Service, Rev. Proc. 2019-25 (May 2019).
[18] 2019 Year-End Devenir HSA Research Report.