



June 9, 2020

**Via Email: comments@fdic.gov**

Federal Deposit Insurance Corporation  
550 17th Street, NW  
Washington, DC 20429

Re: RIN 3064-AE94

Dear Sir or Madam:

Deposit Solutions LLC (“Deposit Solutions”) appreciates the opportunity to submit comments in response to the notice of proposed rulemaking (“NPR”) published by the Federal Deposit Insurance Corporation (“FDIC”) on brokered deposit restrictions.<sup>1</sup>

I. Background on Deposit Solutions

Deposit Solutions provides banks with a modern approach to raising deposits by digitally connecting consumers with deposit-raising FDIC-insured depository institutions (“IDIs”) through Deposit Solutions’ proprietary platform. Consumers get access to, and can deposit money in, savings products (*i.e.*, CDs and money market deposit accounts or “MMDAs”) at the participating IDIs through Deposit Solutions’ distribution network (which includes its own subsidiary, SaveBetter LLC) that is connected to the platform. Through the Deposit Solutions platform, IDIs have full control over, and manage, the savings products and interest rates they offer as well as the volume of deposits they accept. Similarly, consumers choose the offers they want and have full control over the deposits and withdrawals they make.

The Deposit Solutions platform allows IDIs to present the terms of CDs and MMDAs to consumers. Deposit Solutions works with an intermediary bank that enables the deposit of funds by consumers at IDIs and the redemption of deposits from IDIs to consumers. In this service, the individual consumer makes all decisions about whether to deposit funds and where to deposit them, how much to deposit, when to withdraw funds and in what amount. Neither Deposit Solutions nor any participating IDI has authorization to make any of these decisions on behalf of the consumer. Upon receiving a consumer instruction, Deposit Solutions, the intermediary bank and the IDIs participating in the service simply carry out the consumer’s individual instructions.

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<sup>1</sup> FDIC Notice of Proposed Rulemaking, 85 Fed. Reg. 7453-72 (Feb. 10, 2020).

## II. Comments on the NPR

### A. Introduction

Deposit Solutions welcomes the FDIC’s decision to “modernize its brokered deposit regulations to reflect recent technological changes and innovations that have occurred.”<sup>2</sup> As the FDIC explains in the NPR, the existing brokered deposit regulatory framework no longer reflects how modern deposit systems and programs work. Under the existing regulatory framework, the FDIC generally treats any party, other than the depositor and the IDI, that participates in any capacity in the deposit process as a deposit broker, which in turn creates a brokered deposit.

In the modern environment for financial services, consumers have many choices as to how to access their banks, including how to make deposits and withdrawals. No longer are consumers limited to going to a teller at a bank branch to make such transactions. Consumers can access their accounts to deposit and withdraw funds through a teller at a branch, at an ATM, or—without ever having to visit a branch or ATM—online or using applications on their mobile devices. Consumers also may rely on trustees, wealth management advisors (non-discretionary) or other custodians to carry out their instructions by placing funds with IDIs at the consumer’s direction. How a consumer accesses his or her account to make a deposit or withdrawal does not change the fundamental nature of the deposit. Deposits made by consumers through any of these methods have the same characteristics as deposits made by a consumer directly at the branch of an IDI.

In order to give consumers new or more convenient methods to access accounts, IDIs often work with service providers and other third parties to help implement deposit decisions *that are made by depositors*. Here, the service provider does not make any deposit or withdrawal decisions on behalf of the depositor, but rather merely executes the decision *without* any discretion—usually as a custodian or agent or in a transactional capacity. As a result, the involvement of such service providers does not change the nature of the deposits made. By analogy, these arrangements replace the direct interaction between a consumer and an IDI in a way that is similar to the way in which online banking replaced in-person interactions at a branch. As online banking does not take away the control that individual customers have over their deposit and withdrawal decisions, the use of service providers as described above also does not take control away from customers.

Being individual consumer-controlled deposits, the deposits are retail in nature (not wholesale) and are a stable source of funding for IDIs. No third party can trigger the withdrawal of funds of - one or many - depositors at any given time. This stands in contrast to, e.g., traditional brokered sweep deposit arrangements—in which the third party deposit broker has the discretion to make decisions on behalf of consumers and can effectively make the deposit and withdrawal decisions for hundreds or thousands of depositors. This ability to make significant changes to an IDI’s available funds on short notice can create liquidity challenges, instability and, in some instances, even enable imprudent rapid growth. On the other hand, without the discretion to make decisions on behalf of consumers, there is no such systemic (wholesale) risk.

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<sup>2</sup> 85 Fed. Reg. 7453.

Several of the proposed changes in the NPR reflect positive steps in preventing deposits that otherwise are a stable source of funding from being treated as brokered deposits.<sup>3</sup> Two fundamental reasons that brokered deposits are deemed to create more risk is the potential to grow funding rapidly while being instable as a funding source.<sup>4</sup> An important reason for the potential instability is that the deposit broker has both the ability to move significant amounts of deposits at the same time and discretion as to where the money is moved. Therefore, Deposit Solutions believes that the focus of the FDIC’s regulations should *not* be on whether the deposit gathering involves a third party service provider to help capture and communicate the consumers’ deposit and withdrawal decisions to the IDI. Rather, the FDIC regulations should define a deposit broker based on whether the third party’s role results in increased instability risk—for example as a result of the third party’s discretion over the deposit and withdrawal decisions of (a large number of) depositors.

For this reason, Deposit Solutions believes that the brokered deposit regulations would benefit from additional clarifications that are consistent with the NPR’s stated objective. We respectfully urge the FDIC to adopt the additional changes and clarifications discussed below. These changes are consistent with the changes in the NPR, reflect the modern landscape for financial services, and most importantly, will allow activities that present none of the concerns with brokered deposits to proceed without being treated as brokered deposits.

#### B. Response to NPR Questions

The NPR includes specific questions soliciting comments on particular aspects of the NPR. Deposit Solutions offers the following comments in response to a number of specific questions included in the NPR.

##### 1. Definition of “Engaged in the Business of Placing Deposits”

*Question 1: Is the FDIC’s proposed definition of “engaged in the business of placing deposits” appropriate?*<sup>5</sup>

Under the FDIC’s regulations, an entity that is engaged in the business of placing deposits is a deposit broker.<sup>6</sup> The NPR’s proposed approach to the definition of “engaged in the business of placing deposits” should be clarified.

The explanatory material in the NPR states that the “FDIC would view a person to be *engaged in the business of placing deposits* if that person has a business relationship with its

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<sup>3</sup> For example, the NPR provisions allowing wholly-owned subsidiaries of IDIs to participate in the deposit process and the attempt to create objective criteria to determine when an entity is engaged in the business of facilitating deposits.

<sup>4</sup> See, e.g., FDIC Advance Notice of Proposed Rulemaking, 84 Fed. Reg. 2366 (Feb. 6, 2019) (“Brokered . . . deposits became a concern among bank regulators and Congress before any statutory restrictions were put in place. This concern arose because: (1) Such deposits could facilitate a bank’s rapid growth in risky assets without adequate controls; [and] (2) once problems arose, a problem bank could use such deposits to fund additional risky assets to attempt to ‘grow out’ of its problems, a strategy that ultimately increased the losses to the deposit insurance fund when the institution failed[.]”).

<sup>5</sup> 85 Fed. Reg. 7457.

<sup>6</sup> 12 C.F.R. § 337.6(a)(5)(i)(A).

customers, *and as part of that relationship*, places deposits on behalf of the customer (*e.g.*, acting as custodian or agent for the underlying depositor).<sup>7</sup> Thus, the focus of the language in the NPR is on whether a third party is involved in the deposit process. Deposit Solutions believes the focus should be on the specific role played by a third party and, in particular, whether the third party has discretion over the placement of deposits by consumers. In other words, if the consumer makes decisions about whether and when to make a deposit or withdrawal, and the amount of the deposit or withdrawal, the fact that a third party is involved in executing the consumer’s choice should not result in the third party being a deposit broker. In this regard, the FDIC should use the same standard to assess whether a person is engaged in the business of placing deposits that the FDIC uses in the facilitation analysis, which the NPR states is “intended to capture activities that indicate that the person takes an active role in the opening of an account or maintains a level of influence or control over the deposit account even after the account is open.”<sup>8</sup>

As discussed above, in the modern world of financial services, consumers are using a variety of technologies and providers to access IDIs and deposit and withdraw funds from IDI accounts. For example, consumers can access their accounts to deposit and withdraw funds through a teller at a branch or an ATM, or—without ever having to visit a branch—online or using applications on their mobile devices. In the end, it does not matter how the consumer deposits or withdraws money, but that he or she decides on doing so, which is the characteristic of a retail deposit.

The services that makes online banking possible are often provided by third parties. These third parties provide technology that enables consumers to interact with IDIs, often acting as an intermediary between a consumer and an IDI, but they do so without exercising any discretion or seeking to influence prospective depositors, depositors, or IDIs. Similarly, consumers often rely on agents, wealth management advisors (non-discretionary) or other custodians to carry out their instructions by placing funds with IDIs at the consumer’s direction. The fact that the consumer may be using a service provided by a third party does not change the fundamental nature of the consumer’s decisions, transactions or behavior. In all of these instances, the consumer is making all decisions regarding the selection of IDIs and all deposit/withdrawal decisions, and the third parties that are involved are simply carrying out the consumer’s decisions without exercising any discretion.

These third parties that carry out consumers’ instructions without exercising any discretion should not be considered deposit brokers, because they do not change the customer’s behavior or—like brokered CDs—bundle it and the resulting deposits provide an unchanged stable source of funding and thus have the hallmarks of core deposits, rather than traditional brokered deposits. In other words, the method used by the consumer to make a deposit, whether going to a bank branch, using an online portal or mobile application, or giving instructions to an agent, trustee or custodian, should not determine whether a deposit is treated as a brokered deposit. The FDIC’s proposed approach to interpreting whether a party is “engaged in the business of placing deposits,” however, creates ambiguity because third parties that have a business relationship with a consumer

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<sup>7</sup> 85 Fed. Reg. 7457 (emphasis in original). The NPR does not actually propose any change to the defined terms. If the FDIC’s intent is to clarify the meaning of the phrase “engaged in the business of placing deposits,” Deposit Solutions recommends that the FDIC add a definition of “engaged in the business of placing deposits” to the defined terms in 12 C.F.R. § 337.6(a).

<sup>8</sup> 85 Fed. Reg. 7457.

may be deemed a deposit broker even though they make no decisions on behalf of the consumer and merely act on the consumer's instructions.

Deposit Solutions therefore urges the FDIC to clarify that merely having a business relationship with a consumer that consists of an agreement under which a party's only services are the placement of deposits at a bank or in a savings product at the direction of a consumer by executing the consumer's deposit and withdrawal instructions is not sufficient to treat an entity as a deposit broker. Rather, the focus should be on an entity that makes decisions on behalf of customers with respect to the placement of deposits, or otherwise has discretion over a customer's placement of deposits. An entity that has a business relationship that merely involves executing each customer's instructions with respect to the placement of deposits, without having any discretion to influence the customer's decisions regarding making, withdrawing or moving deposits or any decision of an IDI regarding the offering or taking of deposits, should not be treated as a deposit broker.

This clarification is important as more and more companies and business models in the modern economy intermediate consumer interactions with IDIs. Without this clarification, the potential designation of an entity as a "deposit broker" will discourage innovation in the mechanics of the consumer banking experience.

For these reasons, Deposit Solutions respectfully recommends that the FDIC add a new definition of "engaged in the business of placing deposits" in 12 C.F.R. § 337.6(a), as follows:

*Engaged in the business of placing deposits.* A person is engaged in the business of placing deposits if that person has a business relationship with its customers pursuant to which that person makes decisions on behalf of its customers (and does not merely execute decisions made by its customers) regarding the placement of their deposits and places deposits on its customers' behalf.

2. Definition of "Engaged in the Business of Facilitating the Placement of Deposits"

*Question 2: Is the FDIC's proposed definition of "engaged in the business of facilitating the placement of deposits" appropriate?*

*Question 3: Is the FDIC's list of activities that would determine whether a person meets the "facilitation" prong of the "deposit broker" definition appropriate?*

*Question 4: Has the FDIC provided sufficient clarity surrounding whether a third party intermediary would meet the "facilitation" prong of the "deposit broker" definition?*

*Question 5: Should the FDIC provide more clarity regarding whether any specific types of deposit placement arrangements would or would not meet the*

*“facilitation” prong of the “deposit broker” definition? If so, please describe any such deposit placement arrangements.<sup>9</sup>*

Deposit Solutions welcomes the goal of the NPR to provide clarity regarding whether an entity is deemed a deposit broker because the entity is engaged in the business of facilitating the placement of deposits. Deposit Solutions agrees with the intent of the FDIC’s proposal, which the NPR states is “intended to capture activities that indicate that the person takes an active role in the opening of an account or maintains a level of influence or control over the deposit account even after the account is open.”<sup>10</sup> We also agree with the view expressed in the NPR that facilitation of the placement of deposits should involve “a level of control or influence that indicates that the deposit relationship is between the depositor and the person rather than the depositor and the [IDI].”<sup>11</sup>

Thus, the stated intent of the FDIC is that, in determining whether an entity is engaged in the business of facilitating the placement of deposits, the focus should be on whether the entity has the ability to influence or control the customer’s deposit decisions and choices, with respect to the selection of an IDI, the opening of an account with an IDI, and the deposit of funds with and withdrawal of funds from an IDI. Where an entity has the ability to influence or control such decisions, the relationship between the entity and the depositor may result in the lack of stable funding and risk of rapid and large changes in funding amounts for an IDI that are the traditional hallmarks of a brokered deposit.

Further, the explanatory material in the NPR states that the FDIC’s proposed facilitation definition is intended to include “any person that acts as an intermediary between another person that is placing deposits on behalf of a depositor and an insured depository institution, other than in a purely administrative capacity.”<sup>12</sup> The NPR states that administrative functions would include, for example, “reporting or bookkeeping assistance” but would not include, for example, “assisting in decision-making or steering persons (including underlying depositors) to particular insured depository institutions.”<sup>13</sup> While these examples of what does and does not constitute “administrative functions” are helpful, the proposed definition of facilitation is not consistent with these examples.

Indeed, we are concerned that the FDIC’s proposed four-prong definition does not faithfully carry out this purpose and has the effect of potentially treating some non-discretionary administrative activities that do not have the hallmarks of facilitation identified by the FDIC in the NPR as constituting facilitation. We encourage the FDIC to ensure that the four prongs do not discourage an area of technological innovations in financial services that gives consumers more choice, ways and flexibility to execute on those decisions. Customers will access financial services and products more and more as part of integrated solutions or within ecosystems.

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<sup>9</sup> 85 Fed. Reg. 7458.

<sup>10</sup> 85 Fed. Reg. 7457.

<sup>11</sup> *Id.*

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

<sup>13</sup> *Id.*

Under the proposed definition, an entity could be considered a deposit broker if the entity merely provides depositor information to an IDI, because the definition includes in its first prong an entity that “directly or indirectly shares any third party information with the insured depository institution[.]”<sup>14</sup> This prong of the definition presumes that information sharing only occurs in arrangements that have the risk profile that the statute and regulation were designed to mitigate. This prong thus ignores the actual role of the third party, for example, whether the third party exercises any discretion over the customer’s deposit and withdrawal decisions, or merely acts on the customer’s instructions. Many entities that share information with an IDI are merely performing administrative functions as IDI vendors, including vendors that assist IDIs with regulatory compliance or provide online or mobile applications that enable consumers to access their accounts at an IDI and make deposits. Such third parties do not exercise any level of control over the customer’s decisions; rather, they simply help IDIs run their businesses and customers implement their decisions. Where IDI customers and prospective customers make their own deposit or withdrawal decisions, a third party that helps administratively to execute those decisions or helps IDIs act on those decisions in a compliant manner, including by sharing information with the IDI, should not be treated as a deposit broker. The role of such a third party will not undermine the stability of the funding sources or create risks traditionally associated with brokered deposits.

For this reason, Deposit Solutions urges the FDIC to eliminate the information sharing prong of its definition of “engaged in the business of facilitating the placement of deposits.” Alternatively, the FDIC should revise the information sharing prong of its definition to cover only information sharing in connection with an entity’s exercises of discretion to direct a customer’s placement of deposits. Specifically, if the FDIC chooses not to delete this prong of the definition, Deposit Solutions respectfully recommends that the first prong be defined to read as follows:

(A) The person directly or indirectly shares any third party information with the insured depository institution *in connection with the person’s exercise of discretion to direct a customer in determining the placement of deposits of such customer;*

Additionally, Deposit Solutions encourages the FDIC to revise the third prong: “the person provides assistance or is involved in setting rates, fees, terms, or conditions for the deposit account.”<sup>15</sup> Consistent with the FDIC’s expressed intent, the third prong should be limited more precisely to situations in which a person “*has the ability or authority, contractually or otherwise, to set rates, fees, terms, or conditions for the deposit account.*” As drafted in the NPR, the third prong would have the odd result of causing a person to be a deposit broker by virtue of providing consulting or advisory services to IDIs on rates, terms and conditions to help IDIs develop competitive deposit products in the marketplace. This prong of the definition might even cause listing services that currently are not treated as deposit brokers to be deemed to be deposit brokers.

### 3. IDI Exception

*Question 6: Is it appropriate for a separately incorporated operating subsidiary to be included in the IDI exception?*

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<sup>14</sup> 85 Fed. Reg. 7472 (proposed § 337.6(a)(5)(ii)(A)).

<sup>15</sup> *Id.* (proposed § 337.6(a)(5)(ii)(C)).

*Question 7: Are the criteria for including an operating subsidiary in the IDI exception too broad or too narrow?*<sup>16</sup>

The NPR expands the “IDI exception” to include activities of wholly-owned subsidiaries of an IDI with respect to funds placed with the IDI, because there is “little practical difference between deposits placed at an IDI by a division of the IDI versus deposits placed by a wholly-owned subsidiary of the IDI.”<sup>17</sup> Deposit Solutions agrees that this is an appropriate change. We believe that the FDIC should consider further expanding the scope of the IDI exception to include vendors as well. They are subject to federal banking agency-mandated IDI vendor management procedures that ensure that they act like the IDI itself. In other words, when an IDI engages a vendor to perform activities that the IDI’s employees otherwise would perform, the vendor should be treated the same as IDI employees for purposes of the brokered deposit rules.

Specifically, the IDI exception should apply when an IDI engages a third-party service provider to act on the IDI’s behalf. In modern banking, IDIs outsource many functions. There is “little practical difference” for purposes of the issues identified by the FDIC in the NPR between employees of an IDI and an IDI vendor where the vendor acts to perform technology services that enable the IDI to promote its deposit products, receive applications from prospective depositors and receive funds from depositors, and where the vendor has no discretion with respect to such activities. In both cases, the activities are undertaken by or on behalf of the IDI with respect to funds placed with the IDI, and the fact that in one scenario the activities are by non-employees rather than by employees should not change their fundamental character.

#### 4. Primary Purpose Exemption

*Question 8: Is it appropriate to interpret the primary purpose of a third party’s business relationship with its customers as not placement of funds if the third party places less than 25 percent of customer assets under management for its customers, for a particular business line, at depository institutions? Is a bright line test appropriate? If so, is 25 percent an appropriate threshold?*

*Question 9: Should the FDIC specifically provide more clarity regarding what is meant by customer assets under “management” by a broker dealer or third party?*

*Question 10: Is it appropriate to make available the primary purpose exception to third parties whose business purpose is to place funds in transactional accounts to enable transactions or make payments?*<sup>18</sup>

Under the FDIC’s current regulations, a person whose “primary purpose” is not the placement of funds with an IDI is not considered a deposit broker.<sup>19</sup> The NPR would include a specific primary purpose exemption based on the “placement of less than 25 percent of the total

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<sup>16</sup> 85 Fed. Reg. 7458.

<sup>17</sup> *Id.*

<sup>18</sup> 85 Fed. Reg. 7459-60.

<sup>19</sup> 12 C.F.R. § 337.6(a)(5)(iii)(I).



amount of customer assets under management by the third party, for a particular business line, at depository institutions.”<sup>20</sup>

Deposit Solutions welcomes this proposal, but respectfully believes that the FDIC should clarify the application of this new exemption, and application of the primary purpose exemption generally, in several respects.

First, just as we suggest that a vendor of a bank receive the same treatment as a bank employee, a third-party vendor should be an exempt party where the vendor is used by a bank to implement the mechanical steps to enable deposits, without exercising any discretion. In other words, where a *transaction* satisfies the 25% standard, the exemption from the “deposit broker” definition should apply to the entity satisfying that standard and to any third party involved in the transaction, with the result that the deposits that are facilitated by the manager of the assets would not be brokered deposits whether the asset manager performs all necessary actions itself or with the assistance of another party that performs non-discretionary actions.

Second, the same rule should apply when any entity qualifies for the primary purpose exemption on any basis—not just based on the new 25% standard. Thus, where an entity qualifies for a primary purpose exemption, the fact that the entity may use a third party to carry out its or the customer’s instructions without exercising any discretion should not result in the third party being treated as a deposit broker or the resulting deposits being treated as brokered deposits.

Third, the new 25% exemption would not apply to “brokered CDs,”<sup>21</sup> and Deposit Solutions encourages the FDIC to revise the definition of “brokered CD” consistent with the themes of this comment letter. The NPR proposes a new definition of brokered CDs as CDs “issued in wholesale amounts by a depository institution, subdivided by a non-bank entity or a depository institution, and then sold by a nonbank entity or depository institution to investors, *or a similar deposit placement arrangement that the FDIC determines is arranged for a similar purpose.*”<sup>22</sup> This definition could encompass services that involve the non-discretionary execution of a customer’s instructions to deposit funds to a CD. Deposits resulting from such services should be excluded from the definition of brokered deposit, but are at risk of being considered brokered deposits. These deposits are not unstable and not subject to withdrawal by a third party acting on behalf of multiple consumers. Deposit Solutions believes that any such service or solution, involving a third party that simply carries out a customer’s instructions, should not be treated as a deposit broker. For this reason, Deposit Solutions respectfully suggests that the definition of “brokered CD” should be modified to delete the phrase “or a similar deposit placement arrangement that the FDIC determines is arranged for a similar purpose” or to clarify it by changing “similar deposit placement arrangement” to “similar wholesale deposit placement arrangement.”

Finally, Deposit Solutions urges the FDIC to add a new primary purpose exemption for entities that enable persons to learn about, make, move and withdraw deposits, where such entities have no ability to exercise discretion or influence decisions of customers regarding the placement of deposits, and for any third parties or vendors used by such entities. Consistent with the NPR, these entities would not be able to influence the movement of money, and would, with respect to

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<sup>20</sup> 85 Fed. Reg. 7470-71 (proposed § 303.243(b)(4)(i)); *id.* at 7472 (proposed § 337.6(a)(5)(iii)(I)).

<sup>21</sup> 85 Fed. Reg. 7471 (proposed § 303.243(b)(5)).

<sup>22</sup> 85 Fed. Reg. 7470 (proposed § 303.243(b)(2)(v)) (emphasis added).

specific deposits and withdrawals, merely be executing a customer's instructions. This type of activity does not make the deposits and withdrawals risky, and therefore such deposits should not be considered brokered deposits.

### III. Conclusion

Deposit Solutions appreciates the opportunity to provide these comments and respectfully asks that the FDIC consider our recommended changes to the NPR. If you have any questions regarding our comments, please contact the undersigned, Philipp von Girsewald, Deposit Solutions' Chief Executive Officer, at (332) 213-5890, or by email at philipp.girsewald@deposit-solutions.com, or Daniel Goldfisher, Deposit Solutions' General Counsel, at (332) 216-1750 or by email at daniel.goldfisher@deposit-solutions.com.

Respectfully submitted,

A solid black rectangular box used to redact the signature of Philipp von Girsewald.

Philipp von Girsewald  
Chief Executive Officer