June 9, 2020

Mr. Robert E. Feldman
Executive Secretary
Federal Deposit Insurance Corporation
550 17th St., NW
Washington, DC 20429

**RE: *Cross River Bank's Comments on FDIC's Notice of Proposed Rulemaking Entitled "Unsafe and Unsound Banking Practices: Brokered Deposit Restrictions"***

Dear Mr. Feldman:

On behalf of Cross River Bank ("Cross River" or the "Bank"), I thank you for the opportunity to provide comments on the Federal Deposit Insurance Corporation's ("FDIC" or the "Agency") Notice of Proposed Rulemaking ("NPRM") regarding Brokered Deposits Restrictions, issued February 10, 2020. Cross River commends and supports the FDIC's efforts to modernize the current regulatory regime surrounding brokered deposits, in order to accurately reflect the nature and functionality of modern deposit taking practices.

As many commentators noted in the Agency's Advanced Notice of Proposed Rulemaking, the current definitions surrounding brokered deposits have been interpreted in a broad manner, creating an overly inclusive framework that captures products not intended to be covered.[1] As a result of the current interpretation, there has been a lack of clarity and consistency in determining what constitutes a brokered deposit and who qualifies as a deposit broker. This confusion has negatively impacted the ability of banks to efficiently deploy capital and also has raised costs of FDIC premiums insured depository institutions pay.

As Chairman McWilliams and the FDIC have expressed in both the NPRM and public statements, technology has fundamentally altered the way banks interact with customers and take deposits.[2] Digital capabilities allow financial institutions to improve services and reach a greater number of consumers on a national scale. As a result of these technological advancements, financial institutions have reinvented relationship banking and expanded access to financial services for communities traditionally underserved.

Often, the utilization of this new technology comes hand in hand with third party relationships, including, but not limited to, fintech partners, online advertisers or marketing platforms. These partnerships provide Cross River with a competitive edge and ability to efficiently create direct, contractual banking relationships with consumers. In this capacity, the third-party partners do not exert influence or control over consumers accounts yet are classified as brokered deposits under the current interpretation. The

[1] *See* 85 Fed. Reg. at 7455 (Feb. 10, 2020)
[2] *See* 85 Fed. Reg. at 7453 (Feb. 10, 2020)

deposit accounts opened in connection to these relationships are equally as stable as core deposits and should be treated as so. Technological advancements are empowering banks to engage with customers in modernized ways while adhering to safe and sound banking practices.

Further, accounts opened through these types of fintech partnerships, such as those with marketplace lending platforms, continue to aid in the responsible expansion of credit to traditionally underserved families and individuals. The ability to safely optimize deposit accounts opened in coordination with these partners would increase Cross River's capability to responsibly originate loans, creating a more inclusive and resilient system. This full-service experience has become an integral part or modern deposit taking practices to meet the demands of consumers.

Unfortunately, the regulatory framework governing brokered deposits has not evolved with this technology and the current system reflects the concerns brought by the savings and loan crisis ("S&L Crisis"). During this period, institutions attempted to use brokered deposits as a mechanism to grow their way out of trouble, leading to risky behavior and non-performing loans. The risk was not the product itself, but financial institutions undisciplined behavior and use of brokered deposits to attempt to fix larger scale issues. Modern-day third-party relationships are inherently different compared to the ones that played a role in the S&L Crisis and provisions have been put in place to prevent future crises.

Cross River condemns practices that put consumers, the financial system, and the economy as a whole in jeopardy. The Bank understands and appreciates the need to modernize the brokered deposits framework while ensuring safeguards are in place to prevent risk from being injected into the industry.

The NPRM, in part, achieves the FDIC's goal of modernizing the regulatory framework and creating a more transparent system, but does not go far enough in solving some fundamental issues relating to the overly broad definition of deposit broker. If certain provisions are not amended, the industry would be left in a near identical position, imposing unnecessary and burdensome costs on stable sources of deposit funding. Below, Cross River has responded to specific questions posed in the NPRM and provided general comments to assist in achieving the goal of establishing an appropriately tailored, modernized rule.

The Bank's letter will address the following issues respectively, (1) the proposed definition of "engaged in the business of placing deposits"; (2) the proposed definition of whether the facilitation prong is met; (3) the appropriateness of making available the primary purpose exception to third parties whose business purpose is to place funds in transactional accounts to enable transactions or make payments; (4) the appropriateness of the application process for the primary purpose exception; (5) making the FDIC's decisions on applications for the primary purpose exception publicly available; (6) reporting from nonbank entities that have received approval for a primary purpose exception; (7) frequency of reporting requirements; (8) the monitoring of third parties eligible for the primary purpose exception; (9) direct relationship accounts; (10) potential overreliance on the application process for the primary purpose exception; and (11) the continued burdens of a broad interpretation of the definition of brokered deposits.

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**Specific Comments**

1. **Question 1:** ***"Is the FDIC's proposed definition of "engaged in the business of placing deposits" appropriate?"***

Cross River appreciates the FDIC's efforts to create a clearer set of standards regarding what constitutes being engaged in the business of placing deposits. While the proposed definition moves in the right direction, the verbiage provides the potential for a broad and ambiguous interpretation.

The NPRM states, "The FDIC would view a person to be engaged in the business of placing deposits if that person has a business relationship with its customers, and as part of that relationship, places deposits on behalf of the consumer…"[3]

The phrase "as part of that relationship" creates a vague standard that does not fully narrow the definition of a deposit broker as intended. By specifying that the relationship requires a contractual obligation between the depositor and third party, the FDIC would more appropriately achieve the Agency's goal.

A potential mechanism to avoid this conflict and provide clarification, is to amend the language to read, "The FDIC would view a person to be engaged in the business of placing deposits if that person has a business relationship with its customers, and as part of that relationship, **a legal contractual obligation** to place deposits on behalf of the consumer exists."

The amended language should speak to removing instances whereby the customer deposits the funds directly into regulated bank account held at the insured depository institution, via a third-party application or website which is merely the conduit for the customers direct financial relationship with the bank. In such instances, the bank controls the relationship and manages the funds. The deposit relationship will not end or be altered without the direct express direction of the customer or the bank itself.

Cross River believes this clarification will achieve the FDIC's goals of narrowing the deposit broker definition and creating a clear, unambiguous standard. The phrase "as part of that relationship" alone without further clarification, in practice, is not specific enough to identify what triggering activity the business entity conducts to be classified as a deposit broker.

2. **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?"***

Cross River commends the FDIC for prescribing a transparent criterion of activities triggering the "facilitation" prong of the deposit broker definition. Clarity surrounding these activities are crucial to modernizing the current framework. However, the proposed provision regarding data sharing fails to appropriately narrow the scope of activities that would trigger the "facilitation" prong, leaving the industry in an identical position as it is now.

The language in the proposed rule states that the "facilitation" prong would be triggered where, "[t]he person directly or indirectly shares any third-party information with the insured depository institution."[4]

[3] *See* 85 Fed. Reg. at 7457 (Feb. 10, 2020)
[4] *See* 85 Fed. Reg. at 7457 (Feb. 10, 2020)

Specifically, the word "any" creates the overly broad and inclusive definition the FDIC is attempting to narrow. To better achieve the Agency's goal of modernizing the regulatory framework, this provision should be removed all together or amended to tailor the provision and properly reflect the functionality of certain third-party relationships.

If not entirely removed, Cross River recommends the data sharing provision be amended to exclude: (1) information that is shared between partners as required by applicable laws and regulations; (2) information required in the normal course of business: and (3) information shared which is otherwise publicly available or the bank could otherwise obtain in its own capacity.

There are a number of laws and regulations that require banks to collect information on consumers in order to service accounts, some of which are pertinent to national security. For example, the Bank Secrecy Act, Know Your Customer and Anti-Money Laundering regulations require financial institutions to obtain certain information on customers in order to open a bank account. Even after the account is opened continued monitoring is required, the Bank must file suspicious activity reports if something is afoul. To ensure compliance with these relevant laws and regulations, banks and third-party partners are often required to share information. The purpose of data sharing in this regard is to comply with the law and in no way reflects a level of control or influence third parties would have over consumer's accounts with the Bank.

Further, when Cross River and fintech partners share information on consumers, the Bank typically has some sort of pre-existing financial relationship with the consumer. One example is Cross River and the marketplace lending platforms, in this example, the Bank's partners shares information regarding customers, but the Bank has a financial relationship with the consumer, the Bank underwrites the loan and owns the end-to-end process. Another example is the banking-as-a-service products offered by Cross River, in this example, the Bank has a financial relationship with the consumer, clearly demonstrating that the bona fide financial relationship is between the depositor and the Bank, not the depositor and third-party. A third-party partner, such as a market place lender of a banking-as-a service partner, does not change the true nature of the relationship between the Bank and a depositor when opening accounts.

Failure to modernize the regulatory framework for deposit accounts of this nature will ultimately create a barrier for consumers to access safe and affordable credit. These types of accounts are currently categorized as brokered deposits, making it difficult, if not impossible, for Cross River to deploy the funds to responsibly originate additional loans for families with limited access to financial services or products. The loans provide safe alternatives to affordable credit and help consumers avoid predatory practices, such as debt traps. Consumers want an experience where they are able to get all, or multiple, of their financial needs serviced by an insured depository institution where they already have established a trusting and ongoing relationship. To meet these demands, modern deposit taking practices have evolved in coordination with fintech partners.

Data sharing is also part of the normal course of business for relationships with marketing partners and advertising platforms and should not trigger the "facilitation" prong. These types of relationships are

imperative to a bank's ability to compete on a national stage and market competitive products to consumers. With developments in modern technology, one of the main advantages or reasons a bank enters into these partnerships is to obtain data to effectively market their products to consumers that the Bank would otherwise not have been able to reach. Data sharing is essential in this capacity, but it does not provide the third-party with any level of influence or control over the consumer's account, especially outside of administrative capacities. Often these partners may direct consumers to the bank's websites, where the consumers make their own decisions about opening accounts and have soul control of operating their accounts and the bank has sole, discretionary ability to open an account for such consumer. Marketing and advertising partnerships should themselves be excluded from being categorized as deposit brokers and should not trigger the "facilitation" prong.

Lastly, information that is shared which is either publicly available or that the Bank could obtain in its own capacity should not trigger the "facilitation" prong. Similar to the previously mentioned examples, this appears averse to the FDIC's mission of modernizing the brokered deposits regime. Sharing this information does not change the relationship between the Bank and the end consumer, and no risks are posed by an additional point of contact in the equation. Modern business relationships require certain information be shared between partners, this is inherent across many industries, and is not unique to financial services.

Specific types of partnerships that embody the information sharing practices described above include, but are not limited to, (1) fintech partners and marketplace lending platforms; (2) data mining organizations that aggregate data to help community banks identify and market deposits; (2) digital marketing services that target messages across all digital channels, providing both digital and print marketing services; (3) social media, comparison sites or search engines that provide basic information on banks and the product offerings and; (4) application programming interfaces and software-as-a-service platforms that empower banks to expand their product offerings and software capabilities.

Cross River appreciates the FDIC's focus on the level of control or influence to help determine if the deposit relationship is between the depositor and the third-party rather than the depositor and the insured financial institution. However, as demonstrated above, data sharing is inherent in some relationships and does not alter the contractual relationship, or level of control, between banks and depositors. Despite a secondary point of contact, the depositor has an ongoing bona fide financial service relationship with the Bank, regardless of the third-party partners involvement. The current data sharing provision should be tailored to appropriately exclude these types of relationships from the "facilitation" prong.

3. **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?"***

Third parties who place funds in transactional accounts should be eligible for the primary purpose exception and those accounts should generally not be considered brokered deposits. The very nature and functionality of these types of accounts are unrelated to the potential risks or perceived fears posed by brokered deposits.

Often, the purpose of these accounts is to enable payments and transactions, not to encourage savings or sell interest rates. Utilizing the capital in these accounts pose no risk to the balance sheet of a bank or its financial health and would not fuel the risky behavior which the FDIC is attempting to prevent.

Generally, in these types of arrangements with fintech partners, it is the bank that controls the flow of funds within the accounts, and the accounts are opened with the insured depository institutions. Essentially, the third parties act as a marketing partner in this capacity, which in some cases does provide a fee be paid to the third-party from the Bank itself. Further, the Bank has a pre-existing financial relationship with the customer, especially when the customer is referred by a marketplace lending partner, as Cross River is the party underwriting and providing the loan.

The FDIC states in its proposed rule that a condition for third parties meeting the primary purpose exception is the placement of 100% of its customer funds into transaction accounts at where no fees, interest, or other remuneration are provided to the depositor. Cross River recommends the FDIC amend this provision to not place such a heavy focus on the percentage of the funds placed into transactional accounts.

Often, third-party fintech partners may place funds into a variety accounts at the insured depository institution, some which bare interest and others, which do not. A third party should not be barred from utilizing the primary purpose exception on these grounds alone, and all funds that are placed within transactional accounts should be categorized at core deposits. The FDIC should, as planned[5], examine the totality of the circumstances surrounding the rest of the funds placed by third parties to determine the appropriate nature of applying the primary purpose exception.

4. ***Question 14: Is the application process proposed for the primary purpose exception appropriate? Are there ways the application process could be modified to make it more effective or efficient?***

While the primary purpose exception is an essential part of modernizing the regime governing brokered deposits, Cross River believes the application process may prove to be a costly and resource draining process. The process has the potential to create an undue administrative burden not only for the industry, but for the FDIC as well.

Consistent with many regulations, banks should be able to conduct their own analysis and form conclusions, with the assistance of counsel, as to whether a person meets the primary purpose exception. Such activity would not enhance risk to the overall financial system. Further, the ongoing reporting requirements discussed in the proposed rule would mitigate and offset any potential risks. Banks would determine if a person was nonconforming or failed to qualify for eligibility under the primary purpose exception.

To ease the burden and mitigate the costs of the application program, the FDIC could also provide a list of presumptive approvals for certain third-party relationships relying on the primary purpose exception that would not require the filling of an application. Creating a bright line rule for the presumptive approval

[5] *See* 85 Fed. Reg. at 7460 (Feb. 10, 2020)

would increase transparency, efficiency and be consistent with the Agency's goal of safety throughout the financial system.

5. **Question 17:** ***"Should some or all FDIC decisions on applications for the primary purpose exception be publicly available? If so, in what format?"***

In order to ensure a transparent and clear framework, the FDIC should publish all decisions on applications for the primary purpose exception. The FDIC should publish brief explanations describing why an applicant has been approved or denied on either the Agency's "Industry Analysis" or "Regulations and Examinations" section of the website.

By making all decisions publicly available, the industry will be able to gain a further understanding of what types of relationships and activities are triggered under the new framework. Continuity and predictability are key to solving the pain points surrounding the brokered deposits regulatory regime. Further a database of this nature, once built out, would likely result in less reliance on the primary purpose exception general application, as previous explanations could serve as precedent for future applications. A transparent publication process will ensure relationships of the same nature are treated similarly and a patchwork system rifled with uncertainty will be eliminated.

The Agency's website provides an ideal and convenient platform for the FDIC to widely distribute these statements with ease and at low costs. The public would have direct access to a platform providing all necessary information, which could help shape future applications.

6. **Question 23:** ***"Is it appropriate to require reporting from nonbank entities that have received approval for a primary purpose exception? Should the FDIC require IDIs to report on behalf of such nonbank entities instead? Are there other ways the FDIC should consider to ensure that applicants that receive the primary purpose exception remain within the relevant standards?"***

If the nonbank entity's relationships with multiple insured depository institutions qualifies for the primary purpose exception it would be appropriate to require the reporting from the third party. From an organizational perspective, it would likely be more convenient and structured for the FDIC to require reporting from one nonbank entity when there are multiple relationships that qualified for the primary purpose exception as opposed to having multiple insured depository institutions reporting on a single entity. Under these circumstances, the nonbank entity would be a more appropriate center-point to efficiently retrieve reporting data from. The FDIC correctly articulates this point in the NPRM[6] and proposes a process that would effectively avoid redundant, time consuming processes.

7. **Question 24:** ***"How frequently should the FDIC require reporting?"***

There are two potential methods the FDIC could adapt to efficiently and effectively require reporting. The Agency can choose to either require reporting annually or in the event the terms of a contract change between third parties and the insured depository institutions.

[6] *See* 85 Fed. Reg. at 7462 (Feb. 10, 2020)

The contractual terms between the Bank and third-party partners are generally year-to-year although occasionally, the terms of the agreements may be multi-year. By requiring reporting annually, the FDIC would be able to see the terms of the agreement and definitively know the types of activity being conducted and nature of the relationship between the insured depository institution and the advertising or marketing partners. With an annual reporting requirement, the FDIC would be kept up to date to ensure the parties arrangements are consistent with the primary purpose exception.

The FDIC could also require reporting activity in the event the terms of the contractual agreement between third parties and insured depository institutions are renewed, amended, modified or changed in any capacity. Requiring reporting under these conditions would allow the Agency to evaluate the third-party relationship with the insured depository institutions still meets the primary purpose exception, given the new terms between the parties.

Reporting that would be required more frequently would be unduly burdensome creating time consuming and costly processes for the industry. Reporting quarterly, as the NPRM suggests[7], would have no tangible benefit as opposed to an annual or term-changing reporting requirements as recommended above.

8. **Question 25:** ***"Is it appropriate for the FDIC to require IDIs to monitor third parties for eligibility for the primary purpose exception? Are there additional or better ways to ensure that third parties continue to remain eligible for the exception?"***

As the regulated financial institution, third party oversight and monitoring are one of Cross River's core competencies. The Bank has a robust compliance and onboarding process to ensure that its fintech partners meet heightened regulatory standards. Whether it be marketplace lending, marketing arrangements, or banking-as-a-service functions, Cross River continuously monitors and is acutely aware of our partners' activities in order to ensure best in class regulatory compliance.

The Bank understands and appreciates the responsibilities that come with onboarding third parties. Cross River acknowledges the ownership of compliance measures over third-party relationships and the need to ensure that practices are consistent with the principles of safety and soundness.

It is for this reason that Cross River believes it would be more effective to obtain a "blanket" approval under the primary purpose exception.

## General Comments

1. ***Direct Relationship Accounts***

To further achieve the FDIC's mission of modernization, the proposed rule should clarify that when a consumer has a direct ongoing bona fide financial relationship with insured depository institution, the account will not be classified as brokered, regardless of third-party involvement. Specifically, deposit accounts where the customer, not a deposit broker or other third party, maintains a direct, contractual

[7] *See* 85 Fed. Reg. at 7462 (Feb. 10, 2020)

relationship with the insured depository institution and has direct control over the account should be categorized as core deposits.

The insured depository institutions legal contract with third parties does not govern the contract of the deposit account with the financial institution and the two are unrelated. Further, when the consumer has such a direct and ongoing relationship it is clear that the deposit relationship is between the bank and the depositor, not the depositor and the third party. The addition of this provision would adequately account for the technological evolution in banking while simultaneously balancing the FDIC's concerns regarding influence over consumer accounts. The involvement of a third party should not automatically trigger the agency to classify deposit accounts as brokered, especially when the direct relationship between depositor and insured depository institution is clearly and contractually defined.

2. ***Over Reliance on the Application Process for Business Relationships That May Meet the Primary Purpose Exception***

The FDIC's application process for business relationships that may meet the primary purpose exception creates a clear and transparent mechanism to properly categorize certain relationships that do not perfectly fit within the definitions of the rule, but are consistent with the Agency's modernization and safety principles. The FDIC clearly understands that the nature of certain business relationships in the digital age are complex and require a case by case analysis to determine if a brokered deposit classification is appropriate.

While the application will serve as a useful and efficient tool, the above recommendations should be adopted so the Agency is not burdensomely flooded with applications that clearly do not, and should not, constitute a brokered deposit. The application processes, while helpful, does pose concerns of excessive costs, time and resources for the industry if the rule is not amended to further narrow the definition of deposit broker and brokered deposits. Without further clarification and amendment to these terms, as described above, the application process has the potential to create an undue administrative expense and procedure for the industry.

Specifically, by amending the data sharing provision, clarifying the categorization of advertising and media partners and exempting direct relationship accounts, the FDIC could eliminate the need for an abundance of applications or clarifications. Without these changes, there will likely be over reliance on the application process, draining time and resources for both the Agency and industry alike.

Further, leaving such expanded discretionary authority could cause inconsistencies within the framework and the interpretation of definitions could vary from one chair to the next. A more consistent, tailored and narrowed approach should be taken to amend the proposed rule and create a framework that does not overly extend discretionary authority to the Agency. A level of surety, transparency and assurance are required to solve the major pain points caused by the current outdated regulatory regime governing brokered deposits.

3. ***Continued Burdens of Broad Interpretation of Brokered Deposits***

Although Cross River is a well-capitalized institution, the overly broad classification of brokered deposits has the ongoing potential to create burdens on the Banks' costs related to deposit insurance premiums

and ability to strategically deploy capital. If the data provision described above is not properly amended, these issues will continue to plague not only Cross River, but the industry as a whole.

If an insured depository institution's brokered deposit accounts exceed 10% of assets, the deposits are treated more punitively, raising FDIC insurance premiums. With a continued broad definition of brokered deposits, created by the proposed data sharing provision, the number of accounts that would be attributed towards the 10% calculation would be inappropriately high. Without fixing this issue, banks will continue to face potential negative implications affecting components of their deposit insurance assessment ratings.

Banks subject to the Liquidity Coverage Ratio (LCR) also suffer from a lack of appropriately tailoring the definition of brokered deposits. The ability to deploy capital from accounts classified as brokered is vastly constrained due to higher reserve requirements and outflow rates in comparison to core deposits. A bank subject to the LCR must maintain high quality liquid assets, not less than 100% of its projected net cash outflows, over a hypothetical 30-day period. The outflow rate used in calculating the LCR depends on, amongst other things, whether a deposit is categorized as brokered or not.

To put it in context, brokered transactional deposits, that are not reciprocal brokered or brokered sweep deposits, are assigned an outflow rate of 20% or 40% under LCR rules – reciprocal brokered and brokered sweep deposits are assigned outflow rates of 10%, 25% and 40%. By contrast, retail deposits that are not brokered deposits are assigned outflow rates of 3% or 10%. The outflow rates and over classification of deposit accounts categorized as brokered, require Cross River to hold additional reserves, tying up capital that could be responsibly repurposed to serve consumer's needs and expand access to affordable credit.

By properly tailoring and narrowing the definition of brokered deposits, the FDIC would alleviate major pain points for insured depository institutions in a manner safe and consistent with the intended goal of this rulemaking process.

## Conclusion

Cross River commends the FDIC for bringing much needed transparency, consistency and modernization to the regulatory regime governing brokered deposits. Adopting a rule that would ensure the placement of safeguards and accurately reflect the evolution brought by technological advancements, simultaneously promotes consumer protection and fosters innovation.

While many of the provisions in the proposed rule achieve the Agency's goal of modernization, additional amendments are required in order to ensure meaningful reform takes place. The data sharing provision in the facilitation prong poses the biggest obstacle to progress and does not accurately reflect the nature of modern deposit taking practices. If the provision is not amended, the industry will be left in a near identical position as it was prior to reform.

In assessing third party relationships, whether data is being shared or the primary purpose exception invoked, the FDIC should focus on the direct relationship between the depositor and insured depository institution. In Cross River's case, there is often a preexisting relationship with the customers and the deposits should not be viewed as "hot money". These accounts are equally as "sticky" as core deposit and should be treated as so.

Properly classifying the current brokered deposits regulatory regime to account for the types of third party partnerships as described above, especially marketplace lending partners, will allow insured depository institutions to safely and efficiently utilize capital in order to continue expanding access to credit in safe, affordable manners. The ultimate result will be a more inclusive and resilient economy, where credit is responsibly made accessible for families most in need. The availability of these types of services in coordination with fintech partners not only reflect the current nature of deposit account practices, but have become an integral part of the experience consumers demand.

We thank you again for the opportunity to provide comments on the current proposal and look forward to being a resource for the Agency in the future. If you have any questions, please feel free to contact me at agelbard@crossriver.com or 201-808-7189.

Sincerely,

[redacted]

ARLEN W. GELBARD
EVP, General Counsel