June 9, 2020

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

Subject: Comment Letter – FDIC Notice of Proposed Rulemaking "Unsafe and Unsound Banking Practices: Brokered Deposits Restrictions"; RIN 3064–AE94

Dear Mr. Feldman,

Avidia Bank (Avidia) appreciates the opportunity to comment on the Notice of Proposed Rulemaking (NPR) published in the Federal Register on February 10, 2020, "Unsafe and Unsound Banking Practices: Brokered Deposits Restrictions."[1] Avidia administers and offers Health Savings Accounts (HSAs) to a large number of individuals whose employers offer High Deductible Health Care Plans (HDHCPs). Avidia and a number of similarly situated banks act as HSA trustee and/or custodian (Trustee/Custodian Banks), providing traditional banking services including deposit and card base activity, as well as tax reporting. Avidia has a contractual relationship with a technology service provider (TSP) that provides employee benefit plan administration and processing services to Third-Party Administrators (TPAs) through which Avidia receives HSA deposits. The TSP also provides HSA processing services to Avidia and other Trustee/Custodian Banks.

Avidia previously submitted a comment letter on May 7, 2019 in response to the Advanced Notice of Proposed Rulemaking (ANPR) published in the Federal Register on February 6, 2019, "Unsafe and Unsound Banking Practices: Brokered Deposits and Interest Rate Restrictions,"[2] in which we urged the FDIC to expand the regulatory exclusion under 12 C.F.R. § 337.6(a)(5)(ii)(E) to expressly cover HSAs. While the NPR notes that commenters on the ANPR believe that TPAs should be included within the statutory exception for plan administrators for employee benefit plans, it does not appear that the amendments to 12 C.F.R. Part 337 proposed in the NPR would resolve the ambiguity in the current brokered deposit regulatory framework as to whether the exclusion from the definition of a deposit broker applies to intermediaries that facilitate the placement of HSA deposits with insured depositary institutions, including TPAs and TSPs. Avidia urges the FDIC to reconsider the proposed amendments to 12 C.F.R. Part 337 and provide clarification that HSAs—including, but not limited to, those established by employees covered by HDHCPs—should be treated as employee benefit plans for purposes of the § 337.6(a)(5)(ii)(E) exclusion, and that the intermediaries that facilitate the placement of HSA deposits with various insured depositary institutions—including TPAs and TSPs working on behalf of TPAs and/or Trustee/Custodian Banks—are covered by the exclusion from the definition of a deposit broker in Section 29(g)(2)(E) of the Federal Deposit Insurance Act.[3]

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[1] 85 Fed. Reg. 7,453 (Feb. 10, 2020).
[2] 84 Fed. Reg. 2,366 (Feb. 6, 2019).
[3] 12 U.S.C. § 1831f(g)(2)(E).

In an abundance of caution, Avidia and some similarly situated banks have classified HSAs placed by third-party intermediaries under the circumstances described above as brokered deposits; however, others who operate similar models have not. The classification of these HSA accounts under these circumstances as brokered deposits when they present none of the risks of traditional brokered deposits materially disadvantages Avidia and similarly situated banks and serves no apparent public policy, as described below. We comment on the NPR in order to urge the FDIC to clarify, for the reasons and in the manner described below, that HSAs received under these circumstances should not be treated as brokered deposits under Section 337.6 of the FDIC's rules[4] and to ensure that all banks apply the brokered deposit rule in a consistent manner.

HSAs should explicitly qualify as "Employee Benefit Plans" under Section 337.6(a)(5)(ii)(E)

While HSAs are an integral component of employer-sponsored HDHCPs, and therefore should be treated as employee benefit plans for purposes of the brokered deposit rule, it is not clear that these linked HSAs qualify as employee benefit plans for the purposes of the regulatory exclusion under 12 C.F.R. § 337.6(a)(5)(ii)(E). Neither Section 29 of the Federal Deposit Insurance Act nor Part 337 of the FDIC's rules defines the term "employee benefit plan." Similar terms—"employee welfare benefit plan" and "welfare plan"—are defined by the amendments to the Internal Revenue Code contained in the Employee Retirement Income Security Act of 1974 as "any plan, fund, or program . . . established or maintained by an employer or by an employee organization, or by both, . . . for the purpose of providing for its participants or their beneficiaries" various benefits including group health insurance.[5] Although HSAs are tax-advantaged employee benefits established under the Internal Revenue Code,[6] they are not a type of employer-sponsored benefit plan, which is the more commonly understood definition of an employee benefit plan.

The FDIC has acknowledged that HSAs are tax-advantaged "non-retirement savings plans" similar in certain respects to other employee benefit plans.[7] Employers typically couple HDHCPs with HSAs and often contract with a TPA to offer HSAs to employees. These arrangements often include employer contributions to employees' HSAs through payroll deductions and contributions like traditional employee benefit plans.

Proposed Solution: HSAs are so closely related to traditional employee benefit plans that they should be included within the meaning of that term under the FDIC's brokered deposit regulatory framework.

The FDIC Should Expand the Section 337.6(a)(5)(ii)(E) Exclusion to Expressly Cover HSAs

Absent clarification from the FDIC that HSAs are considered to be employee benefit plans, it is unclear whether a TPA or TSP qualifies as "a person acting as a plan administrator" in connection with the services they provide to HSA accountholders and Trustee/Custodian Banks for the purposes of the regulatory exclusion under 12 C.F.R. § 337.6(a)(5)(ii)(E). TPAs and TSPs involved in facilitating the placement of HSA deposits with a Trustee/Custodian Bank in the circumstances described in this comment letter are acting as plan administrators within the meaning of the Section 29(g)(2)(E) exclusion, which provides that the term "deposit broker" does not include "a person acting as a plan

[4] 12 C.F.R. § 337.6.
[5] 29 U.S.C. § 1002(1).
[6] *See* 26 U.S.C. § 223.
[7] 84 Fed. Reg. 2366, 2372 (February 6, 2019).

administrator or an investment adviser in connection with a pension plan or other employee benefit plan provided that that person is performing managerial functions with respect to the plan."[8]

HSA deposits are often placed with Trustee/Custodian Banks through a third-party TSP under an information technology services agreement for outsourced technology and infrastructure that the TPA needs in order to carry out its functions for employers. The TSP merely functions as an agent of the TPA, and together they administer the HSAs as employee benefit plans. Such third-party TSPs are agents of the TPAs and only provide the technology and related infrastructure that the TPA could have developed in-house. Such third-party TSPs act under the direction and control of the TPAs they serve.

To the extent that an HSA qualifies as an employee benefit plan, a TPA providing administrative functions for HSAs should likewise qualify as a plan administrator for the purposes of the regulatory exclusion under 12 C.F.R. § 337.6(a)(5)(ii)(E). These functions often performed by TPAs include, for example, identifying and performing due diligence on depositary banks, educating employees about HSAs, facilitating direct deposit contributions to HSAs from payroll, and addressing employee questions and concerns. The intermediary TSP's primary purpose is to provide technology and related services in support of these functions. These technology companies are not primarily facilitators of deposit relationships; rather, their primary purpose is to offer the enabling technology while bundling a number of services incidental or ancillary to their function as a technology provider. The FDIC should clarify that, where a TSP is providing processing services to a TPA that a TPA could perform itself, the roles of the TSP and TPA should be collapsed and collectively considered a plan administrator for the purposes of the regulatory exclusion under 12 C.F.R. § 337.6(a)(5)(ii)(E). In cases where a TSP has also entered into an agreement to provide information technology services to a Trustee/Custodian Bank, the TSP in such circumstances should be treated as an extension or agent of the TPA.

Proposed Solution: The TPAs and TSP together perform administrative and managerial functions related to the servicing of HSAs and the FDIC should expressly recognize that they qualify for the exclusion from the definition of a "deposit broker" for employee benefit plan administrators in Section 337.6(a)(5)(ii)(E).

Avidia's Experience Indicates that HSAs Present None of the Risks of Traditional Brokered Deposits

As indicated in our previous comment letter on the ANPR, Trustee/Custodian Banks such as Avidia derive HSA deposits through intermediary relationships with TPAs that service employers, other employee benefit plan administrators, and insurance carriers that seek to provide individuals with HDHCPs and associated HSA deposit accounts as part of their employee benefit plan arrangements. Each HSA account derived from such intermediary relationships results in a *direct and continuing* deposit relationship between individual account holders and the Trustee/Custodian Bank. The individual account holder has discretion to open or close his or her HSA account (as opposed to a third-party having such power) and can choose from numerous alternative market participants offering HSA accounts when making that decision. The account itself is akin to a limited purpose account with respect to the limitations placed on deposits made to the account and the qualifications for expenditures to be used for eligible medical purposes. Therefore, the intermediaries (i.e., TPAs and their agents) involved in facilitating the establishment of individual HSAs with a Trustee/Custodian Bank do not have the authority to control the HSAs in any way that is comparable to the control traditional

[8] 12 U.S.C. § 1831f(g)(2)(E).

deposit brokers are able to exercise that allows, for example, a traditional deposit broker to quickly withdraw brokered deposits in large quantities.[9]

The NPR noted that HSAs are "stable sources of funding,"[10] unlike traditional or typical brokered deposits that tend to be volatile and are comparatively high-cost.[11] As shown by the data enclosed with our previous comment letter to the ANPR, HSAs are not rate sensitive deposit accounts, HSA balances have remained stable, and HSA deposits have not experienced significant outflows throughout our HSA program's existence. Avidia's experience with HSA deposit accounts is illustrative of the ways in which HSAs are distinguishable from traditional brokered deposits in terms of the characteristics that concern policymakers and regulators regarding safety and soundness issues related to brokered deposits. HSAs have a proven history as a stable source of funding.

Proposed Solution: The FDIC should expressly include HSA deposits administered by a TPA and TSP within the Section 337.6(a)(5)(ii)(E) exclusion in order to clarify that these types of deposits are fundamentally different from traditional or typical brokered deposits, do not behave the same way, and as a result do not present any of the same risks.

The Proposed Definition of "Deposit Broker" Is Too Broad, and the Primary Purpose Exclusion Application Process Too Burdensome

The NPR proposes to amend the definition of the term deposit broker to include, among other things, "[a]ny person engaged in the business of placing deposits, or facilitating the placement of deposits, of third-parties with insured depository institutions,"[12] which would capture third-party service providers that should not be considered deposit brokers. The proposed rule would impose an unreasonable regulatory burden on banks to submit large numbers of primary purpose exclusion applications on behalf of TSPs and other service providers that facilitate the placement of deposits as an ancillary consequence of the services they provide to avoid classification of such deposits as brokered deposits.

Like most community banks, Avidia relies on TSPs, including financial technology companies ("fintechs"), to provide innovative products and services that compete with much larger banks that have the resources to acquire or develop new technologies in-house. In particular, Avidia partners with a number of fintechs to provide innovative electronic payments solutions to small businesses that involve the establishment of deposit accounts at Avidia to enable the functionality of the electronic delivery of those financial products and services. While fintechs are involved in facilitating the placement of such deposits, they are fundamentally different from traditional brokered deposits because the banking relationship is established directly between Avidia and the individual depositor. This is equally applicable to the TSP involved in facilitating the placement of HSA-related deposits with Avidia.

The NPR proposes to allow third-parties such as fintechs, TPAs and TSPs to apply to the FDIC, or the bank to apply to the FDIC on behalf of such third-parties for a ruling that such a third-party qualifies for the primary purpose exclusion from the definition of a "deposit broker" under 12 C.F.R. § 337.6(a)(5)(ii)(I). One of the factors the FDIC intends to consider when evaluating such applications is

[9] *See Study on Core Deposits and Brokered Deposits*, FDIC, July 8, 2011, pages 15 and 49-52 (https://www.fdic.gov/regulations/reform/coredeposit-study.pdf).
[10] 85 Fed. Reg. 7,453 at 7,454 (Feb. 10, 2020).
[11] *See id.* at pages 11, 15, 32 and 52.
[12] 85 Fed. Reg. 7,453 at 7,454 (Feb. 10, 2020).

the fees received by the third-party in connection with any deposit placement service it offers. It is unclear whether compensation arrangements between a bank and a TSP that include components connected to transaction volume or other factors connected to the amount of funds deposited into HSAs would disqualify such a TSP from the primary purpose exclusion under Section 337.6(a)(5)(ii)(I).

The proposed expansion of the definition of the term deposit broker would significantly increase the regulatory burden and associated costs associated with each of Avidia's fintech partnerships, and hinder Avidia's ability to provide innovative products and services as well. Under the proposed rule, we would need to submit primary purpose exclusion applications on behalf of virtually every fintech company with which we have or would partner. Avidia may also have to submit additional applications in the event that any of our fintech partners wish to renegotiate the contractual terms of our relationship to the extent that any such change may change the facts relied upon by the FDIC in granting any approval under the primary purpose exclusion.

Proposed Solution: The FDIC should create an express exemption from the definition of the term deposit broker for TSPs involved in facilitating the placement of deposits that excludes anyone who provides services to a bank where a banking relationship is established directly between the bank and the individual depositor. The FDIC should also establish a bright line test to apply the primary purpose exception for stable sources of deposits in such relationship-based accounts that does not require a regulatory application process.

The FDIC proposal that a person would meet the "facilitation" prong of the deposit broker definition if "the person directly or indirectly shares any third-party information with the insured depository institution" would significantly expand the scope of who is considered a deposit broker.

This factor related to information sharing would significantly broaden the scope of who is classified as a deposit broker. We are required, when dealing with third-parties, to collect due diligence information as part of our regulatory obligations, including but not limited to customer due diligence and third-party risk management obligations. The FDIC's proposal would cause unintended consequences, capturing relationships that the FDIC does not intend to capture. Avidia Bank does not believe that the sharing of information by a third-party is an appropriate measure for determining whether a third-party is a deposit broker. Information sharing between Avidia Bank and various unaffiliated third parties is performed in the normal course of business under a wide variety of circumstances, including the delivery of digital banking products and solutions and in connection with our fintech partners that provide innovative electronic payment solutions and other financial products and services.

Proposed Solution: The FDIC should remove the criteria that "the person directly or indirectly shares any third-party information with the insured depository institution" from the "facilitation" prong of the deposit broker definition, as this is standard practice for customer due diligence and third-party risk management purposes. It would inadvertently capture relationships or require exclusions for relationships that should not be considered brokered deposit relationships.

Lastly, we also suggest that the Frequently Asked Questions (FAQs) regarding identifying, accepting and reporting brokered deposits issued on June 30, 2016 by the FDIC[13] be revised to specifically address HSAs held by Trustee/Custodian Banks, whether placed directly by a TPA, by an agent on behalf of a TPA

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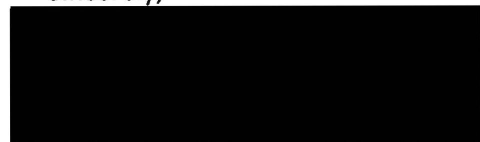
[13] *See* FDIC Financial Institution Letter FIL-42-2016 (June 30, 2016).

or by another employee benefit plan administrator, to clarify that these types of HSAs are not considered brokered deposits under the rule.

The nature and variety of employee benefits has evolved remarkably since Section 29(g)(2)(E) of the FDI Act was enacted and implemented by the FDIC, and the FDIC's rules should reflect those changes in a manner consistent with sound public policy. The rules should also not place undue burdens on smaller banks that need to partner with fintechs and other TSPs to offer innovative financial products and services, and compete effectively with much larger institutions. The rules should also be flexible so as to accommodate future developments in the digital delivery of financial products and services, and in tax-advantaged employee benefits and related financial products—particularly tax-advantaged individual non-retirement savings plans established under the Internal Revenue Code that supplement or replace large, employer-sponsored pension and benefit plans. Avidia recommends that the FDIC amend Section 337.6(a)(5)(ii)(E) of its rules clarify that HSAs are expressly covered by that exclusion, and to ensure that the facilitation prong of the deposit broker definition is amended as we stated above.

We thank you for the opportunity to provide comments.

Sincerely,



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