

**By Electronic Mail**

June 9, 2020

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

**Re: Millennium Trust Company Comment on FDIC Proposal  
Revising Brokered Deposits Restrictions (RIN 3064-  
AE94)**

Dear Sirs and Madams:

Millennium Trust Company, LLC (“Millennium Trust”) appreciates the opportunity to comment on the notice of proposed rulemaking (the “Proposal”)<sup>1</sup> by the Federal Deposit Insurance Corporation (the “FDIC”) to revise its regulations implementing section 29 of the Federal Deposit Insurance Act (“FDI Act”). Section 29 imposes restrictions on the ability of insured depository institutions (“IDIs”) to accept brokered deposits and defines the parties that are deemed deposit brokers.

Millennium Trust is a non-depository trust company that, among other activities, acts as an administrator and a directed custodian for individual retirement accounts (“IRAs”) and other retirement, investment and savings accounts.

An IRA is a form of pension or other employee benefit plan that provides an individual tax advantages for setting aside money for retirement. With \$11 trillion in assets at the end of 2019, IRAs are the single largest component of the country’s private retirement system.<sup>2</sup> More than 46 million households own an IRA.<sup>3</sup> In addition to their role of receiving and holding contributions from IRA owners, IRAs play a critical role in preserving retirement assets when a person changes jobs. The most recent available data show that households transferred \$431 billion from employer-sponsored retirement plans to traditional IRAs in 2016.<sup>4</sup>

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<sup>1</sup> 85 Fed. Reg. 7,453 (Feb. 10, 2020). The Proposal follows an advance notice of proposed rulemaking and request for comment published in February 2019 (the “ANPR”). See 84 Fed. Reg. 2,366 (Feb. 6, 2019).

<sup>2</sup> See Investment Company Institute Statistics, Retirement Assets Total \$32.3 Trillion in Fourth Quarter 2019, (Mar. 29, 2020), available at [https://www.ici.org/research/stats/retirement/ret\\_19\\_q4](https://www.ici.org/research/stats/retirement/ret_19_q4).

<sup>3</sup> See Investment Company Institute Research Perspective, Vol. 25 No. 10 (Dec. 2019), available at <https://www.ici.org/pdf/per25-10.pdf>.

<sup>4</sup> *Id.* (citing Internal Revenue Service, Statistics of Income Division 2019).

Among the IRAs custodied and administered by Millennium Trust is a special type of IRA, known as a “Safe Harbor IRA.” A Safe Harbor IRA is established by an employer-sponsored retirement plan (such as a 401(k) plan) for the benefit of a plan participant and is funded with the mandatory distribution of the participant’s assets from the plan when the participant becomes separated (voluntarily or involuntarily) from the employer sponsoring the plan or when the plan is terminated. Applicable law requires that the plan sponsor direct the assets of a Safe Harbor IRA to be invested initially in principal-preserving assets, such as insured deposits, unless and until the accountholder takes control of the account and directs otherwise.

The vast majority of assets held in Safe Harbor IRAs are placed at the direction of plan sponsors in cash at IDIs under a cash sweep program. As a non-depository trust company, Millennium Trust also sweeps uninvested cash held in the other IRAs for which it serves as custodian (*i.e.*, non-Safe Harbor IRAs) to unaffiliated IDIs at the direction of the individual owners of such IRAs.

Historically, Millennium Trust and the IDIs holding IRA and other custodial assets on deposit have both generally understood that such deposits are *not* brokered deposits. Treatment of these deposits as non-brokered has benefited accountholders because IDIs are generally required to pay the FDIC lower assessment rates for core deposits compared to brokered deposits, and therefore are willing to pay relatively higher rates of interest on core deposits. Additionally, treatment of IRA deposits as non-brokered creates more capacity at IDIs to receive these deposits, allowing Millennium Trust to fulfill plan sponsor and other customer demand for insured deposits and, in the case of Safe Harbor IRAs, facilitate the safe, orderly administration of retirement plans during transitional events using risk-free insured deposits.

This letter explains why deposits by a custodian on behalf of IRA and other custodial account owners should, in any FDIC final rule, remain non-brokered under multiple exceptions to the FDI Act’s definition of “deposit broker”; it also identifies ways the FDIC could affirm this general understanding and market practice in the context of finalizing the Proposal.

Part I of this letter provides background on IRAs, including Safe Harbor IRAs. Part II describes why the FDIC should confirm in the final rule that custodians of IRAs are exempt from the definition of “deposit broker” as the “trustee of a pension or other employee benefit plan, with respect to funds of the plan,” and why this conclusion is particularly warranted for Safe Harbor IRAs. Part III explains why, in the alternative, the FDIC should affirmatively recognize that custodians of IRAs categorically qualify for the “primary purpose” exception to the definition of “deposit broker.” Finally, Part IV explains why certain other custodial activities of Millennium Trust should similarly qualify for the “primary purpose” exception.

## **I. Background on IRAs, Including Safe Harbor IRAs**

### **A. Laws and Regulations Governing IRAs, Including Safe Harbor IRAs**

For an account to qualify as an IRA and provide tax advantages to an individual, a number of requirements must be met. One of these requirements is that a qualified custodian, such as Millennium Trust or another qualifying bank, trust company, or IRS-approved non-bank trustee, must hold the IRA assets, maintain records, file reports, and process transactions.

A Safe Harbor IRA is a highly regulated type of IRA that is subject to additional rules and regulations. This subsection provides a brief background on Safe Harbor IRAs and these additional rules and regulations.

As a general rule, employer-sponsored retirement plans, such as 401(k) plans, may not distribute benefits to a plan participant without the consent of the participant. The Code and Employee Retirement Income Security Act (“ERISA”), however, provide an important exception to this general rule. Under the exception, an employer-sponsored retirement plan may provide for the mandatory distribution of the plan balance of any participant who becomes separated (voluntarily or involuntarily) from the employer (*i.e.* the plan sponsor) if that balance is less than \$5,000 (known as the cash-out limit).<sup>5</sup> The mandatory distribution of balances below \$5,000 upon separation of employment helps plans avoid the proliferation of small-balance accounts, which can lead to administrative burdens, fiduciary liability, and increased plan costs.

For any mandatory distribution of more than \$1,000 from a plan, the plan sponsor is required to establish an IRA at a qualified IRA custodian, such as Millennium Trust, for the benefit of the former participant unless the former participant, in response to a notice from the plan sponsor, directs the plan sponsor to send the distribution directly to the former participant or to an IRA at another financial institution or the plan of the former participant’s new employer.<sup>6</sup> This mandatory rollover of a plan balance to an IRA in the name of a former participant is referred to as an “automatic rollover.” The requirement to establish IRAs for mandatory distributions of more than \$1,000 is intended to preserve the tax-advantaged status of a plan participant’s retirement assets and avoid income tax withholding and premature distribution penalties that could result if the distribution were sent directly to the former participant.

Mandatory distributions below \$1,000 may also, but are not required to, be automatically rolled over into IRAs for the benefit of former participants.<sup>7</sup> A plan sponsor may alternatively send checks directly to former participants for these smaller mandatory distributions.<sup>8</sup>

Plan sponsors also use mandatory distributions and the automatic rollover of plan balances to an IRA provider in connection with the termination of employer-sponsored retirement plans (as a result of, for instance, the acquisition or bankruptcy of the plan sponsor). In the case of terminated plans, the plan sponsor may mandatorily distribute and, unless the participant elects a different form of distribution, automatically roll over to IRAs the entire balances, regardless of amount, of all participants.<sup>9</sup> In these circumstances, unlike mandatory distributions in connection with ongoing plans, the cash-out limit of \$5,000 does not apply, and the balances of all unresponsive participants (not just separated employees) may be distributed

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<sup>5</sup> See 26 U.S.C. § 401(a)(31)(B)(ii).

<sup>6</sup> See 26 U.S.C. § 401(a)(31)(B)(i)(I).

<sup>7</sup> See 29 C.F.R. § 2550.404a-2(d).

<sup>8</sup> See 26 C.F.R. § 1.411(a)-11(c)(3); 26 U.S.C. § 401(a)(31)(B)(i)(I).

<sup>9</sup> See 29 C.F.R. § 2550.404a-3; DOL Field Assistance Bulletin No. 2014-01.

mandatorily from terminated plans and rolled over into IRAs.<sup>10</sup> This makes it possible for a plan sponsor to distribute all amounts and close a terminated plan in an orderly manner that protects participants.

In connection with the opening of an IRA upon an automatic rollover – *i.e.*, a Safe Harbor IRA – the plan sponsor must select a (1) financial institution to serve as the qualified custodian of the IRA and (2) default investment for the IRA. These selections are subject to ERISA’s fiduciary rules. Section 657(c) of the Economic Growth and Tax Relief Reconciliation Act of 2001 (“EGTRRA”) and implementing regulations from the Department of Labor (“DOL”) establish a safe harbor under which ERISA plan sponsors can satisfy their fiduciary obligations in selecting a financial institution and default investment for the Safe Harbor IRA in connection with a small dollar mandatory distribution.<sup>11</sup> DOL has also promulgated a similar safe harbor for sponsors to satisfy their fiduciary obligations in connection with mandatory distributions in connection with a plan termination.<sup>12</sup>

Under these DOL regulations, which we refer to as the “Safe Harbor Rules,” rolled-over funds must be invested by the Safe Harbor IRA’s fiduciary (which initially is the original plan sponsor) in an investment product that is (i) designed to preserve principal (*i.e.*, “to maintain, over the term of the investment, the dollar value that is equal to the amount invested in the product”) and provide a reasonable rate of return, and (ii) offered by an IDI, insurance company, or registered investment company.<sup>13</sup>

The initial investment of rolled-over funds is determined and directed by the plan sponsor, subject to the constraints of the Safe Harbor Rules. Thereafter, any investment decisions with respect to a Safe Harbor IRA may be directed solely by the accountholder of the Safe Harbor IRA or the accountholder’s advisor or agent.

In sum, the purpose of Safe Harbor IRAs is to “preserve assets for retirement purposes” and protect the tax-advantaged character of the funds,<sup>14</sup> and the Safe Harbor Rules make deposits at IDIs one of the few ways for plan sponsors to discharge their fiduciary duties and protect former plan participants.

## **B. Millennium Trust’s Role as Custodian of IRAs, Including Safe Harbor IRAs**

As a qualified custodian, Millennium Trust may serve as the custodian of any IRA. IRAs are opened by or on behalf of individual taxpayers in a number of situations. For example, Millennium Trust (1) administers self-directed IRAs for financial advisors and individual investors for the purpose of investing in publicly-traded securities such as stocks, bonds, mutual

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<sup>10</sup> See *id.*; 26 C.F.R. § 1.411(d)-4, Q-2(b)(2)(vi)(A).

<sup>11</sup> See Pub. L. 107-16, § 657(c)(2) (June 7, 2001); 29 C.F.R. § 2550.404a-2.

<sup>12</sup> See 29 C.F.R. § 2550.404a-3.

<sup>13</sup> 29 C.F.R. § 2550.404a-2(c)(3).

<sup>14</sup> See DOL Field Assistance Bulletin No. 2004-02.

funds, and ETFs, or alternative assets, such as private equity and debt, or real estate, (2) accepts regular, voluntary rollovers into IRAs from employee benefit plan balances when a plan participant affirmatively elects to transfer his or her account to a Millennium Trust IRA, and (3) serves as custodian for Simplified Employee Pension (SEP) IRAs, Savings Incentive Match Plan for Employees (SIMPLE) IRAs and payroll-deducted IRAs offered to employees as part of employee benefit plans sponsored by (or other arrangements facilitated by) small- to mid-sized businesses. And, as mentioned above, Millennium Trust acts as the qualified custodian for Safe Harbor IRAs that are opened for employer-sponsored retirement plan participants by plan sponsors upon a separation of employment or a plan termination in order to preserve existing tax advantages of retirement savings.

As of April 30, 2020, Millennium Trust acted as custodian for approximately 1.5 million IRAs, representing approximately \$16.9 billion of assets.

In all cases, Millennium performs the role of a *directed* custodian. That is, Millennium Trust is not an investment advice fiduciary, and does not provide investment advice or recommendations. When directed by a sponsor of an employer-sponsored retirement plan (in the case of Safe Harbor IRAs) or an IRA owner to hold funds in cash, or when there is uninvested cash in an IRA, Millennium Trust, in its capacity as custodian for the benefit of the individual account owners, places the funds in bank accounts at various unaffiliated IDIs under a cash sweep program. Consistent with a plan sponsor's fiduciary obligation to preserve principal under the DOL's Safe Harbor Rules and at the direction of the plan sponsors, a substantial majority of assets in Safe Harbor IRAs are placed in insured deposits at IDIs. For other IRAs, account owners typically direct only a small percentage of their assets (*i.e.*, less than 10%) to be placed in cash.

Under Millennium Trust's cash sweep program, a portion of the cash in each IRA is automatically allocated among the accounts at the participating unaffiliated IDIs. IDIs hold the funds in omnibus accounts in the name of Millennium Trust, as custodian of the account owners, and Millennium Trust maintains records of the individual names and amounts of each IRA owner on whose behalf the funds are held. Millennium Trust credits all interest income from deposits held at the IDIs to the relevant IRA owners, and receives compensation from the individual account owners for servicing and administering the cash sweep program and rendering other services in connection with custody of the IRAs.

Historically, Millennium Trust and the IDIs holding IRA assets on deposit have both generally understood that such deposits are not brokered deposits, for the reasons discussed in parts II and III, below.

## **II. A Custodian of an IRA is Excluded from the Statutory Definition of "Deposit Broker" Because It is the "Trustee of a Pension or Other Employee Benefit Plan, With Respect to Funds of the Plan"**

Section 29(g)(2)(D) of the FDI Act exempts from the definition of "deposit broker" the "trustee of a pension or other employee benefit plan, with respect to funds of the plan."<sup>15</sup> This

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<sup>15</sup> 12 U.S.C. § 1831f(g)(2)(D).

part of our letter explains why the structure, function, and current and historical treatment of IRAs by the FDIC indicate that an IRA should constitute a “pension or other employee benefit plan” for which a custodian is the “trustee” for purposes of the statute in its capacity as such. As discussed below, this conclusion is particularly warranted for custodians of Safe Harbor IRAs. The FDIC should confirm that IRA custodians are not deposit brokers in the rule text or preamble of the final rule.

**A. An IRA Custodian is a “Trustee” of the IRA**

IRAs are governed by section 408 of the Internal Revenue Code (the “Code”), which generally requires an IRA to take the form of a trust.<sup>16</sup> In the alternative, section 408 permits an IRA to be held in a custodial account, which by law “shall be treated as a trust” and the custodian of which “shall be treated as the trustee thereof” under the Code.<sup>17</sup>

Under relevant governing law, the custodian of any IRA should therefore qualify as a “trustee” of a pension plan under section 29(g)(2)(D) of the FDI Act.

**B. An IRA is a “Pension or Other Employee Benefit Plan”**

An IRA qualifies as a “pension or other employee benefit plan” under section 29(g)(2) of the FDI Act for at least three reasons.

First, although not subject to ERISA in every respect, all IRAs are included within the Code’s definition of “individual retirement plan.”<sup>18</sup>

Second, another part of Subchapter B of the FDIC’s regulations – part 330, which governs deposit insurance coverage – strongly suggests that IRAs are within the scope of “pension or other employee benefit plan[s]” covered by the exclusion from the definition of deposit broker set forth in section 29(g)(2) of the FDI Act. Although 12 C.F.R. § 330.14(f)(2) limits the definition of “employee benefit plan” to those covered by ERISA, that section elsewhere expressly refers to IRAs as a “type of retirement plan.”<sup>19</sup> The reference to a “pension plan” in section 29(g)(2) of the FDI Act can and should be read as synonymous with “retirement plan” in these other contexts, given that the terms are generally interchangeable.

Third, and consistent with this legal framework and the similarity of IRAs to ERISA-governed pension plans, the FDIC’s original regulatory definition of “deposit broker,” on which

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<sup>16</sup> See 26 U.S.C. § 408(a).

<sup>17</sup> See 26 U.S.C. § 408(h).

<sup>18</sup> 26 U.S.C. § 7701(a)(37) (“The term ‘individual retirement plan’ means — (A) an individual retirement account described in section 408(a), and (B) an individual retirement annuity described in section 408(b).”). In addition, an employment-based retirement plan funded by IRAs can be subject to ERISA, unless certain safe harbors are met. See 29 C.F.R. § 2510.3-2(d). For example, SEP-IRAs and SIMPLE IRAs are considered ERISA-governed retirement plans.

<sup>19</sup> 12 C.F.R. § 330.14(b)(2).

the current statutory definition is based, specifically and expressly excluded IRA trustees and custodians, and in the process made clear that IRAs are considered to be “pension plans.”

The FDIC, together with the Federal Savings and Loan Insurance Corporation (“FSLIC”), adopted restrictions on brokered deposits and a definition of “deposit broker” in 1984 – five years before Congress adopted that framework in section 29 of the FDIC Act as part of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 (“FIRREA”). The text of the FDIC’s and FSLIC’s 1984 deposit broker rule provided that “[t]he term ‘deposit broker’ does not include . . . a trustee or custodian of a pension or profit-sharing plan which qualifies under section 401(d) or 408(a) of the Internal Revenue Code of 1954, as amended.”<sup>20</sup> This exemption is very similar to the exemption that Congress later adopted in section 29(g)(2)(H) of the FDI Act, except that Congress changed the regulation’s reference to section 408(a) to be a reference to section 403(a). Importantly, when establishing the original regulatory exemption, the FDIC and RTC expressly stated in the preamble that pursuant to that exemption, “trustees and custodians of IRA and Keogh accounts will not be deemed to be deposit brokers.”<sup>21</sup>

Not only does this history show that the FDIC’s original deposit broker regulations excluded IRA custodians from the definition of “deposit broker,” it also demonstrates why changes to the FDI Act that followed likewise were intended to exclude such custodians from the statutory definition. It would make no sense for the FDIC and FSLIC to have exempted IRA custodians using language that refers to a “pension plan . . . qualified under section . . . 408(a)” of the Code unless IRAs were “pension plans.” Thus, even if IRAs were not deemed to be “a pension or profit-sharing plan qualified under section 401(d) or 403(a)” under section 29(g)(2)(H) of the FDI Act, at the very least they should be considered to be “pension plans” such that their trustees are exempt under section 29(g)(2)(D).

When Congress adopted the regulatory definition of “deposit broker” in section 29 of the FDI Act as part of FIRREA in 1989, it gave no indication that it intended to upset the treatment of IRAs as “pension plans,” or as otherwise being exempt from the definition of “deposit broker.” Indeed, the Senate bill that became FIRREA, S. 774, like the regulation on which the statutory definition was based, would have expressly carved out from the definition trustees and custodians of pension or profit-sharing plans qualified under section 408(a) of the Code as part of its proposed section 29(g)(2)(H).<sup>22</sup> In contrast, the House of Representatives version of the “deposit broker” definition referred instead to section 403(a) of the Code in its proposed section 29(g)(2)(H). The Conference materials include no suggestion that Congress intended to make a substantive change when it used the House version of section 29(g)(2)(H) in the final version of FIRREA.

While it appears to be possible that Congress inadvertently referred to section 403(a) of the Code rather than section 408(a) in the final version of FIRREA, at the very least, this history shows that the Senate, like the FDIC and FSLIC before it, considered an IRA to be a “pension

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<sup>20</sup> 49 Fed. Reg. 13,003, 13,011-12 (Apr. 2, 1984).

<sup>21</sup> *Id.* at 13,009-10.

<sup>22</sup> See S. Rep. No. 101-19, at p. 128 (1989).

plan.” Otherwise, it would not have made sense for the Senate to pass a bill that referred to a pension plan qualified under section 408(a) of the Code, which governs IRAs.

Very shortly following the passage of FIRREA, the FDIC confirmed its understanding that a trustee of an IRA continued to be exempt from the definition of “deposit broker.” In FDIC Interpretive Letter No. 90-16, the FDIC staff concluded that a trust company was not a deposit broker when it served as trustee for IRAs, Keogh Plans, and multi-beneficiary qualified employee benefit plans.<sup>23</sup> This interpretation remains on the FDIC’s website, and the FDIC has never expressly revoked it.

Surprisingly, however, in the brokered deposits ANPR of February 2019, the FDIC stated that “[i]ndividual retirement accounts (IRAs) are retirement accounts set up outside of a pension plan or employee benefit plan and thus are not expressly covered by” section 29(g)(2)(D)’s exclusion. This statement, which is not repeated in the December 2019 proposed rule, ignores the law governing IRAs and the FDIC’s longstanding treatment of IRAs as pension plans, discussed above.

**C. A Safe Harbor IRA is a “Pension or Other Employee Benefit Plan” Even Under the ANPR’s More Restrictive Statement**

Even if one were to accept, for the sake of argument, the FDIC’s statement in the February 2019 ANPR that IRAs are generally “set up outside a pension plan,” that statement is not true with respect to Safe Harbor IRAs.<sup>24</sup> Safe Harbor IRAs are established within the context and circumstances of an ERISA-governed pension plan from which the participant is being cashed out, or that is being terminated. There is a direct connection between the Safe Harbor IRA funds placed at the IDI and the pension plan because the assets are placed with the IDI pursuant to a distribution from the pension plan in accordance with the terms of the plan and at the direction of the plan sponsor. Just as a participant’s retirement assets do not lose preferred tax treatment when they are automatically transferred from an employer-sponsored retirement plan to a Safe Harbor IRA, the participant’s retirement assets should not lose their character as non-brokered merely because they are rolled over into a Safe Harbor IRA. The Safe Harbor IRA is essentially an extension of the plan and serves as a vehicle for the plan participant to continue to save for retirement in a tax-advantageous manner.

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<sup>23</sup> See FDIC 90-16, Trust Company Acting as Trustee or Custodian of Pension Plan or Other Employee Benefit Plans (Mar. 30, 1990), *available at* <https://www.fdic.gov/regulations/laws/rules/4000-5340.html#fdic400090-16>.

<sup>24</sup> There is precedent for the federal financial regulators treating Safe Harbor IRAs differently from other IRAs based on the unique characteristics of Safe Harbor IRAs. For example, because a Safe Harbor IRA involves the opening of an IRA by a plan sponsor automatically on behalf of a non-responsive individual, the Safe Harbor IRA custodian is not able to apply its customer identification programs (“CIP”) under the Bank Secrecy Act to the individual. Under guidance issued by multiple federal agencies, including the FDIC, Safe Harbor IRAs, unlike ordinary IRAs, can forego customer identification on the former participants to open these accounts. See Interagency FAQs on Final CIP Rule, FAQ No. 4 (Jan. 2004), *available at* <https://www.fincen.gov/sites/default/files/shared/finalciprule.pdf>.



As mentioned above, the funds in a Safe Harbor IRA must initially be invested in an asset designed to preserve principal, and insured deposits are far and away the preferred investment chosen by ERISA plan fiduciaries for Safe Harbor IRAs. To conclude that such deposits are brokered would dis-incentivize banks from offering deposit accounts to Safe Harbor IRAs, and/or incentivize banks to decrease the rates they pay on these deposits to compensate for the higher deposit insurance assessment rates they would need to pay on the deposits. A decrease in capacity resulting from the treatment of these deposits as brokered could also require Millennium Trust to find less favorable alternatives to insured deposits for Safe Harbor IRA accounts. These results would harm the very people Congress intended to protect with section 657(c) of the EGTRRA – participants in retirement plans that are forcibly cashed out.

### **III. A Custodian of an IRA Is Also Excluded From the Statutory Definition of “Deposit Broker” Because Its “Primary Purpose is Not the Placement of Funds with Depository Institutions”**

Section 29(g)(2)(I) of the FDI Act exempts from the definition of “deposit broker” an “agent or nominee whose primary purpose is not the placement of funds with depository institutions.” Custodians of IRAs fall within this primary purpose exception even if the FDIC concluded that they do not fall within the section 29(g)(2)(D) exemption for trustees of pension and other employee benefit plans discussed in part II above. This conclusion is supported by prior FDIC interpretations finding that an agent that places deposits at IDIs in order to satisfy a separate legal mandate categorically satisfies the primary purpose exception. As such, if the FDIC does not recognize in the rule text or preamble of the final rule that IRA custodians generally (or even Safe Harbor IRA custodians specifically) satisfy the section 29(g)(2)(D) exemption, it should recognize that these custodians categorically satisfy the primary purpose exception (in their capacity as IRA custodians and not any other capacity in which they may be acting for other customers).

If the FDIC does not adopt such a categorical position with respect to IRA custodians, or even Safe Harbor IRA custodians, Millennium Trust still should be deemed to satisfy the primary purpose exception based on the structure of its business activities when evaluated against criteria that the FDIC has suggested as being relevant to assessing an agent’s primary purpose. Thus, if the FDIC’s final rule does not recognize that IRA custodians or Safe Harbor IRA custodians are generally exempt from the “deposit broker” definition based on either the pension plan exemption of section 29(g)(2)(D) of the FDI Act or the primary purpose exception of section 29(g)(2)(I), it should at least recognize that custodians that structure their activities similar to Millennium Trust are exempt under the primary purpose exception of section 29(g)(2)(I).

#### **A. Custodians of IRAs, and Especially of Safe Harbor IRAs, Place Deposits at IDIs For the Purpose of Satisfying a Separate Legal Mandate**

A Safe Harbor IRA custodian’s primary purpose is to act as custodian of IRA assets in compliance with the IRS’s Safe Harbor Rules, so as to preserve the accountholder’s assets for retirement purposes and their tax-advantaged character. In analogous contexts, the FDIC has recognized that when an agent places deposits at an IDI to comply with a legal mandate of this type, the agent has a primary purpose of complying with that legal requirement rather than of

placing funds with depository institutions. For example, in Interpretive Letter No. 94-39, the FDIC stated that a broker-dealer that places funds in a “Special Reserve Bank Account for the Exclusive Benefit of Customers” at an IDI to satisfy the requirements of Securities Exchange Commission Rule 15c3-3(e) is not a deposit broker, as the broker-dealer’s primary purpose “is to satisfy the mandate of Rule 15c3-3(e), not to provide a deposit-placing service to its customers.”<sup>25</sup>

Similarly, Safe Harbor IRA custodians such as Millennium Trust place customer funds at IDIs to satisfy the principal preservation mandate that applies to the plan sponsor under the Safe Harbor Rules, not to provide a deposit-placing service to their customers. Although Safe Harbor IRA custodians place a significant portion of account assets in bank deposits, this placement does not reflect the custodian’s or plan sponsor’s business purpose. Rather, the placements are at the direction of plan sponsors and reflect the constraints of the Safe Harbor Rules (that the account’s assets be invested only in deposit accounts or other “principal preservation” options, which are highly limited). Although other types of principal-protected investment are permitted, as a practical matter, because the thrust of the Safe Harbor Rule is to preserve principal, insured deposits as a matter of principal protection are far and away the preferred investment by ERISA plan fiduciaries for Safe Harbor IRAs.

As such, like broker-dealers placing customer deposits in Rule 15c3-3(e) customer reserve accounts, Safe Harbor IRA custodians should be recognized as having a primary purpose other than placing deposits at depository institutions.

Custodians of non-Safe Harbor IRAs also place deposits at IDIs in satisfaction of a legal mandate. Account owners use IRA custodians to satisfy the legal requirement that a qualified custodian hold IRA assets, maintain records, file reports, and process transactions. Absent that legal requirement, account owners could place their own cash at IDIs directly, and there would be no question that the deposits are not brokered. The fact that federal law requires the use of an IRA custodian should not change the character of these funds as non-brokered. Moreover, Millennium Trust is a directed custodian; account owners direct the investment of assets in their IRAs. Millennium Trust also is a non-depository trust company, so it must use unaffiliated IDIs to safeguard cash that IRA owners decide to leave uninvested in their accounts. In fact, under Millennium Trust’s standard IRA agreements, account owners direct Millennium Trust to sweep any uninvested cash to these IDIs. Thus, Millennium Trust’s obligation to deposit cash at an IDI arises from, and is fulfilled pursuant to, legal and contractual requirements that apply to IRAs and Millennium Trust as IRA custodian. These facts support a conclusion that Millennium Trust, in its capacity as IRA custodian, has a primary purpose other than the placement of deposits.

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<sup>25</sup> See FDIC 94-39, *Brokered Deposits: Are Funds Deposited in a Special Reserve Bank Account for the Exclusive Benefit of Customers Brokered Deposits under Sections 29 and 29A of the FDI Act* (Aug. 17, 1994), available at <https://www.fdic.gov/regulations/laws/rules/4000-9110.html#fdic400094-39>.

**B. The Structure of Millennium Trust's IRA Activities Further Demonstrates its Primary Purpose as Being Other Than Deposit Placement**

**1. With Safe Harbor IRAs, Millennium Trust Does Not Market Any Services, Let Alone Deposit Placement Services, to Prospective Depositors**

The Proposal states that an important factor in determining whether the primary purpose exception applies is “whether the agent’s . . . marketing activities to prospective depositors are aimed at opening a deposit account or to provide some other service, and if there is some other service, whether the opening of the deposit account is incidental to that service.”<sup>26</sup>

Given the unique nature of Safe Harbor IRAs, Millennium Trust conducts *no* marketing to prospective depositors (*i.e.*, IRA owners). Instead, it markets its services to employee benefit plan sponsors and their service providers (*e.g.*, recordkeepers and third party administrators) seeking custodial services for a Safe Harbor IRA into which they may automatically roll over certain plan participant balances. The solution sought by plan sponsors, recordkeepers and third party administrators (and marketed by Millennium Trust) is the ability to transition unresponsive participants from a plan by establishing Safe Harbor IRAs for them at a qualified IRA custodian in accordance with the Safe Harbor Rules. In connection with that solution, Millennium Trust’s marketing highlights a range of custodial services and features, including its assistance in compliance with the Safe Harbor Rules, the ease of its processes for accepting rollovers, its customer support team, the search services it offers to “reunite” plan participants with the Safe Harbor IRA established for them, and investment options for individuals once they are found. The placement of funds into a deposit account is wholly incidental to those activities.

**2. With Other IRAs, Millennium Trust Does Not Market Deposit Placement Services to Prospective Depositors**

For other types of IRAs, Millennium Trust’s advertising also focuses on services other than the placement of excess cash at IDIs. For instance, Millennium Trust self-directed IRA marketing to financial advisors and individuals focuses on Millennium Trust’s expertise and ability to administer and custody alternative assets, which many other custodians are unable to administer and custody. Millennium Trust markets direct rollover IRAs to recordkeepers that seek an easy, automated solution for the direct, voluntary rollover into an IRA of larger plan participant balances. The marketing focuses on continued investment in assets managed by the recordkeeper, which determines the investment options. And Millennium Trust markets its Workplace Savings IRAs as a simple and cost-effective way for small- and medium-sized businesses to provide their employees with access to retirement benefits like SIMPLE, SEP and payroll-deducted IRAs.

In all cases, Millennium Trust’s cash sweep program is wholly incidental to the primary services offered and marketed to customers.

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<sup>26</sup> 85 Fed. Reg. at 7,460.

In summary, under the standards articulated in the Proposal, Millennium Trust's marketing efforts with respect to IRAs are consistent with a finding that it is not acting as a deposit broker.<sup>27</sup>

### **3. Millennium Trust Receives its Compensation From Accountholders, Not IDIs**

The Proposal states that one important factor in whether an agent has a primary purpose of placing funds with IDIs is “the revenue structure for the agent,” and another “the fees, and type of fees, received by an agent . . . for any deposit placement service it offers.”<sup>28</sup> For all IRAs, Millennium Trust only receives compensation from accountholders and receives no fees or other revenue from any IDI at which deposits are placed. This factor further supports its primary purpose as being other than the placement of deposits at depository institutions.

To the extent that Millennium Trust will be required to submit an application to rely on the primary purpose exception, we request that the FDIC clarify in the final rule text or preamble that a custodian is eligible to be an agent that places less than 25 percent of the total assets that it has “under management” for its customers, in a particular business line, at depository institutions for purposes of § 303.243(b)(8)(i) of the proposed rule text, such that it would be eligible for FDIC approval of its application thereunder. That is, the FDIC should clarify that “assets under management” includes “assets under custody,” which is a term used more commonly than “assets under management” in the context of a custodian that lacks investment discretion.

### **IV. Millennium Trust Should Likewise Be Excluded From the Statutory Definition of “Deposit Broker” in Its Capacity as Custodian of Certain Other Custody Accounts Because Its “Primary Purpose is Not the Placement of Funds with Depository Institutions”**

In addition to serving as a custodian of IRAs, Millennium Trust provides other retirement, investment and savings solutions. These include taxable custody accounts, which are accounts opened when an individual, advisor or sponsor requires or desires a third party custodian for investments or other assets. One form of taxable custody account is an emergency savings fund, which is made available by recordkeepers to retirement plan savers alongside 401(k) and other retirement savings options as part of a complete financial wellness solution. According to a January 2019 survey from personal finance website Bankrate, only 40 percent of Americans are able to pay an unexpected expense of \$1,000, such as a car repair or a hospital visit, with their savings. Emergency savings funds provide individuals access to an easy and automatic way to save for unexpected expenses. Millennium Trust places uninvested cash in

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<sup>27</sup> The Proposal states that in evaluating the application of the primary purpose exception to an agent or nominee, the FDIC will consider “whether the agent’s or nominee’s marketing activities to prospective depositors is aimed at opening a deposit account or to provide some other service, and if there is some other service, whether the opening of the deposit account is incidental to that other service.” 85 Fed. Reg. at 7,460.

<sup>28</sup> *Id.*

emergency savings funds and other taxable custody accounts at unaffiliated IDIs under a cash sweep program, as it does with IRAs.

Many of the same reasons why IRA custodians qualify for the primary purpose exception apply with equal force to custodians of taxable custody accounts, including emergency savings funds. For instance, Millennium Trust focuses its marketing efforts with respect to taxable custody accounts on its expertise and ability to administer and custody alternative assets, such as real estate, private equity and debt, hedge funds and precious metals, which many other custodians are unable to administer and custody. And it markets its emergency savings account to recordkeepers to be included as part of a complete financial wellness platform that allows individuals to save for unexpected emergencies. For both types of accounts, Millennium Trust only receives compensation from accountholders and receives no fees or other revenue from any IDI at which deposits are placed.

As discussed above, the FDIC should clarify in the final rule text or preamble that “assets under management” includes “assets under custody.” This clarification would facilitate the straightforward processing of primary purpose exception applications from custodians of taxable custody accounts, such as Millennium Trust, that plainly have a primary purpose other than the placement of deposits with IDIs.


## **V. Conclusion**

For the reasons described above, the FDIC should appropriately recognize in the final rule that custodians of IRAs are not deposit brokers, and that deposits by custodians of IRAs, including Safe Harbor IRAs, are not brokered deposits under section 29 of the FDI Act. In addition, the FDIC should conclude that the primary purpose exception from the definition of deposit broker should apply to custodians of similar types of accounts, including emergency savings funds.

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We appreciate the FDIC’s consideration of our comments. If you have any questions, please contact the undersigned at (630) 472-5989 or [jperugini@mtrustcompany.com](mailto:jperugini@mtrustcompany.com).

Respectfully submitted,



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