June 9, 2020

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

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

Dear Mr. Feldman,

The Consumer Bankers Association ("CBA")[1] appreciates the opportunity to offer our views on the Federal Deposit Insurance Corporation's ("FDIC" or "the agency") Notice of Proposed Rulemaking ("the NPR" or "the proposed rule" or "the proposal") concerning the FDIC's regulatory approach to brokered deposits.

CBA believes the agency's regulatory approach to brokered deposits must be modernized to allow banks to better serve their customers and remain competitive in today's financial services landscape. Since the FDIC's brokered deposit restrictions were last amended in 1991, legal developments, consumer preferences and technological advances have drastically transformed the business models, products, and delivery channels that support the banking industry, as well as the manner in which banks gather deposits to fund their activities.

CBA supports the FDIC's objectives[2] for revisiting the agency's approach to brokered deposits and our members agree revisions to the definition of what constitutes a "deposit broker" (and thus a brokered deposit) are necessary. Banks should be more easily permitted to accept stable and low volatility deposits outside their geographic branch footprint or with the involvement of third parties using digital technologies without running afoul of antiquated brokered deposit restrictions. At the same time, our members recognize the FDIC must strike the proper balance to improve brokered deposits treatment for low-risk deposits while also ensuring the federal

[1] The Consumer Bankers Association is the only national trade association focused exclusively on retail banking. Established in 1919, the Association is now a leading voice in the banking industry and Washington, representing members who employ nearly two million Americans, extend roughly $3 trillion in consumer loans, and provide $270 billion in small business loans.

[2] The NPR outlines 4 broad objectives for revisiting the FDIC's approach to brokered deposits: 1) to meet evolving consumer needs in accessing banking services; 2) to modernize the FDIC's regulations to reflect technological innovations across the banking industry; 3) to provide clarity and transparency to the process for determining what constitutes a brokered deposit; and 4) to minimize risk to the deposit insurance fund.

safety net and core deposit treatment does not extend too far to riskier deposits gathered outside the well-regulated banking system. The NPR reflects a considerable effort by FDIC staff to address this complicated topic and we appreciate the agency's desire to introduce transparency and clarity in a process that significantly impacts the investments, long-term strategies, and business models banks, third-parties, and fintech companies pursue.

Nevertheless, our members are concerned some of the specific changes in the proposed rule do not align with the agency's stated goals for revisiting the brokered deposits framework and believe adjustments can be made to improve the proposal. Under the proposed rule, the definition of a deposit broker remains overly broad and confusing and the application process for seeking exceptive relief from brokered deposit treatment represents a significant departure from current practice that will be lengthy, costly, and more difficult to navigate.

To help bridge these gaps, we recommend the FDIC:

1. Enumerate in a final rule specific types of low-risk deposits the agency does not consider to be brokered, as well as provide examples of relationships that do not involve "facilitation" to narrow the definition of "engaged in the business of facilitating the placement of deposits."

2. Amend the list of proposed activities that meet the definition of "facilitation" by:

    a. Striking the language "the person directly or indirectly shares any-third party information with the insured depository institution."

    b. Changing the language "other than in a purely administrative capacity" to "other than in a purely administrative capacity, or as otherwise required by law."

3. Replace the term "assets under management" with "assets under administration" to determine whether the primary purpose of a brokerage sweep constitutes the placement of funds.

4. Ensure banks do not have to file primary purpose applications for affiliate broker dealer sweep deposits.

5. Specify the Advisory Opinions and interpretive letters the agency intends to preserve or retire as part of a notice and comment rulemaking process.

6. Grandfather all existing Advisory Opinions which conclude deposits are not brokered to preserve continuity and minimize industry disruption to existing business models, investments and relationships developed in reliance on those opinions.

7. Codify the implementation period the FDIC will use to transition to a new framework and reserve the primary purpose application process for new or novel products and relationships.

In response to the FDIC's specific questions about the proposed rule, we offer the following perspectives and recommendations for the agency to consider before finalizing any brokered deposits rules.

I. The FDIC's proposed definition of "engaged in the business of facilitating the placement of deposits" is overly broad.

Under the proposal, a person would satisfy the definition of "facilitation" by, engaging in any one, or more than one, of the following activities:

1. The person directly or indirectly shares any third-party information with the insured depository institution;
2. The person has legal authority, contractual or otherwise, to close the account or move the third party's funds to another insured depository institution;
3. The person provides assistance or is involved in setting rates, fees, terms, or conditions for the deposit account; or,
4. The person is acting, directly or indirectly, with respect to the placement of deposits, as an intermediary between a third party that is placing deposits on behalf of a depositor and an insured depository institution, other than in a purely administrative capacity.

Our members believe the language set forth in the first proposed criteria is problematic. As proposed, the language "directly or indirectly shares" broadens the scope of the FDIC's existing interpretations, captures arrangements the FDIC has previously determined do not result in brokered deposit treatment, and is inconsistent with the FDIC's intent to bring more clarity to the brokered deposits regulatory framework.

The FDIC notes in the Preamble of the NPR the facilitation definition is "intended to capture activities that indicate the person takes an active role in the opening of an account or maintains a level of influence or control over the deposit account even after the account is opened." Simply sharing information about a potential depositor with a bank, alone, does not indicate the third party takes an active role in opening an account or maintains influence or control over the account after it is opened. Today, in the normal course of business, information is shared between insured depository institutions and third parties to facilitate data processing, web servicing, consulting, advertising, and marketing. In some instances, information sharing is required by law. These arrangements do not give a third party a level of "influence or control" over a deposit account, particularly when the depositor selects the insured depository institution, and opens and funds the account. Accordingly, CBA recommends the FDIC delete this first criteria altogether.

The fourth criteria is equally problematic, as it is not clear what constitutes "a purely administrative capacity." The proposal states "administrative functions would include, for example, any reporting or bookkeeping assistance provided to the person placing its customers' deposits with insured depository institutions. Administrative functions would not include, for

example, assisting in decision-making or steering persons…to particular insured depository institutions." However, this language is minimally helpful in determining whether relationships could be inadvertently swept up in the definition of "engaged in the business of facilitating the placement of deposits" based on activity that is not "purely [an] administrative capacity."

Examples of unintentional capture within the definition of "a purely administrative capacity" could include: 1) An attorney maintaining clients' funds in a trust account as required by state law or bar rules; 2) An insurance agent maintaining clients' funds in a trust account as required by state law or insurance rules; 3) A real estate agent maintaining clients' funds in a trust account as required by state law or real estate agent rules; 4) A property manager maintaining a property owner's funds, such as rental payments, in a trust account as required by state law or property manager rules; 5) A landlord maintaining tenants' security deposits in a custodial account as required by state law; 6) A nursing home maintaining residents' social security or other retirement benefit payments in a custodial account as required by state or federal law or regulation; 7) An escrow agent maintaining class action awards in a custodial account under a court order pending distribution to class members; and 8) A homeowner's association maintaining homeowners' funds in a custodial account under state law or homeowner association rules.

To improve clarity, we suggest the language "or as otherwise required by law" be included in the fourth criteria immediately following the phrase "a purely administrative capacity." Additionally, the agency should articulate the types of activities that constitute "a purely administrative capacity" and therefore do not satisfy the definition of being "engaged in the business of facilitating the placement of deposits."

On March 2, 2020, the FDIC published a staff memorandum in the public file for this rulemaking in an effort to explain certain activities such as market research, advertising links on websites and providing general consulting and advisory services do not fall within the definition of "engaged in the business of facilitating the placement of deposits." While we appreciate the clarification, the very fact that a Staff Memorandum was published suggests the language in the proposed rule is somewhat confusing. The FDIC can remedy this ambiguity and reduce the need for subsequent interpretive guidance by ensuring the final rule codifies specific examples of activities or arrangements that do not constitute "the business of facilitating the placement of deposits."

II. The 25% threshold for determining whether the primary purpose of a third party's business relationship with its customers constitutes the placement of funds is a clear bright-line test consistent with Advisory Opinion 05-02, though the FDIC should not measure "assets under management."

Consistent with FDIC Advisory Opinion 05-02, our members support a clear, bright-line test for unaffiliated cash management accounts or sweeps to determine the primary purpose of a third-party's business relationship with its customers. Additionally, while we support an upward adjustment from the current 10% threshold, CBA does not believe "assets under management" is an appropriate measure for evaluating whether the primary purpose of a brokerage sweep constitutes the placement of funds. Because "assets under management" is a defined legal term

codified in other laws, this terminology as applied to the brokered deposits framework is confusing. Instead, we recommend the term "assets under management" be replaced with the term "assets under administration" or a defined term that is representative of all client assets.

Additionally, we encourage the FDIC to ensure the final rule does not require an application process for affiliated broker dealer sweep deposits. Affiliates are under a common ownership and do not engage in excessive rate deals to attract deposits. Affiliate deposit sweep programs are stable and counter cyclical; they do not have the risk characteristics the brokered deposit rules seek to mitigate. Therefore, banks should not have to obtain application approvals to treat these deposits as core.

III. The FDIC should specify the Advisory Opinions the agency intends to retire and those it intends to preserve. Alternatively, the FDIC should codify all Advisory Opinions and interpretive letters which conclude deposits are not brokered.

Absent a clear line of sight into the future framework, it is difficult to provide meaningful comments about the consequences that could materialize if only some Advisory Opinions are retired. Alternatively, the FDIC should grandfather all existing Advisory Opinions which conclude deposits are not brokered to provide continuity and minimize disruptions to the business models, relationships and investments built in reliance on those opinions. Additionally, our members encourage the FDIC to make publicly available the agency's interpretations of Section 29, and to make the information easily searchable on the FDIC's website by date, topic, and keywords.

IV. Additional clarity is needed to make the primary purpose exception available to third parties whose business purpose is to place funds in transaction accounts to enable transactions or make payments.

CBA believes certain types of deposits placed in transaction accounts to enable transactions or make payments should be expressly codified as core deposits, including those deposits which support prepaid accounts, campus cards, affiliate referrals for non-maturity accounts, deposits of customers of bank subsidiaries, deposits for investment advisor client accounts, affiliate deposit sweep programs, and sweep deposits of unaffiliated broker-dealers that satisfy the requirements of FDIC Advisory Opinion No. 05-02, and certain marketing relationships. While the proposed exception may apply to some of these products, it would be helpful for the FDIC to specifically state in a final rule the types of payment arrangements it intends for this exception to cover to eliminate the need for primary purpose applications to be filed for these arrangements.

Additionally, we believe there may be some unintended consequences that flow from the proposed primary purpose exception, and we encourage the FDIC to provide more specific guidance for how the agency will evaluate products with rewards. Because the FDIC will closely scrutinize whether the "agent or nominee or the depository institution pays any sort of interest, fee, or provides any remuneration" our members are concerned entities that rely on this exception will be discouraged from offering rewards or savings programs that promote consumer wellness. To ensure these programs are not affected, we recommend the FDIC only scrutinize interest or fees that are not market value or minimal interest.

V. The proposed application process may not operate as intended.

The proposed rule would create enormous operational burdens for banks because the application process is not limited to new or novel activities. The high volume of applications required under the proposed process and the associated burdens are exacerbated by the proposal's simultaneous rescission of all Advisory Opinions because banks will have to submit applications for exceptive relief for activities the FDIC has already determined are not brokered. In the proposal's cost-benefit analysis, the FDIC acknowledges the agency "lacks the data necessary to determine the number of business lines for which firms may submit applications, and in the absence of a more refined estimate, assumed that all respondents submit one application." This estimate misses the mark, as many CBA members anticipate submitting at least 20-30 applications while others anticipate submitting upwards of thousands of applications across different business lines and at significant cost expenditure.

While the FDIC anticipates its staff will provide applicants with an agency response within 120 days of receipt of a complete application, the proposal does not account for the time an institution must wait between the date an application is first submitted and the date the FDIC deems the application to be complete. Historically, the FDIC only deems an application to be complete when the FDIC's staff determines that all questions have been answered, thus the time between the date the application is submitted and the date an application is approved can be lengthy. CBA is concerned the overall timeframe for the application process will be well over 120 days for most applications, particularly if the FDIC receives thousands or even hundreds of applications at once.

To avoid potential backlog and to expedite application processing times we recommend the final rule (1) specify an implementation period to provide banks and the FDIC time to adjust to a new set of rules, evaluate any changes to existing Advisory Opinions and manage primary purpose applications in the queue pending review; (2) reserve the primary purpose application process for new or novel products or relationships; (3) grandfather existing Advisory Opinions which conclude deposits are not brokered; and (4) codify specific arrangements the FDIC does not consider to be deposit brokers and which do not require an application to be filed for exceptive relief.

VI. Insured depository institutions should not be required to monitor third parties for eligibility for the primary purpose exception.

Many of the relationships banks have with third parties captured by the primary purpose exception do not trigger heightened bank vendor management requirements and the additional scrutiny of third-party risk management practices. As such, banks are not best positioned to monitor third parties such as homeowners associations for eligibility for the primary purpose exception. If the FDIC provides a third-party with conditional approval of the third-party's primary purpose application, it will be difficult for the bank to then monitor the third-party's compliance with the FDIC's conditions, particularly if the information needed to monitor compliance rests in the hands of the FDIC and the third-party and not the bank. We encourage

the FDIC to develop broad-based exemptions for arrangements that do not require primary purpose applications or ongoing monitoring for primary purpose eligibility.

VII. Conclusion.

The Consumer Bankers Association appreciates the FDIC's efforts to revise the brokered deposits framework. We believe our recommendations will improve the current and proposed brokered deposits framework by streamlining the interpretive process for both the FDIC and the financial services industry, thus improving transparency and reducing operational burden. We welcome the opportunity for further engagement on this topic. Should you have any questions or wish to discuss these comments, please contact Jenna Burke at jburke@consumerbankers.com or (202) 552-6366.

Sincerely,

Jenna Burke
Vice President, Associate General Counsel
Consumer Bankers Association