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April 2, 2020

Submitted via E-Mail at: comments@fdic.gov

Federal Deposit Insurance Corporation
550 17th Street, N.W.
Washington D.C. 20429

Re: Notice of Proposed Rulemaking and Request for Comment
Unsafe and Unsound Banking Practices: Brokered Deposits Restrictions
[RIN 3064-AE94]

To Whom it May Concern:

This letter is submitted to the Federal Deposit Insurance Corporation (the "**FDIC**") on behalf of the Innovative Payments Association ("**IPA**")[1] in response to the FDIC's proposed rule concerning brokered deposits restrictions, which was published in the Federal Register on February 10, 2020 (the "**Proposed Rule**").[2] The Proposed Rule seeks to modernize the deposit broker regulations under the Federal Deposit Insurance Act (the "**FDI Act**") to reflect recent technological changes and innovations that have occurred within the payments industry. The IPA believes modernizing the deposit broker regulations is critical to fostering continued innovation and competition within the financial services industry, particularly in light of the increasingly varied ways in which providers bring financial services products to market.[3] For this reason, the IPA supports the FDIC's efforts in its Proposed Rule. The IPA is concerned, however, that additional changes to the FDIC's Proposed Rule are necessary to fully modernize the brokered deposit regulations in a manner that provides full clarity to industry participants. In particular, and as discussed in detail below, the IPA respectfully requests that the FDIC modify its Proposed Rule to include additional bright-line tests for the application of the primary purpose exception without the need for obtaining approval of the FDIC and, when such approval is necessary, to provide more detail and clarity around the factors and circumstances the FDIC will use to evaluate requests for the application of the exception.

Discussion

[1] The IPA is a trade organization that serves as the leading voice of the electronic payments sector, including prepaid products, mobile wallets, and person-to-person (P2P) technology for consumers, businesses and governments at all levels. The IPA's goal is to encourage efficient use of electronic payments, cultivate financial inclusion through educating and empowering consumers, represent the industry before legislative and regulatory bodies, and provide thought leadership. The comments made in this letter do not necessarily represent the position of all members of the IPA.

[2] 85 Fed. Reg. 7453 – 7472 (February 10, 2020).

[3] The IPA has worked with the FDIC for several years on this issue, including engaging in discussions with FDIC staff and filing several comment letters, which can be found at https://www.fdic.gov/regulations/laws/federal/2019/2019-unsafe-and-unsound-banking-practices-3064-ae94-c-017.pdf.

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The Proposed Rule seeks to define certain aspects of the definition of "deposit broker" under the FDI Act along with the exceptions to that definition. In particular, the Proposed Rule would further clarify the two prongs of the "deposit broker" definition and then amend the statutory exception to this definition that applies where an agent or nominee's *primary purpose* is not to place deposits (the "**Primary Purpose Exception**"). In addition, the Proposed Rule would introduce an application process required for providers seeking to take advantage of the Primary Purpose Exception. While the IPA supports many of the changes proposed by the FDIC, the IPA urges the FDIC to make additional changes to the Primary Purpose Exception and the application process outlined by the FDIC to further modernize and streamline the brokered deposit regulations.

The FDIC Should Amend the Primary Purpose Exception Further to Create a True Bright Line Test to Guide Industry Participants

Brief Summary of the Proposed Rule's Primary Purpose Exception

The FDI Act defines a "deposit broker" in pertinent part as "any person engaged in the business of placing deposits, or facilitating the placement of deposits, of third parties with insured depository institutions or the business of placing deposits with insured depository institutions for the purpose of selling interests in those deposits to third parties."[4] For purposes of much of the electronic payments industry, the most important part of this definition is its application to persons engaged in *facilitating* the placement of deposits, because of the various parties that may be involved in delivering an electronic payment service to an end-user. In recent years, the FDIC has heightened the importance of this aspect of the "deposit broker" definition by applying a broad interpretation to the type of conduct and businesses that the term "facilitating" encompasses. This broad scope is evident in the Proposed Rule, where the FDIC notes that any person that acts as an intermediary between an insured depository institution ("**IDI**") and a deposit placer, other than in a strictly administrative capacity, *facilitates* within the meaning of the "deposit broker" definition. In effect then, according to the FDIC, unless one of the exceptions to the definition of a "deposit broker" applies, any product involving a non-administrative intermediary is inherently brokered.

Given the FDIC's broad interpretation of what conduct constitutes "facilitating" for purposes of the "deposit broker" definition, the application of the enumerated exceptions to the definition under the FDI Act are critical for the purpose of not applying the brokered deposit regulations to products that were never intended to be covered by them. For purposes of this letter, the most important of these enumerated exceptions is the Primary Purpose Exception. This is because, in the case of the electronic payments industry, participants' primary purpose is not the collection of deposits for a depository institution, but rather providing a product that allows for the facilitation of payments to consumers (such as wages and government benefits) or by consumers (such as point of sale transactions, online purchases or ATM withdrawals).

Notably the Proposed Rule addresses the Primary Purpose Exception in detail, providing that the FDIC will apply the exception under the following three circumstances:

[4] 12 U.S.C. § 1831f(g)(1)(A).

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- First, the Proposed Rule states that the Primary Purpose Exception will apply if less than 25% of an agent or nominee's total assets that it has under management for a particular business line are placed at IDIs (the "**25% Test**"). The FDIC notes that where an agent or nominee for a particular business line places 75% or more of the assets at non-banks, then the agent has demonstrated that its primary purpose for that business line is not the placement of deposits. The FDIC notes that the 25% Test is intended to be a transparent, bright-line test for the application of the Primary Purpose Exception.

- Second, the Proposed Rule would also apply the Primary Purpose Exception where an agent or nominee places 100% of its customer funds into transaction accounts at IDIs and no fees, interest, or other remuneration is paid to the depositor (the "**Enabling Transactions Test**"). In such a case, the FDIC believes the agent or nominee's primary purpose is to enable payments as opposed to placing deposits. A provider hoping to qualify for the Enabling Transactions Test would need to first file an application with the FDIC and receive the FDIC's approval to apply the Primary Purpose Exception.

- Finally, the Proposed Rule would also apply the Primary Purpose Exception to other business relationships subject to an application process that would take a number of factors about the product and relationship of the parties into consideration, including the revenue structure and the primary aim of the third party's marketing activities (the "**Other Relationships Test**").

The FDIC Should Modify the Proposed Rule to Include Circumstances under which the Primary Purpose Exception Would Apply Without the Need for an Application

With respect to the Primary Purpose Exception and the tests outlined above, the IPA urges the FDIC to adopt certain modifications that would provide additional clarity to industry providers and further streamline the application of the deposit broker regulations. Specifically, with respect to the Enabling Transactions Test, the IPA does not see the need for an application process where a product or service meets all of the enumerated parts of the test. If a product involves the placement of 100% of funds into transaction accounts that do not pay remuneration to the depositor, the Primary Purpose Exception should apply as a clear and bright-line test without the need for an application to the FDIC.[5] The IPA believes such a bright-line test would benefit all parties by providing industry participants clear parameters to operate in without running afoul of the deposit broker regulations, while ensuring the FDIC is not overburdened with applications to approve programs that already satisfy the agency's requirements. In the description of the 25% Test, the FDIC suggests that a self-certification or a "bright-line test" should be sufficient for a program

[5] While we make several suggestions below for how the FDIC can modify its application process to improve efficiency and transparency for applicants, we note that our members' strong preference is for the establishment of bright-line tests that do not depend on the express approval of the FDIC. Our members note that, until recently, the legal determination of whether a deposit held by a bank was "brokered" was left to the bank and did not require separate approval from the FDIC. We do not believe it makes sense to "modernize" the brokered deposits rule now by adding additional layers of complexity to it. Thus, we ask that the FDIC give careful consideration to the adoption of bright-line tests that do not rely on the approval of an application.

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to avail itself of the Primary Purpose Exception. The IPA respectfully requests that, at a minimum, the FDIC treat the Enabling Transaction Test in a manner that is consistent with the 25% Test in determining who qualifies for the Primary Purpose Exception.

Similarly, we note that it is unclear in the Proposed Rule whether the FDIC expects to receive applications for the Primary Purpose Exception on a program basis or on some other basis, such as by a provider for a specific product construct type that would apply to all of that provider's programs. If the former, the IPA is concerned that such a requirement would be overly burdensome to the FDIC as it would result in the FDIC receiving thousands of applications. This is another reason for the FDIC to clarify that programs meeting the enumerated parts of the Enabling Transactions Test do not need to file an application for approval and / or modify the Final Rule to clarify that applications are not required on a program level, but, instead, can be submitted on a provider basis.

The FDIC Should Modify its Application Process to Include an Objective List of Factors it Will Use to Determine if a Program Qualifies for the Primary Purpose Exception

In addition to the bright-line test described above, the IPA urges the FDIC to provide additional clarity around the factors it would consider in deciding whether or not to approve an application of the Primary Purpose Exception for programs that deviate from the enumerated Enabling Transactions Test – for example, by offering some form of remuneration to a depositor, such as in the form of a customer loyalty rewards program – or that seek to take advantage of the Other Relationships Test. The IPA believes that industry would benefit from additional clarity on what specific factors the FDIC will use and how the FDIC will apply those factors along with specific examples designed to illustrate the FDIC's process and reasoning. Such additional clarity would help to better guide industry participants in their development of programs that conform to the FDIC's expectations and the requirements of the deposit broker regulations. The additional clarity would also benefit the FDIC by decreasing the ambiguities in how and when the tests outlined in the Proposed Rule would apply and thereby increase the speed and efficiency of its application process while at the same time mitigating the risk of seemingly arbitrary or conflicting decisions.

The FDIC Should Clarify that a Depositor for Purposes of the Primary Purpose Exception is the Ultimate Recipient of the Product or Service and User of the Transaction Account

Our understanding is that a "depositor" for purposes of the Primary Purpose Exception, and the enabling test in particular, is intended to mean the ultimate recipient of the product or service or the person conducting transactions from the transaction account. However, to avoid any potential future confusion, such as in the case of a payroll card product where an employer is naturally involved in establishing an account for the payment of wages to its employees, we ask the FDIC to confirm that the "depositor" for purposes of the exception is the ultimate recipient of the financial service or product and the person using the transaction account to make transactions.

The FDIC Should Modify its Application Process to be More Transparent, including Adding an Appeals Process for its Decisions on Applications

Next, the IPA urges the FDIC to make a number of changes in its application process to increase transparency and efficiency. First, in the Proposed Rule the FDIC states that it plans to respond to industry

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submitted Primary Purpose Exception applications within 120 days. The IPA believes that 4 months is too long for the FDIC to respond to such applications particularly if the FDIC, as requested in this letter, provides the concrete factors it will use in making its determinations. With this in mind, the IPA is concerned that the speed at which the FDIC plans to review applications is wholly inconsistent with the rapid pace at which the payments market is currently evolving. Companies who have to wait 4 months will be disadvantaged in the marketplace, which is why the IPA supports both bright-line tests in the case of programs that meet the enumerated tests put forth by the FDIC and an expedited turn around where applications are necessary. For this reason, the IPA proposes that the FDIC streamline its review process from 120 to 45 days. The IPA suggests that the FDIC could stipulate that the 45-day period could be extended to as much as 120-days for more difficult applications provided that notice and an explanation for the extension is provided to the applicant.

Moreover, as noted above, the IPA believes it is critical that the application process instituted by the FDIC be transparent. For this reason, in addition to providing a clear list of factors that the FDIC will consider as part of the application, the IPA requests that the FDIC make its ultimate decision on an application public, provide a written copy of the decision, along with an explanation for why the decision was made, to the applicant, and provide for an appeals process should the application be denied. Lastly, in reviewing applications for the Primary Purpose Exception, in the case of appeals of denied applications, rather than leaving such determinations in the hands of staff, the FDIC should establish independent panels similar to other federal administrative proceedings to review and decide upon appeals of denied Primary Purpose Exception applications. The IPA believes the changes outlined above will benefit the public and industry by creating an impartial, transparent and meaningful process that will give applicants faith that the FDIC will review applications in a fair, efficient, and uniform manner.

The FDIC Should Modify the Proposed Rule to Allow Savings Features Products to Qualify for the Primary Purpose Exception under Certain Circumstances

Finally, the IPA also wishes to express its concerns with the FDIC's treatment of savings products and features as part of the Proposed Rule. In particular, the FDIC states in the Proposed Rule that it would not grant a Primary Purpose Exception if a third party's primary purpose for its business relationship with its customers was to place or assist in placing funds into deposit accounts to "encourage savings," "maximize yield," "provide deposit insurance" or any similar purpose. The IPA is concerned that such a one-size fits all approach to products that try to encourage savings will discourage providers from developing such products and ultimately decrease their prevalence in the marketplace. Implementing a policy that decreases or discourages the offering of savings products in the marketplace would be extremely harmful to consumers, particularly in light of the fact that, according to a recent study by the Board of Governors of the Federal Reserve, 27% of adults would need to borrow or sell something to pay for an unexpected expense of just $400.[6]

The IPA respectfully suggests that, in lieu of the one-size fits all approach taken in the Proposed Rule, the FDIC could consider a framework for such products to operate within without being considered

[6] Board of Governors of the Federal Reserve, Report on the Economic Well-Being of U.S. Households in 2018, May 2019, available at https://www.federalreserve.gov/publications/files/2018-report-economic-well-being-us-households-201905.pdf.

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inherently brokered, such as by limiting the ability to move savings feature balances from one IDI to a successor IDI without going through the Bank Merger Act approval process (or any successor process). The IPA believes such a framework would satisfy the FDIC's interests in ensuring such products do not operate in the manner of "hot money" while not posing significant harm to consumers by potentially eliminating desperately needed savings products and features from the marketplace.

The FDIC should clarify that the Final Rule will Supersede its previously issued FAQs and that the FAQs will be Rescinded

Our previous letters to the FDIC on this issue expressed our members' concern with the treatment of prepaid account products by the FDIC in its advisory documents, including Financial Institution Letters FIL-2-2015, as modified by FIL-51-2015, and FIL-42-2016 (collectively, the "FAQs"). The changes the FDIC is proposing in its Proposed Rule will, as part of the Final Rule, supersede the FAQs. For this reason, we ask the FDIC to rescind the FAQs as part of its Final Rule.

Conclusion

The IPA appreciates the opportunity to submit feedback on the Proposed Rule. If you have any questions, please do not hesitate to contact me at the number listed below or at: btate@ipa.org.

Sincerely,

[redacted]

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