



Robert E. Feldman
Executive Secretary
Federal Deposit Insurance Corporation
550 17th Street, NW
Washington, DC 20429
Attn: Comments RIN 3064–AE94

Delivered via e-mail to comments@fdic.gov

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

Ladies and Gentlemen:

FirstService Residential, the market leader in providing third-party residential property management services, appreciates the opportunity to comment on the Federal Deposit Insurance Corporation's (the "FDIC") proposed changes to its regulations ("Proposed Regulations") regarding brokered deposit restrictions addressed in RIN 3064–AE94. We support the FDIC's rulemaking initiative to review and modernize its regulations governing brokered deposits. We write specifically to address the potential impact of the Proposed Regulations on residential real estate community associations ("Community Associations") and third-party residential property management companies ("Management Companies") that service Community Associations, and request either that the Proposed Regulations, if adopted, (i) exempt qualifying, full-time Management Companies providing services to Community Associations from the definition of "deposit broker", or (ii) provide clarity that Community Association deposits placed by Management Companies will qualify for expedited treatment under the "primary purpose" exemptive application process set forth in the Proposed Regulations.

Community Association Background

According to the Community Association Institute, more than 70 million people live in community associations in the United States. That number is expected to double by 2040.¹ Annually, Community Associations collect \$95.6 billion in community assessments with nearly \$30 billion of that contributed to reserve accounts. Community Association assessments, much like municipal property taxes, are compulsory assessments that are used exclusively to fund

¹ <https://www.caionline.org/AboutCommunityAssociations/Pages/StatisticalInformation.aspx>

essential obligations, including professional management services, utility expenses, insurance, routine maintenance, and capital improvements.²

Definition of a Community Association

A Community Association provides a communal basis for preserving, maintaining, and enhancing homes and property. All Community Associations have three basic, defining characteristics:

- Membership in a Community Association is mandatory and automatic for all homeowners within the community. This is unlike other associations whose membership is voluntary.
- Certain legal documents - e.g. community bylaws – specify the mandatory terms and conditions to be observed by all homeowners that are members of the Community Association, as well as the Community Association itself. These documents require mutual obligations to be performed by the individual homeowner and the community at large, acting through the Community Association.
- Mandatory lien-based economic charges or assessments are levied on each homeowner in order to operate and maintain the Community Association.

Community Association Assessments

All Community Associations have fees (assessments) that must be paid to the association. Depending on the association articles or bylaws, the assessments may be paid monthly, quarterly, or annually. The fees cover costs such as:

- Property Management and accounting services
- Maintenance and janitorial services
- Insurance
- Landscaping and maintenance of common areas (e.g. roofs, hallways, lobbies, etc.)
- Snow removal
- Garbage collection
- Street lighting
- Fees for amenities (pool, tennis court, golf course, exercise room, etc.)
- Social activities

² <https://foundation.caonline.org/wp-content/uploads/2018/06/2017StatsReview.pdf>

- Security and access control

In order to manage their obligations and their finances, Community Associations routinely retain Management Companies to perform or oversee the obligations and functions (executive and day-to-day operational) of the Community Association.

FirstService Residential

FirstService Residential,³ a wholly-owned division of FirstService Corporation,⁴ generates over \$1 billion in annualized revenues with more than 13,000 employees in the United States. FirstService Residential currently holds management contracts with more than 8,000 Community Associations. Communities managed include low, mid, and high-rise condominiums, co-operatives, rental communities; large scale master-planned and active adult communities; and hospitality and other mixed-use properties across the United States (“Clients”).

FirstService Residential Core Services

As a full-time third-party residential property management company, FirstService Residential’s core responsibilities (“Core Services”) to its Clients include the following:

Physical Management

- Review Community Association common areas and facilities to ascertain proper aesthetics, repair needs, and safety
- Rules violation and architectural monitoring
- 24 hour on-call after-hours emergency & non-emergency call/dispatch service
- Oversight and management by a designated property manager

Vendor/Subcontractor Oversight

- Facilitate bid process for any and all community-related contracts
- Specifications and request for proposal (RFP) oversight
- Monitor vendor performance and meet with vendors regarding performance on their specified work
- Insurance tracking for vendors/subcontractors

³ <https://www.fsresidential.com/corporate/about-fsr/overview>

⁴ https://www.firstservice.com/about_us/default.html

Communication

- Hosted website with 24/7/365 access to real-time information for board members and residents
- Use of call center for resident inquiries 24/7 (emergency and non-emergency calls)
- Mass communication via email, robo-call and text

Administration/Advisement

- On-site manager attendance at all board meetings and regional support team to provide support as needed
- On-going manager and team member education (industry specific and soft skill)
- Complete administration and facilitation of agendas and packets for board meetings
- Administration of all association tasks
- Production of executive reports and customized reporting (such as call logs, weekly projects summary, walk-through reports, violations, maintenance statistics, work order status, etc.)
- Committee support and guidance
- New board member orientation training
- Board strategic planning and goal setting and financial forecasting with leadership team
- Record keeping of all documents and files

Legal Compliance

- Coordinate and administer community association's annual meeting
- Civil Code and legal filing compliance
- Legislation monitoring

Staffing & Other Fees

- Payroll for on-site staff
- Managing human resources: compliance with Equal Employment Opportunity Commission (EEOC) guidelines, payroll, reviews, staff training, and hiring

Financial Services

- Internal controls to safeguard Client assets

- Manage accounts receivable
- Accounts payable processing
- Customized financial reporting
- On-line payment options (EFT, ACH, Credit Card)
- Prepare monthly financials
- Compliance with federal, state and local regulatory requirements
- Prepare billing statements/coupons
- Community assessment collection (including delinquencies)
- Reserve analyses
- Annual budgeting

Community Association Banking

The administration of FirstService Residential's Clients' liquid funds that are collected from Client member homeowners and other sources (e.g., insurance proceeds) are used to pay Clients' operating expenses and other obligations. To fulfill its contractual responsibilities, FirstService Residential must open all Client bank accounts at federally insured depository institutions (each an "IDI"). This requirement derives from applicable state and municipal laws and regulations and/or Client articles of membership or condominium that uniformly require Client funds to be maintained only at an insured depository institution (or in infrequent cases, at a U.S. branch or agency of a foreign banking organization). Deposit accounts are opened by FirstService Residential for the accounts of its Clients, but can only be opened with the express consent of the Client. Similarly, deposit accounts can only be closed, or moved to another IDI, with the Client's express consent.

Client deposit accounts fall into two categories: (i) operating accounts established for the maintenance of the community (e.g., landscaping, insurance, labor, utilities, etc.) that FirstService Residential uses to handle daily deposits and withdrawals of Client operating funds ("Operating Accounts"), and (ii) reserve accounts established for specific capital improvement expenditures (e.g., roofs, roads, façade, elevators, etc.) for the holding of Client reserve funds as required by a Client's articles of membership and/or state or local law ("Reserve Accounts"). Operating Accounts generally are established as demand deposit accounts. Seventy-five percent of Reserve Accounts are established as money market accounts with the remainder as short-term bank-issued (i.e. non-brokered) time deposits that typically range from twelve to thirty-six months.⁵ Inasmuch as Reserve Accounts are not used for the payment of routine

⁵ Note that FirstService Residential does not place Client funds in "brokered CDs" as defined in the Proposed Regulations.

Client expenses, the placement of these funds in money market or term deposit accounts better serves the interests of its Clients.

Community Association IDIs

The average Client has significant cash management and banking needs and to satisfy them, FirstService Residential works with a suite of high quality IDIs that have agreed to provide deposit, payment, and related depository services to FirstService Residential on behalf of Clients with deposits at that IDI. IDIs are selected by FirstService Residential based on factors such as geography (consistent with the geographic locations of the Clients), financial condition and stability, willingness to service the Community Association industry, and Community Association industry-specific understanding and technology.

The goal of the IDI program is to match Clients (at their discretion) with top-tier IDIs to maximize the security and yield of their account portfolios. Unlike general businesses or individuals, Management Companies face unique challenges that IDIs are ill-suited or not inclined to overcome. Community Associations are non-profit organizations that are governed by volunteer oversight boards (often with significant annual turnover), and require the expertise of a professional third-party property management company to which they entrust to handle, as agent and custodian, their day-to-day operations including vendor payments and managing the receivables from their constituent homeowners. We also recognize that our Clients want immediate access to their financial assets as well as their monthly financial statements delivered in a timely manner. Our services are delivered by experienced financial personnel, who ensure all records are up-to-date, accurate, and distributed in a timely manner. All processes are segregated and performed by diverse individuals in separate departments with segregated supervision. Each line of a balance sheet is supported by a schedule. Our client accounting team also:

- Conducts a thorough review of financial records
- Implements internal control procedures that provide maximum assurance that financial matters are being handled with full transparency
- Offers multiple payment options to help reduce resident delinquencies and improve cash flow
- Provides online board approval capabilities and access for a speedy collections process
- Delivers timely financial packages prepared following Generally Accepted Accounting Principles (GAAP)
- Works with the board and Finance/Budget Committee to develop annual budget
- Provides CPA access for financial reporting as needed for audits and tax returns

- Contracts with separate third-party accounts payable and receivable systems to provide:
 - 24/7 availability and mobile access—review and approve invoices anytime, anywhere and see real-time payments received
 - Complete transparency throughout the process: tracking of invoices, coding, and approvals
 - Accountability and visibility to budgets so Clients can see how receivables and invoices impact their budgets in real time

Negative Consequences of Treating Management Companies as “Deposit Brokers” and Community Association Deposits as “Brokered Deposits.”

The treatment of Management Companies as “deposit brokers” under the FDIC’s brokered deposit regulations would materially limit the ability of Management Companies to identify and establish the state-mandated and Community Association-mandated banking relationships with eligible IDIs. Such a limitation would result in significant deposit concentration at a handful of IDIs that are large enough to accept brokered deposits en masse and also are equipped to handle the unique qualities of servicing Community Associations. The residential property management industry is a specialized industry that requires IDIs with in-depth industry knowledge, integrated technology solutions, and a commitment to provide dedicated teams focused on specific service requirements. Today, there are a limited number of IDIs that have the combination of size, industry understanding, resources, geographic footprint, fraud expertise,⁶ and desire to support these depository and service relationships; a deposit broker determination would surely reduce the number of qualified IDIs significantly.

In a related vein, the classification of Community Association deposits as “brokered deposits” would make IDIs more reluctant to accept these types of deposits, thereby reducing their value. Community Associations board members, bound by a fiduciary duty to their community homeowners, are conservative investors that rely exclusively on deposit interest for their investment return. While a well-capitalized IDI can accept brokered deposits, a brokered deposit determination would certainly limit that IDI pool, and without any meaningful IDI competition, would most assuredly eliminate the already minimal interest return that Community Associations rely on to fund their day-to-day operations and future community

⁶ Due to the membership structure of Community Associations, every member of a community has a right to review any Community Association record or document, including the Community Association’s bank statements, resulting in heightened fraud exposure. Additionally, due to the volunteer, and more passive, management of Community Association board members, and sheer volume of accounts payable and receivable, the risk for fraud is significantly higher than for an actively managed business.

improvements, placing the burden on the shoulders of homeowners to make up that shortfall via increased community assessments or pursuit of riskier, non-FDIC insured investment opportunities.

In short, a determination that Management Companies are “deposit brokers” and Community Associations’ Operating and Reserve Accounts are “brokered deposits” would have significant adverse consequences, limiting the IDIs that service and protect Community Association deposits, unnecessarily disrupting the residential property management industry that is focused on providing its services to ensure that Community Associations are safe and well-maintained, and putting even more financial burden on the tens of millions of homeowners that live in Community Associations across the United States.

Discussion

Taking into account the foregoing as background, as well as the negative consequences of treating Management Companies as “deposit brokers” under the FDIC’s brokered deposit regulations, our position on the Proposed Regulations is straightforward: Management Companies engaged in providing a full range of real estate-related management services to Community Associations should not be treated as being “engaged in the business” of placing, or facilitating the placement of, deposits for their Community Associations within the meaning of the FDIC’s brokered deposit regulations, and should be excluded from the definition of “deposit broker” under the Proposed Regulations, if they are adopted.

In addition, we believe that, even if Management Companies are not afforded a full exemption from the definition of “deposit broker,” the nature, quality and scope of the depository services provided by Management Companies to Community Associations should qualify for expedited exemptive treatment under the proposed IDI exemptive application process, inasmuch as we believe that the “primary purpose” of Management Company depository relationships with IDIs is not the placement of deposits for Community Associations. Having stated our general position, we address below several of the specific questions posed by the FDIC in connection with the Proposed Regulations.

Question 8: Is it appropriate to interpret the primary purpose of a third party’s business relationship with its customers as not placement of funds if the third-party places less than 25 percent of customer assets under management for its customers, for a particular business line, at depository institutions? Is a bright line test appropriate? If so, is 25 percent an appropriate threshold?

- Applying a bright line test will be very difficult in the case of non-financial service firms such as Management Companies. As discussed above, our primary business purpose is third-party residential property management, namely, the ultimate asset and customer of concern are the residential real estate and the homeowner; the financial services that we provide are only one component of our Core Services. The Proposed Regulations, if adopted, must provide a suitably broad definition of “asset” that is reflective of actual industry practices and business objectives – including a Client’s real estate -- if the FDIC is going to rely on a percentage-based threshold in applying the “primary purpose” exemption. In this regard, we suggest that including a Community Association’s total insurable value – a commonly available metric in the Community Association industry -- in the definition of “assets” would be a suitable calculation metric. By including the value of the real estate that is managed by a Management Company in the “primary purpose” percentage measurement test, we believe that the FDIC would accurately recognize the fact that the deposit assets are only one relatively small piece of the total Community Association assets under management. A similar bright line test we encourage the FDIC to consider, akin to the proposed twenty-five percent rule, for determining the primary purpose of a Management Company’s – or other third party’s - business relationship is the net revenue it receives from the placement of funds as a percentage of the total net revenue that the third party receives from the customer for other services.

Question 9: Should the FDIC specifically provide more clarity regarding what is meant by customer assets under “management” by a broker dealer or third party?

- As we discussed in response to Question 8, if the FDIC insists on applying a bright-line rule, the FDIC should include real estate values (which, as noted above, can be defined using a community association’s total insurable value), as well as considering the ownership structure and discretion that a third party has over the asset. For instance, as previously mentioned, while FirstService Residential has the authority to open and close accounts on behalf of its Clients, its Clients need to approve those decisions before they are executed, resulting in a slow movement of funds – if there is any movement at all -- from one IDI to another; stated otherwise, Clients’ deposit accounts that are managed by FirstService Residential (and other Management Companies) are highly “sticky” deposits. This last factor is highly relevant, taking into account a key legislative and regulatory objective behind the brokered deposit restrictions, namely, to address and manage the risks associated with volatile bank deposits.

Question 10: Is it appropriate to make available the primary purpose exception to third parties whose business purpose is to place funds in transactional accounts to enable transactions or make payments?

- Our primary business purpose is to provide our Core Services to our Client Community Associations, and not to place funds with IDIs. That said, our Client operating funds must be placed in transactional accounts with an IDI, because those funds must be available on demand to satisfy our Clients' financial obligations.

Question 11: Are there particular FDIC staff opinions of general applicability that should or should not be codified as part of the final rule? If so, which ones?

- The availability of the primary purpose exception to bank services arrangements such as Management Company services for Community Associations has not been directly considered by FDIC staff. In at least one recent analogous matter, however, FDIC staff concluded that the primary purpose exception was applicable to homeowner association deposits placed at a bank, provided that any corresponding fees were paid directly to the management companies.⁷ We request that you review this staff opinion and consider it for inclusion as part of the final rule.

Question 12: Has the FDIC provided sufficient clarity regarding what will be considered a "business line"? How can the FDIC provide more clarity? Are there other factors that should be considered in determining an agent's or nominee's business line(s)?

- As discussed earlier in this letter, FirstService Residential's Core Services include a wide range of activities that we must perform on a daily basis on behalf of our Clients. The management and use of Client operating and reserve funds through Client accounts is not the primary purpose of our business but nonetheless it is integral to providing our Core Services. As a third-party non-financial service provider, the term "business line" is insufficiently defined within the context of our specific business. In turn, as the term is

⁷ Letter from FDIC Dallas Regional Office Re: Brokered Deposit Determination (April 30, 2012). Although the nature of the activities reflected in this letter appears very similar to the activities in which FirstService Residential is engaged, material factual information, including the details of the deposit fee and how it was calculated, have been redacted from the publicly-available version of this letter, so we are not in a position to assess or discuss with precision how closely analogous the activities addressed in the letter are to FirstService Residential's activities.

applied to a Management Company, a business line should include all contracted functions that support a Management Company's management of the underlying residential real estate for its Community Association clients.

- In this regard, the full suite of the Management Company's contracted functions (i.e., the Core Services provided by FirstService Residential) should be considered only for those Management Companies that are engaged full-time in providing property management services for Community Associations. Thus, it is reasonable for the FDIC to treat differently a third-party broker-dealer that manages funds for community associations on a limited basis differently than a full-service third-party residential property management company that is paid to manage the entire community, not simply the community association deposit accounts.

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

- See Question 16 below.

Question 15: Is the application process for IDIs that apply on behalf of a third party workable? Are there ways to improve the process for IDIs that apply on behalf of third parties?

- See Question 16 below.

Question 16: Are there additional ways that the FDIC could better ensure that the primary purpose exception is applied consistently, transparently, and in accordance with the statute.

Our collective response to Questions 14-16 is as follows:

- The FDIC should provide a step-by-step application and review process for non-financial service third-party entities – which would include Management Companies -- as well as a means for an applicant third-party provider to request confidential treatment of sensitive information that a third party may need to provide during the review process. And lastly, the FDIC should provide its reasoning to the applicants for all determinations, but in particular for denials.

Question 18: Are there commonly known deposit placement arrangements not mentioned above that are sufficiently simple and straightforward that applications for such arrangements should receive expedited application processing, as described above?

- In 2018, there were over 347,000 Community Associations in the United States, comprised of 26.6 million housing units, with approximately 70 million residents living in these units. In 2018, the estimated real estate value of homes in Community Associations was over \$6 trillion. Furthermore, estimates show that nearly 75% of all new residential housing stock is built in Community Associations.⁸ Given the prevalence of Community Associations in the current housing markets, and the nature and scope of current and future Community Association deposit relationships, it is appropriate for the FDIC to address directly the brokered deposits status of Community Association deposit relationships – for which Management Companies have specific and well-defined contractual and state-law required deposit responsibilities — by providing expedited processing of Management Company exemption requests submitted in the IDI application process, which in turn will allow Management Companies to focus on providing their Core Services without a risk to a disruption in their IDI relationships.

Question 20: Are the criteria for considering and approving primary purpose applications for third parties that seek a primary purpose exception based on placing less than 25 percent of customer assets under management at depository institutions appropriate?

- As stated above, the proposal does not provide enough clarity about how the FDIC will apply the rule to third-party, non-financial service providers such as Management Companies, and how it intends to define “assets,” “management,” or “business line.” In the case of Management Companies that service Community Associations, please refer to our responses to Questions 8, 9 and 12 for our views on the definitions of “assets,” “management” and “business lines.”

Question 22: Are proposed requirements for the application process for business relationships, other than those described in paragraphs (C)(1) and (C)(2) appropriate?

- In the review of an application, the FDIC must consider not only the income associated with deposit account maintenance, but also the expenses that a third party may incur related to carrying out its primary purpose. For example, it is common practice for IDIs

⁸ <https://www.caionline.org/AboutCommunityAssociations/Pages/StatisticalInformation.aspx>

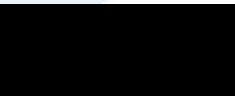
that service Community Associations – in exchange for the payment of a fee - to shift the manual workload of accounting and administrative tasks associated with establishing and maintaining the IDI relationship, as well as the third-party processing expenses to provide vendor invoice processing and payment services, monthly maintenance fee statement production, mailing, and lockbox processing costs, card transactions, all of which are paid for by the Management Company, most of these costs would be borne by the IDI to maintain and service a similar relationship. To fully understand a highly specialized business line like community association banking, the FDIC needs to recognize that IDIs may rely on a third party, like a Management Company, to provide meaningful relationship support and that exchanging a fee for those services allows for efficient and secure banking relationships.

Conclusion

FirstService Residential requests that the FDIC revise the Proposed Regulations, if adopted, to provide that Management Companies, acting on behalf of their Community Associations, meet the statutory definition of an “agent whose primary purpose is not the placement of funds with depository institutions” and either be (i) excluded from the definition of “deposit broker” or (ii) eligible for expedited processing of an exemption request under the forthcoming IDI application process, because the depth, breadth, and quality of a Management Company’s contractual services (e.g., Core Services provided by FirstService Residential) for Community Association clients indicate overwhelmingly that the Management Company’s primary business purpose is maintaining the property and value of homes within a Community Association, not the placement of deposits.

We again express our appreciation for this opportunity to comment on the FDIC’s Proposed Regulations, and to provide what we hope will be useful clarity and direction that our industry companies and homeowner clients desire.

Sincerely,



Andrew Lester
Vice President, FirstService Residential