

July 27, 2015

T 703-292-3400  
F 703-528-5700[www.promnetwork.com](http://www.promnetwork.com)

comments@fdic.gov

Mr. Robert E. Feldman, Executive Secretary  
Attention: Comments  
Federal Deposit Insurance Corporation  
550 17th Street, N.W.  
Washington, D.C. 20429

Re: RIN 3064-AE33

Ladies and Gentlemen:

I am writing on behalf of Promontory Interfinancial Network, LLC (“*Promontory*”)<sup>1</sup> to comment on the Advance Notice of Proposed Rulemaking on Large Bank Deposit Insurance Determination Modernization (the “*ANPR*”).<sup>2</sup>

In the ANPR, the Federal Deposit Insurance Corporation (the “*FDIC*”) requests comment on a variety of matters, including pass-through coverage accounts. The ANPR suggests that “[t]he need to obtain information from the agents or custodians [for pass-through accounts] delays the calculation of deposit insurance by the FDIC, which may result in delayed payments of insured amounts or erroneous overpayment of insurance.”<sup>3</sup>

The ANPR then outlines two possible options for resolving the stated problem:

Option 1: Require banks with a large number of deposit accounts to identify pass-through accounts, and place holds on these accounts as if the full balance were uninsured. If such a bank failed, brokers, agents and custodians would have to submit required information in a standard format within a certain time. The standard format could expedite deposit insurance determinations.

---

<sup>1</sup> Founded in 2002, Promontory provides services to the bank and brokerage industries. Promontory’s deposit-related services include CDARS®, the Certificate of Deposit Account Registry Service® (CDARS®), for time deposits, ICS®, the Insured Cash Sweep® service, for non-time deposits, and IND®, the Insured Network Deposits® service, for automated sweeping of funds to non-time deposit accounts.

<sup>2</sup> Large Bank Deposit Insurance Determination Modernization, Advance Notice of Proposed Rulemaking, 80 Fed. Reg. 23,478 (April 28, 2015).

<sup>3</sup> *Id.* at 23,482.

Option 2: A bank with a large number of deposit accounts would have to maintain up-to-date records sufficient to allow immediate or prompt insurance determinations either for all pass-through accounts or for certain types of pass-through accounts where depositors need access to their funds immediately.<sup>4</sup>

### Introductory Summary

Promontory does not, in principle, disagree with Option 1, most of which Promontory believes reflects current practice, at least for Promontory's services.

Promontory disagrees with Option 2. Even if the FDIC possesses the statutory authority to require that banks holding pass-through deposit accounts maintain current customer information on beneficial owners of the accounts,<sup>5</sup> the FDIC should refrain from imposing such a requirement, for at least four important reasons:

1. The ANPR does not demonstrate the existence of a problem with pass-through accounts that would warrant imposing the significant new regulatory burden of Option 2.
2. Option 2 would needlessly compound the exposure of confidential depositor information to cyberattack and identify theft.
3. Option 2 would force community banks to provide information on their best customers to large banks, potentially giving large banks an unfair competitive advantage.
4. By applying different deposit insurance rules to different banks, Option 2 would risk creating depositor confusion and reducing public confidence in the FDIC.

#### A. Option 1

The first sentence of Option 1 provides for requiring certain banks "to identify pass-through accounts, and place holds on these accounts as if the full balance were uninsured."<sup>6</sup> Under longstanding FDIC regulations, pass-through accounts are identified as such by their titling.<sup>7</sup> In addition, Promontory understands that placing holds on them is existing practice. Accordingly, although the need for a new regulation in this respect is not clear, Promontory does not, in principle, disagree with the first sentence of Option 1.

---

<sup>4</sup> *Id.*

<sup>5</sup> Other commenters have addressed whether the FDIC possesses such statutory authority. For purposes of these comments, Promontory assumes, without agreeing, that it does.

<sup>6</sup> 80 Fed. Reg. at 23,482.

<sup>7</sup> *See* 12 C.F.R. § 330.5.

The second sentence of Option 1 provides that “brokers, agents and custodians would have to submit required information in a standard format within a certain time.”<sup>8</sup> In Promontory’s services, information is already promptly provided to the FDIC in a standard format that has been identified through collaboration with the FDIC. Promontory therefore does not, in principle, disagree with the second sentence of Option 1, so long as the format and the time are reasonable.

B. Option 2

**1. The ANPR does not demonstrate the existence of a problem with pass-through accounts that would warrant imposing the significant new regulatory burden of Option 2.**

Although the pass-through account structure has been successfully used for decades, Option 2 suggests that now, in 2015, the FDIC’s process for payment of pass-through account insurance claims is broken and potentially requires a regulatory fix that would impose large new costs on banks. Promontory disagrees.

In describing the asserted problem, the ANPR states that, “[a]t certain banks with a large number of deposit accounts and large numbers of pass-through accounts, potential delays or erroneous overpayments could be substantial.”<sup>9</sup> If this problem were so serious and widespread as to require the adoption of Option 2, however, the ANPR would not have had to resort to using inherently speculative language – saying that “potential” problems “could be” substantial – rather than citing actual evidence of one.<sup>10</sup>

The actual evidence of which Promontory is aware does not show that any such problem exists. During the more than ten years in which Promontory has offered the CDARS service, participating banks holding CDARS deposits have been the subject of FDIC payouts on six occasions. The payouts typically have occurred within a few business days or less, the only exceptions being delays caused by a snowstorm that closed an FDIC office and a change in FDIC staffing. Even these minor delays have presented no issue, and no overpayments have occurred.<sup>11</sup>

---

<sup>8</sup> 80 Fed. Reg. at 23,482.

<sup>9</sup> *Id.*

<sup>10</sup> If delays or overpayments on pass-through accounts were causing significant problems, one might expect to have seen some mention of the problems somewhere in the news. Promontory performed a search (updated today) of the “All English Language News” database on Lexis-Nexis, with no time limit, on the following terms: (FDIC or Federal Deposit Insurance) w/25 (pass-through w/10 (account or insurance)) w/25 (delay or overpayment). The search produced only three results, each of which consisted of the ANPR itself.

<sup>11</sup> The sub-custodian and recordkeeper in Promontory’s services is The Bank of New York Mellon. If problems have arisen with other services from the use of entities that are not regulated financial institutions, a requirement that regulated institutions be used for such purposes might be appropriate.

**2. Option 2 would needlessly compound the exposure of confidential depositor information to cyberattack and identify theft.**

The FDIC currently permits the required information on pass-through depositors to be maintained by an agent unless and until a bank closing occurs. Through this practice, the FDIC reinforces the safety and security of the depositor information by minimizing the number of entities that have access to it. In contrast, if the FDIC were to require that the agent provide the depositor information to each bank holding pass-through accounts, even though the chance that the information would ever be needed at that bank is slight, the FDIC would compromise the security of the information by needlessly increasing the number of entities from which the information could be obtained through cybercrime.

For example, if a depositor submits \$2 million for placement through CDARS, the depositor's funds are placed in time deposits at nine or more banks. Under Option 2, any of these nine or more banks that was subject to the regulation, and in many cases one or more of its service providers, would receive depositor information for which it had no need, in each case increasing the vulnerability of the information through the unnecessary dissemination. This effect would be all the more pronounced given that the large banks to which Option 2 would apply are among the banks that cybercriminals most intensively target.

“Over the past year, financial sector organizations and other U.S. businesses experienced a host of notable cyber incidents, including large-scale data breaches that compromised financial information.”<sup>12</sup> One recent report, which describes a cybertheft from as many as 100 banks, states that banking has entered “a ‘new era’ of cyber crime where criminals steal directly from banks instead of their customers.”<sup>13</sup> In such an era, unnecessarily *multiplying* the opportunities for cybercriminals to gain access to depositor information would not be sound policy.

**3. Option 2 would force community banks to provide information on their best customers to large banks, potentially giving large banks an unfair competitive advantage.**

The agent that places funds for a depositor is often a community bank, and the depositor for which the community bank places funds is often one of its best relationship customers. The identity of such a customer, and information about the deposit relationship, are among the community bank's crown jewels. The longstanding pass-through rules of the FDIC protect the confidentiality of this information by permitting the records that identify such depositors to be maintained by the community bank or its sub-custodian, such as, for Promontory's services, The Bank of New York Mellon.

---

<sup>12</sup> United States Financial Services Oversight Council, 2015 Annual Report, at p. 105 (2015), <http://www.treasury.gov/initiatives/fsoc/studies-reports/Documents/2015%20FSOC%20Annual%20Report.pdf>.

<sup>13</sup> Kaja Whitehouse, “Hackers steal directly from banks in ‘new era’ of cyber crime,” USA Today (Feb. 16, 2015), <http://www.usatoday.com/story/tech/2015/02/16/bank-hesit-cybersecurity-kaspersky-report/23509937/>.

The ANPR states: “This ANPR does not contemplate imposing [the potential] requirements on community banks.”<sup>14</sup> Far from sparing community banks, however, Option 2 would force a community bank to turn over the names of its best customers to any large bank at which a portion of the customer’s funds might be placed.<sup>15</sup> In contrast, a large bank would *not* have to turn over the identities of its customers to community banks at which the funds of the large bank’s customers might be placed. This one-way flow of information would give large banks an unfair competitive advantage that cannot have been intended and should not be conferred.

**4. By applying different deposit insurance rules to different banks, Option 2 would risk creating depositor confusion and reducing public confidence in the FDIC.**

The statement in the ANPR that it does not contemplate imposing the potential requirements on community banks means that Option 2 would create different insurance coverage rules for accounts at different banks. Setting such a precedent would be unwise.

Since the creation of the FDIC in 1933, a hallmark of the U.S. deposit insurance system has been the certainty and clarity that the public can rely on for the safety of deposits placed at FDIC-insured banks. A key element of that certainty and clarity has been the application of uniform deposit insurance coverage rules to all FDIC-insured banks. Depositors have confidence that the FDIC coverage they receive at one bank will be the same at other banks. If the FDIC were to adopt Option 2, this uniformity – and the confidence that goes with it – would be lost.

Moreover, effectively bifurcating the deposit insurance rules in this way would change FDIC insurance from a constant to a variable. That is a path away from, not toward, the goal of public confidence that stands at the center of the FDIC’s mission.

\* \* \*

---

<sup>14</sup> 80 Fed. Reg. at 23,478.

<sup>15</sup> It might be suggested that the community bank could seek a contractual commitment from the large bank not to use the information to solicit the customers. Such a suggestion would be similar to asking Microsoft to release all the source code for its software on the strength of a promise not to use it. As a practical matter, community banks would be unlikely to have confidence that the information on their best customers, once provided to their largest competitors, would be effectively protected or that the protection could be effectively enforced.

Thank you for consideration of our comments. Should you wish to discuss them further, please contact the undersigned at (703) 292-3333 (mjacobsen@promnetwork.com).

Sincerely,



Mark P. Jacobsen  
President and Chief Executive Officer