

# SEWARD & KISSEL LLP

901 K STREET, NW  
WASHINGTON, DC 20001

TELEPHONE: (202) 737-8833  
FACSIMILE: (202) 737-5184  
WWW.SEWKIS.COM

PAUL T. CLARK  
PARTNER  
clark@sewkis.com

ONE BATTERY PARK PLAZA  
NEW YORK, NEW YORK 10004  
TELEPHONE: (212) 574-1200  
FACSIMILE: (212) 480-8421

CALL REPORTS  
COT 25139 01/2018  
EXECUTIVE SECRETARY

October 26, 2018

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

Re: **FDIC RIN 3064-AE89**  
*Limited Exception for a Capped Amount of Reciprocal Deposits from Treatment as Brokered Deposits*

Ladies and Gentlemen:

We are writing in response to the request of the Federal Deposit Insurance Corporation ("FDIC") for comment on a Notice of Proposed Rulemaking concerning a Limited Exception for a Capped Amount of Reciprocal Deposits from Treatment as Brokered Deposits (the "NPR").<sup>1</sup> We appreciate the opportunity to provide comments on the NPR on behalf of our clients.

Seward & Kissel represents a wide range of participants in the deposit markets, including broker-dealers, banks, and service providers. Our clients underwrite and issue certificates of deposit ("CDs") and offer, support, and participate in "Deposit Sweep Programs" in which broker-dealers deposit free credit balances from their customers' securities accounts into deposit accounts at insured depository institutions. Collectively, such deposit arrangements total in excess of \$1.5 trillion, or approximately 12.4% of all domestic deposits.<sup>2</sup>

---

<sup>1</sup> Limited Exception for a Capped Amount of Reciprocal Deposits from Treatment as Brokered Deposits, Notice of Proposed Rulemaking, 83 Fed. Reg. 48,562 (Sept. 26, 2018).

<sup>2</sup> Data are derived from brokered deposits reported on Call Reports (\$969 billion as of December 31, 2017) and an estimate of broker-dealer "sweep" program deposits not reported by the banks as brokered pursuant to the "primary purpose" exception from the definition of "deposit broker" in FDIC regulations. This estimate is conservative. The amount of exempt sweep deposits is not readily available and we have assumed an amount at the low end of the estimate (\$500-600 billion). Further, the amount of reported brokered deposits attributable to stored value card deposits, deposits referred from affiliates and other sources deemed "brokered" is not available.

The FDIC is seeking comment on issues, and responses to questions, related to implementing changes to Section 29 of the Federal Deposit Insurance Act (“FDIA”) made by Section 202 of the Economic Growth, Regulatory Relief, and Consumer Protection Act concerning reciprocal deposits, which took effect on May 24, 2018. This letter addresses the need for additional clarification of the definition of “covered deposit” contained in proposed 12 CFR 337.6(e)(2)(ii).

In particular, we request that the FDIC clarify in the preamble or commentary to the final rule that when a broker-dealer (1) places funds into deposit accounts at an affiliated bank as agent for the broker-dealer’s customers pursuant to the “primary purpose exception”<sup>3</sup> and (2) authorizes the bank to place a portion of those deposits through a “deposit placement network,” those deposits are covered deposits and thus eligible for the limited exception in proposed 12 CFR 337.6(e)(1).

The definition of “covered deposit” in proposed 12 CFR 337.6(e)(2)(ii) excludes deposits that originated as “brokered” deposits. In the case of Deposit Sweep Programs, deposits placed by many broker-dealers with affiliated banks are not placed by a deposit broker because the “primary purpose exception” applies.

The primary purpose exception applies when an institution places funds with a bank for a substantial purpose other than to obtain deposit insurance for a customer or to provide the customer with a deposit-placement service. In the context of Deposit Sweep Programs, the FDIC has held that the primary purpose of depositing free credit balances in customers’ securities accounts into deposit accounts at insured depository institutions is to facilitate the purchase and sale of securities (and other investment assets) and to allow customers to earn a return on their cash balances pending future investment in longer-term investment products.

In such cases, many banks participating in Deposit Sweep Programs have obtained letters from the FDIC confirming that such deposits – provided certain conditions are met – are not brokered (the “Exception Letters”). The Exception Letters do not address the ramifications of a bank placing deposits received pursuant to the exception into deposit accounts at other banks through a “deposit placement network” as defined in the NPR.

In our view, the subsequent placement by a “network member bank” of such deposits with other banks in the deposit placement network should not affect the characterization of such deposits as non-brokered. If the initial deposits are eligible for the primary purpose exception, the bank accepting the initial deposits has obtained an Exception Letter and the bank and affiliated broker-dealer are in compliance with the terms of the Exception Letter. There is no reason why these deposits should not be considered covered deposits and the bank should not then be able to submit the deposits to a deposit placement network.

Customers establish brokerage accounts with broker-dealers for the purpose of obtaining investment advice and guidance, and to purchase and sell securities and other

---

<sup>3</sup> 12 CFR 337.6(a)(5)(ii)(1).

Robert E. Feldman

October 26, 2018

Page 3

investment assets. The further placement of such deposits with other banks pursuant to a reciprocal arrangement does not change this fundamental relationship. These deposits are still readily available to the broker-dealer customers for the purpose of investing in longer-term investment products.

We believe that proposed 12 CFR 337.6(e)(2)(ii) as written contemplates that such deposits placed through a Deposit Sweep Program would be covered deposits and eligible for the limited exception in proposed 12 CFR 337.6(e)(1). Nonetheless, given the size and prominence of the Deposit Sweep Program market, we believe that participants would be well served if the FDIC expressly clarified its position on such deposits in the context of the limited exception. We are concerned that without an express clarification, commercial relationships could be unnecessarily hampered because of counterparty friction during negotiation and contract execution.

Accordingly, we request that the FDIC clarify in either the preamble or commentary to the final rule that such deposits placed at network member banks would continue to qualify for the primary purpose exception and eligible for the exception in proposed 12 CFR 337.6(e)(1). As a corollary, we request clarification that the placement of such deposits with network member banks does not disqualify the deposits *retained* by the participating bank from treatment as non-brokered pursuant to the primary purpose exception.

We would be pleased to discuss with the FDIC staff any of the views set forth in this letter.

Very truly yours,

A solid black rectangular redaction box covering the signature of Paul T. Clark.

Paul T. Clark