



June 3, 2020

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

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

Dear Mr. Feldman:

The California Bankers Association (“CBA”) writes this letter on behalf of the FDIC-insured depository financial institutions doing business in the state of California. CBA, established in 1891, is a division of Western Bankers Association, a professional non-profit organization for banks doing business in thirteen western states and three U.S. territories. CBA frequently provides comments to regulatory proposals by the federal banking agencies.

We appreciate the opportunity to provide comments on the proposed revisions to the Brokered Deposits Restrictions regulation promulgated by the Federal Deposit Insurance Corporation (FDIC), which were first enacted as part of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989.

We support the work of the FDIC to advance this proposal which seeks to modernize its brokered deposit regulations to reflect recent technological changes and innovations that have occurred and recognize that the definition of deposit broker may not be as relevant compared to the deposit placement arrangements that exist in the market today.

This letter addresses concerns we have with the proposal (hereinafter the Proposal) under the Unsafe and Unsound Banking Practices: Brokered Deposits Restrictions regulations, (12 CFR Parts 303 and 337), which creates a new framework for analyzing certain provisions of the “deposit broker” definition, including “facilitating” and “primary purpose”, and establishes an application and reporting process with respect to the primary purpose exception. While we are generally supportive of the efforts to modernize these regulations, we do believe that some aspects of the proposal should be clarified to avoid ambiguity and unintended consequences.

As drafted, the proposal primarily (1) defines certain prongs of the deposit broker definition, including whether a person is engaged in the business of placing deposits or facilitating the

placement of deposits, and (2) amends two exceptions to the deposit broker definition including the insured depository institution (IDI) exception that does not consider an IDI to be a deposit broker when it (or its employees) places funds at a bank, and the primary purpose exception, which provides an exception to the definition of a deposit broker if an agent or nominee's primary purpose is something other than the placement of funds with the depository institution.

Deposit Broker Definition

CBA appreciates the efforts by the FDIC to amend the definition of deposit broker to reflect deposit placement arrangements that exist today. The proposal sets forth several definitions of a deposit broker as a person who (1) is engaged in the business of placing deposits of third parties with IDIs, (2) is engaged in the business of facilitating the placement of deposits of third-parties with IDIs, (3) is engaged in the business of placing deposits with IDIs for the purpose of selling interests in those deposits to third-parties, or (4) is an agent or trustee who establishes a deposit account to facilitate a business arrangement with IDIs to use the proceeds of the account to fund a prearranged loan.

A. Engaged in the Business of Placing Deposits

In the first point of the deposit broker definition provided above is a description of a person who is "engaged in the business of placing deposits". While the Proposal preamble mentions that a person would be viewed to be engaged in the business of placing deposits if that person has a business relationship with its customers and as part of that relationship places deposits on behalf of the customer, it is not entirely clear what this would encompass. We are concerned that all entities that place deposits, even those that have little to no discretion in placing deposits, will fit this definition. As such, we believe that further clarity of the deposit broker definition is needed to define what "engaged in the business of placing deposits" is, what entities in this context will be considered deposit brokers, and that those entities that utilize little to no discretion in the placement of deposits be excluded from the definition altogether.

B. Facilitation of Deposits

CBA recognizes the value in the refining of the activities that result in a person being "engaged in the business of facilitating the placement of third-party deposits at an IDI", the second point in the deposit broker definition set forth above. However, we are concerned that as presently drafted, the proposal's language is vague and ambiguous and will inadvertently result in more activities being considered brokered. The proposal outlines four factors that, if any are met, would determine if a person is engaging in facilitating the placement of deposits.

The first factor provides that a person will meet the facilitation prong if the person directly or indirectly shares any third-party information with the IDI. This factor is troubling in that the language is too broad and several activities community banks take part in during the normal course of business will now be in danger of being considered brokered deposits. For example, a community bank may have several relationships with third-party vendors where information is shared. Due to their size, these smaller banks often do not have the same resources as larger

banks and instead rely on third-party vendors to provide information that helps them to deliver services such as marketing and data processing. Simply providing information to an IDI does not constitute influence or control over a deposit account and as such should not be considered as facilitating the placement of deposits.

The second factor stipulates the person has legal authority, contractual or otherwise, to close the account or move the third party's funds to another IDI. We believe it is appropriate that the language focus on the person who has control over the account to determine whether the person is engaging in the facilitation of deposits.

The third factor states the person provides assistance or is involved in setting rates, fees, terms, or conditions for the deposit account. Determining what "providing assistance" means is difficult to ascertain. It would be helpful if specific examples were referenced that would provide a clear and unambiguous meaning to this factor.

The fourth factor specifies that 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 IDI, other than in a purely administrative capacity. The terms "indirectly" and "acting as an intermediary" are vague and should be more clearly defined. In addition, it would be helpful if examples of the type of activity envisioned by this factor were included.

Bank Operating Subsidiaries and the IDI Exception

CBA applauds the FDIC's efforts to extend the IDI Exception to wholly owned subsidiaries. We believe the exception should extend to employees of a wholly owned subsidiary as well. In addition, the exception should apply to all customers of a bank, not just those who are retail customers.

Transition Period

CBA urges the FDIC to implement a reasonable transition period for community banks to continue to rely on past staff opinions determining that activities have met the primary purpose exemption to the broker deposit definition. In the summary section of the proposal, the FDIC indicates that as part of the rulemaking process, they intend to evaluate existing staff opinions to identify those that are no longer relevant or applicable based on any revisions made to the brokered deposit regulations. In addition, the FDIC plans as part of any final rule to codify staff opinions of general applicability that continue to be relevant and applicable, and to rescind any staff opinions that are superseded, obsolete or no longer relevant or applicable. As it is difficult to ascertain which staff opinions will be deemed relevant versus those that will be considered obsolete or no longer applicable, we suggest that all staff opinions that have granted a deposit broker exemption continue to be honored and that a transition period be established that would commence from the time the comment period has ended and extend for three years after the rule has been finalized. This will ensure that our community banks will still be able to rely upon past opinions and comply in a timely manner with any additional changes.

In closing, CBA appreciates the effort to modernize the brokered deposit restrictions and looks forward to continued work with the FDIC on this significant issue.

Sincerely,

CALIFORNIA BANKERS ASSOCIATION

By:



Mike Webb
Vice President, Assistant General Counsel