



June 5, 2020

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

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

Mr. Feldman,

MidFirst Bank appreciates the opportunity to submit this comment letter in response to the Federal Deposit Insurance Corporation's (FDIC) Notice of Proposed Rulemaking (NPR)¹ on brokered deposits. In the NPR, the FDIC has proposed to create a new framework for analyzing whether an entity is considered a deposit broker and to establish an application and reporting process by which entities who are considered deposit brokers can seek to qualify for the primary purpose exception, one of the statutory exceptions to the term 'deposit broker'.

The FDIC's stated goals in issuing the NPR are to "modernize its brokered deposit regulations to reflect recent technological changes and innovations that have occurred"² and "expand the number of entities that meet the [primary purpose] exception."³ As such, the rulemaking presents an ideal setting for the FDIC to clarify that certain marketing relationships – for example, a partnership between a bank and a university to provide university-branded debit cards to students and alumni – do not result in brokered deposits. Such a clarification would be consistent with the fact that deposits resulting from university marketing partnerships are not the type of 'hot money' deposits Congress intended to limit when it enacted Section 29 of the Federal Deposit Insurance Act in 1989.

This letter provides background on these relationships between banks and universities, explains changes to the NPR's "facilitation" prong that would prevent universities from being inappropriately treated as deposit brokers, and discusses why, in the alternative, universities involved in such partnerships should be treated as having a primary purpose other than placing funds with insured depository institutions.

¹ NPR published at 85 FR 7453 and comment deadline extended at 85 FR 19706.

² 85 FR 7453.

³ 85 FR 7453, 7459.

I. UNIVERSITY PARTNERSHIPS HELP PROMOTE ACCESS TO BANKING SERVICES AND RESULT IN A STABLE SOURCE OF DEPOSITS

One example of deposits that have been improperly classified as brokered are deposits originating from a university banking program. A university may contract with a bank to provide banking services and financial education to students, faculty, staff and alumni who may be interested in certain university-branded banking products and services. One of the banking services is a student ID card with payment functionality that is an option available to students, faculty, and staff to use for identification purposes, to access campus buildings and to function as a debit card. Similarly, alumni have the option to obtain university branded debit cards.

The university may connect students and alumni with a bank but the university is not involved with, nor does it have any control over, whether a student or alumnus opens an account with the bank. All marketing is performed by the bank directly to students or alumni. The university may provide contact information to permit the bank to market to alumni or for administrative purposes of tracking which students chose the student ID with payment functionality, but it is the student or alumnus choosing whether to open an account and if so, does so directly with the bank.

For students who choose the student ID card with payment functionality, this may be their first bank account and first entry into the banking system. It allows students to learn how to manage money and more often than not leads to long term relationships with a bank after graduation. MidFirst retains a significant portion of these accounts after students graduate. In connecting students or alumni with a bank, a university is not providing deposit placement services or seeking to obtain deposit insurance. The university is not engaged in selecting the deposit account type, interest rate, or maturity. The university is not recommending any deposit account to be opened by the student, faculty, or alumnus and is not an intermediary between the bank and the consumer during the account opening process. In fact, the university has no direct knowledge of whether alumni open an account and only knows about accounts associated with student ID cards so the university can issue standard student ID cards to those students who do not choose the student ID with payment functionality. The accounts do not represent ‘hot money’ but rather long-term and stable deposits typically maintained during four years of college and beyond.

The regulations should be written to encourage, rather than discourage, these partnerships, which introduce students to banking products and services, and encourage long-term banking relationships. Though the proposed revisions to the FDIC’s brokered deposit rules appear intended to narrow the types of arrangements that are treated as brokered, particularly those that create access to banking services by the unbanked or underbanked such as college students, its new definition of “facilitating placement of deposits” would have the opposite effect in this case. As the FDIC states in the proposed rule, “[u]nbanked or underbanked customers . . . may benefit from increased ease of access to deposit

placement services because banks would be more willing to accept deposits that would be no longer considered brokered under the proposal.”⁴

Designating university accounts as brokered deposits also ignores the initial catalyst for adopting the brokered deposit statute and regulation – to prevent higher-risk institutions from raising noncore interest rate-sensitive deposits by offering ever increasing deposit interest rates in times of financial difficulty and in turn increasing the possibility of institution failure. University accounts are checking accounts tied to a bankable student ID card and therefore are rate inelastic. This is particularly true for transactional accounts that offer little or no interest rate benefit to the consumer. Yet more practically, to conclude that university accounts are brokered and therefore interest rate-sensitive, one must envision that university-related deposit customers will en masse move accounts to other institutions based solely on rate. That seems highly unlikely, especially for relationships for which a bank branch is near the university or for which students would lose the functionality of a single combined student ID and debit card if they moved their deposits elsewhere.

II. FACILITATING PLACEMENT OF DEPOSITS

A. Intent Behind New Definition

In the preamble to the proposed rule, the FDIC states that the new “facilitation” definition is “intended to capture activities that indicate that the person takes an active role in the opening of an account or maintains a level of influence or control over the deposit account event after the account is open.”⁵ Control over the account indicates the relationship is between the depositor and the person rather than the depositor and the bank. Where there is no control, then “the needs of the depositor are the primary drivers of the selection of the bank.”⁶ As Chairwoman McWilliams stated in a speech for the Brookings Institute before the NPR was issued, “the proposal will clarify that various types of existing partnerships in which a consumer maintains a direct relationship with a bank will not be considered brokered.”⁷

The FDIC identifies four activities that will constitute ‘facilitating’ placement of deposits. A person engaged in any one of the four activities will be considered a ‘deposit broker’. While the second and third activity are tied to account opening or subsequent control over an account, the first activity – “The person directly or indirectly shares any third party information with the IDI” – is not tied to an account at all and is so broad it will encompass most third party relationships with a bank.⁸

⁴ 85 FR 7435, 7464.

⁵ 85 FR 7435, 7457.

⁶ Id.

⁷ “Brokered Deposits in the Fintech Age”, Keynote Remarks by Jelena McWilliams, Chairman FDIC, Brookings Institution, Washington DC (December 11, 2019)

⁸ The fourth activity concerns a person acting as an intermediary between a third party placing deposits between an entity placing deposits and a bank, other than in a purely administrative capacity.

B. Information Sharing Activity is Overly Broad

The proposed information sharing activity would cover *any* sharing of third-party information between the person and a bank, regardless of purpose. Today's marketing relationships may involve a variety of exchanges of information for administrative purposes, informational purposes or marketing facilitation purposes. The sharing of information may connect customers with a bank, but merely connecting customers does not mean the marketing partner is exercising control or influence over whether an account is opened. The mere fact a person connects a customer to a bank should not be determinative, especially where the customer is the party opening the account directly with the bank.

Using the university partnership as an example, the information sharing that occurs involves administrative or marketing functions that should not be considered 'facilitating placement of deposits.' In the case of the student ID cards, bank employees attend freshman orientation and explain the two student ID options and how the ID with payment functionality is connected to a deposit account the student opens directly with the bank. The university provides the bank with a list of students attending orientation so the bank can notate which students chose the student ID option with payment functionality. This list of names is not provided to facilitate opening accounts but rather purely for administrative purposes so that the university can issue standard ID cards to those students who did not choose the ID card with payment functionality. Under the proposal as written, the university's act of providing a list of student names for administrative purposes would qualify as the sharing of information with the bank, and as a result, the university would be considered to be 'facilitating placement of deposits.' If, on the other hand, the bank created a list of students who attended orientation and provided that list to the university, the information sharing prong would not be triggered.

Similarly, the university may provide name and contact information for alumni to the bank for purposes of mailing marketing materials about the co-branded debit cards and other banking services directly to alumni. The university has no involvement or knowledge of whether an alumnus chooses to open an account tied to the debit card. The list and the information on the list are not used to open or even facilitate opening accounts; they simply allow the bank to send marketing materials about available products and services to alumni. Yet under the proposal, this simple act of providing contact information to the bank would be considered facilitation on the university's part. Ironically, if the university sent the marketing materials to alumni directly, the information sharing prong would not be triggered.

Simply providing a list of names and contact information should not trigger the facilitation prong of deposit broker. This information is not used to open an account or transact on an account. Rather, the student or alumnus makes the decision to open an account and provides additional information to the bank directly in order to open an account. The needs of the depositor, not the university, are the 'primary drivers' of the selection of a student ID with payment functionality or an alumni debit card.

C. Information Sharing Activity Should Be Eliminated or Limited in Scope

The sharing of third-party information with a bank is not an appropriate factor in assessing whether a person is facilitating placement of deposits. It is too broad to be useful and, as the above examples demonstrate, is not reflective of the person having any control over an account. However, if the FDIC believes that some level of information sharing triggers facilitation of placement of deposits, it should be appropriately limited to situations where the information provided is both necessary and sufficient to fulfill account opening. Basic contact information provided for administrative or marketing purposes should not qualify. The FDIC should revise the first activity that will trigger the facilitation prong to state:

“The person directly or indirectly shares any third party information (other than name and contact information for a specific class of potential depositors) with the IDI;”

III. PRIMARY PURPOSE EXCEPTION

A. Proposal

In the NPR, the FDIC states that the primary purposes exception test would be clarified by introducing three new tests for determining whether an entity meets the primary purpose exception:

1. If the entity places less than 25% of the total assets that it has under a particular business line at an IDI;
2. If the entity places depositors’ funds into transactional accounts at an IDI in order to enable payments and no fees, interest, or other remuneration is provided to the depositor in connection with such placement; or
3. For an entity that does not meet either of the prongs described above, an entity can apply to the FDIC to rely on the primary purpose exception based on facts and circumstances (and the NPR lists some of the relevant factors to be considered by the FDIC).

Entities that fall within the first two prongs would be presumed to qualify for the primary purpose exception whereas all other entities will have to establish eligibility. Any entity seeking to rely on the primary purpose exception under *any* of the three prongs would have to submit an application to the FDIC and the FDIC would provide a written determination within 120 days of receipt of a complete application.

B. The List of Entities Presumed to be Eligible for Primary Purpose Exception is Too Limited

As stated above, MidFirst urges the FDIC to revise what qualifies as ‘facilitating placement of deposits’ so that a marketing partner with a bank such as a university is not considered a deposit broker where the university has no input or control over accounts opened by students or alumni. Accounts opened by students and alumni are stable relationship accounts that do not possess characteristics of brokered deposits and should not be considered as such.

If the FDIC declines to modify the information sharing factor for facilitation then most, if not all, marketing partners with a bank will continue to be considered deposit brokers. This will in turn result in these entities or their bank partners being required to qualify under the primary purpose exception. Inserting an application process for relationships that inherently should qualify under the primary purpose exception is not only unduly burdensome for the FDIC, it will ultimately stifle innovation in the industry.

The proposal specifically states that, in assessing an entity's primary business purpose, the FDIC will focus on the primary purpose of the entity's business relationship with its customers and if that primary purpose is not placement of funds with a bank, the entity will qualify for the primary purpose exception. Yet the proposal only identifies two relationships that are presumed to qualify for the exception. While other entities can apply for the exception, there are several business relationships beyond the two the FDIC identifies that should automatically qualify for the exception upon presentation of a simple application.

C. Establish a Marketing/Affinity Relationship Exception

The FDIC should include marketing/affinity arrangements as a relationship that is presumed to qualify for the primary purpose exception.⁹ In these instances, the deposit accounts are opened directly by individuals who are informed of the bank's products and services by or with the assistance of an organization that has a separate commercial relationship with the bank, but the organization has no control over the decision to open an account, nor does it have influence over the movement of funds, including account closure. A university banking program is an example of such a relationship.

The primary business purpose between a university and its students is higher education. The university is not entering into a marketing arrangement with a bank to place deposits or obtain deposit insurance but rather to provide convenient retail banking services generally to its students, alumni and staff. The university has no control over whether an account is opened, the type of account or what happens with the account thereafter. The success or failure of the marketing/affinity relationship by whichever metric that might be selected would not produce a decision by the university to cease the provision of educational services. As a result, no nexus exists to support the claim that the university's primary purpose is facilitating the placement of deposits. If the FDIC truly focuses on the business relationship between the third party and its customers as it states it intends to do, there is no question that the primary business purpose of a university that partners with a bank to offer banking services to students, faculty, staff and alumni, is not the placement of funds with a bank.

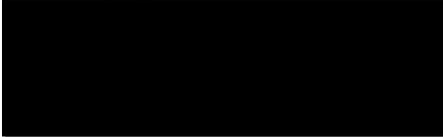
IV. Conclusion

MidFirst Bank appreciates and supports the FDIC's efforts to modernize its brokered deposit regulations. To implement the FDIC's stated intent, the proposal should be revised

⁹ Though dated, FDIC previously found that deposits originating from affinity relationships are not brokered. See FDIC Advisory Opinion 93-30 (June 15, 1993).

to narrow the types of entities that qualify as facilitating placement of deposits to exclude a university that enters into a marketing relationship with a bank, whether that be through narrowing the facilitation definition or expanding the primary purpose exception's coverage. If you have any questions or requests for additional information, please contact the undersigned at 405 767-7322.

MidFirst Bank



Charles R. Lee
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