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VIA ELECTRONIC MAIL (BrokeredDepositFAQs@fdic.gov)

Ms. Doreen R. Eberley
Director, Division of Risk Management Supervision
Federal Deposit Insurance Corporation
550 17th Street, NW
Washington, DC 20429

Re: Financial Institutions Letter 51-2015 (November 13, 2015)
Comments to Revised Brokered Deposit FAQs

Dear Director Eberley:

TIAA-CREF appreciates the opportunity to provide comments to the Federal Deposit Insurance Corporation (the "FDIC") regarding the FDIC's revised Frequently Asked Questions Regarding Identifying, Accepting, and Reporting Brokered Deposits, which, along with an updated introductory letter, were issued by the FDIC on November 13, 2015 as Financial Institutions Letter 51-2015 (collectively, the "Revised FAQs").[1] TIAA-CREF is concerned that the Revised FAQs continue a trend of expanding the definition of brokered deposits and applying that overbroad definition in a manner inconsistent with both the purpose of Section 29 of the Federal Deposit Insurance Act ("Section 29")[2] and other changes made to federal statutes since the enactment of Section 29 in 1989.

In particular, pursuant to Section 1506 of the Dodd-Frank Wall Street Reform and Consumer Protection Act (the "DFA"), Congress required the FDIC to conduct a study on core deposits and brokered deposits.[3] One of the mandates of the study was to "evaluate the potential impact on the Deposit Insurance Fund of revising the definitions of brokered deposits and core deposits to better distinguish between them."[4] After recommending that Congress not amend or repeal the brokered deposit statute, the final report associated with this study[5] (the "Study") stated that "[d]espite technological change and other deposit gathering innovations, the FDIC has found that, for supervisory and assessment purposes, the statute is sufficiently flexible to allow the FDIC to treat deposits, including new forms of brokered deposits, appropriately."[6] We believe that the FDIC has not used this flexibility to recognize that certain of the types of deposits being swept up in its current regulatory interpretations do not possess

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[1] FDIC Financial Institutions Letter 51-2015 (November 13, 2015), *FDIC Seeking Comment on Frequently Asked Questions Regarding Identifying, Accepting, and Reporting Brokered Deposits*, available at: www.fdic.gov/news/news/financial/2015/fil15051a.pdf.
[2] 12 U.S.C. § 1831f.
[3] *See* the DFA, § 1506(a)(3).
[4] *Id.*
[5] *Study on Core Deposits and Brokered Deposits* (July 8, 2011), available at: www.fdic.gov/regulations/reform/coredeposit-study.pdf.
[6] The Study at p. 3.

the characteristics of "brokered" deposits that concerned Congress when adopting Section 29. We urge the FDIC to re-examine several of its increasingly dated positions regarding the facts and circumstances that give rise to a brokered deposit to bring them better into alignment with the ultimate purpose of Section 29 — preventing weakened depository institutions from trying to grow their way out of trouble through the use of high rate, volatile funding.

We find the analytic framework the FDIC laid out in the Study helpful in analyzing whether a deposit should be treated as brokered. The Study identified the three potential problems posed by depository institutions utilizing brokered deposits as: (1) rapid, risky growth, (2) deposit volatility and (3) lower franchise value.[7] The Study then identified five characteristics that the FDIC believes are indicative of deposits that raise these problems: (1) high interest rates, (2) easy to obtain in large quantities, (3) no relationship with the institution (or its affiliate), (4) uninsured and (5) short term to maturity.[8] We believe that the FDIC needs to re-examine its existing interpretations in light of these principles.

Specifically, TIAA-CREF believes it is time that the FDIC directly address how, over time, a non-maturity deposit originally sourced through a referral, absent further involvement by the deposit broker, will become a core deposit. Likewise, the FDIC should re-examine the treatment of affiliate referrals in light of the significant regulatory changes imposed on banking organizations over the past quarter century and the significant franchise value created by the resulting deposits in a world where the source of strength doctrine has been codified and the FDIC's liquidation authority has expanded beyond the insured depository institution to include its affiliates.

I. TIAA-CREF Background

Teachers Insurance and Annuity Association of America ("TIAA") is a New York-domiciled life insurance company founded in 1918, which, by virtue of its ownership of TIAA-CREF Trust Company, FSB ("TIAA-FSB"), is subject to regulation by the Board of Governors of the Federal Reserve System (the "Federal Reserve") as a savings and loan holding company. TIAA, its subsidiaries, and its companion organization, the College Retirement Equities Fund ("CREF"),[9] are collectively known as TIAA-CREF. TIAA-CREF is a leading provider of financial services to institutions and individuals in the academic, research, medical and cultural fields, managing retirement and other assets on behalf of over four million individuals and 15,000 institutions nationwide. The mission of TIAA-CREF is "to aid and strengthen" the institutions it serves by providing financial products that best meet the needs of these organizations and help their employees attain financial well-being. TIAA-CREF's products and services offer a range of options to help individuals and institutions meet their retirement plan administration and savings goals as well as income and wealth protection needs. In addition to TIAA-FSB, TIAA's subsidiaries include Securities and Exchange Commission ("SEC)-registered broker-dealers and investment advisers, registered and unregistered investment companies, and a life insurance company.

TIAA-FSB was chartered in 1998 and began accepting deposits in 2010. As of September 30, 2015, TIAA-FSB had total assets of $3.3 billion and total deposits of $2.4 billion. TIAA-FSB's head office is in St. Louis, Missouri and it currently has no branch offices. TIAA-FSB's retail deposit products and services are primarily offered through the Internet and through referrals from TIAA-CREF financial advisers. TIAA-FSB and its affiliates have established processes, systems and controls to monitor such

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[7] The Study at pp. 48-49.
[8] The Study at p. 49.
[9] CREF issues variable annuities and is an investment company registered under the Investment Company Act of 1940.

referrals and to identify resulting deposit accounts in order to track them for purposes of reporting brokered deposits.

II. General Discussion

TIAA-CREF's concerns with the FDIC's out-of-date positions regarding brokered deposits stem from several sources. First, changes in the federal securities and banking laws have mandated that activities formerly conducted within a bank now be conducted by a broker-dealer or other affiliate. Second, the DFA fundamentally changed the scope of the FDIC's resolution authority, codified the source of strength doctrine, and in so doing, tied together the fate of depository institutions and their non-bank affiliates. Third, the marketplace for financial services has fundamentally transformed over the past quarter century as customers seek holistic financial advice, and financial services are increasingly delivered through ATMs, the Internet and mobile devices, rather than through brick-and-mortar bank branches. Lastly, the regulatory characterization of deposits as brokered is now significantly more impactful in light of the development of the liquidity coverage ratio and the incorporation of brokered deposits in determining a depository institution's FDIC insurance assessment, as well as the negative market and supervisory connotations arising from deposits reported as brokered.

In 1989, a bank could act as a broker for securities transactions by its clients without registration with the SEC as a broker-dealer, and could act as an investment adviser to a registered investment company again without registration with the SEC as an investment adviser. The Gramm-Leach-Bliley Act of 1999[10] amended banks' broad securities laws exemptions and in so doing have either forced, or at a minimum strongly encouraged, banking organizations to remove these activities from their banking subsidiaries and move them into SEC registered broker-dealers and advisers. As a result, registered representatives of banks' brokered-dealer affiliates are now involved in client transactions that formerly involved solely bank personnel. This change was imposed by Congress and implemented by the SEC and the Federal Reserve to improve customer protections and disclosures with regard to transactions in individual securities.[11]

The DFA also fundamentally changed federal banking regulators' authority over a bank's affiliates with the codification of the source of strength doctrine in Section 616(d), the expansion of the FDIC's resolution authority to include affiliates under DFA Sections 201-210, restrictions on activities of both banks and their affiliates through the Volcker rule (DFA Section 619) and enhancements to consolidated capital standards through the Collins Amendment (DFA Section 171). All of these legislative and regulatory changes act to link banks together with their affiliates in order to protect the Deposit Insurance Fund from potential loss.

Since Section 29 was enacted, the number of banks in the United States has dropped by over 58 percent,[12] the number of ATM transactions has soared and many depositors now primarily transact with their bank through the Internet or mobile devices. The concept of "relationship" is being fundamentally altered by technology and changes to the regulatory landscape. Ease of doing business is a key competitive advantage and the ability to seamlessly provide financial advice has become a key means to deepen client relationships. While we agree that services such as bill pay and direct deposit deepen

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[10] Pub. L. No. 106–102, 113 Stat. 1338 (1999).

[11] *See* Federal Reserve Regulation R (12 C.F.R. Part 218, added by 72 Fed. Reg. 56,514 (Oct. 3, 2007)).

[12] Based on information published by the FDIC, the 15,158 commercial banks and savings institutions in 1990 had declined to 6,270 as of the third quarter of 2015. *See* FDIC, *Statistics at a Glance*, available at: www.fdic.gov/bank/statistical/stats/2015sep/fdic.pdf.

banking relationships,[13] we also maintain that client connections through brokerage accounts, IRAs and insurance products increase client loyalty and relationship franchise value. Moving brokerage accounts from firm to firm requires significant client effort, and similarly, the process for changing insurance carriers is far more complex than that involved in opening a certificate of deposit ("CD") with a new bank.

The more products and services a client obtains from a financial services organization, the greater the transaction costs to the client of moving to a new provider and the stickier the relationship becomes. Federal and state law mandate that banks utilize affiliates to offer insurance and securities products to their clients. Yet the FDIC treats these affiliates as if their "primary purpose" is to generate high rate, volatile deposits for their affiliated banks, going as far as assuming there is compensation paid to the employees of the affiliate regardless of the individual facts and circumstances.[14] In FAQ E7, the FDIC addresses the statutory "primary purpose" exemption: "The primary purpose exemption applies only infrequently" and "[o]n those rare occasions when this exemption may apply, the FDIC also may impose restrictions on the activities involved, routine reporting requirements, and regular monitoring."[15] In adopting the primary purpose exemption, we believe that Congress intended that the FDIC take a more pragmatic and literal reading of the statutory text and that the FDIC's policy as reiterated in FAQ E7 has strayed from Congressional intent in creating the exemption.

TIAA-CREF believes that the FDIC's narrow reading of the primary purpose exemption, particularly in the context of affiliate relationships, needs to be reconsidered, and, as discussed below, appropriate treatment for affiliate referred deposits developed. Changes in federal law since the enactment of Section 29 now require the involvement of affiliates in many client transactions and relationships and encourage or require information sharing among affiliates, we urge the FDIC to re-examine its positions regarding the primary purpose exemption and affiliate referred deposits both in light of these changes and in order to appropriately use its discretion to realign the definition of brokered deposits with Congress's goal in adopting Section 29 – preventing weakened depository institutions from trying to grow their way out of trouble through the use of high rate, volatile funding.

III. Specific Comments

A. Affiliate Referrals

In the Study, despite determining that "[i]n all, referrals from affiliates and their agents . . . appear to pose fewer of the problems that a deposit can pose compared to brokered deposits in general,"[16] the FDIC ultimately concluded that "they still pose greater problems than many other non-brokered deposits—particularly their dependence on the success and strategies of an affiliate—(sic) should not be considered core and should continue to come under the purview of the statute."[17] TIAA-CREF strongly encourages the FDIC to reconsider its views regarding deposits generated through referrals from affiliated financial services entities. We believe that it is *because*, not in spite of, the affiliate relationships that such deposits, particularly non-maturity accounts, possess the attributes of *core* deposits. The FDIC's

[13] The Study at n. 103.

[14] *See* FDIC Advisory Opinion 94-15 (March 16, 1994) ("[A] deposit broker could steer its customers to a parent holding company or affiliate and derive compensation through a *quid pro quo* arrangement with the parent or affiliate. If we exempted commercial enterprises from the statutory restrictions whenever they arranged to be compensated indirectly, the statutory restrictions could be easily circumvented.").

[15] The Revised FAQs at FAQ E7.

[16] The Study at p. 57. The FDIC reiterates this view in further stating: "[T]hese deposits do not present all of the problems that traditional brokered deposits present . . . ."

[17] *Id.*

position that such deposits are brokered merely due to the involvement of a third party (*i.e.*, an affiliate or its employees) and not the behavior of the resultant deposits is inconsistent with the intent of Section 29 and the protection of the Deposit Insurance Fund.

We believe that the stability of affiliate referral deposits is substantially similar to other core deposits and that affiliate referral deposits are substantially less volatile than traditional brokered deposits (*i.e.*, CDs sourced through deposit brokers). It appears that the FDIC's position in the Study that affiliate referred deposits should be treated as brokered is largely based on the FDIC's lack of data regarding the performance and characteristics of such deposits.[18] We are troubled by the FDIC's conclusory statement that the burden of collecting such data would outweigh the benefit of collecting it.[19] The current reporting of brokered deposits on Call Report Schedule RC-E appears designed to track brokered CDs by maturity and balance tier and does not provide useful information regarding non-maturity deposits that are being characterized as brokered under the FDIC's interpretations of Section 29.[20] We suggest that voluntary reporting of such deposits as well as data regarding their performance by depository institutions should alleviate the FDIC's skepticism and uncertainty regarding the value of affiliate referral deposits. Set forth below is a discussion of affiliate referral deposits, relative to the three potential brokered deposit problem areas cited by the FDIC in the Study.

1. Rapid Growth

In the Study, the FDIC describes affiliate referral deposits as "ancillary to the affiliates' legitimate businesses and are usually based upon a relationship between the customer and the affiliate."[21] Moreover, the FDIC concludes that "it is unlikely that a bank could use these deposits to grow quickly."[22] We concur with these determinations. As discussed previously, the deposits that TIAA-FSB receives through referrals from its affiliates are the result of the client's long-standing relationship with TIAA-CREF and/or the client's strong desire to increase the breadth of that relationship. Also as discussed above, TIAA-CREF exists to help our clients achieve financial well-being and to do so TIAA-CREF provides a variety of financial planning tools and services to its clients. In providing such holistic financial advice, one of the first steps is to establish that the client has sufficient highly liquid financial reserves to cover unforeseen contingencies and to advise on the importance of having an emergency fund equal to several months' average expenses. In this context, a referral of the client to an affiliated bank to establish a savings account may be an appropriate and natural outcome of the planning session. Although broker-dealer or financial planning affiliates may make bank account recommendations based on the client's financial goals, the client must then take the initiative to directly open any such bank accounts, which places the ultimate control of the deposit relationship with the client. Affiliate referrals are individualized transactions and are intended to both broaden and deepen the client's relationship with the financial services organization. Each of these individualized transactions takes time to develop and execute, and as a result, such referrals are not conducive to funding rapid deposit growth.

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[18] *See* the Study at p. 56 ("[T]here is virtually no data on these deposits.").

[19] *See* the Study at p. 33 ("To develop a formal approach—to replace the statute, or change the supervisory approach or assessment system—would require that banks undertake considerably more tracking and reporting of deposits. The costs of doing so would appear to outweigh the potential benefits.").

[20] *See* RCON2365 [total brokered deposits], RCON2343 [under $100k], RCONJ472 [$100k-$250k], RCONA243 [1 year or less $100k], RCONK219 [1 year or less $100k-$250k], RCONK220 [1 year or less greater than $250k].

[21] The Study at p. 56.

[22] *Id*. The FDIC tempers this conclusion by also stating: "However, there is no data on these deposits."

2. Volatility

We believe that volatility should be the primary factor in determining whether deposits should be treated as core or non-core. As for affiliate referral deposits, the FDIC states in the Study that "[b]ecause depositors have a relationship with an affiliate of the bank, these deposits may behave more like deposits where the bank itself has a relationship with the depositor and thus may be more stable and less likely to leave for higher rates when the bank is under stress."[23] Like the commenters referenced in the Study, we strongly agree that affiliate referral deposits are a lower-cost means to obtain stable funding.[24] Because TIAA-CREF's clients have deep, long-term relationships with the organization, they are less rate-sensitive and are unlikely to close their deposit accounts if TIAA-FSB experiences difficulties. Further, we suggest that the FDIC recognize that after a reasonable amount of time, an affiliate referred account relationship becomes relationship-based for the bank as well as the affiliate. That is, the customer's relationship with the bank, through services such as direct deposit of payroll or benefits, bill pay and ATM access, deepens the overall relationship with the customer so that any direct reliance on the relationship with the affiliate is reduced over time. We submit that affiliate referral sourced non-maturity deposits are inherently more stable than new accounts that open without a prior existing relationship, and we disagree with the statement in the Study that "the depositor's relationship with the affiliate may or may not increase the likelihood the depositor will continue to maintain the deposit with the bank."[25] Clearly, such affiliate relationships, in the context of non-maturity deposits, enhance the stability of the depository relationship.

We also believe that there are many easily-measurable factors that are indicative that an affiliate-referred banking relationship will endure, including, for example, the duration of the depositor's relationship with the affiliate and whether the depositor has relationships with multiple affiliates. The nature of the account relationship is also especially important—a non-maturity account, and particularly a transaction account, is unlikely to leave for higher rates or due to bank stress, especially when the customer utilizes direct deposit and electronic bill payment. Similarly, the existence of multiple bank accounts (particularly non-maturity accounts) suggests an entrenched relationship with the bank, regardless of the length or depth of any affiliate relationship.

3. Franchise Value

As reflected in the Study, the FDIC's primary discomfort with affiliate referral deposits appears to stem from its uncertainty regarding the impact of those deposits on franchise value, as well as the fact that this issue has not been formally evaluated or tested in the context of actual bank or affiliate failures.[26] We believe the FDIC's focus on actual bank failures, rather also considering recapitalizations and reorganizations of nearly-failed institutions, is misguided. For example,. depository institutions such as E*TRADE Bank that experienced distress during the recent financial crisis were able to *create* franchise value (*e.g.*, receive private capital investments) *because* of the tremendous value created by the customer relationships of its broker-dealer affiliate, E*TRADE Securities.

[23] The Study at pp. 56-57.
[24] *See* the Study at p. 57 ("Some commenters [stated] that these deposits are stable and low cost.").
[25] *Id*.
[26] *See id*. ("Because the bank obtains [affiliate referral deposits] only because of the depositor's relationship with the bank's affiliates . . . the deposits may or may not have franchise value, given that it is difficult to account for the range of circumstances affecting the bank and its affiliate. The value and behavior of these deposits has not been tested to any extent in actual bank or affiliate failures.").

The FDIC should not give undue weight to data limitations regarding franchise value when evaluating affiliate referral deposits as a whole. As discussed above, brokered deposits are presently reported on Call Report Schedule RC-E utilizing the existing overbroad and undifferentiated definition of brokered deposits. Accordingly, there is limited public data to distinguish between the high rate, volatile, third-party sourced deposits Congress sought to address through Section 29, and the lower rate, stable, affiliate-sourced deposits that have become an increasingly important source of funding for many financial services organizations. We urge the FDIC to consider either enhancements to brokered deposit reporting or voluntary reporting that will demonstrate the important distinctions between these two very different types of funding.

Despite the purported lack of sufficient data, we believe that the existence of certain key factors allows for the reasonable assumption that a bank's affiliate referral deposits have or enhance its franchise value. Such factors might include: (a) the breadth, depth, and duration of the customer's relationship with both the bank and its affiliates; (b) the characteristics of the deposits at issue (*i.e.*, CDs versus non-maturity deposits, and if non-maturity deposits, whether supplemental services such as direct deposit and electronic bill payment are being utilized); and (c) the financial strength and reputation of the affiliate(s) and/or parent organization. At a minimum, we recommend that the FDIC consider allowing examiners to evaluate such factors as part of a case-by-case assessment as to whether a bank's affiliate deposits should be characterized as core or non-core. Moreover, in this context, the FDIC appears to hold affiliate referral deposits to an unfair standard by seemingly ignoring the fact that there is no absolute certainty that a bank's *core* deposits (which include Internet-sourced deposits with relatively little relationship value) will maintain or provide franchise value in a distressed or failed bank scenario.

B. Timing and Circumstances for Recharacterization of Brokered Deposits

TIAA-CREF strongly encourages the FDIC to revise and clarify its positions regarding the time after, and the circumstances under, which deposits initially characterized as brokered[27] may be recharacterized as non-brokered. We particularly recommend that the FDIC reconsider and revise certain statements in FAQ F2, and either supplement FAQ F5 or develop an additional FAQ to provide more fulsome and pragmatic guidance on these issues. Detailed discussions regarding the imprecision and adverse effects of the FDIC's existing guidance on the recharacterization of brokered deposits are set forth below.

1. Third Party Access to Account Information

TIAA-CREF strongly opposes the FDIC's unqualified statement in FAQ F2 that "continued access to account information (such as the balance of the account)" would constitute "involvement by [a] third party" sufficient to cause a renewed account to remain a brokered deposit.[28] As further discussed below, we believe that this condition was inaccurately derived from a long-standing FDIC advisory opinion, and that, in any case, bank affiliates and/or non-maturity accounts should be excluded from this condition. We also believe that such determination is inconsistent with various federal laws, rules, and regulations that expressly permit, encourage, and in certain cases require, the sharing of customer account and transactional information among a bank and its affiliates.

[27] In accordance with existing brokered deposit rules and FDIC guidance and interpretations.
[28] The Revised FAQs at FAQ F2.

FAQ F2. FAQ F2 of the brokered deposit FAQs issued by the FDIC in January 2015[29] (the "Initial FAQs") reflected, among other things, that: (a) "*any* type of involvement by a third party [is] sufficient to qualify [a] renewed account as a brokered deposit" (emphasis in original), and (b) "continued access to account information (such as the balance of the account" by a third party constitutes involvement that would cause the renewed account to be a brokered deposit.[30] Each of these positions was new with the Initial FAQs, and included no context, background, or citation to previous guidance. As a result, banks with deposits resulting from affiliate referrals, particularly in instances where customer information is routinely shared among the bank and its affiliates (whether independent of, or through involvement by, the customer) with which the customer maintains concurrent relationships, were suddenly left to wonder whether, due solely to such information sharing or access, those deposits must be perpetually reported as brokered.

In the Revised FAQs, FDIC Advisory Opinion 92-69[31] ("AO 92-69") was cited as the previous FDIC determination with respect to "*any* third party involvement," and FDIC Advisory Opinion 15-01[32] ("AO 15-01"), which apparently was made public concurrently with the Revised FAQs, was cited as the previous FDIC guidance regarding "continued access to account information." We respectfully assert that the FDIC's references to AO 92-69 and AO 15-01 in FAQ F2 are misplaced in the context of affiliate relationships.

AO 92-69. The key facts of the relevant portion (*i.e.*, the renewal of the CDs at issue) of AO 92-69 were as follows:

> [E]xaminers have determined that the broker is no longer involved *in the transaction*. The customer must acquiesce to the renewal directly without any *intervention* by the original broker. [T]he broker did not place the original deposit directly with the bank. Rather, the broker's customers wired their funds directly to the bank at the direction of the broker. Both before and after the renewal, the CDs will be styled in the name of the customer; the CD is not carried in the name of the broker as agent/trustee. (Emphasis added.)

Based on these facts, the FDIC stated that its interpretation of the term "acceptance" in Section 29[33] was that a renewed or rolled-over brokered CD would continue to be brokered "*only* if the deposit broker continues to be involved *in the transaction* [(*i.e.*, the renewal of the CD)] in some manner (emphasis added)."[34] Moreover, the FDIC also stated in AO 92-69 that involvement *in the transaction* "*is a question of fact*."[35] In formulating FAQ F2 and AO 15-01,[36] the FDIC has ignored both of these critical components of AO 92-69, without explanation.

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[29] FDIC Financial Institutions Letter 2-2015 (January 5, 2015), *Guidance on Identifying, Accepting, and Reporting Brokered Deposits*, available at: https://www.fdic.gov/news/news/financial/2015/fil15002a.pdf.
[30] The Initial FAQs at FAQ F2.
[31] FDIC Advisory Opinion No. 92-69 (October 23, 1992).
[32] FDIC Advisory Opinion No. 15-01 (April 16, 2014).
[33] Including consideration of the phrase "obtained . . . by or through any deposit broker," as reflected therein. *See* 12 U.S.C. § 1831f(a).
[34] *See* AO 92-69. In support of this position, the FDIC generally cited two August 3, 1992 letters that apparently were, and remain, unpublished. *See* AO 92-69, n. 1 ("For a discussion of when an intermediary is a 'deposit broker' even though the intermediary does not directly place his or her customer's funds with the bank, see my letter dated August 3, 1992 to *** and my letter dated August 3, 1992 to ***.").
[35] Notably, in AO 92-69, the FDIC determined that, based on the facts presented, the deposit broker was no longer involved in the transaction and therefore the renewed CDs would not have to be further characterized as brokered.
[36] AO 15-01 generally cites AO 92-69 for the proposition that "any involvement" by a deposit broker in connection with the

AO 15-01. In AO 15-01, which involved the renewal of initially brokered CDs without further compensation to the deposit brokers, the FDIC stated that because “the broker will continue to receive access to the customer’s account information *and will continue to provide guidance to the customer as to the investment of the funds* (emphasis added),” the broker continues to be “involved,” and thus the deposits remain brokered.[37] Notably, the second half of the FDIC’s key statement in AO 15-01 (highlighted in the foregoing) is not included in FAQ F2, again without explanation.

TIAA-CREF Recommendations. We believe that direct and material “intervention” by a third party in the actual renewal of the deposit, as suggested in the facts of AO 92-69, reflects the intended and pragmatic definition of “involvement *in the transaction*.” With respect to the facts and analysis set forth in AO 15-01, we similarly believe that it is the broker’s express provision of investment guidance or direction—specifically regarding the account or funds being renewed—that should be a key factor regarding whether the renewed funds should continue to be deemed brokered, rather than merely the broker’s continued access to client account information. Each of these interpretations aligns logically with “engag[ing] in the business of placing deposits, or facilitating the placement of deposits,” the key components of the definition of a “deposit broker,”[38] and prevents the absurd result that a third party’s mere knowledge of the customer’s account information causes such CD to continue be characterized as brokered.

2. Limited Applicability of FAQ F2 and AO 15-1

Referrals not from Affiliates. Notably, the facts pertaining to AO 15-01 reflect that the deposit brokers at issue consist of “approximately 200 broker-dealers and financial advisory firms.”[39] Although AO 15-01 is silent on the issue, we believe that this fact suggests that the broker-dealers and financial advisory firms were unaffiliated with the subject bank and therefore that the CDs at issue were part of a programmatic deposit collection structure, rather than a relationship-building initiative among affiliated financial services providers. We further believe that this is an important distinction in the context of the third parties’ ongoing access to customer account information because, as discussed below, the sharing of certain customer information among financial services affiliates is not only permissible, but in many cases strongly encouraged if not required, by law and regulation. Accordingly, we request that the FDIC revise FAQ F2, or issue a supplemental FAQ, to reflect that the determination set forth in AO 15-01 pertaining to a third party’s access to customer account information is not applicable to deposits resulting from affiliate referrals.

No Guidance on Non-Maturity Deposits. AO 92-69, AO 15-01, and FAQ F2, only address issues relating to the recharacterization of brokered deposits in the context of renewed or rolled-over CDs. It remains unclear whether and how such guidance would apply to non-maturity deposits. We recommend that the FDIC revise the FAQs to provide clarity in this regard, and we discuss this issue in greater detail below.

3. Disincentivized Permissible Information Sharing

The FDIC’s determination in AO 15-01 and FAQ F2 discourages the exchange of customer information among financial services affiliates. Accordingly, TIAA-CREF strongly encourages the FDIC

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renewal or rollover of a brokered deposit will cause that deposit to continue to be brokered. As described in the foregoing, we strongly submit that this is inconsistent with the finding in AO 92-69.

[37] *See* AO 15-01.

[38] *See* 12 U.S.C. § 1831f(g)(1)(A), 12 C.F.R. § 337.6 (a)(5)(i)(A).

[39] *See* AO 15-01.

to reconsider and revise FAQ F2 in this regard given the existence of numerous federal statutes, rules, and regulations, along with pragmatic contemporary financial services concepts, nearly all of which have developed since the adoption of Section 29 and its implementing regulations, that promote, encourage, and/or require customer information sharing among financial services affiliates. Key examples are as follows:

> Fair Credit Reporting Act (the "FCRA"). The FCRA permits a financial institution to share with its affiliates a customer's transactional and experiential information, and does not allow a customer to restrict such transactional and experiential information sharing through an "opt-out" election, as must be provided for information that is shared among affiliates for marketing purposes.[40] It is well established that an account's balance constitutes transactional information that may be shared without restriction among affiliates.
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> Gramm-Leach-Bliley Act (the "GLBA"). The GLBA permits financial institutions to share their customers' transactional and experiential information with their financial service provider affiliates for certain everyday business (*i.e.*, non-marketing) purposes, and does not require that financial institutions provide a customer opt-out mechanism for such information sharing.[41]
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> Bank Secrecy Act (the "BSA"). The implementing regulations for the BSA permit a bank to rely on another financial institution (expressly including an affiliate) to perform any of the bank's customer information program requirements with respect to a bank customer that also has a similar financial services relationship with the affiliate, subject to certain conditions.[42] The information shared between a bank and an affiliate for this purpose could presumably include "account information," as referenced in AO 15-01 and FAQ F2. Also, source of funds is a required element of a financial institution's enhanced customer due diligence under the standards set forth in the FFIEC BSA/AML Examination Manual.[43] To satisfy this standard, affiliates would need bank balance information as part of their required due diligence. In addition, in 2010, the Financial Crimes Enforcement Network ("FinCEN"), in consultation with federal banking agencies, including the FDIC, issued guidance that expressly permits depository institutions to share suspicious activity reports ("SARs") or the existence of SARs with certain affiliates, again subject to certain conditions (the "SAR Guidance").[44] This guidance, which recognized the importance of enterprise-wide risk management, expanded permissible SAR-related information sharing between banks and certain affiliates, which was previously limited to only the underlying facts, transactions, and documents upon which a SAR is based.[45] Both before and after the SAR Guidance, FinCEN and the federal banking agencies, including the FDIC, recognized that the sharing of customer information between affiliates is often critical in preventing money laundering and terrorist financing.

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[40] *See, e.g.*, 15 U.S.C. §§ 1681a (d)(2)(A)(i) and (ii); 15 U.S.C. § 1681s-3(a).
[41] *See generally* GLBA § 502, Pub. L. No. 106–102, 113 Stat. 1338 (1999).
[42] *See* 31 C.F.R. § 1020.220(a)(6).
[43] *See generally* "Enhanced Due Diligence for Higher-Risk Customers," FFIEC BSA/AML Examination Manual at pp.57-58.
[44] *See* FinCEN FIN-2010-G006 (November 23, 2010), *Sharing Suspicious Activity Reports by Depository Institutions with Certain U.S. Affiliates.*
[45] 31 C.F.R. § 1020.320(e)(1)(ii)(A)(2)(i).

> Suitability Requirement. Both SEC-registered investment advisers and broker-dealers have a duty to their client/customer that includes ensuring that a recommended investment transaction or strategy is suitable/appropriate for the customer. Such determination must be "based on the information obtained through the reasonable diligence of the [adviser or broker-dealer] to ascertain the customer's investment profile," which includes, but is not limited to, the customer's "other investments, financial situation and needs, . . . liquidity needs, . . . risk tolerance, and any other information the customer may disclose to the [adviser or broker-dealer] in connection with such recommendation."[46] Accordingly, a customer's deposit account information would typically be requested, if not required, by an adviser or broker-dealer as part of their mandated suitability assessment.
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> Industry Trends and Customer Expectations. As the demand for traditional brick-and-mortar-based delivery of financial services—including banking, brokerage, insurance, and financial/retirement planning—continues to decrease and is replaced by increasing demand for services provided through the Internet and mobile device platforms, our experience is that customers appreciate and in many cases require access to those services from a single source (*i.e.*, a diversified financial services organization). Accordingly, when customers seek financial planning or investment advice from their consolidated financial services provider, they reasonably assume and expect that the adviser or broker-dealer will have access to the customer's holistic relationship within the organization, including bank account information.

The examples above demonstrate that the sharing of customer account information among financial services affiliates is not only permissible and common, but often required. Moreover, customers increasingly utilize and prefer a "one stop shop" approach to obtain financial services and reasonably expect that their account information will be appropriately shared among the affiliate service providers. Accordingly, it is inappropriate for the FDIC to impose, through its unduly broad application of the brokered deposit statute and its determinations set forth in AO 15-01 and FAQ F2, adverse consequences on the sharing of customer account information with or among financial services affiliates. We believe that the FDIC's full adherence to the guidance reflected in AO 92-69 with respect to "intervention" or "involvement in the transaction" by a deposit broker would be fully consistent with the intent, requirements, and limitations of Section 29, while having no adverse effects on the otherwise permissible and expected sharing of customer account information among financial services affiliates.

C. "Timing Out" of Non-Maturity Accounts

As discussed above, Section 29 and the FDIC's implementing regulation, 12 C.F.R. § 337.6 ("Section 337.6"), do not explicitly address the time or other circumstances under which a deposit previously characterized as brokered may be recharacterized as non-brokered. Although certain of the FDIC's Advisory Opinions and the FAQs touch on this issue, recharacterization is addressed almost exclusively in the context of CDs, as reflected by the facts of applicable Advisory Opinions and the interpretive focus on "renew[als]" and "roll over[s]," each as used in Section 29 and Section 337.6.[47] Logically, these terms apply solely to CDs, as only accounts that mature or have an expiration period

[46] Financial Industry Regulatory Authority Rule 2111(a).
[47] *See* 12 U.S.C. § 1831f(b), 12 C.F.R. § 337.6(b)-(d). FAQ F5 addresses a bank's treatment of non-time deposit brokered deposits if it becomes less than well capitalized, but it does not address when such deposits would no longer constitute brokered deposits (both time and circumstance), outside of such occurrence.

have the opportunity to renew or roll over into a new or existing account.[48] As described above, non-maturity accounts related to affiliate referrals continue to be an important source of funding for depository institutions within larger financial services organizations. Accordingly, we urge the FDIC to issue guidance that clarifies the time and circumstances after and under which an initially brokered non-maturity account may be recharacterized as non-brokered. When considered against the FDIC's five deposit evaluation characteristics utilized in the Study, we believe that the standards for recharacterization of non-maturity deposits can be both reasonable and easily derived.

1. Interest Rates

In the Study, the FDIC states that "[d]eposit accounts that pay high interest rates are likely to exhibit all three of the problems identified," namely rapid growth, volatility, and lack of franchise value.[49] TIAA-CREF agrees that rate should be a factor in determining brokered status, as it was high-rate <u>CDs</u> that led to the adoption of Section 29. We also acknowledge that a bank could pay elevated rates on non-maturity accounts to attempt to grow deposits quickly. We submit, however, that unless a bank guarantees the interest rate or establishes an interest rate floor on a non-maturity account, the risk associated with higher interest rates on non-maturity accounts is much less than that associated with high rate CDs.

In any case, we believe that the FDIC could establish interest rate criteria as a factor in determining whether deposits, including non-maturity accounts, that are characterized as brokered under the FDIC's existing guidance, may be characterized as core from the outset or eventually recharacterized as core. For example, Section 29 and Section 337.6 already establish interest rate thresholds for adequately capitalized banks that accept, renew, or roll over brokered deposits under a waiver from the FDIC, or for undercapitalized banks in general.[50] We suggest that the FDIC develop similar interest rate thresholds as a factor in determining permissible recharacterization of brokered deposits and that the FDIC could create a safe harbor for depository institutions to follow in transitioning non-maturity deposits from brokered to core status.

2. Ability to Be Gathered Quickly in Large Quantities

TIAA-CREF agrees with the FDIC's view that "[d]eposits that can be gathered quickly in large quantities present . . . potential problems by allowing an institution to grow very quickly and invest in risky assets."[51] However, as the FDIC stated in the Study, "a fundamental distinction [exists] between deposits that are acquired singly (*often based on a customer relationship*) and those that are acquired in bulk or large quantities . . . [emphasis added]."[52] Accordingly, we believe that the FDIC should provide guidance incorporating this distinction, particularly in the context of non-maturity deposits. As discussed above, TIAA-FSB accounts resulting from affiliate referrals must be opened individually and directly by the customer, and thus cannot be gathered quickly and in large quantities, in contrast to bulk forms of traditional brokered deposits where the deposit broker is the named custodial accountholder.

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[48] We acknowledge that funds in a non-maturity account could be "rolled over"—at any point, even immediately—into another account; however, the Advisory Opinions and FAQs that address "rollovers" do not address such concept in the context of non-maturity accounts.

[49] The Study at p. 49. *See also* the Study at p. 48.

[50] *See* 12 U.S.C. § 1831f(e); 12 C.F.R. §§ 337.6(b)(2)(ii) and (b)(3)(ii).

[51] The Study at p. 50.

[52] *Id*.

History has shown that non-maturity accounts—particularly those arising from affiliate referrals—are remarkably stable, especially when linked with features such as direct deposit and electronic bill payment. We believe that a customer relationship is an integral part of these accounts. We urge the FDIC to acknowledge that non-maturity accounts (and even more specifically, transaction accounts) are unlikely to be gathered quickly in large quantities, and that even if such risk does exist in the context of savings or money market accounts, other factors, such as a reasonable interest rate or the existence of a customer relationship, may largely mitigate this risk.

3. Customer Relationship

In the Study, the FDIC states that "[d]eposits that are not based upon a customer relationship are likely to present all three problems."[53] We agree, particularly when cast conversely: relationship-based deposits are <u>un</u>likely to present all three problems. Moreover, we believe that in the majority of instances, a non-maturity account inherently reflects a customer relationship. Unfortunately, the FDIC failed to adequately address in the Study what "relationship" means in the context of brokered deposits, stating that "[d]efining a 'relationship' . . . is also not simple and [the Study] does not attempt to define it[,]" and ultimately concluding that "additional analysis is needed to determine the proper definition of a relationship."[54] We strongly encourage the FDIC to undertake such analysis and to develop a pragmatic definition of "relationship" that can be applied in the context of the brokered deposit characterization of deposits involving a third party.

We believe that the example factors that the FDIC provides in the Study are an excellent start toward the development of an effective definition for "relationship," namely: (a) any type of bank deposit, along with a loan or other bank or bank affiliate service, such as wealth management or broker-dealer services; or (b) an active transaction account (i) paired with direct deposit, automatic bill pay, or another deposit account, or (ii) used for payroll.[55] These factors are consistent with the FDIC's additional statement in the Study that "depositors that have multiple connections with the institution or have been a customer of the institution for an extended period of time represent more stable deposits than those that do not have a relationship." In our experience, even utilizing these "minimum" factors alone would provide a fair and reasonable definition for "relationship" that could be used by the FDIC to provide greater clarity around non-maturity and affiliate-sourced deposits.

We concur with the commenters referenced in the Study who suggested that the definition of "relationship" could also be based on "the length, as well as the depth, of the customer's relationship with the bank."[56] While we also agree that the definition of a relationship could vary based on the size, location, and operating strategies of a given bank,[57] we nevertheless believe that the aforementioned minimum factors can be applied effectively to any bank, and encourage the FDIC to do so.

We also believe that the foregoing particularly applies to non-maturity deposits, and we encourage the FDIC to consider the distinctions between non-maturity accounts and CDs regarding the existence and development of customer relationships with respect to such accounts. We further recommend that the FDIC formally recognize that a non-maturity account resulting from an affiliate referral is largely relationship-based from the outset, and that after a reasonable period of time

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[53] *Id*.
[54] The Study at n. 103.
[55] *See id*.
[56] *Id*.
[57] *Id*.

(*e.g.*, 12 months), and perhaps upon certain other specified conditions, such deposits may be recharacterized as non-brokered.

4. Deposit Insurance

TIAA-CREF acknowledges that "[w]hen a bank experiences financial deterioration, customers who hold deposits in excess of the deposit insurance coverage limit are likely to remove those deposits," and that "[u]ninsured balances at failed banks are either low or non-existent, unless the bank fails due to fraud or unexpected liquidity problems."[58] The FDIC has not, however, demonstrated any correlation between uninsured deposits and brokered deposits. While we recognize that uninsured deposits could theoretically arise from programmatic brokered deposit arrangements, our experience is that such programs restrict balances per depositor to the applicable FDIC insurance limit. Accordingly, the risk of uninsured deposits is generally unrelated to brokered status.[59]

As suggested in the Study, the runoff of uninsured deposits when a bank becomes distressed is often the result of depositors' sophistication in terms of understanding deposit insurance limits and the risks associated therewith.[60] Moreover, we believe that uninsured deposits (prior to any runoff) are typically associated with a material CD balance at the subject bank, and that it is such CD balances that are likely to leave the bank should it become distressed, while relationship-based, feature-linked, non-maturity deposits are mostly likely to remain with the bank as insured balances and thereby create franchise value.

5. Time to Maturity

We agree with the FDIC's statement in the Study that "[t]he longer a deposit's remaining time to maturity and the stricter the restrictions on early withdrawal, the less likely it is to be withdrawn when an institution is under stress."[61] Clearly, this position relates to CDs, and reflects at least part of the basis for the early withdrawal penalty provisions of Regulation D.[62] We concur with certain of the FDIC's characterizations in the Study regarding the "duration" of demand deposit and NOW accounts. Specifically, the FDIC states that based on the deposit analyses conducted in connection with the Study, demand deposits "have an average duration of six months to seven years, depending on the type of deposit."[63] We strongly agree that the effective duration of non-maturity accounts can greatly exceed that of CDs. In our view, each maturity of a CD represents a cost-free and easy opportunity for the funds to leave the bank, the probability of which increases if the bank's financial condition becomes distressed.

In our experience, if a demand deposit or NOW account remains open for more than six months, which likely signals both satisfaction with the institution and the account, such account becomes quite stable, and such stability only increases with time. This position is consistent with the FDIC's statement in the Study that "for these non-maturity deposit accounts, the expected life of the deposit or its duration may depend on features of the account that make it less likely the customer will withdraw funds. For example, a NOW account customer that has direct deposit and uses electronic bill pay, all other

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[58] The Study at p. 51.
[59] Indeed, it is our understanding that FINRA generally requires broker-dealers to restrict the placement of customer deposit balances with a bank to the applicable FDIC insurance limit.
[60] *See* the Study at p. 51.
[61] *Id*.
[62] *See generally* 12 C.F.R. § 204.2(c)(1)(i).
[63] The Study at p. 51. It is unclear, however, what the FDIC means by "depending on the type of deposit," given that the apparent subject of the sentence is demand deposits.

factors being equal, may have a longer duration than one that does not."[64] In other words, non-maturity accounts with certain features generally constitute very stable funds that do not warrant perpetual brokered deposit characterization. Moreover, any brokered funds in a demand deposit or NOW account are almost surely turned over within 3-6 months, particularly if direct deposit and electronic bill payment are linked to the account. Accordingly, we strongly encourage the FDIC to formally recognize that, subject to clear conditions, banks should be able to recharacterize initially brokered non-maturity deposits as non-brokered within a reasonable amount of time.

IV. Conclusion

TIAA-CREF reiterates its appreciation for the opportunity to comment on the Revised FAQs and the FDIC's positions and approaches regarding brokered deposits in general. TIAA-CREF understands that brokered deposits continue to be an area of regulatory concern and scrutiny, and that imprudent use or reliance on brokered deposits can materially elevate a financial institution's risk and possibly contribute to distress or failure. However, we strongly believe that the FDIC's current overly broad and generalized approach to characterizing deposits as brokered, as well as the potentially infinite duration of that characterization, is inconsistent with the factors giving rise to, and the intent of, Section 29.

In light of the significant legal, technological and marketplace changes that have occurred over the past quarter century, TIAA-CREF urges the FDIC to re-examine its position regarding what is a brokered deposit to once again focus on the risks Congress intended to address in passing Section 29—rapid growth through high rate, volatile funding. We strongly believe that the time has come for the FDIC to recognize the fundamental difference between non-maturity deposits resulting from affiliate referrals and CDs sourced through true third-party deposit brokers, and to recognize that information sharing among affiliates should not be a factor in determining brokered deposit status. Likewise, the FDIC should give clear, actionable guidance regarding when a non-maturity deposit ceases to be deemed "brokered."

If you have questions about the foregoing or need additional information, please contact me at (212) 916-4229 or *asvarre@tiaa-cref.org* or my colleague Matthew C. Stone at (704) 988-7918 or *matthew.stone@tiaa-cref.org*.

Very truly yours,

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Banking and Trust

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[64] *Id.*