

FEDERAL DEPOSIT INSURANCE CORPORATION

12 CFR Part 337

RIN 3064-ZA30

Unsafe and Unsound Banking Practices: Brokered Deposits

AGENCY: Federal Deposit Insurance Corporation (FDIC).

ACTION: Notice of Additional Designated Business Relationship that Meets the Primary Purpose Exception

SUMMARY: The FDIC is identifying an additional business relationship, or “designated exception,” that meets the “primary purpose” exception to the deposit broker definition. The business relationship relates to specific, non-discretionary custodial services offered by third parties to depositors or depositors’ agents. Entities that meet the criteria detailed below will be permitted to rely upon the primary purpose exception without submitting a notice or application.

FOR FURTHER INFORMATION CONTACT: Division of Risk Management Supervision: Rae-Ann Miller, Associate Director, (202) 898–3898, rmiller@fdic.gov. Legal Division: Vivek V. Khare, Counsel, (202) 898–6847, vkhare@fdic.gov.

SUPPLEMENTARY INFORMATION:

I. Background

On December 15, 2020, the FDIC adopted a final rule on brokered deposits and the interest rate restrictions that apply to less than well capitalized insured depository institutions

(“IDIs”).¹ For brokered deposits, the final rule established a new framework for analyzing certain parts of the “deposit broker” definition, including a new interpretation for the “primary purpose” exception and the business relationships that meet the exception. The final rule took effect on April 1, 2021. Full compliance with the rule was extended to January 1, 2022.

II. Primary Purpose Exception

Section 29 of the FDI Act provides that the primary purpose exception applies to an “agent or nominee whose primary purpose is not the placement of funds with depository institutions.”² In the final rule, the FDIC provided that the primary purpose exception will apply when the primary purpose of the agent or nominee’s business relationship with its customers is not the placement of funds with depository institutions.³ In addition, the FDIC identified a number of business relationships (or “designated exceptions”) that meet the “primary purpose” exception. The final rule also provided that, as part of the enumerated list of designated exceptions, the FDIC would make publicly available any additional business arrangements not described in the rulemaking that the FDIC later determines meet the primary purpose exception (without requiring an application).⁴

III. Additional Designated Exception

As described below, the FDIC has identified the following additional business arrangement that meets the primary purpose exception and intends to make conforming changes

¹ 86 FR 6742 (Jan. 22, 2021); 12 CFR 337.6.

² 12 U.S.C. 1831f.

³ 86 FR 6742, 6749 (Jan. 22, 2021).

⁴ *Id.* at 6755; 12 CFR 337.6(a)(5)(v)(I)(I)(*xiv*).

to the Call Report instructions in coordination with the Federal Financial Institutions Examination Council.⁵

The agent or nominee is “engaged in the business of placing” customer funds at IDIs, in a custodial capacity, based upon instructions received from a depositor or depositor’s agent specific to each IDI and deposit account, and the agent or nominee neither plays any role in determining at which IDI(s) to place any customers’ funds, nor negotiates or set rates, terms, fees, or conditions, for the deposit account.

Over the past several months, in response to questions received, the FDIC has been considering the role that certain custodial agents play in various deposit placement arrangements. Specifically, in some deposit placement arrangements, a depositor, or a depositor’s agent, uses a custodial agent in placing depositor or customer funds at IDIs. Based on the “deposit broker” definition, these agents likely meet the “engaged in the business of placing” part of the definition because they receive third party funds and place those funds at more than one IDI.⁶

The FDIC recognizes, however, that in certain arrangements, the agent or nominee, in a custodial capacity, places deposits but has no discretion over where the deposits are placed and acts solely upon instructions given by the depositor or the depositor’s agent specific to each deposit account. Moreover, in these arrangements, when the agent or nominee, acting in a custodial capacity, places deposits based upon instructions received from a depositor or depositor’s agent, it does so without playing any role in determining at which banks the depositor’s funds are to be placed nor does the agent negotiate or set rates, terms, fees, or conditions for the deposit account.

⁵ The additional designated exception will be posted to the FDIC’s Banker Resource Center (Brokered Deposits Webpage), available at: <https://www.fdic.gov/resources/bankers/brokered-deposits/>, will be updated to reflect this additional designated business exception.

⁶ 12 CFR 337.6(a)(5)(i)(A).

As such, in these specific arrangements, it is the FDIC's view that the agent or nominee's primary purpose in placing deposits at IDIs is to provide non-discretionary custodial services on behalf of the depositor or depositor's agent. Therefore, such entities will be deemed to meet the primary purpose exception. Accordingly, through this Notice, the FDIC is identifying this specific business relationship as a designated business relationship that meets the primary purpose exception. Entities that meet the criteria described in this Notice will be permitted to rely upon the exception without the submission of an application or notice.

As noted above, a custodial agent that plays any role in determining at which IDI(s) to place any customers' funds will not be eligible for the designated exception. As an example, a custodial agent that plays any role in creating, operating, or using an algorithm that is used to determine or recommend at which IDI(s) any customer funds are placed would be viewed as playing a role in determining at which banks the depositor's funds are to be placed and thus not eligible for the designated exception.

Involvement of Additional Third Party Deposit Brokers

The FDIC notes that a depositor or depositor's agent that meets the deposit broker definition and uses the services of a custodial agent that meets this designated exception to place deposits would result in such deposits being classified as brokered deposits. The involvement of the non-discretionary custodial agent does not change the classification of deposits placed by, or through the facilitation of, an entity that otherwise meets the deposit broker definition.

Federal Deposit Insurance Corporation.

Dated at Washington, DC, on December 29, 2021.

James P. Sheesley,

Assistant Executive Secretary.

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