

## **SMALL ENTITY COMPLIANCE GUIDE**

### **FDIC’s revision of the “Brokered deposits” rule 12 CFR § 337.6**

#### **Introduction**

This guide<sup>1</sup> is intended to help community banking organizations, insured depository institutions (“IDIs”), and other interested parties understand the FDIC’s recent changes to the rule entitled “Brokered deposits,” codified at 12 CFR 337.6 (the “brokered deposits rule”). This guide does not carry the effect of law or regulation. In addition to using this guide, community banking organizations, IDIs, and other interested parties should review the FDIC’s recent revision of the brokered deposits rule published in the Federal Register on January 22, 2021, at [86 Fed. Reg. 6742](#).

#### **Overview of the brokered deposits framework**

##### ***Applicable statute***

Section 29 of the FDI Act, 12 U.S.C. 1831f (“Section 29”), generally restricts insured depository institutions that are not well capitalized from accepting deposits by or through a “deposit broker” (or if adequately capitalized, without a waiver from the FDIC). A person is a “deposit broker” if it is engaged in the business of placing deposits, facilitating the placement of deposits of third parties with insured depository institutions, or placing deposits with insured depository institutions for the purpose of selling interests in those deposits to third parties.<sup>2</sup> An agent or trustee is a “deposit broker” when it establishes a deposit account to facilitate a business arrangement with an insured depository institution to use the proceeds of the account to fund a prearranged loan.<sup>3</sup>

Section 29 additionally provides nine statutory exclusions from the definition of deposit broker.<sup>4</sup> The last of these, which excludes “an agent or nominee whose primary purpose is not the placement of funds with depository institutions,” is commonly referred to as the “primary purpose exception,” and receives the most attention.<sup>5</sup>

##### ***FDIC’s Brokered deposits rule***

In 1989, the FDIC promulgated its brokered deposits rule under authority granted by Section 29 of the FDI Act to implement and clarify the statutory restrictions and requirements. The rule has been amended from time to time, most recently in December 2020.

Under the rule, “deposit brokers” include those who are in the business of placing or facilitating

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<sup>1</sup> This small entity compliance guide is issued in accordance with Section 212 of the Small Business Regulatory Enforcement Fairness Act of 1996, Pub. L. No. 104-121, 110 Stat. 857, reprinted in 5 U.S.C.A. § 601, note.

<sup>2</sup> 12 U.S.C. § 1831f(g)(1)(A).

<sup>3</sup> 12 U.S.C. § 1831f(g)(1)(B).

<sup>4</sup> 12 U.S.C. § 1831f(g)(2).

<sup>5</sup> 12 U.S.C. § 1831f(g)(2)(I).

the placement of deposits of third parties at IDIs, those selling brokered CDs, those arranging deposits to fund pre-arranged loans, or IDIs or their employees soliciting deposits by paying interest significantly higher than that offered by other IDIs in the IDI's normal market place. The rule as revised provides that any person who has an exclusive deposit placement arrangement with **one IDI**, and is not placing or facilitating the placement of deposits at any other IDI, will not be a deposit broker. The rule also adds an exclusion from the definition of "deposit broker" for certain U.S. Government programs and interprets the statutory "primary purpose exception" in the context of modern deposit relationships.

### **Policy objectives for revising the brokered deposits framework**

The FDIC revised the framework for analyzing certain provisions of the statutory definition of "deposit broker" to:

- ease access to deposits for U.S. customers, including unbanked and underbanked customers, by removing regulatory disincentives that limit banks' ability to serve customers the way customers want to be served;
- modernize the regulation to reflect technological changes and innovations across the banking industry while balancing the need to promote safe and sound banking practices and ensuring that the classification of a deposit as brokered appropriately reflects changes in the banking system, including banks' use of new technologies to engage and interact with their customers; and
- provide clarity and transparency to the process for determining what constitutes a brokered deposit by identifying a number of bright-line categories, called "designated exceptions," for business arrangements that automatically satisfy the primary purpose exception and establishing a transparent application process for entities that seek a "primary purpose exception" but do not meet one of the "designated exceptions."

The revised brokered deposits rule expressly continues treatment of brokered CDs as brokered deposits and also affirms that third parties that place, or assist in the placement of, deposits with the primary purpose of encouraging savings will not be eligible for a primary purpose exception, unless as part of a tax-incentivized program.

### **Specific changes to the FDIC's brokered deposits rule**

*The meaning of "engaged in the business of" placing, or facilitating the placement of, deposits*

The revised brokered deposits rule clarifies that a person is "engaged in the business of" placing deposits, or facilitating the placement of deposits, of third parties:

- if that person receives third party funds and deposits those funds at more than one insured depository institution; and

- when that person has a business relationship with third parties, and as part of that relationship, places, or facilitates the placement of, deposits with insured depository institutions on behalf of the third parties.

*The meaning of “facilitation”*

The revised brokered deposits rule clarifies that a person is engaged in the business of “facilitating” the placement of deposits of third parties with insured depository institutions when that person is engaged in the following activities:

- The person has legal authority, contractual or otherwise, to close the account or move the third party’s funds to another insured depository institution;
- The person is involved in negotiating or setting rates, fees, terms, or conditions for the deposit account; or
- The person engages in active matchmaking, which means that the person proposes deposit allocations at, or between, more than one bank based upon both the particular deposit objectives of specific depositor (or depositor’s agent) and the particular deposit objectives of specific banks, except in the case of deposits placed by a depositor’s agent with a bank affiliated with the depositor’s agent.

*The “primary purpose exception”*

The revised brokered deposits rule provides that the primary purpose exception applies when, with respect to a particular business line, the primary purpose of the agent’s or nominee’s business relationship with its customers is not the placement of funds with depository institutions. Whether an agent or nominee qualifies for the primary purpose exception will be based on analysis of the agent’s or nominee’s relationship with those customers, not on the relationship to the bank. Entities intending to apply this exception should, in good faith, determine their appropriate, specific business lines. However, the FDIC ultimately retains discretion to determine the appropriate business line to which the primary purpose exception would apply.

The revised brokered deposits rule identifies several business relationships that automatically meet the primary purpose exception (referred to as “designated exceptions”)<sup>6</sup> and establishes an application process for entities that do not meet one of the “designated exceptions” but may qualify for the primary purpose exception. Designated exceptions are business relationships in which, with respect to a particular business line, the agent or nominee places, or facilitates the placement of:

- less than 25 percent of customer assets under administration with an insured depository institution;

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<sup>6</sup> 12 C.F.R. 337.6(a)(5)(iv)(I)(2).

- 100 percent of depositors' funds into transactional accounts that do not pay any fees, interest, or other remuneration;
- customer funds for the primary purpose of providing property management services;
- customer funds for the primary purpose of providing cross-border clearing services to its customers;
- customer funds for the primary purpose of providing mortgage servicing;
- customer funds for the primary purpose of facilitating real estate transactions;
- customer funds for the primary purpose of facilitating exchanges of properties under section 1031 of the Internal Revenue Code;
- customer funds to comply with 17 CFR 240.15c3-3(e) or 17 CFR 1.20(a) (commonly referred to as “special reserve bank accounts for the exclusive benefit of customers”);
- customer funds for the primary purpose of posting as collateral for customers to secure credit-card loans;
- customer funds for the primary purpose of paying for or reimbursing qualified medical expenses under section 223 of the Internal Revenue Code;
- customer funds for the primary purpose of investing in qualified tuition programs under section 529 of the Internal Revenue Code;
- customer funds to enable participation in certain tax-advantaged retirement programs;
- customer funds to deliver funds to the beneficiaries of government programs; or
- customer funds for the primary purpose of such other business relationships specifically identified by the FDIC.

A number of these business relationships have been the subject of prior FDIC staff interpretations indicating they met the primary purpose exception to the definition of “deposit broker.”

The brokered deposits rule states expressly that brokered CD placements are NOT eligible for primary purpose exception.

*Notice, application, and reporting requirements*

The FDIC has made a corresponding change to its rules of procedure covering notices and applications related to primary purpose exceptions.<sup>7</sup> Entities eligible for relief under the first two designated exceptions listed above (the “25 percent of customer assets” relationship or the “enabling transactions” relationship) must file a notice with the FDIC. No notice is required if covered by the other designated exceptions. Entities having a business relationship that does not fit within any of the designated exceptions may apply to the FDIC to recognize that business relationship as meeting the primary purpose exception. For more information, please refer to the Banker Resource Center Brokered Deposit page on the FDIC website, which includes instructions for submitting notices and applications with supporting documentation, as well as any required annual certifications or periodic reports. (<https://www.fdic.gov/resources/bankers/brokered-deposits/index.html>).

General questions about brokered deposits and the notice and application process should be sent to [Brokered\\_Dep@fdic.gov](mailto:Brokered_Dep@fdic.gov). Certain entities with business relationships that meet a designated exception, or that have applied for and been granted a primary purpose exception, may also be subject to periodic reporting requirements. These reporting requirements will allow the FDIC to monitor the applicability of the primary purpose exception.

### **Effect of brokered deposits rule changes on Small Entities**

The rule could incentivize the development of banking relationships between small, FDIC-insured institutions and other firms. The new opportunities could spur growth in the types of companies that provide third party deposit placement services, potentially resulting in greater access to, or use of, bank deposits by a greater variety of customers. Further, such growth could be of benefit to small FDIC-insured institutions allowing them to compete against large financial institutions that are utilizing internet-based deposit gathering methods across the country. The rule could also be beneficial if greater access to funding sources is shown to support small FDIC-insured institutions’ ability to provide credit.

Small, FDIC-insured institutions could benefit from the rule by having greater certainty and greater access to funding sources that would no longer be designated as brokered deposits, thereby easing their liquidity planning in the event they fall below well capitalized and become subject to the restrictions set forth in the law and regulations and reducing the likelihood that a liquidity failure of an otherwise viable institution might be precipitated by the brokered deposit regulations.

### **Compliance Dates**

The final rule takes effect on April 1, 2021. Full compliance with the brokered deposits rule is extended to January 1, 2022 to permit entities to continue to rely on existing staff advisory opinions until that date. After January 1, 2022, entities that wish to rely upon the primary purpose exception must file a notice with the FDIC or have applied for and received FDIC’s approval of a primary purpose exception (as appropriate).

### **Resources**

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<sup>7</sup> 12 CFR § 303.243.

FDIC's Final Rule to revise the brokered deposits rule, 86 Fed. Reg. 6742 (January 22, 2021) available at <https://www.fdic.gov/news/board/2020/2020-12-15-notice-dis-a-fr.pdf>.

FIL-113-2020, Combined Final Rule on Brokered Deposits and Interest Rate Restrictions (December 15, 2020) available at <https://www.fdic.gov/news/financial-institution-letters/2020/fil20113.html>.

Identifying, accepting, and reporting brokered deposits frequently asked questions (Updated June 30, 2016. Revised July 14, 2016) available at <https://www.fdic.gov/news/financial-institution-letters/2016/fil16042b.pdf>.