

**Decision of the
Supervision Appeals Review Committee**

In the Matter of * * *

Case No. 2022-02

I. Summary

After consideration of the timely filed written submissions of the parties and the record of this case, and following the parties' presentations and the deliberative meeting of the Supervision Appeals Review Committee (Committee), the Committee upholds the decision of the Director of the Division of Risk Management Supervision (RMS) that deposits received by * * * (Bank) from four broker-dealers are brokered deposits and must be reported as such on the Bank's Reports of Condition and Income (Call Reports). The Director's determination is consistent with the text and the FDIC's published interpretations of the regulations governing brokered deposits.

II. Background and Procedural History

This appeal concerns deposits totaling approximately \$[amount] received by the Bank through sweep programs of four broker-dealers: [Broker-Dealer # 1, Broker-Dealer #2, Broker-Dealer #3, and Broker-Dealer #4]. The Bank was not reporting these deposit balances as "brokered deposits" on its Call Reports. FDIC examiners inquired about the involvement of certain third parties – [Deposit Allocation Service Provider A] and [Deposit Allocation Service Provider B] – in the programs. [Deposit Allocation Service Provider B] is involved in the sweep program of [Broker-Dealer #1], while [Deposit Allocation Service Provider A] is involved in the other three broker-dealers' sweep programs. The examination team obtained the agreements between the broker-dealers and [Deposit Allocation Service Provider A and Deposit Allocation Service Provider B], and subsequently determined that [Deposit Allocation Service Provider A] and [Deposit Allocation Service Provider B] were "deposit brokers" because they were "engaged in matchmaking activities" as defined in the brokered deposit regulations. Accordingly, on May 24, 2022, [a Deputy Regional Director] directed the Bank to report these deposits as "brokered deposits" on its Call Reports.

The Bank began reporting the deposits as brokered deposits on its [date] Call Report, and filed a request for review of the determination with the Director of RMS (Director) pursuant to the FDIC's *Guidelines for Appeals of Material Supervisory Determinations* ("Guidelines").¹ On

¹ 87 Fed. Reg. 77112 (Dec. 16, 2022) (available at <https://www.fdic.gov/resources/regulations/appeals-of-material-supervisory-determination>).

September 8, 2022, the Director issued a decision concurring in the determination that the deposits should be reported as brokered deposits.

The Bank appealed the Director’s decision to the Committee. In accordance with the Guidelines, the Committee reviewed the appeal for consistency with the policies, practices, and mission of the FDIC, and the reasonableness of, and the support offered for, the positions of the parties. The Committee heard oral presentations from the parties on April 26, 2023 and subsequently met to consider the appeal.

III. Statutory and Regulatory Framework

The Federal Deposit Insurance Act generally prohibits insured depository institutions that are not well capitalized from accepting funds obtained, directly or indirectly, by or through any deposit broker.² The statute defines “deposit broker” to include “any person engaged in the business of placing deposits, or facilitating the placement of deposits, of third parties with insured depository institutions....”³

The focus of this appeal is the “facilitating the placement of deposits” prong of the “deposit broker” definition. Section 337.6 of the FDIC’s regulations implements the statute, and defines what it means to be “engaged in the business of facilitating the placement of deposits” to include, among other things, engaging in matchmaking activities.⁴ With respect to matchmaking activities, the regulation provides:

A person is engaged in matchmaking activities if the person proposes deposit allocations at, or between, more than one bank based upon both the particular deposit objectives of a 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. A proposed deposit allocation is based on the particular objectives of:

- (i) A depositor or depositor’s agent when the person has access to specific financial information of the depositor or depositor’s agent and the proposed deposit allocation is based upon such information; and
- (ii) A bank when the person has access to the target deposit-balance objectives of specific banks and the proposed deposit allocation is based upon such information.⁵

² 12 U.S.C. § 1831f(a).

³ 12 U.S.C. § 1831f(g)(1)(A).

⁴ 12 C.F.R. § 337.6(a)(5)(iii)(C).

⁵ 12 C.F.R. § 337.6(a)(5)(iii)(C)(I).

Following issuance of the brokered deposits regulation, the FDIC published on its website a Question and Answer document (“Questions and Answers”)⁶ addressing questions received on the regulation. Several questions address the matchmaking prong. Question C.5 states the following:

Under the “matchmaking definition,” when does a third party have access to a bank’s “target deposit-balance objectives”?

A third party has access to a bank’s “target deposit-balance objectives” when it has information regarding a specific deposit amount, a deposit-related percentage, or an amount of deposits within a specified range, that a bank is willing to accept. Communicating such information at any point during the deposit placement relationship with the third party would result in the third party having access to a bank’s target deposit balance objectives....

The analysis does not end when a person meets the statutory definition of “deposit broker,” as the statute provides a number of exclusions from the definition. One of these exclusions, generally referred to as the “primary purpose exception,” states that “deposit broker” does not include “an agent or nominee whose primary purpose is not the placement of funds with depository institutions.”⁷ The regulations enumerate certain relationships that automatically meet the primary purpose exception, known as “designated business exceptions,” and define procedures for entities that wish to claim these exceptions.

Where an arrangement involves multiple third parties, each third party’s role in the arrangement is considered to determine whether any third party satisfies the definition of “deposit broker,” and if so, whether any exceptions apply. If even one third party in the arrangement is a deposit broker without an applicable exception, the deposits are brokered deposits, regardless of whether other third parties fall outside the statutory definition of “deposit broker” or qualify for exceptions.⁸

⁶ See Questions and Answers Related to Brokered Deposits Rule, <https://www.fdic.gov/resources/bankers/brokered-deposits/brokered-deposits-qa.pdf>.

⁷ 12 U.S.C. § 1831f(g)(2)(I).

⁸ See 12 C.F.R. § 337.6(a)(2), (5); see also 86 Fed. Reg. 6756 (Jan. 22, 2021).

IV. Discussion

Each of the four broker-dealers here has provided notice to the FDIC that it meets the criteria for a designated exception to the definition of “deposit broker.”⁹ However, RMS’s information indicates that these broker-dealers had contracts with other parties – [Deposit Allocation Service Provider A] and [Deposit Allocation Service Provider B] – that could be deposit brokers under the FDIC’s regulations.¹⁰ Examiners determined that [Deposit Allocation Service Provider A] and [Deposit Allocation Service Provider B] satisfied the definition of “deposit broker” because they were engaged in matchmaking activities, with the result that the broker-dealers’ deposits would be considered brokered deposits.

The Bank’s Position

The Bank asserts that the services provided by [Deposit Allocation Service Provider A] and [Deposit Allocation Service Provider B] are administrative and do not constitute matchmaking. The Bank notes that for a person to be engaged in matchmaking under the regulation, the deposit allocations it proposes must be based upon the “particular deposit objectives” of both specific depositors (or their agents) and specific banks. The Bank asserts that “objectives” mean future goals. The Bank reasons that for a person to be a matchmaker, it must know the depositor’s specific future goals for the deposited funds as well as the bank’s specific future goals, including the rates, duration, and location of deposits. The Bank states that the regulatory definition of matchmaking is narrow, and that both the Director’s decision and the FDIC’s Questions and Answers attempt to broaden this definition.

The Bank further asserts that the FDIC’s comments in the preamble to the final rule on brokered deposits make clear that to be a matchmaker, a third party must control the flow of deposits. In the Bank’s view, [Deposit Allocation Service Provider A] and [Deposit Allocation Service Provider B] do not control the deposited funds. The Bank states that it has contracts with each of the broker-dealers dictating the balances transferred to the Bank, and [Deposit Allocation Service Provider A] and [Deposit Allocation Service Provider B] execute the terms of those contracts.

The Bank also states that it relied upon the representations of each of the broker-dealers that third parties were only providing administrative services that would not affect the application of the primary purpose exception. The Bank states that it was not in a position to know the details of

⁹ Section 303.243 of the FDIC’s regulations sets forth a process for a person or entity to notify the FDIC that it will rely upon a designated exception to the definition of “deposit broker.” The FDIC makes available on its website a list of companies that have filed such notices. See <https://www.fdic.gov/resources/bankers/brokered-deposits>.

¹⁰ Where information provided to the FDIC indicates that additional third parties are involved that may meet the deposit broker definition, the listing of notice filers on the FDIC’s website includes an asterisk to indicate this. The list includes a note explaining that if additional third parties meet the deposit broker definition, banks should report deposits received under the business line as brokered deposits on their Call Reports.

the broker-dealers' arrangements with [Deposit Allocation Service Provider A] and [Deposit Allocation Service Provider B], and had no reason to assume that the broker-dealers would misrepresent the role of third parties in their contracts with the Bank.

RMS's Position

RMS argues that services of [Deposit Allocation Service Provider A] and [Deposit Allocation Service Provider B] constitute matchmaking under the plain language of the regulation. In RMS's view, whether a party controls the flow of funds or has a direct relationship with customers are not determining factors under the definition of matchmaking.

RMS argues that [Deposit Allocation Service Provider A] and [Deposit Allocation Service Provider B] use both specific financial information of the depositor or the depositor's agent and target deposit-balance objectives of specific banks to propose allocations of deposits among banks. RMS asserts that the depositor's objective is maximizing FDIC insurance coverage for the deposited funds, and [Deposit Allocation Service Provider A] and [Deposit Allocation Service Provider B] use specific financial information of the depositor or depositor's agent in order to propose allocations that fall within the insurance limit applicable to the depositor at each bank. As for banks' target deposit-balance objectives, RMS points to contract provisions stating that [Deposit Allocation Service Provider A] and [Deposit Allocation Service Provider B] each use as a component of the allocation process the amount of deposits that each bank is willing to accept. RMS concludes that [Deposit Allocation Service Provider A] and [Deposit Allocation Service Provider B] act as matchmakers in these deposit sweep arrangements by operating the algorithm that proposes deposit allocations.

The Committee's Findings

The determination that [Deposit Allocation Service Provider A] and [Deposit Allocation Service Provider B] were engaged in matchmaking activities is consistent with the regulation's plain meaning and the FDIC's published interpretations. Under the regulation, a proposed deposit allocation is based on the "particular objectives" of the depositor or depositor's agent when it is based upon specific financial information of the depositor or depositor's agent.¹¹ The agreements with [Deposit Allocation Service Provider A] and [Deposit Allocation Service Provider B] provide that the allocation process will employ such information. A particular objective of the depositors or depositors' agents in these sweep programs is maintaining full deposit insurance coverage. Both firms' allocation processes transfer funds to banks in increments that do not exceed the \$250,000 deposit insurance limit at any single bank, and allow

¹¹ 12 C.F.R. § 337.6(a)(5)(iii)(C)(1)(i) and Questions and Answers Related to Brokered Deposits Rule, C.5.

for the exclusion of particular banks to ensure full deposit insurance coverage where a depositor maintains a separate deposit account at that same bank.¹²

Under the regulation, a proposed deposit allocation is based on the “particular objectives” of banks when it is based on target deposit-balance objectives of specific banks.¹³ A bank’s target for or limit on the amount of deposits it is willing to accept is a “target deposit-balance objective.” This is consistent with the FDIC Questions and Answers, which state that “target deposit-balance objectives” would include a specific deposit amount, a deposit-related percentage, or an amount of deposits within a specified range that a bank is willing to accept.¹⁴ The agreements with [Deposit Allocation Service Provider A] and [Deposit Allocation Service Provider B] provide that the allocation process is based on the “target balance” or limit on deposits that each bank is willing to accept,¹⁵ and this is sufficient to meet the criteria defined in the regulation.¹⁶

The record establishes that [Deposit Allocation Service Provider A] and [Deposit Allocation Service Provider B] propose deposit allocations at more than one bank based upon both particular deposit objectives of depositors or their agents and particular deposit objectives of banks. [Deposit Allocation Service Provider A] and [Deposit Allocation Service Provider B] are engaged in matchmaking activities, and are therefore engaged in the business of facilitating the placement of deposits. The record does not establish that any statutory or regulatory exceptions to the “deposit broker” definition apply to [Deposit Allocation Service Provider A] and [Deposit Allocation Service Provider B]. Accordingly, the involvement of [Deposit Allocation Service Provider A] and [Deposit Allocation Service Provider B] in the sweep programs of the four broker-dealers results in the deposits being “brokered deposits.”

V. Conclusion

¹² See, e.g., Bank’s Exhibit 18, [Broker-Dealer #1] and [Deposit Allocation Service Provider B] Agreement; Bank’s Exhibit 20, [Broker-Dealer # 2] / [Deposit Allocation Service Provider A] Agreement.

¹³ 12 C.F.R. § 337.6(a)(5)(iii)(C)(I)(ii).

¹⁴ See Questions and Answers Related to Brokered Deposits Rule, C.5.

¹⁵ See, e.g., Bank’s Exhibit 18, [Broker-Dealer #1] and [Deposit Allocation Service Provider B Agreement]; Bank’s Exhibit 19, [Broker-Dealer #4] and [Deposit Allocation Service Provider A Agreement].

¹⁶ Control is not a prerequisite of matchmaking. While the preamble to the rule on brokered deposits references control over movement of customer funds, this discussion related to prongs of the facilitation definition — specifically, 12 C.F.R. §§ 337.6(a)(5)(iii)(A) and (B) — that are not at issue in this case. The discussion of the matchmaking prong makes no reference to control, and states that the facilitation definition and its three prongs “will apply, generally, to *any third party that plays a role in the flow of funds* between a prospective depositor and the opening of a deposit account at an insured depository institution.” 86 Fed. Reg. 6746-47 (Jan. 22, 2021) (emphasis added).

We note that this is the first appeal involving the brokered deposit regulations decided since the FDIC made significant amendments to those regulations in 2020. The Committee appreciates the challenges the Bank faced in conducting due diligence with respect to these arrangements, as the Bank was not a party to the agreements between the broker-dealers and [Deposit Allocation Service Provider A] and [Deposit Allocation Service Provider B]. Consistent with the statement issued by the FDIC on July 15, 2022 regarding similar deposit arrangements,¹⁷ we believe it is reasonable that the Bank was not required to amend its previously filed Call Reports. However, once the details regarding [Deposit Allocation Service Provider A] and [Deposit Allocation Service Provider B] respective roles in the deposit placement arrangements became evident, the deposits must be reported as brokered on the Bank's Call Reports.

For the reasons stated above, the Committee concludes that the decision of the Director of RMS was consistent with the policies and practices of the FDIC, and therefore upholds that decision.

This decision is a final supervisory decision by the FDIC.

¹⁷ See <https://www.fdic.gov/news/financial-institution-letters/2022/fil22030.html>.