July 27, 2015

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

Attention: Comments

RE: Advance Notice of Proposed Rulemaking with respect to Large Bank Deposit Insurance Determination Modernization (12 CFR §360); RIN 3064–AE33[1]

Dear Mr. Feldman:

The American Bankers Association, the Clearing House Association, and the Consumer Bankers Association (collectively, the Associations)[2] appreciate the opportunity to respond to the advance notice of proposed rulemaking (ANPR) from the Federal Deposit Insurance Corporation (FDIC) on Large Bank Deposit Insurance Determination Modernization. Comments in this letter are drawn from discussions with representatives of all of the banks that would be subject to the ANPR as proposed (covered banks).[3]

The Associations and covered banks appreciate the open discussions with FDIC staff regarding the ANPR. Comments in this letter represent the reactions of the covered banks to the ANPR and clarifications provided by FDIC staff.

The ANPR seeks to enhance processes to expedite depositors' access to their funds in accordance with FDIC insurance coverage in the event of failure of a covered bank. The Associations support this goal as a means to maintain public confidence in the FDIC, bank deposits, and the U.S. banking system. We are committed to working with the FDIC to design and implement cost-effective solutions to achieve these ends.

The Associations appreciate the complexity involved in resolving a failed bank and fulfilling the FDIC's insurance obligations. In order to provide a comprehensive assessment of the issues

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1 80 Federal Register (81) 23478, April 28, 2015, available at www.gpo.gov/fdsys/pkg/FR-2015-04-28/pdf/2015-09650.pdf.

2 Descriptions of the Associations are provided in an appendix.

3 Banks with two million or more of deposit accounts would be subject to any final rule as contemplated in the ANPR.

raised in the ANPR, covered banks will need significantly more information on the proposed insurance determination and transaction posting rules. The Associations and covered banks are ready to continue discussions with the FDIC as consideration of this matter evolves.

Summary of the Associations' Position

To make the FDIC insurance determinations contemplated in the ANPR, covered banks will be required to obtain and maintain "accurate and complete data on each depositor's ownership interest by right and capacity … for all or a large subset of the bank's deposit accounts."[4] Based on their understanding of the FDIC's intent, the covered banks have significantly varying projections of the percentages of their deposit balances for which they anticipate being able to make insurance determinations as "closing night deposits." These projections vary depending on a covered bank's data and systems capabilities and on the types of accounts the FDIC categorizes as "closing night deposits." The covered banks generally believe that the process could include the largest and most common insurance categories of single, joint, and business accounts. The Associations believe that an automated solution on this scale would provide for prompt insurance determinations on "a substantial subset of deposit accounts,"[5] in accordance with the objective of the ANPR.

There are some account types, including those identified by the FDIC with regard to 12 CFR §360.9,[6] for which it will not be feasible or practical for covered banks to collect the depositor information needed for FDIC insurance determinations. The Associations support recognition in any final rule that, for reasons discussed below, covered banks cannot and should not be required to collect full customer/beneficial owner information for some deposits, and that these accounts should be considered "post-closing deposits."

The ANPR also contemplates significant upgrades to covered banks' information management and recordkeeping systems so that these can be used to determine insured balances and place holds on specified portions of uninsured balances at the close of any business day. Implementing these upgrades is likely to involve major information technology (IT) projects at a time when substantial resources are already committed to high-priority data security projects and to meet other significant and recently imposed regulatory requirements.

The covered banks believe they can ultimately be prepared to satisfy the FDIC's intent, provided the FDIC (i) allows sufficient development and implementation time, (ii) provides details of how

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4 ANPR, pages 23478 and 23480.

5 ANPR, pages 23478 and 23480.

6 Rule 12 CFR §360.9 on "large-bank deposit insurance determination modernization" (www.gpo.gov/fdsys/pkg/CFR-2011-title12-vol4/pdf/CFR-2011-title12-vol4-sec360-9.pdf) requires every bank having at least $2 billion in deposits and either (i) at least 250,000 deposit accounts or (ii) $20 billion in total assets, regardless of the number of deposit accounts, to "have in place practices and procedures for providing the FDIC in a standard format upon the close of any day's business with required depositor and customer data for all deposit accounts held in domestic and foreign offices and interest-bearing investment accounts connected with sweep and automated credit arrangements."

insurance determination computations are to be performed, and (iii) works closely with each covered bank throughout the process. While we understand and support the purpose of this effort, we ask the FDIC to acknowledge that requiring covered banks to assume a function for which the FDIC has ultimate responsibility represents a far greater challenge for the banks than compliance with 12 CFR §360.9. As with that rule, we request that the FDIC apply flexibility in assessing each covered bank's capabilities on an individual basis and granting accommodations where application of the proposed requirements is not feasible or practical.

In recognition of these challenges, we recommend the following.

- **Continued Flexibility.** The FDIC should work with and assess each covered bank's capabilities on an individual basis and be appropriately flexible where application of the proposed requirements is not feasible or practical.

- **Post-closing deposits.** At a minimum, the exceptions provided for 12 CFR §360.9 should be the basis for determining the types of accounts classified as "post-closing deposits."

- **Trust accounts.** Covered banks should not be required to maintain information on beneficiaries of trust deposit accounts or other types of pass-through accounts, or on other parties for whom covered banks do not currently collect such information.

- **12 CFR §330.9 signature requirement.** The FDIC should initiate the process of deleting the signature requirement of 12 CFR §330.9(c)(1)(ii) for "qualified joint accounts" in the context of a bank failure, or else change this provision to allow that a joint account is a "qualifying joint account" based on the titling of the account.

- **Implementation Timeline.** Assuming our recommendations are incorporated into any final rule, based on their experience with 12 CFR §360.9, covered banks estimate that they would need at least four years after any final rule is issued, with potential extensions depending on their progress, to develop and implement the processes envisioned in the ANPR.

- **Clarity in the Rule.** The FDIC should provide, as soon as possible, a clear statement of the scope of the deposit accounts/systems to be covered, the business rules that covered banks would need to follow in order to design and operate systems capable of making deposit insurance determinations in-house, and guidance regarding systems expectations.

- **Disclosure of insured balances.** Covered banks should not be required to disclose insured balance levels to depositors.

These recommendations are discussed in greater detail below.

Need for Continued Flexibility

The ANPR contemplates augmenting for covered banks the recordkeeping requirements under 12 CFR §360.9. In developing systems to comply with that rule, most of the covered banks found clusters of deposit accounts for which the desired depositor information was simply unavailable, or for which the cost and customer disruption required to collect such information would be excessive. Recognizing these limitations, the FDIC has collaborated with many of the banks to identify a reasonable treatment for those deposits.[7]

Considering the complexity of the systems and processes envisioned in the ANPR and challenges in their implementation, **the Associations ask the FDIC to apply the same level of flexibility as it did for 12 CFR §360.9 in assessing, on an individual basis, each covered bank's capabilities to comply with any final rule, granting exceptions where application of the requirements is not feasible or practical**.

"Closing Night Deposits" *vs.* "Post-Closing Deposits"

The Associations and covered banks request that, **at a minimum, the FDIC use the exceptions provided in 12 CFR §360.9 as the basis for determining the types of accounts to be classified as "post-closing deposits" under any final rule.**

The ANPR contemplates covered banks maintaining extensive customer and balance data on their deposit systems. The banks judge that they could, in time, capture and maintain the requisite depositor information for "a substantial subset of deposit accounts"[8] representing a large majority of individual, joint, and business accounts, to be "closing night deposits" – provided the issue of signatures for "qualifying joint accounts" is resolved (as discussed below). The ability to manage efficiently this magnitude of deposits at the close of any business day would support the FDIC's objective to "maintain the public trust in the banking system" and "fulfill its statutory obligation to make insured depositors whole 'as soon as possible.'"[9] The remaining deposits that could not be included in this process could be resolved as "post-closing deposits" under existing FDIC procedures.

In working with banks to assess implementation of 12 CFR §360.9, the FDIC identified classes of deposits for which full depositor identification information could not reasonably or practically be obtained and the data download requirements would not apply:[10]

- deposits where beneficial owner data are not maintained by the bank, such as brokerage customer deposit sweeps,[11] brokered CDs[12] where the paper is registered with the Depository Trust Company, and deposit exchanges between banks (such as CDARS);

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[7] For example, some of the covered banks have been permitted to leave small-balance deposits maintained on legacy systems out of their 12 CFR §360.9 data download processes.

[8] ANPR, pages 23478 and 23480.

[9] ANPR, pages 23479 and 23480.

[10] See www.fdic.gov/regulations/resources/largebankdim/modernization.html.

- gift and payroll cards where cardholder data are maintained by an unaffiliated entity;
- omnibus deposit accounts set up by another institution or a non-bank customer on a pass-through basis so that the bank has no direct relationship with (and therefore no records identifying) the individual account beneficiaries, such as escrow accounts and safekeeping balances, employee deductions accounts;
- accounts that reside on external systems with only summary posting of totals to the bank's general ledger, such as credit card and loan overpayments, prepaid loan expenses and loan proceeds in process, clearing accounts, unclaimed property accounts, general ledger suspense accounts, and Health Savings Accounts;
- deposits in process for settlement or transfer, where the account holder information resides temporarily in an internal account;[13]
- balances for government benefits payable, such as food stamps and child support, or health benefits payable to employees; and
- U.S. Treasury Tax and Loan Accounts.

The FDIC has described the attributes of these deposits as follows:[14]

- [a] DDA account [that] represents a summary of many individual accounts
- accounts [that] reside on external systems with only summary posting totals to the institutions' general ledger … such as credit card overpayments
- [general ledger] accounts used as clearing accounts for unposted items[15]
- credit card, prepaid card, payroll card, gift card, and other similar accounts … due to the small balances and inaccessibility to owner information
- balances representing government benefits payable, such as food stamps, child support, and similar programs
- balances representing health benefits payable to employees

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[11] For deposit sweeps, broker-dealers (affiliated and non-affiliated) maintain the customer data for the depositors benefiting from FDIC "pass-through" insurance coverage with deposits held at a bank. As noted in the ANPR, the need to obtain information from the agents could delay the calculation of deposit insurance by the FDIC in the case of a bank failure.

[12] The Associations note that the FDIC has an established procedure for determining insurance coverage for brokered deposits (www.fdic.gov/deposit%2Fdeposits/brokers/01overview.html). We assume that that procedure would not be revoked or materially changed for brokered deposits in covered banks. The availability of that procedure appears to make inclusion of brokered deposits in "closing night deposits" unnecessary, since brokers would provide needed information after the closing date.

[13] Internal accounts holding deposits for cashier's checks and official checks that have been issued warrant the same treatment.

[14] As worded on www.fdic.gov/regulations/resources/largebankdim/modernization.html.

[15] To the extent that FDIC procedures allow completion of postings on a closing date, exemption from "closing night deposits" for accounts that reflect unposted items would not create gaps in FDIC insurance coverage. If normal posting is not permitted, the operational complexity and cost of any final rule would rise considerably.

The reasons for including and excluding deposits from the scope of 12 CFR §360.9 data downloads apply equally to the intent of the ANPR in differentiating between "closing night deposits" and "post-closing deposits." Where covered banks have been able and are required to provide downloadable data for accounts used to determine FDIC-insured balances under 12 CFR §360.9, those accounts can be identified as "closing night deposits." Where account attributes mean that these data are unavailable or cannot feasibly be collected, these accounts should be identified as "post-closing deposits."

Currently, after closing a bank the FDIC pursues additional information for some types of deposit account to finalize insurance determinations. Based on the ANPR and discussions with FDIC staff, we understand that the intent is to permit the FDIC, in the case of a covered bank's failure, to apply procedures similar to those used in smaller bank failures. However, expansion of the set of account types for which final determinations can be made over a resolution weekend, to include accounts for which banks do not collect the information needed, would be a major divergence from those procedures. Such an expansion would disadvantage covered banks by significantly raising the cost of their deposit operations and also making them unattractive in the market for certain deposit products. It could also result in material differences in the treatment of customers of a closed covered bank and those of other closed banks.

The Associations also recommend that the FDIC entirely exclude deposits that are not covered under FDIC insurance from the scope of any proposed or final rule. For example, deposits in foreign bank offices are not insured, and therefore there is no practical reason to evaluate them for insurance coverage at the customer level. Covered banks have already adopted processes under 12 CFR §360.9 to place holds on such deposits, and those capabilities would be employed during a resolution.

Based on the above principles, the Associations recommend the FDIC adopt the following attributes as criteria for "post-closing deposits":

- deposit or customer data needed to perform insurance determinations do not exist or are unavailable, or are incomplete on the bank's deposit systems of record;[16]
- deposit or customer data needed to perform insurance determinations are not held by the bank;
- distribution of account or customer data is restricted by legal or contractual obligations; or
- balances are ineligible for FDIC insurance, such as foreign office deposits.

The ANPR asks for input on which depositors need immediate access to their funds following a bank failure.[17] The Associations believe that this issue is a matter of public policy for Congress and the FDIC to determine.

[16] This includes situations where deposit or customer data to perform insurance determinations, or else accounts or balances, are not maintained on the bank's deposit systems of record.

Limits on Depositor Information for Trust and Other Types of Deposit Account

For certain types of depositors, existing legal and practical barriers significantly limit the ability of banks to collect full identification information until it is needed for disbursement of funds. Of particular note are deposit accounts for trusts and other pass-through accounts. The ANPR acknowledges these barriers in proffering two options for these types of accounts, as follows:[18]

1. Require each covered bank to maintain current information on account beneficiaries, so that prompt FDIC insurance determinations could be made at the close of any business day.

2. Require each covered bank's deposit recordkeeping system to be able to identify trust accounts and place full or partial holds on these accounts. Should the bank fail, the account owners would need to submit beneficiary identification information to the FDIC.

Given these barriers, the Associations strongly support the second option: **any final rule should not require covered banks to maintain current information on trust and pass-through deposit account beneficiaries**.

In the case of a deposit account maintained by a formal, written trust, the trustee is bound by fiduciary obligations of loyalty to keep the affairs of the trust confidential and not disclose certain information to a third party, such as a bank, when opening the account. This confidential information includes the names and status of the beneficiaries under the trust document.[19]

In an effort to protect the trustees from liability and avoid compromising their duty of loyalty, Uniform Trust Code (UTC) §1013 provides that trustees can use a Certification of Trust containing limited information to show the trustee's authority to transact business on behalf of the trust. The purpose of the Certification is "to protect the privacy of a trust instrument by discouraging requests from persons other than beneficiaries for complete copies of the instrument in order to verify a trustee's authority."[20] In addition, many state statutes contain a provision similar to UTC §1013(h), which imposes potential liability on third parties demanding the entire trust document.[21]

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[17] ANPR, pages 23482 and 23483.

[18] ANPR, page 23483.

[19] For example, a beneficiary's status may be that of a current, remainder, or contingent beneficiary. Under the FDIC's insurance coverage rules for irrevocable trusts, only certain types of beneficiaries, such as those with non-contingent trust interests, may confer additional deposit insurance to the account. (12 CFR §330.13)

[20] Uniform Trust Code §1013 Commentary, available at www.uniformlaws.org/shared/docs/trust_code/UTC_Final_rev2014.pdf.

[21] Uniform Trust Code §1013(h) provides that "[a] person making a demand for the trust instrument in addition to a certification of trust or excerpts is liable for damages if the court determines that the

Even if there were no legal obstacles to obtaining trust beneficiary information, it would not be practical to maintain records of sufficient accuracy to treat accounts maintained by formal, written trusts as "closing night deposits." The number and names of non-contingent beneficiaries that may confer additional deposit insurance to the trust deposit change periodically with births, deaths, and as conditions for contingent beneficiaries are satisfied. In addition, the insurance coverage rules for trusts are nuanced and require consideration of the legal status of the trust beneficiary. For example, deposit insurance for irrevocable trusts depends upon the number of beneficiaries with a "non-contingent trust interest," as defined in 12 CFR §330.1(m). This definition, in turn, looks to the federal estate tax regulations in 26 CFR §20.2031-7. If covered banks are to be required to make such determinations, they would not be able to open deposit accounts for trusts without obtaining information that trustees are unwilling or unable to provide, as noted above.

In the case of a bank serving as trustee (or in a related capacity, such as paying agent) pursuant to a bond indenture, pooling and servicing agreement, or similar document, the bank does not know who the beneficiaries are. Unless the issuer of the bonds provides physical certificates to evidence an investor's ownership – which is rarely done – the bonds are held in book entry form at the Depository Trust & Clearing Corporation (DTCC). When paying interest on bonds, the trustee (or paying agent) makes a single payment to the DTCC to cover amounts due to bondholders. The DTCC, in turn, makes appropriate proportionate payments to its members (typically banks and broker-dealers) who, in turn, make proportionate payments to their clients. This process proceeds until the interest payments reach the actual bondholders. All buying and selling activity (including resales) of the bonds occurs at the lowest level of this chain, for which information is not provided to the indenture trustee. When indenture trustees must try to reach individual bondholders, for example with respect to bankruptcy of the issuer, the trustee must ask the DTCC to work through its participants to provide a list of the bondholders, a process that is quite time-consuming and expensive. Thus, indenture trustees have no knowledge of who the actual bondholders are (with the rare exception noted above with respect to holders of physical certificates). Moreover, even if this information could be obtained, it would only reflect a point in time as bondholders may change frequently. Consequently, it is entirely infeasible for covered banks to meet a requirement to have beneficiary information on an ongoing basis.

For deposits made by the trust department of a covered bank into the commercial side of the same institution,[22] the same duties of loyalty and confidentiality preclude sharing information about beneficiaries prior to resolution of the bank. However, it is possible that, to the extent that the covered bank has the requisite information in its trust records (*e.g.*, for some personal trusts), the FDIC would be able to process these accounts relatively quickly after a resolution has started.

If covered banks were required to maintain in their deposit or other recordkeeping systems current trust or pass-through beneficiary information, they would be significantly disadvantaged

person did not act in good faith in demanding the trust instrument." This provision has been adopted in 31 states and the District of Columbia.

[22] Sometimes referred to as fiduciary self-deposits.

in offering deposit services to trusts and pass-through accounts. They would need to inquire regularly with trustees and other direct customers to check on and update beneficiary information in case of births, deaths, and changes in beneficiary status. For some types of accounts, the trustees and direct customers would not have the required information in any case. These customers would clearly be incented to take their business elsewhere.

To expedite the resolution of trust and pass-through accounts in the case of failure of a covered bank, the Associations recommend that the customer information regarding FDIC insurance coverage, provided on www.fdic.gov, be augmented to explain in detail the treatment of trusts and pass-through accounts in a bank failure, to indicate to trustees and beneficiaries where they would stand should the bank fail and instruct trustees on what to do to recover funds as quickly as possible. Further, the Associations volunteer to work with the FDIC to improve the account beneficiary forms posted to www.fdic.gov for trustees or account managers to use in the event of a bank failure.[23]

Signature Requirement under 12 CFR §330.9 and Joint Accounts

The Associations recommend that the signature requirement of 12 CFR §330.9(c)(1)(ii) be deleted in the context of a bank failure or that the FDIC provide an alternative means to satisfy this requirement based on the titling of the joint account in the bank's records. Otherwise, covered banks would almost certainly be unable to provide all the information required for insurance of joint accounts.

Regulation 12 CFR §330.9 provides that "joint ownership accounts" are a separate FDIC-insurance category, such that, when a joint account is a "qualifying joint account," every co-owner of the account is entitled to $250,000 FDIC insurance protection for that account (in addition to $250,000 coverage per account owned in other capacities).[24] Further, 12 CFR §330.9(c)(1)(ii) specifies that, to be a "qualifying joint account," the bank must have on file a deposit account signature card signed by each co-owner. And finally, 12 CFR §330.9(d) provides that if an account is not a "qualifying joint account," then the account co-owners do not receive the additional, separate $250,000 protection.

There is no requirement for banks to (1) ensure that all signature cards are complete and on file for joint accounts, or (2) record in deposit recordkeeping systems which joint accounts have complete signature cards. Consequently, covered banks advise that they cannot certify that their deposit recordkeeping systems have accurate records as to which joint accounts are "qualifying" because they have never been required to maintain such records. Even banks that have tried to do so may have incomplete records for deposits acquired in mergers and acquisitions.

[23] The Associations offer to assist the FDIC in review of the deposit claims posted to www.fdic.gov/regulations/laws/FORMS/claims.html.

[24] 12 CFR §330.9 Joint Ownership Accounts is available at www.gpo.gov/fdsys/pkg/CFR-2013-title12-vol5/pdf/CFR-2013-title12-vol5-sec330-9.pdf.

However, as 12 CFR §330.9 is currently written, a bank cannot accurately determine FDIC-insured deposit levels for single and joint accounts without being able to identify "qualifying joint accounts." The bank has to know whether a joint account holder qualifies for or receives separate coverage up to $250,000 for both a joint account (if it is "qualifying") and for his/her separate, individual account(s), *vs.* whether his/her share of a joint deposit account (if it is not "qualifying"), when added to his/her individual account(s), exceeds $250,000. And if he/she is a participant in multiple joint accounts, then the bank must know which of these are "qualifying" to make an accurate determination.

A covered bank could go through all of its joint accounts records to verify which have full sets of signature cards and are "qualifying." However, this would be a major undertaking. Moreover, going forward, keeping these records accurate and up-to-date would be a continuing and likely unsolvable problem. Not infrequently, an individual will open a joint account and take the signature card for a joint co-owner to sign, saying that he/she will return with the co-owner's signatures, but then take considerable time – if ever – to get to it.

Therefore, covered banks report that they cannot assure their records on signature cards for joint accounts can reasonably be expected to ever be complete.

The Associations note that this is likely an issue in most if not all bank failures, not just for covered banks. When the FDIC has sought to expedite account resolutions in the past, it is not clear that it has held to the signature card requirement. In this case, it would be inequitable to treat joint accounts and account co-owners differently depending on whether the account is in a covered *vs.* other bank.

As an alternative to deleting the signature requirement of 12 CFR 330.9(c)(1)(ii), the Associations recommend that the FDIC consider adding language to either 12 CFR 330.9(c)(1) or 12 CFR 330.9(c)(3) to provide that a covered bank – or, for that matter, any bank – be permitted to conclusively presume that a joint account is a "qualifying joint account" based on the titling of the account on its systems.

Changes in Information Technology Systems to Implement any Final Rule

Enhancing recordkeeping systems so that FDIC insurance determinations for "closing night deposits" can be made on covered banks' systems at the close of any business day will present two major challenges. First, covered banks will be required to develop a full understanding of FDIC insurance guidelines. Although all banks currently have operational familiarity with these rules, no bank today takes responsibility for the legal determination of the extent of insurance coverage beyond the extent required to address customer inquiries and assure accuracy in advertising. Yet, if the ANPR contemplates that covered banks' systems will correctly calculate insurance coverage in the compressed timeframe of a resolution, accurate systems programming according to detailed business rules will be essential. Because this requirement clearly transcends the compliance responsibilities of a covered bank and represents a core part of FDIC's statutory responsibilities, **the Associations recommend that the FDIC provide means to alleviate the**

burden of individual, customized programming, and that the FDIC staff allocate time to work closely with covered banks to address this aspect of the process. This effort will involve direct involvement between bank and FDIC staff, recognizing that information systems inevitably vary among institutions, so that any operationally effective solution will necessarily involve details that are unique to each covered bank.

Second, the FDIC is asking covered banks to undertake major systems development projects at a time when key resources in all of the banks are under continuing pressure to enhance data security systems and all are occupied with major initiatives, most driven by new compliance demands, some of which involve categorization of deposits for other regulatory purposes.[25] These efforts absorb enormous shares of covered banks' available human capital and systems budgets. These initiatives have deadlines and milestone requirements that are beyond the institutions' control and, in many cases suffer from a lack of any meaningful regulatory coordination. To add a deposit insurance determination project to this extensive list will require careful consideration and balanced allocation of resources. Otherwise, the process will increase the risk of technical failures.

Covered banks note that the scope of accounts subject to any final rule and the related information requirements will drive the final cost, complexity, and required implementation time of the required IT changes and system enhancements. Further, resolution first of the scope of "closing night deposits" account types will be required to support development of the systems enhancements and would facilitate identification of potential synergies, or at least reduce the likelihood of conflicts, with other information systems initiatives simultaneously underway.

Implementation Timetable

The covered banks will need considerable time to implement the processes envisioned in the ANPR. Two years were permitted for the earlier Large Bank Deposit Insurance Determination Modernization rule that became 12 CFR §360.9, and the FDIC extended that timetable in recognition of the time and effort exerted but still needed by the banks. The enhancements contemplated in the ANPR are much more complex and would require more major IT system changes. **Covered banks have advised the Associations that they would need at least four years with potential extensions for implementation after any final rule is issued.** In addition, the Associations recommend incorporation into any implementation timeline a period of testing and dialogue between FDIC and covered bank staff.

The Associations urge the FDIC to recognize that covered banks would have to queue the system enhancements envisioned in the ANPR with several other regulatory requirements. Covered

[25] Covered banks are currently incorporating systems enhancements for Federal Reserve reporting to support stress testing, capital planning and risk assessments (forms FR Y-14A and FR Y-15); the Liquidity Coverage Ratio rule and form FR 2052A; resolution planning; Bank Secrecy Act/Anti-Money Laundering Know Your Customer and Transaction Monitoring; Service Members' Civil Relief Act; Foreign Account Tax Compliance Act; Language of preference (Spanish language letters, notices, statements); Volcker Rule compliance; and TILA-RESPA Integrated Disclosures.

banks have advised the Associations that the system enhancements to meet the expectations of the ANPR would not interplay with these other processes, so its implementation could not be integrated with any of them. The timetable in any final rule will need to take this queuing into account.

To support and promote the intended system changes, **the Associations ask the FDIC to provide, as soon as possible, a clear statement of the scope of the deposit accounts/systems to be covered, the business rules that covered banks would need to follow in order to design and operate systems capable of making deposit insurance determinations in-house, and guidance regarding systems expectations.** The Associations recommend that the FDIC develop these through public rulemaking.

Closing Deposit Accounts after Insurance Determination

FDIC staff indicated during discussions with covered banks an intent for the upgraded IT systems to be capable of "automated closings" of resolved deposit accounts. We interpret this to mean that the insurance determinations contemplated in the ANPR would be reflected in the banks' systems of record following closure, which could, for example, permit an insured deposit transfer to an acquiring bank, if the FDIC determines that to be the least-cost resolution alternative.

The Associations understand the FDIC's resolve to process accounts for insurance determination as quickly as possible. In this case, we caution that consideration should be given to the time needed to post insured deposits during a resolution. Covered banks indicate that the process could run as follows. First, the day's closing account balances would be determined after the normal daily processing runs to completion. For some of the banks, run-off of deposit sweep balances is not complete until early morning hours. Then, the bank's augmented system would run determinations of insured and uninsured balances. The banks estimate that this would take at least 12 hours, judging by the time required for normal daily processing. Only then could insured balances be posted to accounts, which could take at least another 12 hours. These figures are gross approximations, as covered banks advise that they cannot provide good estimates without a better understanding of the details of the insurance calculations. At best, then, there would be little leeway to accomplish all this before the end of a resolution weekend.

The Associations do not interpret the comment to mean that the FDIC would consider an insured deposit payout for a covered bank, such that the bank's systems would need to be able to close resolved accounts in batch. The time required, in addition to the process outlined above, to find customers, cut and post checks – and then for the customers to wait for checks in the mail – surely would not satisfy the FDIC's "statutory obligation to make insured depositors whole as soon as possible.'"[26]

[26] ANPR, pages 23479 and 23480.

Examination and Testing

FDIC staff indicated during discussions with covered banks that there is likely to be a periodic testing requirement in any final rule, with an aim to ensure continued compliance and integrity of the insurance determination processes. They indicated that they are considering various options for annual or bi-annual on-site or remote testing.

The Associations strongly recommend that the FDIC consider the cost and disruption imposed to test their FDIC-insurance-determination systems. The frequency of testing is a major concern that escalates with the complexity of tests and location (on-site *vs.* remote). As noted, even basic testing would take a minimum of 12 hours and many staff to run the system before any follow-up trials or reporting begins. **The Associations recommend off-site testing and reporting with attestation of results to satisfy the FDIC's desire for review. On-site examinations, if required, should be scheduled well in advance to allow the banks to plan workflows.**

Regardless of how testing is done, covered banks will need clear direction, preferably developed through public rulemaking, on the timing, requirements, parameters, and expectations of testing and reporting. Detailed standards will help covered banks prepare to meet FDIC expectations.

Disclosing Deposit Insurance Coverage

The ANPR requests comment on the desirability and feasibility of providing depositors with the insured and uninsured amounts of their deposits.[27] **The Associations recommend against such a requirement**.

The Associations advocate transparency to promote consumer literacy and financial health. However, providing up-to-date insured balances to customers would be infeasible, and the questionable benefit to them of doing so would be dwarfed by the cost (direct and potential) and effort required of covered banks to do so.

As noted, computation in batch of daily insured balances could take until at least 12 hours after normal daily processes are completed in the early morning hours. After that, several hours could be required to post depositor-accessible information. In total, depositors' insured deposit balances at the end of a business day could not be made available until after the close of business the following day, at which point many additional financial transactions would have taken place to render the information out-of-date.

Moreover, customers would inevitably be confused by disclosed insured balances, given the complex FDIC insurance rules based on ownership capacity. The fact that the information would be stale would heighten the confusion and apprehension. This confusion would lead to nervous customer inquiries, driving up servicing costs for covered banks.

[27] ANPR, page 23481.

Requiring complex and unavoidably dated disclosures would also increase the risk of litigation. Involved depositors might consider filing *qui tam* lawsuits under the False Claims Act, in which private companies are charged with making false claims of Federal payouts. Even if a court ultimately determines that insurance determinations fully comply with the Federal Deposit Insurance Act and FDIC regulations, the litigation process would be costly and time-consuming. The fact that the bank is in resolution would be unlikely to deter plaintiffs' counsels from seeking redress from related parties. The Associations note that national insurance companies have stopped making federal flood insurance determinations for the Federal government as a result of the costs of *qui tam* lawsuits.

The Associations note further that the ANPR contemplates requiring covered banks to develop systems capable of insured deposit determinations at the close of any business day; there is no suggestion of requiring the banks to perform this operation daily. The complexity involved, including the need to produce output in a customer-friendly format, would far exceed even the complexity of a system to support resolution of a failed covered bank. The enormous cost and effort would far outweigh the questionable benefit to depositors of outdated information.

Implementation Cost

The ANPR asks for estimates of the cost of implementing the processes it considers.[28] Covered banks advise that it will not be possible for them to estimate costs until key issues are resolved, including the scope of deposits to be included in "closing night deposits," determination of FDIC insurance coverage, and the extent of applications to be developed and integrated into IT systems. Nonetheless, they advise that significant investments would be required over a number of years to develop the requisite systems, followed by material ongoing operational costs once the systems are in place.

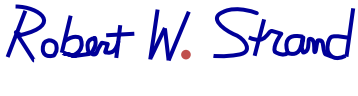
[28] ANPR, page 23481.

Conclusion

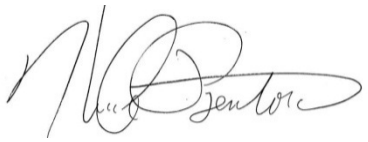
The Associations and covered banks appreciate that FDIC staff has engaged in open discussions on the ANPR. We look forward to continuing to work together to achieve the ends that the ANPR seeks. We view this as the beginning of a process and seek to collaborate in multiple workflows in the process.

The FDIC will note that some of the questions in the ANPR have not been addressed here. The covered banks advise that they cannot address these questions without additional details on the FDIC's intentions. Detailed and clear instructions in any proposed rule would help covered banks understand the scope of expectations and permit more comprehensive responses during the rulemaking process. The Associations and covered banks are prepared to address these issues iteratively in working with the FDIC on this issue.

Sincerely,



Rob Strand
Senior Economist
American Bankers Association



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David Pommerehn
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Cc: Marc Steckel, Deputy Director, Division of Resolutions and Receiverships, FDIC
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Karen L. Main, Counsel, Legal Division, FDIC

Appendix

American Bankers Association

The American Bankers Association is the voice of the nation's $16 trillion banking industry, which is composed of small, regional and large banks that together employ more than 2 million people, safeguard $12 trillion in deposits and extend more than $8 trillion in loans.

The Clearing House

Established in 1853, The Clearing House is the oldest banking association and payments company in the United States. It is owned by the world's largest commercial banks, which collectively hold more than half of all U.S. deposits and which employ over one million people in the United States and more than two million people worldwide. The Clearing House Association L.L.C. is a nonpartisan advocacy organization that represents the interests of its owner banks by developing and promoting policies to support a safe, sound and competitive banking system that serves customers and communities. Its affiliate, The Clearing House Payments Company L.L.C., which is regulated as a systemically important financial market utility, owns and operates payments technology infrastructure that provides safe and efficient payment, clearing and settlement services to financial institutions, and leads innovation and thought leadership activities for the next generation of payments. It clears almost $2 trillion each day, representing nearly half of all automated clearing house, funds transfer and check-image payments made in the United States. See The Clearing House's web page at www.theclearinghouse.org.

Consumer Bankers Association

The Consumer Bankers Association is the only national financial trade group focused exclusively on retail banking and personal financial services—banking services geared toward consumers and small businesses. As the recognized voice on retail banking issues, CBA provides leadership, education, research, and federal representation for its members. CBA members include the nation's largest bank holding companies as well as regional and super-community banks that collectively hold two-thirds of the total assets of depository institutions.