

May 13, 2019

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Mr. Robert E. Feldman, Executive Secretary
Attention: Comments
Federal Deposit Insurance Corporation
550 17th Street, N.W.
Washington, D.C. 20429

Re: RIN 3064-AF03

Ladies and Gentlemen:

On behalf of Promontory Interfinancial Network, LLC (“*Promontory Network*”),¹ I write to comment on the Notice of Proposed Rulemaking on Recordkeeping for Timely Deposit Insurance Determination, issued by the Federal Deposit Insurance Corporation (the “*FDIC*”) on April 11, 2019 (the “*NPR*”).²

INTRODUCTION AND SUMMARY

Promontory Network applauds the NPR’s stated policy objective, which is to reduce compliance burdens for insured depository institutions under the FDIC’s rule titled “Recordkeeping for Timely Deposit Insurance Determination” (“*Part 370*”),³ while continuing to support the FDIC’s ability to make prompt deposit insurance determinations.⁴ Promontory Network believes that the NPR’s proposed amendment of the definition of “transactional features” in 12 C.F.R. § 370.2(j) would achieve the NPR’s policy objectives, although Promontory Network suggests a minor clarification. Promontory Network also believes that the NPR’s proposed revision of 12 C.F.R. § 370.5(b) achieves the NPR’s policy objectives and should be adopted.

¹ Founded in 2002, Promontory Network provides services to the banking and brokerage industries. Promontory Network’s deposit allocation and sweep services include CDARS[®], the Certificate of Deposit Account Registry Service[®], for time deposits, ICS[®], the Insured Cash Sweep[®] service, for non-time deposits, and IND[®], the Insured Network Deposits[®] service, for non-time deposits swept to banks primarily by broker-dealers.

² Notice of Proposed Rulemaking on Recordkeeping for Timely Deposit Insurance Determination, 84 Fed. Reg. 14,814 (Apr. 11, 2019).

³ Codified at 12 C.F.R. part 370.

⁴ NPR at 14,814.

DISCUSSION

1. The FDIC should adopt the NPR's proposed amendment of 12 C.F.R. § 370.2(j) modifying the definition of "transactional features."

In the NPR, the FDIC acknowledged that "some of the requirements of part 370 with regard to certain types of accounts [are] not commensurate with the benefit of improvements to prompt payment of deposit insurance and resolvability that such compliance achieves."⁵ The FDIC stated its intention to limit the definition of accounts with "transactional features," to which special requirements apply, to accounts that "may support depositors' routine financial needs and require a prompt deposit insurance determination to avoid delays in payment processing should the covered institution's deposit operations be continued by a successor institution."⁶

The NPR's proposed revised definition of "transactional features" fulfills this stated intention in a reasonable and burden-reducing manner. Promontory Network agrees that, in programs in which customer transactions originate with an instruction first presented to an account at an insured depository institution ("IDI") or another financial institution⁷ other than the covered institution, there is often no need to conduct a deposit insurance determination within 24 hours after the covered institution's failure.⁸ As the FDIC states, actions taken by other parties involved in deposit placement programs often mitigate any potential disruptions.⁹

The first sentence of the proposed revised definition states as follows:

(j) *Transactional features* with respect to a deposit account means that the account holder or the beneficial owner of deposits can make transfers from the deposit account to parties other than the account holder, beneficial owner of deposits, or the covered institution itself, by methods that may result in such transfers being reflected in the end-of-day ledger balance for such deposit account on a day that is later than the day that such transfer is initiated, even if initiated prior to the institution's normal cutoff time for such transaction.¹⁰

Promontory Network believes that, under the proposed revised definition, funds placed through deposit placement and deposit sweep arrangements typically would not have "transactional features." Nevertheless, as explained below, Promontory Network believes that a modest word change would help clarify this point.

⁵ *Id.* at 14,815.

⁶ *Id.* at 14,817.

⁷ Although the NPR refers to an IDI, the instructions could also be presented to an institution that is not an insured depository institution, such as a broker-dealer.

⁸ *See id.* at 14,818.

⁹ *Id.* at 14,818-19.

¹⁰ Proposed section 370.2(j); NPR at 14,830-31.

In sweep arrangements, the account holder is typically a broker-dealer that acts as custodian for the beneficial owner. An ability of the broker-dealer, as custodian, to transfer funds from the deposit account at the covered institution only to a brokerage account of the beneficial owner would not give rise to “transactional features” under the proposed revised definition, because it is not an ability to transfer funds from the deposit account “to parties other than the account holder, beneficial owner of deposits, or the covered institution itself.”

In deposit placement networks, the account holder is typically a sub-custodian for the IDI or other financial institution that acts as custodian. The account holder, as sub-custodian, transfers funds to the custodian for the account of its customer, which is usually the beneficial owner, but may be an agent, custodian, or trustee for the beneficial owner. The ability of the account holder, as sub-custodian, to transfer funds from the deposit account only to an account at the IDI or other financial institution that acts as custodian could possibly be regarded as an ability to transfer funds to one party (the custodian) “other than the account holder, beneficial owner of deposits, or the covered institution itself,” but cannot be regarded as an ability of the account holder to transfer funds “to parties [plural] other than the account holder, beneficial owner of deposits, or the covered institution itself.”¹¹ Therefore, under the proposed revised definition, the deposit accounts used in such arrangements should not be regarded as having transactional features.

Nevertheless, Promontory Network believes that it would be helpful to modify the proposed revised definition, for maximum clarity, to read as follows:

(j) *Transactional features* with respect to a deposit account means that the account holder or the beneficial owner of deposits can make transfers from the deposit account to parties other than the account holder, beneficial owner of deposits, [**any custodian or sub-custodian for the beneficial owner,**] or the covered institution itself, by methods that may result in such transfers being reflected in the end-of-day ledger balance for such deposit account on a day that is later than the day that such transfer is initiated, even if initiated prior to the institution’s normal cutoff time for such transaction.

The practical effect of a sub-custodian account holder’s ability to transfer funds to a custodian, rather than directly to a beneficial owner, is no different from a custodian account holder’s ability to transfer funds directly to a beneficial owner, the ability for which does not give rise to transactional features under the proposed revised definition. For this reason, we encourage the FDIC to include the clarifying language shown above.

¹¹ See *id.*

2. The FDIC should not adopt the “Alternate Proposal” or, if it decides to do so, should do so only with certain restrictions.

Eliminating the definition of transactional features and providing that requirements of proposed section 370.5(a) apply to all deposit accounts of a certain type without regard for whether the account has transactional features (the “*Alternate Proposal*”) would be contrary to the FDIC’s stated policy objectives. The Alternate Proposal would unnecessarily increase the compliance burden for many accounts that the FDIC acknowledges are not likely to require a deposit insurance determination within 24 hours.¹² And, because under the Alternate Proposal these special requirements would be imposed on many accounts not typically requiring a 24-hour insurance determination, there would be little, if any, benefit to depositors.

The Alternate Proposal would apply proposed section 370.5(a)’s special requirements to all deposit accounts of a certain type. For all deposit accounts for which the covered institution maintains its deposit account records in accordance with section 370.4(b)(1), a covered institution would be required to “take steps reasonably calculated to ensure that the account holder will provide to the FDIC the information needed for the covered institution’s information technology system to calculate deposit insurance as set forth in section 370.3 within 24 hours after the appointment of the FDIC as receiver.”¹³ At a minimum, “steps reasonably calculated” would include (1) certain contractual arrangements with the account holder obligating the account holder to deliver the required information in the proper format and (2) a disclosure stating that the account holder’s delay in providing such information, or providing it in the wrong format, could result in delayed access to deposits should the covered institution fail.¹⁴

These requirements are appropriate to impose on covered institutions with respect to accounts only if the underlying task, *i.e.*, obtaining the required information in the proper format, reasonably could be accomplished in 24 hours. In many cases, such as with trusts, obtaining the information in 24 hours is not feasible, and there is no way for a covered institution to make a good faith effort to do something that cannot be done. In the NPR, the FDIC acknowledges this

¹² See *id.* at 14,818 (proposing to amend the definition of “transactional features” to make that definition align with FDIC’s intention “that the transactional features definition itself capture only the subset of alternative recordkeeping accounts for which an insurance determination with 24 hours following its appointment as receiver is essential to fulfillment of its policy objectives”).

¹³ Proposed section 370.5(a); *id.* at 14,832.

¹⁴ See *id.*

problem,¹⁵ proposing to amend section 370.5(b) to exclude formal revocable trusts and irrevocable trusts from the requirements applicable to such trust accounts with transactional features.¹⁶

The same problem also arises with respect to other accounts with many account participants, such as public bond accounts, annuity contract accounts, and mortgage service accounts. If even one account participant is not named in the account title, providing all the required information within 24 hours often will not be possible.¹⁷ That account participants can frequently change for certain account types presents additional challenges.¹⁸

Given that compliance with the Alternate Proposal would impose a significant burden on covered institutions, one that institutions may not be able to meet despite their best efforts, the FDIC should not adopt it. If, however, the FDIC does adopt the Alternate Proposal, it should do so only with respect to deposit accounts for which all beneficial owners and account participants are named in the account title.¹⁹ Only in those cases would providing the required information to the FDIC within 24 hours be consistently feasible.

3. The FDIC should adopt the proposed amendment to section 370.5(b)(5).

The FDIC should adopt the proposed amendment to section 370.5(b)(5), which adds to the list of accounts that are excepted from the requirements of section 370.5(a) formal revocable trusts insured as described in 12 C.F.R. § 330.10 and irrevocable trusts insured as described in 12 C.F.R. § 330.12 and 12 C.F.R. § 330.13. As the FDIC has recognized, account holders of these trust accounts will often be unable to provide the FDIC will all information needed to make a deposit insurance determination immediately following the failure of a covered institution.²⁰ The proposed amendment recognizes the complexity of trust accounts, aligning regulatory requirements with practical considerations. Finally, the proposed amendment would allow covered institutions to

¹⁵ NPR at 14,820 (“The FDIC recognizes that an account holder that places deposits with a covered institution on behalf of such a trust may not be able to immediately provide to the FDIC all of the information needed to calculate the total amount of coverage available for deposits insured in any one of these three deposit insurance categories should the covered institution fail.”).

¹⁶ *Id.* at 14,820, 14,832.

¹⁷ Even where all account participants are named, gathering all the required information may be challenging. For example, the Account Participant File that covered institutions would be required to provide to the FDIC requires additional information about Account Participants, including each Account Participant’s government identification information. *See* FED. DEPOSIT INS. CORP., DEPOSIT BROKER’S PROCESSING GUIDE, PART 370 ADDENDUM, available at <https://www.fdic.gov/deposit/deposits/brokers/part-370-appendix.html>.

¹⁸ For example, with respect to public bond accounts that qualify for pass through insurance, the records maintained at a covered institution may not contain the names of bondholders, especially where bondholders hold bonds through an intermediary. In such a scenario, it would be extremely difficult, if not impossible, for the account holder to provide the name of all account participants within 24 hours of the FDIC being appointed as a receiver.

¹⁹ The NPR asks commenters to consider whether “other types of deposit accounts be included in the list of exceptions set forth in § 370.5(b).” NPR at 14,820.

²⁰ *See supra* note 15.

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more easily receive through deposit placement networks funds from trust accounts without incurring a compliance burden that is difficult, if not impossible, to meet.

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Thank you for consideration of our comments. Should you wish to discuss them further, please contact the undersigned at (703) 292-3338 (dphillips@promnetwork.com).

Sincerely,

Douglas E. Phillips
Senior Vice President and General Counsel