May 6, 2019

Via Email

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

Re: RIN 3064-AE94; Advance Notice of Proposed Rulemaking Regarding Brokered Deposits and Interest Rate Restrictions

Dear Mr. Feldman:

Mastercard International Incorporated ("Mastercard") submits this comment letter to the Federal Deposit Insurance Corporation (the "FDIC") in response to its advance notice of proposed rulemaking and request for comment regarding its brokered deposit regulation (the "ANPR").[1] Mastercard appreciates the opportunity to provide input on the ANPR. We recognize the policy reasons underlying the FDIC's restrictions on brokered deposits, and believe that Section 29 of the Federal Deposit Insurance Act (the "FDIA"),[2] and the implementing regulations thereto,[3] remain important mechanisms for protecting bank safety and soundness. We believe that, consistent with that policy, the statute may be read to accommodate banks offering prepaid cards and health savings accounts ("HSAs") without such products constituting brokered deposits.

Unlike typical brokered deposits, which raise "hot money" concerns, deposits associated with prepaid cards and HSAs are not placed for the purpose of rapidly building a bank's deposit base or to yield depositors the highest available rates. Both prepaid cards and HSAs are associated with a significant contractual infrastructure, forcing banks to make a considered judgment whether to enter the business and making it unlikely for a customer to move funds. Moreover, these products serve distinct purposes for consumers (other than an investment purpose) and for banks (other than deposit generation). Indeed, prepaid cards and HSAs often do not pay interest.

Thus, we believe that the FDIC should take the view that both prepaid card program managers ("Prepaid Program Managers") and third-party HSA administrators ("HSA Administrators") do not have the primary purpose of placing funds with depository institutions, and thus would fall within one of the codified exceptions to the definition of deposit broker.[4] In the alternative, we believe the FDIC could broadly view third-party HSA Administrators as "acting

[1] 84 *Fed. Reg.* 2366 (Feb. 6, 2019).
[2] 12 U.S.C. § 1831f.
[3] 12 C.F.R. § 337.6.
[4] *See* 12 U.S.C. § 1831f(g)(2)(I).

as a plan administrator . . . in connection with a pension plan or other employee benefit plan,"[5] and thus falling within a different exemption.

The discussion that follows analyzes prepaid card products and HSAs under the brokered deposit statute and regulations, as well as under the policy framework set out for evaluating brokered deposit risk in the ANPR. However, we first provide a brief description of Mastercard and our role in payment card (including prepaid card and HSA debit card) transactions.

Background on Mastercard

Mastercard does not issue payment cards of any type, including prepaid cards or HSA debit cards, nor does it contract with merchants to accept those cards. In the Mastercard payment system, those functions are performed in the United States by numerous banks. Mastercard refers to the banks that issue payment cards bearing the Mastercard brands as "issuers." Mastercard refers to the banks that enter into contracts with merchants to accept Mastercard-branded payment cards as "acquirers." Mastercard owns the Mastercard family of brands and licenses banks in the United States to use those brands in conducting payment transactions. Mastercard also provides the networks through which its customer banks can interact to complete payment transactions and sets certain rules regarding those interactions.

When a cardholder presents a Mastercard-branded payment card (including a prepaid card or HSA debit card) to a merchant to purchase goods or services, the merchant sends an authorization request to its acquirer, the acquirer routes the request to Mastercard, and Mastercard routes the request to the issuer. The issuer either approves or declines the authorization request and routes its decision back to the merchant through the same channels. Mastercard's role in the transaction is to facilitate the payment instructions between the parties to the transaction – the cardholder, the merchant, the acquirer, and the issuer. In an automated teller machine ("ATM") transaction, Mastercard similarly transmits instructions between the ATM operator and the issuer.

Comments on the ANPR

Mastercard believes that Prepaid Program Managers and HSA Administrators should be excluded from the definition of the term "deposit broker" in Section 29 of the FDIA and Section 337.6 of the FDIC's regulations. This would, in turn, mean that deposits placed with a bank by either a Prepaid Program Manager or an HSA Administrator would not be treated as brokered deposits. We believe that the plain language of the statute supports this interpretation, as both Prepaid Program Managers and HSA Administrators place funds with a "primary purpose" other than the placement of funds with a depository institution, while HSA Administrators also are acting as "plan administrators . . . performing managerial functions with respect to the plan." Moreover, we believe that reading these exceptions to cover both Prepaid Program Managers and HSA Administrators would be consistent with congressional intent in enacting the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 ("FIRREA"), as well as public policy objectives.

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[5] *See* 12 U.S.C. § 1831f(g)(2)(E).

I. The Text of Section 29 of the FDIA Supports Treating Prepaid Program Managers and HSA Administrators as Exempted from the Definition of a Deposit Broker

Section 29 of the FDIA places restrictions on the ability of depository institutions that are not well capitalized or that are troubled institutions to accept, renew, or roll over deposits obtained through a deposit broker, while reserving authority to the FDIC to impose "additional restrictions on the acceptance of brokered deposits . . . as the [FDIC] may determine to be appropriate."[6] The statute defines a deposit broker, in relevant part, as "any person engaged in the business of placing deposits, or facilitating the placement of deposits, of third parties with insured depository institutions."[7] The term "brokered deposit" is defined by the FDIC by regulation. It "means any deposit that is obtained, directly or indirectly, from or through the mediation or assistance of a deposit broker."[8] Both statute and regulation include a common set of exceptions from the definition of what constitutes a "deposit broker," though the regulation incorporates one additional exception. This additional exception does not bear upon the subject of this letter.

We believe that, based upon the plain meaning of Section 29 of the FDIA, Prepaid Program Managers and HSA Administrators should qualify for an exception from treatment as deposit brokers, as "agent[s] or nominee[s] whose primary purpose is not the placement of funds with depository institutions."[9]

A Prepaid Program Manager provides consumers with a payment mechanism that substitutes for cash or a money order and depository institutions with a suite of technology services that enable such payment mechanism. For corporate or government products, a Prepaid Program Manager also provides such entities with a way of making payments that is more cost-effective than, and administratively preferable to, using checks. The deposits that result from these activities are purely incidental to, and not the primary purpose of, the products offered. The ANPR notes that the FDIC staff has previously taken the position that a Prepaid Program Manager would not be covered by the primary purpose exemption, and that the staff has not drawn a distinction between "acting with the purpose of placing deposits for other parties, [and] acting with the purpose of enabling other parties to use deposits to make purchases."[10] Respectfully, we believe that, in light of the questions of congressional intent and public policy set forth in the following section, this is an overly-narrow interpretation of the statutory text.

An HSA Administrator places funds with banks as an incident to providing a tax-advantaged program for healthcare expenditures. An HSA program may involve maintenance of client funds in a variety of vehicles: client-directed brokerage accounts, investment funds managed by the HSA Administrator (or an investment advisor), or deposit accounts. This variety, and especially that an HSA Administrator does not always place funds in a deposit account, evidences that an HSA Administrator does not have a primary purpose of placing funds with FDIC-insured

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[6] 12 U.S.C. § 1831f(f).
[7] 12 U.S.C. § 1831f(g)(1)(A).
[8] 12 C.F.R. § 337.6(a)(2).
[9] 12 U.S.C. § 1831f(g)(2)(I).
[10] 84 *Fed. Reg.* at 2374.

depository institutions.[11] Moreover, HSA arrangements are not structured to incentivize the placement of funds at a particular institution (including to incentivize HSA Administrators to change the institution with which they place funds), and HSA Administrators are generally not dependent upon banks for fees for opening accounts (typically, clients pay fees to HSA Administrators).[12] Taken together, this all strongly indicates that the primary purpose of an HSA Administrator, in placing funds at a bank on behalf of a client, is not the placement of funds itself. Rather, the purpose is to provide clients with a tax-advantaged means of paying healthcare expenses, and how the money is held for that purpose is secondary.

HSA Administrators likely also qualify for exemption from treatment as a deposit broker under the exemption for brokers "acting as a plan administrator . . . in connection with a pension plan or other employee benefit plan."[13] The ANPR notes that the FDIC currently views certain "non-retirement savings plans [with] tax-favored status," including HSAs, as not "expressly covered by the exception."[14] While the existence of HSAs is a byproduct of how the tax code treats certain monies saved for health expenses, these accounts should not be viewed as mere savings vehicles. Given the substantial shifts in the healthcare marketplace over the past decade, the better view of the health insurance market is that an HSA is an integral part of a healthcare plan, rather than a mere tax-advantaged account. An employee may only open or contribute to an HSA when the employee is enrolled in a high-deductible health plan ("HDHP"). The two are integral to one-another, allowing an employee to elect to pay lower premiums during the year, but bear more direct costs of healthcare consumption. The HSA is where money that is saved on premiums can be channeled, to bear the increased direct costs. Understood this way, it is clear that an HSA Administrator is acting in connection with an employee benefit plan, namely, the combined HDHP-HSA unit.

II. Legislative History and Public Policy Considerations Support Not Treating Prepaid Program Managers and HSA Administrators as Deposit Brokers

Based upon the legislative history of FIRREA, as well as both historic and current public policy considerations, we believe that the FDIC would be amply justified in treating Prepaid Program Managers and HSA Administrators as not covered by Section 29 of the FDIA. Section 29 was enacted to address a particular type of brokered deposit, which carries unique and significant risk. This risk was comprehensively detailed in the legislative history of FIRREA, and given that this clear legislative history accompanies clear statutory text, it is appropriate for the FDIC to interpret Section 29 consistent with this history. Similarly, there are clear public policy arguments in favor of this interpretation. Many of these same policy arguments underlie the original enactment of FIRREA, and remain equally applicable today. They counsel against reading the exceptions to Section 29 narrowly, and in favor of protecting entities offering products that are outside the policy rationales for imposing the brokered deposit restrictions.

[11] 84 *Fed. Reg.* at 2372.
[12] *Id.*
[13] 12 U.S.C. § 1831f(g)(2)(E).
[14] 84 *Fed. Reg.* at 2372.

A. *Legislative History*

In the report of the Senate Committee on Banking, Housing, and Urban Affairs (the "Senate Committee"), relating to an early Senate draft of FIRREA, the congressional intent underpinning the decision to allow the FDIC to regulate certain brokered deposits is already clear. The Senate Committee noted expressly that brokered deposits are a "common trait among currently weak and insolvent" institutions, having been used to fuel "a history of rapid growth."[15] Moreover, the report specifically names what concerned the Senate Committee regarding brokered deposits, namely, "the ready availability of brokered funds, obtained through the payment of above-market rates, to [be used to] support risky and speculative asset investment by weak and insolvent institutions."[16]

Senator Frank Murkowski of Alaska subsequently introduced an amendment toughening the restrictions on brokered deposits.[17] This amendment substantially tracks the language that was ultimately enacted into law, including the exemptions thereto.[18] At a hearing before the House Committee on Banking, Finance and Urban Affairs, Subcommittee on General Oversight and Investigations (the "House Committee"), Sen. Murkowski testified regarding his intent in offering the amendment. In his testimony, he summarized the purpose of the amendment as one meant to "rein in the abuses of brokered deposits by troubled institutions and to create accountability on the part of Federal regulators."[19] Moreover, and of specific note for the FDIC's consideration in determining how broadly the exceptions to the statute should be construed, Sen. Murkowski specified that his amendment was a "narrowly drawn provision that specifically targets the most flagrant abusers."[20]

Taken together, these legislative history materials establish that, in enacting Section 29, Congress was primarily concerned with the effects of traditional "hot money" brokered deposits, most commonly in the form of brokered CDs. While the statute is drafted broadly, it is safe to say that Congress sought to remedy a particular type of ill in drafting the legislation. The FDIC should hew closely to Congressional intent in regulating traditional "hot money" concerns, and should not seek to broaden the statute in ways that Congress did not intend. In particular, we believe this means reading the statutory exceptions to avoid having the statute sweep up all manner of financial products that incidentally result in the placement of deposits at depository institutions, such as prepaid card products and HSAs.

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[15] S. Rep. No. 101-19, at 38 (Jan. 3, 1989).
[16] *Id.*
[17] 135 Cong. Rec. S4451 (daily ed. April 19, 1989) (proposing amendment of Sen. Murkowski and Senator J. James Exon of Nebraska).
[18] The "primary purpose" and "plan administrator" exemptions were enacted as proposed.
[19] *Insured Brokered Deposits and Federal Depository Institutions: Hearing on S.744 and H.R.1278 Before the Subcommittee on General Oversight and Investigations of the Committee on Banking, Finance, and Urban Affairs*, 101st Cong. 9 (1989) (statement of Sen. Frank Murkowski).
[20] *Id.* at 9-10.

B. *Public Policy*

We believe that there are compelling public policy reasons for the FDIC to exclude Prepaid Program Managers and HSA Administrators from the definition of deposit broker. The ANPR describes three characteristics of brokered deposits that pose risk to the deposit insurance fund ("DIF") – rapid growth, volatility, and franchise value.[21] These characteristics are not present in the types of deposits that Prepaid Program Managers and HSA Administrators place with banks.

First, prepaid cards and HSAs cannot be used to rapidly grow a bank's deposit base, permitting that bank to imprudently expand risky assets or investments. Unlike brokered CDs, which can be sold in amounts of five-figures or higher, deposits associated with prepaid cards are much smaller, and collected much more slowly. Prepaid cards are commonly purchased or provided to persons who are unbanked or underbanked, and quite often of limited economic means. This is not the "hot money" demographic that is buying CDs. HSAs are loaded in small amounts and slowly, but for different reasons. HSAs are typically loaded through payroll deductions, which lend themselves to small deposits over time, rather than large deposits all at once. Thus, it is much less likely that the products offered by Prepaid Program Managers and HSA Administrators would promote rapid growth.

Second, accounts associated with prepaid cards and HSAs are either impossible, or highly unlikely, to be moved by consumers, whether caused by bank trouble or higher interest rates elsewhere. Thus, they do not have the potential to cause volatility at a depository institution. Unlike traditional brokered deposits, funds placed by a Prepaid Program Manager or an HSA Administrator involve a complex web of contractual obligations, which include not only limits on the entities involved but also limits on the prepaid card cardholders and HSA accountholders. These contracts make it extremely unlikely that a Prepaid Program Manager or HSA Administrator would or could change the bank in which they deposit funds in a rapid manner or with any sort of frequency. Also, they preclude cardholders and accountholders from easily moving funds from one bank to another. For example, payroll cardholders do not select the depository institution with which their employer or a Prepaid Program Manager contracts and prepaid cards sold in a retail setting might not have a feature that facilitates the transfer of funds to another depository institution. While HSA customers do have an ability to choose an HSA Administrator, and therefore an underlying bank in which they will make HSA deposits, there is still a degree of complexity in arranging to move the account. As such, there is not flexibility of the type that would allow rapid or frequent movement of HSAs by consumers, which could create deposit volatility at a depository institution. However, even if a cardholder or accountholder could move funds from one bank to another to pursue higher interest rates, it is unlikely that they would, as prepaid cards and HSAs often do not pay interest.

Third, in the event of a bank failure, prepaid cards and HSAs are unlikely to be viewed as unattractive assets (like brokered CDs), and therefore do not increase the risk of loss to the DIF. According to the ANPR, during the previous financial crisis, 47 of the approximately 530 banks

[21] 84 *Fed. Reg.* at 2369.

that failed relied heavily on brokered deposits.[22] Two of the largest, IndyMac Bank, F.S.B. and ANB Financial National Association, relied heavily on brokered deposits, in the form of brokered CDs.[23] However, prepaid cards and HSAs are unlike brokered CDs. A purchaser of a failed bank would know that, for the reasons discussed in the preceding paragraph, deposits associated with prepaid cards and HSAs are "sticky" and thus valuable to a depository institution that is considering purchasing a failed bank.

Finally, the tiny amount of deposits associated with prepaid products and HSAs relative to the overall brokered deposit market provides another policy reason in support of our request. In particular, the magnitude of any rapid growth, volatility or franchise value risk (and we believe there are no such risks) would be very small with respect prepaid products and HSAs. According to the ANPR, traditional "hot money" brokered deposits (namely brokered CDs), when combined with funds swept by broker-dealers to unaffiliated insured depository institutions, represent over 90% of the reported brokered deposits. It is brokered deposits in the former category – brokered CDs – that both in the 1980s and in 2008 posed the greatest difficulties for the banking sector, as these brokered deposits may be used to inflate a bank's balance sheet and are the most prone to flight. Thus, even if there were risks to the DIF associated with prepaid products and HSAs, the quantum of risk would be so small as not to justify a narrow reading of the deposit broker exceptions.

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Mastercard appreciates the opportunity to provide these comments. If you have any questions regarding our comments, please do not hesitate to contact the undersigned at (914) 249-1582 or by email at Tina.Woo@mastercard.com, or our counsel in this matter at Sidley Austin LLP, Joel Feinberg, at (202) 736-8473.

Sincerely,

[redacted]

Tina Woo
Senior Managing Counsel
Regulatory Affairs

cc: Joel Feinberg, Sidley Austin LLP
Matthew Katz, Sidley Austin LLP

[22] 84 Fed. Reg. at 2370.
[23] *Id.*