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May 7, 2019

Robert E. Feldman
Executive Secretary
Attn: Comments
Federal Deposit Insurance Corporation
550 17th Street NW
Washington, DC 20429
Via Email to: comments@fdic.gov

Re: **Unsafe and Unsound Banking Practices: Brokered Deposits and Interest Rate Restrictions, RIN 3064–AE94**

Dear Mr. Feldman:

As the leading provider of retirement and other financial services for those in academic, research, medical, and cultural fields, Teachers Insurance and Annuity Association of America ("TIAA") appreciates the opportunity to submit this letter in response to the advance notice of proposed rulemaking and request for comment on brokered deposits and interest rate restrictions (the "ANPR") issued by the Federal Deposit Insurance Corporation ("FDIC").[1] We applaud the FDIC for reviewing its regulatory approach to brokered deposits and interest rate restrictions in light of the significant changes to technology, business models, and the economic environment that have taken place in recent years.

Summary

Section 29 of the Federal Deposit Insurance Act ("Section 29") was enacted in 1989 to regulate the use of brokered deposits by institutions that are not well capitalized. Originally drafted as a response to the banking crises of the late 1980s, Section 29 was intended to restrict depository institutions with weak capital structures from using volatile deposits to fund rapid growth. Experience at the time indicated that such institutions were highly likely to engage in risky activities that would lead to failures at great expense to the deposit insurance funds. Since Section 29 was enacted 30 years ago, the FDIC has released interpretive guidance in the form of advisory opinions and frequently asked questions that go far beyond the original scope of Section 29. Through its guidance, the FDIC has substantially expanded the definition of a deposit broker over the years, and has narrowly construed the exceptions to that definition. The FDIC's guidance has not only broadened the universe of deposits that are considered to be brokered, it has in many cases muddied the waters, creating ambiguity as to the circumstances in which an individual or entity will qualify as a deposit

[1] *Unsafe and Unsound Banking Practices: Brokered Deposits and Interest Rate Restrictions*, 84 Fed. Reg. 2366 (February 6, 2019), *available at*: https://www.fdic.gov/news/board/2018/2018-12-18-notice-sum-i-fr.pdf.

broker. In many instances, the FDIC's increasingly expansive interpretations have served to obscure and even undermine Section 29's original purpose. Many forms of stable, inexpensive deposits are now considered brokered, a designation that serves little purpose in protecting the deposit insurance system.

In addition, changes in technology and consumer behavior in recent years have significantly altered the way banks provide services to their customers. These sweeping changes require similarly significant updates to the decades-old regulatory framework for banks. We think it an opportune time for the FDIC to step back and reevaluate those types of deposits that should be considered as brokered.

Accordingly, in order to better reflect the realities of the U.S. banking system today, TIAA believes it is time for the FDIC to update its regulations and guidance with respect to brokered deposits. First and foremost, we recommend that the FDIC return to the fundamental principles that originally motivated the drafting of Section 29. In determining whether a deposit is brokered, we encourage the FDIC to focus its attention on three core questions: (1) Does the deposit facilitate rapid growth in risk assets? (2) Are the deposits inherently volatile – meaning, are brokers and customers likely to pull the deposits if they can get higher rates at another institution, or see signs of trouble at their bank? (3) Do the deposits create bank franchise value in a way that would be attractive to purchasers of the bank? By concentrating on these three questions, we believe the FDIC will find that many types of deposits that are classified as brokered today should actually be treated as "core," because they do not facilitate risky and rapid growth, are stable, and add franchise value to the bank where they are placed.

As part of a return to the fundamental principles of Section 29, we respectfully urge the FDIC to update a number of its interpretations regarding brokered deposits. We believe strongly that deposits sourced from a bank's affiliates or subsidiaries should be treated as core deposits. Data show that far from increasing a bank's risk profile, affiliate referral deposits actually *increase* a bank's franchise value and contribute to the institution's ability to withstand liquidity pressures during financial crises. We believe that the stability of affiliate referral deposits is substantially similar to that of other core deposits, and substantially greater than that of traditional brokered deposits. Affiliate referral deposits do not implicate any of the concerns that Section 29 was designed to address – and a return to a principles-based approach to identifying brokered deposits necessitates the treatment of these deposits as core. We also urge the FDIC to clarify and update a number of points in its 2016 Frequently Asked Questions on Identifying, Accepting and Reporting Brokered Deposits (the "Revised FAQs").[2] We discuss our recommendations in further detail below.

<u>About TIAA</u>

Founded in 1918, TIAA is the leading provider of retirement services for those in academic, research, medical, and cultural fields. Over our century-long history, TIAA's mission has always been to aid and strengthen the institutions, retirement-plan participants, and individual and institutional customers we serve and to provide financial products that meet their needs. Our investment model and long-term approach aim to benefit the five million individual customers we serve across more than 15,000 institutions.[3] With our strong nonprofit heritage, we remain committed to the mission we embarked on

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[2] *Frequently Asked Questions on Identifying, Accepting and Reporting Brokered Deposits,* FIL-42-2016, FDIC (June 30, 2016), *available at*: https://www.fdic.gov/news/news/financial/2016/fil16042.pdf.
[3] Customer data is as of December 31, 2018.

in 1918 of serving the financial needs of those who serve the greater good. To carry out this mission, we have evolved over time into a diversified financial services organization that operates through multiple affiliated entities to offer our customers a wide range of financial products and services, including asset management and banking services.

TIAA offers deposit and lending products, as well as fiduciary services, through its subsidiary federal savings bank, TIAA, FSB. TIAA, FSB is headquartered in Jacksonville, Florida and, as of year-end 2018, had total assets of $36.9 billion and total deposits of $23.5 billion. TIAA-CREF Trust Company, FSB (the "Trust Company"), the predecessor to TIAA, FSB, was established by TIAA in 1998 and entered into the business of deposit-taking in 2010. In 2017, TIAA acquired EverBank and merged the Trust Company with EverBank to form TIAA, FSB. Over the years, both the Trust Company and EverBank had significant first-hand experience with the challenges banks and diversified financial services organizations face in structuring their activities to avoid brokered deposit status for various types of deposits, and, in particular, for affiliate-connected deposit relationships.[4] TIAA, FSB operates on a nationwide basis, primarily through web, mobile, and phone channels, with a limited branch network in the state of Florida.

In addition to TIAA and TIAA, FSB, the TIAA family of companies includes broker-dealers, investment advisers, commercial lenders, investment companies and a variety of operating companies associated with investments made by our insurance company affiliates. TIAA's unique corporate structure allows us to focus our efforts on our clients' long-term financial needs. TIAA has no outside shareholders, other than the TIAA Board of Overseers, which is a non-stock not-for-profit entity. Importantly, under TIAA's corporate charter, TIAA functions without profit to the corporation or its shareholders. As a result, our corporate interests remain well aligned with those of our customers.

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Section 29 Purpose

TIAA believes that the FDIC needs to refocus on the core reasons that Section 29 was adopted in 1989 in order to appropriately redefine how to apply Section 29 to banking in the 21st century. Congress adopted Section 29 in response to the lessons learned from the banking crises of the 1980s and early 1990s. As discussed in the ANPR and in the FDIC's History of the Eighties - Lessons for the Future, concerns over brokered deposits focused on high-rate brokered certificates of deposit ("CDs") which were used to fund rapid growth particularly in high-risk loans. As acknowledged in the ANPR, up until 2000, "brokered retail CDs and wholesale CDs were the main type of brokered deposits used in the banking system."[5] Weak institutions, with access to easily available brokered deposits, used these deposits to fund very rapid growth into high-risk assets in an attempt to generate earnings and capital. Unfortunately, these efforts were rarely successful, resulting in substantial losses to the deposit insurance funds. These risks and the devastating impact on the deposit insurance funds drove Congress to adopt Section 29. As well stated in the ANPR, Congressional and regulatory concern over brokered deposits:

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[4] Based on its experience, TIAA provided comments in response to the FDIC's Financial Institutions Letter 51-2015. *See* letter of Andrew C. Svarre to Doreen R. Eberley (December 28, 2015), *available at*: https://www.fdic.gov/regulations/laws/publiccomments/brokered-deposit-faq/comment8.pdf.

[5] ANPR at 2368.

> arose because: (1) [s]uch deposits could facilitate a bank's rapid growth in risk assets … (2) … a problem bank could use such deposits … to attempt "grow out" of its problems … ultimately increas[ing] the losses to the deposit insurance fund … and (3) brokered and high-rate deposits were sometimes volatile because deposit brokers (on behalf of customers), or the customers themselves … were prone to leave the bank when they found a better rate or they became aware of problems at the bank.[6]

The legislative history of Section 29 demonstrates that Congress intended to limit the ability of weaker banks to grow by using hot money to fund risky assets where the risk of loss would ultimately be borne by the Deposit Insurance Fund. TIAA believes that the FDIC in its Study on Core Deposits and Brokered Deposits (the "Study") [7] appropriately identified the three primary questions that should be asked when examining whether particular deposits should be considered brokered:

1. Rapid Growth - Do the deposits facilitate rapid growth in risky assets?
2. Volatility - Are the deposits inherently volatile as brokers and customers are likely to pull the funds for higher rates or on signs of problems at the bank?
3. Franchise Value – Do the deposits create franchise value for the bank that would be attractive to purchasers of the bank?

TIAA believes that the FDIC needs to go back to these core questions in re-examining which types of deposits should be subject to the restrictions of Section 29.

Regulatory Changes

Since 1989, the bank regulatory framework has changed substantially. Importantly, banks have significantly broader powers and have become part of large, complex financial organizations. With the ability to engage in a wide range of insurance and securities transactions, both directly and with affiliates, these institutions are better able to meet the financial needs of their customers. At the same time, Congress has incentivized banks to share information across the entire organization to assure that important public policy objectives are met. Section 29 did not and could not have anticipated these changes, and should be reevaluated in light of modern market structure and practice. Deposits that reside in an institution as a result of relationships a customer may have with other parts of the institution should not be deemed brokered if they do not present the types of dangers Congress attempted to address through Section 29. A few of the important statutory changes are noted below.

A. Gramm-Leach-Bliley Act

In 1989, a bank could act as a broker for securities transactions by its clients without registration with the Securities and Exchange Commission ("SEC") as a broker-dealer, and could act as an investment adviser to a registered investment company without registration with the SEC as an investment adviser. The Gramm-Leach-Bliley Act of 1999 ("GLB")[8] amended banks' broad securities laws exemptions, and in so doing have either forced, or at a minimum strongly encouraged, banking organizations to remove these activities from their banking subsidiaries and move them into separate SEC-registered broker-dealers and advisers. As a result, registered representatives of banks'

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[6] ANPR at 2366.
[7] *The Study on Core Deposits and Brokered Deposits*, FDIC (July 8, 2011).
[8] Pub. L. No. 106–102, 113 Stat. 1338 (1999).

brokered-dealer affiliates are now involved in client transactions that formerly involved solely bank personnel.

GLB also significantly expanded the types of activities that bank affiliates were able to engage in, which now include securities and insurance underwriting as well as merchant banking activities. With the passage of GLB, Congress recognized that diversified financial services organizations were an appropriate approach to serving customer needs. Congress also recognized that diversified financial services organizations would need to share customer information among their affiliates in order to efficiently meet customer needs and expectations and, after significant debate, preserved the exemptions permitting sharing of information between affiliates provided for in the Fair Credit Reporting Act.[9]

B. USA PATRIOT Act

Similarly, anti-money laundering requirements that have been implemented since 1989 also encourage the sharing of certain data between affiliates. Section 314(b) of the USA PATRIOT Act of 2001 ("Section 314(b)") encourages financial institutions to share information regarding "individuals, entities, organizations, and countries suspected of possible terrorist or money laundering activities," including sharing information between affiliates.[10] Regulatory guidance in this area has echoed this encouragement.[11] In the context of a diversified financial services organization, regulators, as evidenced by various enforcement actions,[12] expect financial institutions to implement a consolidated organization-wide AML Program addressing customers across legal entities, which requires the sharing of customer information.[13]

C. FINRA Rule 2111

In 2012, the Financial Industry Regulatory Authority ("FINRA") implemented Rule 2111, the Suitability Rule, which requires a broker to develop a reasonable basis to believe that a particular transaction is suitable for a customer.[14] To make this determination, the broker must obtain a variety of customer information, including the customer's liquidity needs. Information on balances in a customer's bank

[9] *See e.g.,* 15 U.S.C. §§ 1681a(d)(2)(A)(i) and (ii); 15 U.S.C. § 1681s-3(a).
[10] Pub. L. No. 107-56, 115 Stat. 272 (2001).
[11] *See e.g.,* FinCEN's 314(b) Fact Sheet, *available at*: https://www.fincen.gov/sites/default/files/shared/314bfactsheet.pdf; FFIEC BSA/AML Examination Manual (the "Manual"). The Manual says that information-sharing pursuant to Section 314(b) is "encouraged" and describes the safe harbor from liability that is afforded to financial institutions that share information in accordance with Section 314(b).
[12] For example, in a 2013 Consent Order between the Federal Reserve Board and JPMorgan Chase & Co., the bank holding company of three national banks ("JPMC"), the Federal Reserve required JPMC to improve its firm-wide compliance program, "to ensure that compliance risk is effectively managed across JPMC, including within and across business lines, support units, legal entities, and jurisdictions in which JPMC and its subsidiaries operate." *In the Matter of JPMorgan Chase & Co.* Docket No. 13-002-B-HC (January 14, 2013). The Federal Reserve clearly expected JPMC to address customer risk across legal entities and individual lines of business.
[13] The Manual has incorporated a set of expanded examination procedures for consolidated AML Programs that manage money-laundering risks across multiple legal entities within an integrated financial services organization. The Manual states that financial services organizations maintain discretion as to how they organize their AML Programs, and notes that many complex organizations choose to consolidate AML compliance functions in a single, corporate compliance function that by its nature, must share customer information across legal entities.
[14] FINRA, Rule 2111 (2012).

account is important in this regard, as account funds are a key means by which the customer's liquidity needs may be met.

D. Dodd-Frank Wall Street Reform and Consumer Protection Act

Title II of the Dodd-Frank Wall Street Reform and Consumer Protection Act ("DFA")[15] established the Orderly Liquidation Authority ("OLA") resolution regime, under which the Secretary of the Treasury, in consultation with the President, can initiate a process to appoint the FDIC as receiver of a severely distressed financial company. OLA represents a fundamental shift in how large financial services organizations can be resolved. Under OLA, the FDIC would resolve an entire financial services organization and not just its banking subsidiaries, allowing franchise value created across legal entities to be realized.

Congress, in Section 1506 of DFA, mandated that the FDIC reexamine the effectiveness of Section 29 in light of the experience of the financial crisis and, in response, the FDIC issued the Study. In the Study, the FDIC recommended that Section 29 not be amended or repealed and found that "the statute is sufficiently flexible to allow the FDIC to treat deposits … appropriately."[16] As evidenced by the subsequent passage of the Economic Growth, Regulatory Relief, and Consumer Protection Act, Congress clearly disagreed with the FDIC's findings and certain positions articulated in the Study and amended Section 29 to give core deposit status to certain reciprocal deposits.[17]

E. Other regulatory recognition of overall relationships

Federal functional regulators have taken other steps that recognize customer relationships with diversified financial services organizations cut across legal entity boundaries. After the enactment of GLB, banking regulators took a number of actions to clarify and expand the exemptions to the anti-tying restrictions.[18] Most notably, the Federal Reserve Board amended Regulation Y to add a regulatory safe harbor for banks offering a "combined-balance discount," based on a customer's maintenance of a combined minimum balance for a variety of financial products, not just bank products.[19] Similarly, in 2014, the Department of Labor issued a prohibited transaction exemption letter to Bank of America under which it allowed Bank of America, its subsidiaries and affiliates ("BoA") to offer certain relationship benefits to individuals based on their entire relationship with BoA, including IRAs and health savings accounts ("HSAs"). Each of these regulatory actions is a recognition that since the enactment of GLB, customer relationships cross legal entity boundaries and franchise/relationship value is created by treating customers holistically across an organization's full set of products and services.

[15] Pub. L. No. 111-203, 124 Stat. 1376 (2010).
[16] The Study at 3.
[17] *See* Section 202 of the Economic Growth, Regulatory Relief, and Consumer Protection Act, codified in 12 U.S.C. § 1831f (May 24, 2018).
[18] *See e.g.,* OCC Bulletin No. 95-20 (April 14, 1995); 12 C.F.R. § 225.7(b)(2).
[19] 12 C.F.R. § 225.7(b)(2).

Structural and Operational Change

Banks operate differently in 2019 than they did in 1989 in ways that Congress did not and could not have anticipated. There are fewer banks,[20] and those banks operate fewer branches.[21] Technology has become ubiquitous, changing the way people interact with their financial institutions.[22] Customers have multiple entry points into financial institutions, and many of those entry points are not themselves banks, although the distinction is often invisible to the customer. Today, deposits in banks often arise through these non-bank entry points, and they should not be treated as brokered unless they pose real risks to the Deposit Insurance Fund.

The concept of "relationship" is being fundamentally altered by technology and changes to the regulatory landscape. Ease of doing business is a key competitive advantage and the ability to seamlessly provide financial advice has become a key means to deepen client relationships. While TIAA agrees with the FDIC's position that services such as bill pay and direct deposit deepen banking relationships,[23] we also maintain that client connections through brokerage accounts, IRAs, consolidated web and mobile applications, and insurance products also increase client loyalty and deepen a client's overall relationship with a financial services organization. Moving brokerage accounts from firm to firm requires significant client effort, and similarly, the process for changing insurance carriers is far more complex than that involved in opening a CD with a new bank.

Driven by technological change, banks now rely on third-party vendors in all aspects of their operations, including for deposit platforms and outsourced services. Few U.S. banks do not utilize FIS, Fiserve, or Jack Henry to provide and/or maintain their core deposit platform – in fact, these three service providers have over 71% of U.S. core banking market share as of Q1 2019.[24] These and other vendors also provide call center services, which have become more important as traditional branches decline. In a technical reading of Section 29, these third-party vendors 'facilitate' the taking of deposits, since deposits are placed in depository institutions through their services. While these vendors technically are in the business of facilitating the opening of banks' deposit accounts, they rightly have never been characterized by the FDIC as deposit brokers. Categorizing these vendors as deposit brokers would be irrational and would not comport with the legislative intent of Section 29. Therefore, TIAA believes that clearly articulating a vendor exception from the definition of deposit broker would be appropriate and would fit with a core principles-based approach to determining whether deposits should be treated as brokered or core.

To satisfy the growing needs and demands of their customers, banks have developed increasingly complex structures, often by incorporating subsidiaries to perform functions and provide services for the bank and its customers. Bank subsidiaries engage in activities that the bank itself may engage in

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[20] Based on information published by the FDIC, the 15,158 commercial banks and savings institutions in 1990 had declined to 5,406 as of the fourth quarter of 2018. *See* FDIC, *Statistics at a Glance*, *available at*: www.fdic.gov/bank/statistical/stats/2015sep/fdic.pdf.

[21] *See* FDIC Quarterly Banking Profile: Third Quarter 2017, *Factors Shaping Recent Trends in Banking Office Structure for Community and Noncommunity Banks*, Volume 11, Number 4; Stackhouse, Julie *Why Are Banks Shuttering Branches?*, On the Economy Blog, Federal Reserve Bank of St. Louis, *available at*: https://www.stlouisfed.org/on-the-economy/2018/february/why-banks-shuttering-branches.

[22] *See* Board of Governors of the Federal Reserve System and Federal Reserve System, The Federal Reserve Payments Study 2016: Recent Developments in Consumer and Business Payment Choices (December 2016).

[23] The Study at n. 103.

[24] Data available from FedFis, *available at*: www.FedFis.com.

as well as activities the bank may be limited in doing or not permitted to do (*e.g.*, engaging in certain securities transactions). Bank subsidiaries operate functionally as divisions of the bank, are consolidated into the bank's financial statement, and are assets of the bank in any resolution of the bank. While an employee of an insured depository institution, by statute, is not a deposit broker with respect to funds placed with the employing depository institution, the FDIC has issued guidance that an employee of an insured depository institution's subsidiary is *not* excluded from the definition of a deposit broker.[25] This interpretation produces an illogical result whereby a deposit's status as brokered is solely dependent on whether an officer of a subsidiary of a bank gets his or her W-2 from the bank or the bank subsidiary. There is no policy rationale for this arbitrary and technical distinction – and as such, we believe the FDIC should revise its guidance to indicate that employees of a bank's subsidiary are excluded from the definition of "deposit broker" with respect to funds placed with the subsidiary's parent depository institution.[26]

Experience in the 2008 Crisis

The financial crisis of 2007-2008 demonstrates that the overly broad application of the brokered deposit rule captured long-term, stable deposits that actually strengthened, not weakened, depository institutions. The crisis evidenced the validity of concerns regarding liquidity risk among U.S. banks. Importantly, however, it also served to highlight the ways in which a bank's affiliation with a securities firm, and the resulting affiliated sweep deposits that often result from such a relationship, can make a bank more stable during times of liquidity pressure and add franchise value. During the financial crisis, banks facing significant liquidity pressure were forced to cut back sharply on their provision of credit, which ultimately intensified the crisis. But banks that were affiliated with securities firms, and, as a result, received a flow of affiliated sweep deposits from brokerage customers looking to move away from the volatile securities markets, enjoyed greater stability and were better equipped to weather the crisis. For example, depository institutions such as E*TRADE Bank that experienced distress during the financial crisis were able to create franchise value (*e.g*., receive private capital investments) at least in part because of the tremendous value created by the customer relationships of its broker-dealer affiliate, E*TRADE Securities. Similarly, the FDIC was able to resolve Wachovia at a minimal cost to the Deposit Insurance Fund in part due to the franchise value Wells Fargo placed on Wachovia Securities' and other non-bank Wachovia subsidiaries' customer relationships.

TIAA believes that the data the FDIC presents in the ANPR and the Study shows that traditional brokered CDs and funds placed by broker-dealers with non-affiliated banks have a correlation with bank failure and Deposit Insurance Fund losses, yet nothing in this data suggests that affiliate-related deposits provided anything other than a source of stable funding through the crisis.

Brokered Deposit Interpretations Stuck in Time

In light of this significant structural and regulatory change, the existing FDIC interpretative letters addressing Section 29 have become outdated and have strayed from the policy concerns underlying Section 29. Most of the interpretive letters, which were issued in the 1990s, take a very expansive view of the activities that make an individual or entity a deposit broker, and a very narrow technical view of the scope of Section 29's statutory exemptions. But the FDIC has the ability to update its existing guidance by taking an interpretive approach that focuses on the fundamental principles

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[25] *See* 12 U.S.C. § 1831f(g)(2); *see also* The Revised FAQs at FAQ E2.
[26] This could be done by using the primary purpose exemption or by an interpretation of what it means to be "in the business" of a deposit broker.

behind Section 29. Below, we recommend several ways in which the FDIC could update its brokered deposit interpretations to reflect 30 years of regulatory and technological change, while still advancing the policy goals that Section 29 was designed to achieve.

First, TIAA believes the FDIC's position on the conditions under which brokerage sweep deposits placed with an affiliated bank will qualify as core deposits needs to be updated in light of the stability and franchise value that such deposits provide. In a 2005 advisory opinion (the "2005 Advisory Opinion"), the FDIC confirmed that brokerage sweep deposits are not brokered if they fall within the "primary purpose exemption," which applies to an agent who "places funds into a depository institution for a substantial purpose other than to obtain deposit insurance coverage for a customer or to provide the customer with a deposit-placement service."[27] The FDIC acknowledges in the 2005 Advisory Opinion that the primary purpose of sweep deposits is not "to provide customers with a deposit-placement service," but rather "to facilitate the customers' purchase and sales of securities."[28] Nevertheless, the FDIC has placed a number of limitations on the application of the primary purpose exemption as it relates to brokerage sweep deposits. Namely, the 2005 Advisory Opinion imposes a 10% "permissible ratio" on the accounts participating in the bank-affiliated broker-dealer's deposit sweep program.

While TIAA strongly supports the approach to the primary purpose exemption taken in the 2005 Advisory Opinion, TIAA questions the need for the conditions imposed by the 2005 Advisory Letter and, in particular, we believe that the 10% threshold set for the permissible ratio is arbitrary and inappropriately low, and should be substantially increased. Consistent with other regulatory precedents, TIAA recommends that the permissible ratio be raised to 25%. This would require that at least 75% of participating brokerage account assets remain invested in non-deposit product investments, which clearly demonstrates that the underlying accounts would primarily be engaged in securities and other investment activities. A 25% permissible ratio limit is also consistent with data regarding individual investors' fluctuating cash component of their overall asset allocation. The American Association of Individual Investors conducts monthly surveys of individual investors' asset allocations (the "AAII Survey"). Since 1997, a compilation of the AAII Survey monthly results shows that the average cash allocation was 23%, with a maximum of 44% (March 2009), a minimum of 12% (December 1999), and a standard deviation of 6.4%.[29]

Second, TIAA believes that a number of the FDIC's interpretations and its Revised FAQs should be updated or rescinded. For example, the FDIC notes in its response to Revised FAQ Question B6 that with respect to professionals such as insurance agents, lawyers, or accountants that refer clients to a bank, the resulting client deposits that are placed with the bank *would* be brokered if (1) the professional has entered into a written agreement with the bank for the referral of depositors; or (2) the professional receives fees from the bank. We respectfully contend that the mere fact that a professional has received *any* fees from a bank should not be sufficient to determine that deposits from a client that the professional has referred to the bank are brokered. Rather, we believe the *nature* of the fees paid by the bank to the professional are important. We recommend that the FDIC issue guidance stating that unless a professional has received *volume-based fees*[30] based on the amount of deposits the bank has received from clients that were referred by the professional, those

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[27] "Are funds held in 'Cash Management Accounts' viewed as brokered deposits by the FDIC?", Advisory Opinion, FDIC (February 3, 2005), *available* at: https://www.fdic.gov/regulations/laws/rules/4000-10350.html.
[28] *Id*.
[29] Survey data available at: https://www.aaii.com/assetallocationsurvey.
[30] TIAA strongly believes that fixed dollar referral payments are not volume-based fees and that only fees determined by the volume of deposits and not number of accounts should be considered in determining deposit broker status.

deposits will not be treated as brokered. We note that in its response to Revised FAQ Question B4, the FDIC states that only where a third-party organization receives *volume-based fees* from a bank in exchange for advertising or referring clients to the bank will the FDIC consider the resulting deposits to be brokered. The same standard should apply to deposits resulting from client referrals from professionals such as insurance agents, lawyers, or accountants. For these purposes, we do not believe a per-account referral fee should be treated as a volume-based fee since it is analogous to a per-click web-based marketing fee.

TIAA also believes that deposits generated from “friends and family” or loyalty programs that give bank customers cash or other rewards for referring depositors to the bank should *not* be considered brokered. In its response to Revised FAQ Question B7, the FDIC addressed this issue, noting that it will determine whether deposits resulting from these programs are brokered by considering “whether the program is designed to significantly drive deposit growth to the insured depository institution or is merely a small recognition of the customer’s or employee’s loyalty to the bank. In making the determination, the FDIC considers whether the cost of the incentive package to the bank is relatively small, the fee is *de minimis* to the recipient, and payments are capped in total amount or limited in frequency per individual.” In our experience, bank customer loyalty programs are inherently designed to provide customers with a small reward for recommending the bank to their social networks – *not* to significantly drive deposit growth. Section 29 was not drafted to regulate the behavior of bank customers participating in small-scale incentive programs – and as such, we believe it would be inappropriate to consider any deposit resulting from such a program to be brokered.

Time to Get Back to Fundamental Principles

As well articulated in the American Bankers Association’s (“ABA”) February 28, 2019 letter to FDIC Chairman McWilliams[31] and attached legal analysis, and by the FDIC in the Study, the FDIC has authority to interpret Section 29 in a less technical and expansive manner and to return its focus to core principles. As discussed above, TIAA believes that the interpretation and application of Section 29 needs to be grounded on whether the third party’s involvement with a bank’s deposits: (1) facilitates rapid growth, (2) yields volatile deposits, and (3) fails to create franchise value for the bank.

First, the FDIC needs to rationalize its views of what it means to be in the business of placing deposits or facilitating the placement of deposits. TIAA believes that the ANPR evidences the FDIC’s renewed commitment to focusing brokered deposit regulation on the policy goals underlying the enactment of Section 29. In the ANPR, the FDIC states:

> If a third party is in the business of either (1) placing funds, or (2) facilitating the placement of funds— of another third-party (such as its customers)—then it meets the definition of ‘‘deposit broker’’ and the deposits are brokered, unless an exception applies.[32]

TIAA strongly supports the position articulated in this language that the phrase “in the business of” modifies both the placement of funds and the facilitation of the placement of funds. There are a number of Advisory Opinions that are explicit in parsing this language to limit the phrase “in the

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[31] Letter of Rob Nichols, President and CEO of ABA, to FDIC Chairman Jelena McWilliams (Feb. 28. 2019), *available at*: https://www.aba.com/Advocacy/LetterstoCongress/Documents/fdic-mcwilliams-brokered-deposit-policies-022819.pdf.
[32] ANPR at 2371.

business of" to modify only "placing deposits," and thus treat "facilitating the placement of deposits" as its own, independent qualification for being a deposit broker.[33] However, TIAA believes that such a construction is incorrect, contrary to the underlying policy goals of Section 29, and has created significant confusion around the meaning of the definition of "deposit broker." It would be very helpful if the FDIC would explicitly confirm that the language provided in the ANPR (quoted above) accurately reflects the FDIC's position that the phrase "in the business of" modifies both "placing deposits" and "facilitating the placement of deposits."

As an example, third parties often work with banks to make banking services available to individuals in a manner that TIAA believes does not rise to the level of being in the business of being a deposit broker, even though the third party's activities do facilitate the establishment of deposit accounts or facilitate the funding of deposit accounts. Common examples of these situations arise in the context of employers assisting their employees in obtaining banking services, including deposit accounts, on favorable terms through workplace banking offers, as well as encouraging their employees to directly deposit their wages into such bank accounts. TIAA offers a program whereby a participating institution can, as part of an overall benefits package, make available to its employees special incentives and bonus opportunities associated with deposit accounts at TIAA, FSB. The institutions that participate in the program can choose to promote these banking opportunities to their employees to the extent they desire, which may range from simply making available promotional flyers in an employee break room to disseminating dedicated email communications from the human resources department to the entire employee base. In these instances, TIAA does not consider these institutions to be "deposit brokers." These employers are not "in the business of" placing deposits. They are not being compensated by TIAA for providing these opportunities to their employees, and are instead creating a valuable opportunity for the benefit of their workforce.

Second, TIAA believes it is time to revoke Advisory Opinion 94-15[34] and all FAQs based on that opinion. Affiliates that refer customers to a bank should not be treated as deposit brokers as long as (1) the customer establishes a direct account relationship with the bank, (2) the affiliate does not have the legal authority to move the customer's funds to another depository institution, and (3) the bank retains complete control over setting rates, fees, terms, and conditions for the account, as well as full discretion over the opening or closing of the account. As discussed above, regulatory and structural changes have led to the creation of diversified financial services organizations that meet their customers' needs through multiple legal entities. As a general matter, the more products and services a client obtains from a financial services organization, the greater the transaction costs to the client of moving to a new provider and the stickier the relationship becomes. Federal and state law mandate that banks utilize affiliates to offer insurance and securities products to their clients. Yet the FDIC treats these affiliates as if their "primary purpose" is to generate high-rate, volatile deposits for their affiliated banks, going so far as to assume there is compensation paid to the employees of the affiliate for referrals, regardless of the individual facts and circumstances.

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[33] *See, e.g.,* FDIC Advisory Opinions 92-79 (Nov. 10, 1992); 93-30 (June 15, 1993); 93-31 (June 17, 1993); 93-34 (June 24, 1993); 93-46 (July 21, 1993); 93-71 (October 1, 1993); and 04-04 (July 28, 2004)).

[34] *See* FDIC Advisory Opinion 94-15 (March 16, 1994) ("[A] deposit broker could steer its customers to a parent holding company or affiliate and derive compensation through a *quid pro quo* arrangement with the parent or affiliate. If we exempted commercial enterprises from the statutory restrictions whenever they arranged to be compensated indirectly, the statutory restrictions could be easily circumvented.").

In FAQ E7, the FDIC addresses the statutory "primary purpose" exemption: "The primary purpose exemption applies only infrequently" and "[o]n those rare occasions when this exemption may apply, the FDIC also may impose restrictions on the activities involved, routine reporting requirements, and regular monitoring."[35] In adopting the primary purpose exemption, TIAA believes that Congress intended that the FDIC take a more pragmatic and literal reading of the statutory text; we also believe that the FDIC's policy as reiterated in FAQ E7 has strayed from congressional intent in creating the exemption. A more pragmatic and literal reading would align with the FDIC's language in the ANPR (quoted above) that a deposit broker must be "in the business of" either (1) placing deposits, or (2) facilitating the placement of deposit, such that if a person is not engaged in that type of business – that is, their primary purpose is something other than placing or facilitating the placement of deposits – then that person is not a deposit broker. In this way, the primary-purpose exception merely makes explicit what is implied by the definition of deposit broker.

TIAA believes that the FDIC's narrow reading of the primary purpose exemption, particularly in the context of affiliate relationships, needs to be reconsidered, and, as discussed below, appropriate treatment for affiliate-referred deposits developed. Changes in federal law since the enactment of Section 29 now require the involvement of affiliates in many client transactions and relationships and encourage or require information-sharing among affiliates. As such, we urge the FDIC to re-examine its positions regarding the primary purpose exemption and affiliate-referred deposits. Doing so would not only reflect the statutory changes that have occurred in recent decades, it would represent an appropriate use of the FDIC's discretion to realign the definition of brokered deposits with Congress's goal in adopting Section 29 – *i.e.*, preventing weakened depository institutions from trying to grow their way out of trouble through the use of high-rate, volatile funding. Indeed, TIAA recommends that the FDIC remove as a factor in its brokered deposit analysis of affiliate-referred deposits "whether the [affiliate] third party is given access to the depositor's account, or will continue to be involved in the relationship between the depositor and the insured depository institution."[36]

TIAA strongly supports the position the FDIC articulated in the ANPR that "[i]f a bank's trust department serves as the trustee or custodian of such plans [IRAs, 529 savings plans, and HSAs], and the trust has not been established for the primary purpose of placing funds with IDIs, the plans' deposits would not be treated as brokered deposits because of the exception for trust departments."[37] TIAA agrees with the FDIC that the trust department exemption covers custodial relationships for IRAs and HSAs in particular, as the IRS forms of trust and custody agreements for these accounts have virtually identical terms.[38]

<u>Affiliate Referrals</u>

In the Study, despite determining that "[i]n all, referrals from affiliates and their agents . . . appear to pose fewer of the problems that a deposit can pose compared to brokered deposits in general,"[39] the FDIC ultimately concluded that "they still pose greater problems than many other non-brokered deposits—particularly their dependence on the success and strategies of an affiliate" and as such "should not be considered core and should continue to come under the purview of the statute."[40] TIAA strongly encourages the FDIC to reconsider its views regarding deposits generated through referrals from affiliated financial services entities. We believe that it is *because* of, not in spite of, the

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[35] The Revised FAQs at FAQ E7.
[36] ANPR at 2371.
[37] ANPR at 2372.
[38] Forms available at: https://taxmap.irs.gov/taxmap/ts0/form5305traditiona_f_5cc6a7fe.htm.
[39] The Study at p. 57. The FDIC reiterates this view in further stating: "[T]hese deposits do not present all of the problems that traditional brokered deposits present . . . ."
[40] *Id.*

affiliate relationships that such deposits, particularly non-maturity accounts, possess the attributes of *core* deposits. The FDIC's position that such deposits are brokered merely due to the involvement of a third party (*i.e.*, an affiliate or its employees) and not the behavior of the resultant deposits is inconsistent with the intent of Section 29 and the protection of the Deposit Insurance Fund.

TIAA believes that the stability of affiliate referral deposits is substantially similar to other core deposits and that affiliate referral deposits are substantially less volatile than traditional brokered deposits (*i.e.*, CDs sourced through deposit brokers). It appears that the FDIC's position in the Study that affiliate-referred deposits should be treated as brokered is largely based on the FDIC's lack of data regarding the performance and characteristics of such deposits.[41] TIAA believes that the current reporting of brokered deposits on Call Report Schedule RC-E appropriately tracks brokered CDs by maturity and balance tier since these types of CDs were exactly what Congress wished to address with passage of Section 29.[42] Set forth below is a discussion of affiliate referral deposits, relative to the three core principles discussed above.

1. Rapid Growth

In the Study, the FDIC describes affiliate referral deposits as "ancillary to the affiliates' legitimate businesses and . . . usually based upon a relationship between the customer and the affiliate."[43] Moreover, the FDIC concludes that "it is unlikely that a bank could use these deposits to grow quickly."[44] TIAA concurs with these determinations. As discussed previously, the deposits that TIAA, FSB receives through referrals from its affiliates are the result of the client's long-standing relationship with TIAA and/or the client's strong desire to increase the scope of that relationship. Also as discussed above, TIAA exists to help our clients achieve financial well-being, and to do so, TIAA provides a variety of financial planning tools and services to its clients. In providing such holistic financial advice, one of the first steps is to establish that the client has sufficient highly liquid financial reserves to cover unforeseen contingencies and to advise on the importance of having an emergency fund equal to several months' average expenses. In this context, a referral of the client to an affiliated bank to establish a savings account may be an appropriate and natural outcome of the planning session. Although broker-dealer or financial planning affiliates may make bank account recommendations based on the client's financial goals, the client must then take the initiative to directly open any such bank accounts, which places the ultimate control of the deposit relationship with the client. Affiliate referrals are individualized transactions and are intended to both broaden and deepen the client's relationship with the financial services organization. Each of these individualized transactions takes time to develop and execute, and as a result, such referrals are not conducive to funding rapid deposit growth.

2. Volatility

TIAA believes that potential volatility should be the primary factor in determining whether deposits should be treated as core or brokered. As for affiliate referral deposits, the FDIC states in the Study that "[b]ecause depositors have a relationship with an affiliate of the bank, these deposits may behave more like deposits where the bank itself has a relationship with the depositor and thus may be more stable and less likely to leave for higher rates when the bank is under stress."[45] Like the commenters referenced in the Study, we strongly agree that affiliate referral deposits are a lower-cost means to obtain stable funding.[46] Because TIAA's clients have deep, long-term relationships with the

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[41] *See* the Study at p. 56 ("[T]here is virtually no data on these deposits.").
[42] *See* RCON2365 [total brokered deposits], RCON2343 [under $100k], RCONJ472 [$100k-$250k], RCONA243 [1 year or less $100k], RCONK219 [1 year or less $100k-$250k], RCONK220 [1 year or less greater than $250k].
[43] The Study at p. 56.
[44] *Id*.
[45] The Study at pp. 56-57.
[46] *See* the Study at p. 57 ("Some commenters [stated] that these deposits are stable and low cost.").

organization, they are less rate-sensitive and our experience shows their accounts are stickier than accounts sourced through mass market, non-affiliate channels. TIAA believes that such accounts are unlikely to close even if TIAA, FSB experiences difficulties.

3. *Franchise Value*

As reflected in the Study, the FDIC's primary discomfort with affiliate referral deposits appears to stem from its uncertainty regarding the impact of those deposits on franchise value, as well as the fact that this issue has not been formally evaluated or tested in the context of actual bank or affiliate failures.[47] TIAA believes that the FDIC's focus on actual bank failures, rather than also considering recapitalizations and reorganizations of nearly-failed institutions, is misguided. As discussed above, depository institutions such as E*TRADE Bank that experienced distress during the recent financial crisis were able to *create* franchise value (*e.g.*, receive private capital investments) *because* of the tremendous value created by the customer relationships of its broker-dealer affiliate, E*TRADE Securities. Similarly, we believe in acquiring Wachovia, Wells Fargo took into account the value created both by non-bank activities as well as the value creation from inter-affiliate referrals. In light of OLA, the FDIC's view of franchise value should likewise expand to include cross legal entity value creation in diversified financial services organizations. Relationship pricing, affiliate referrals and client experience integration all create value across legal entity boundaries and can be the basis for higher valuations from investors for interests in troubled organizations.

The FDIC has given undue weight to data limitations regarding franchise value when evaluating affiliate referral deposits as a whole. By focusing on data regarding past failures, the FDIC loses sight of how affiliate referral deposits strengthened banks that did not fail and thus biases its analysis. As discussed above, brokered deposits are presently reported on Call Report Schedule RC-E utilizing the existing overbroad and undifferentiated definition of brokered deposits. Accordingly, there is limited public data to distinguish between the high-rate, volatile, third-party sourced deposits Congress sought to address through Section 29 (*e.g.*, brokered CDs, funds swept by broker-dealers to unaffiliated banks) and the lower-rate, stable, affiliate-sourced deposits that have become an increasingly important source of funding for many financial services organizations.

<u>Affiliate Activities and Information-Sharing</u>

As discussed above, one of the ways diversified financial organizations can best serve their customers is to share customer information across legal entities and to offer a broad array of products to meet each customer's individual needs. To meet those goals, TIAA believes that it is appropriate and in customers' best interests to allow affiliated entities and their employees to distribute bank-prepared marketing materials to affiliate customers and prospective customers without such activities causing such affiliates or their employees to be considered deposit brokers. We also believe that any deposit accounts that are funded following such distribution of marketing materials should not be considered brokered deposits. In most instances, the type of marketing materials are either educational in nature, describing a bank's products and services, or provide a special offer to qualifying customers who open an account with the bank. Such activities do not implicate the rapid growth or volatility policy concerns described above, and help generate positive franchise value.

As described above, although TIAA believes strongly that affiliate referrals for deposit accounts should not be treated as brokered deposits, if the FDIC continues to hold to the conclusion that such deposits are brokered, we would request that the FDIC revisit Advisory Opinion 15-01, and FAQs F2

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[47] *See id*. ("Because the bank obtains [affiliate referral deposits] only because of the depositor's relationship with the bank's affiliates . . . the deposits may or may not have franchise value, given that it is difficult to account for the range of circumstances affecting the bank and its affiliate. The value and behavior of these deposits has not been tested to any extent in actual bank or affiliate failures.").

and F3 to acknowledge and recognize the difference between referrals from affiliated and unaffiliated third parties in regards to information-sharing and other account access. In particular, a bank should be permitted to re-categorize deposits as non-brokered upon renewal (for time deposits) or 12 months after account opening (for non-time deposits). As noted above, other Federal functional regulators have taken steps to recognize that customer relationships with fully diversified financial services organizations cut across legal entities, and customers of such organizations expect that information will be appropriately shared in order to provide a seamless customer experience. To that end, we would request that the FDIC permit banks to re-categorize brokered deposits resulting from affiliate referrals to non-brokered deposits at maturity or after 12 months, as applicable, even if the affiliate has ongoing access to the customer's account statements and other account information, as such access is for the benefit of the customer, the organization as a whole, and the bank in particular. As discussed above, information-sharing among entities within a diversified financial services organization is necessary and proper, authorized by law, and should not be a factor in determining whether a deposit is brokered.

TIAA's Responses to Specific Questions Asked in the ANPR:

1. Are there ways the FDIC can improve its implementation of Section 29 of the FDI Act while continuing to protect the safety and soundness of the banking system? If so, how?

As discussed above, the FDIC can improve its implementation of Section 29 by focusing on a core set of fundamental principles that address the concerns underlying the adoption of Section 29 and moving away from its historically overbroad interpretation of who is a deposit broker and what is a brokered deposit.

To ease the regulatory burden imposed on banks in analyzing whether third parties are acting as deposit brokers for purposes of Section 29, TIAA recommends that the FDIC, by regulation, issue guidance with regard to relationships, activities, and entities that presumptively do not give rise to deposit broker status. The regulations could also set forth a process through which regulators could rebut these presumptions and list the factors that would be applied in rebutting the presumptions.

An initial list of relationships, activities, and entities that presumptively do not give rise to deposit broker status should include:

(a) Officers and employees of legal entities placing deposits on behalf of such legal entities.
(b) General partners of partnerships placing deposits on behalf of such partnerships.
(c) SEC-registered investment advisers placing deposits on behalf of registered investment companies they manage.
(d) Bank vendors and contractors and their employees facilitating the acceptance of deposits by an insured depository institution by providing outsourced services to the insured depository institution that include providing bank systems, maintaining bank records, processing bank transactions, operating bank call centers, maintaining bank web sites and mobile applications, and servicing bank customer accounts.
(e) Employers with regard to offering their employees access to deposit accounts offered by insured depository institutions, including through physical and electronic communication of workplace banking offers to their employees, as well as with regard to facilitation of deposits to insured depository institutions through direct deposit of employee wages and benefit payments.
(f) Non-profit organizations with regard to accounts established by or on behalf of third parties in connection with the non-profit organization's charitable purpose.

(g) Depository institution affiliates and their employees that refer potential deposit customers to the depository institution.

In addition, TIAA recommends that the FDIC formally rescind or revise the outdated interpretive letters and related FAQs that no longer follow the fundamental principles we have outlined above.

2. Are there types of deposits that are currently considered brokered that should not be considered brokered? If so, please explain why.

TIAA strongly believes that affiliate referrals should not be considered brokered deposits and respectfully requests the FDIC to revisit its views on deposits referred by affiliates of a bank. Affiliate-referred deposits are the result of an ongoing customer relationship, and, as the FDIC has recognized, are less volatile than other types of deposits. Given the fact that affiliate referrals actually increase the franchise value of an organization, this change is consistent with the intent of Section 29 and will neither negatively impact the safety and soundness of the banking system nor increase resolution costs to the Deposit Insurance Fund.

TIAA also recommends that the FDIC revisit its determination of the instances in which professionals, such as insurance agents, lawyers, and accountants, are considered deposit brokers. Currently, if a professional receives any fees from a bank, the professional is considered a deposit broker. TIAA agrees that a professional who receives fees from a bank based on the volume of deposits referred to the bank could be considered a deposit broker. However, the mere fact that a bank pays a professional a fee of any kind should not lead to all deposits related to customers referred by that professional being treated as brokered. Banks may wish to establish relationships with professionals, such as cross-referral arrangements, make payments for legal or accounting services, or offer donations to charitable organizations. These arrangements are not directly tied to the volume of deposits received, and banks should not be required to treat all referrals from those professionals as brokered. Similarly, deposits by lawyers pursuant to court orders that require the opening of restricted FDIC insured accounts, such as guardianships, irrevocable trusts or escrow accounts, should not be considered brokered.

Furthermore, TIAA believes that non-profit veterans services organizations, which are required to open FDIC insured accounts in connection with special needs trusts for veterans and the disabled, should clearly be excluded from the definition of a deposit broker. TIAA believes that, as a matter of public policy, the mere involvement of a third-party veterans services organization in serving veterans and the disabled should not in any way trigger brokered deposit status.

3. Are there types of deposits that are currently not considered brokered that should be considered brokered? If so, please explain why.

TIAA believes the deposits that Congress intended to restrict as brokered were principally brokered CDs and analogous third-party controlled deposit arrangements. These are currently considered brokered and would continue to be considered brokered under the principles-based approach TIAA recommends the FDIC formally adopt.

4. <u>Are there specific changes that have occurred in the financial services industry since the brokered deposits regulation was adopted that the FDIC should be cognizant of as it reviews the regulation? If so, please explain.</u>

As discussed above, significant regulatory, structural and technological changes have occurred since 1989 impacting how financial services are delivered in the United States. These changes need to be taken into account in how the FDIC interprets Section 29 for banks operating in a 21st century economy.

5. <u>Do institutions currently have sufficient clarity regarding who is or is not a deposit broker and what is or is not a brokered deposit?</u>

In light of the above, institutions spend a great deal of time and resources analyzing whether particular facts and circumstances give rise to a relationship involving a deposit broker. Existing dated precedents give little helpful guidance in addressing novel facts and circumstances resulting from economic, technological, and market changes over the past 30 years. In light of the fast-paced competitive environment that banks face in the 21st century, clear guardrails in determining brokered deposit status are essential for banks to remain competitive and respond to novel and innovative situations, relationships, and products.

6. <u>Are there ways the FDIC can provide additional clarity through updates to the brokered deposits regulation, consistent with the statute and the policy considerations described above?</u>

As discussed above, TIAA believes the FDIC has sufficient authority under Section 29 to issue regulations and interpretations to refocus brokered deposit regulation on the fundamental issues Section 29 was intended to address. As we outline above, the FDIC has the opportunity to issue regulations that go beyond just echoing the statutory text and articulate when individuals and entities are not acting as deposit brokers.

8. <u>Are there any statutory changes that warrant consideration from Congress?</u>

If the FDIC does not through regulation and interpretation adopt a more appropriate approach to interpreting Section 29, TIAA would support statutory changes that would narrow the definition of a deposit broker and expand the exemptions from deposit broker status, consistent with the principles of appropriate brokered deposit policy discussed above.

11. <u>Should the methodology used to calculate the “national rate” be changed? If so, how?</u>

Given the changes to the banking industry since the current “national rate” calculation methodology was adopted, TIAA believes the FDIC should update the methodology. The current calculation skews too heavily in favor of the largest national banks, all of which operate large brick and mortar branch networks. Given their dominant physical presence, these large banks need not always offer competitive rates to attract deposits. Smaller banks, as well as internet-based or electronic commerce-based banks (“Online Banks”), must offer higher rates in order to compete with the largest banks. The current national rate calculation does not adequately reflect the rate premium that small and Online Banks must offer to compete with the largest national players.

13. <u>Should the amount of the rate cap, currently 75 basis points over either the national rate or the prevailing market rate, be revised? If so, how?</u>

TIAA strongly supports revising the amount of the rate cap for Online Banks. TIAA believes that the FDIC determined the 75 basis point margin over the national rate/prevailing market rate based on assumptions regarding market structure and customer acquisition and servicing models that are no longer accurate for many banks. TIAA, FSB operates nationally as an Online Bank with a limited branch presence in a single state. Like other Online Banks, we need to offset the competitive disadvantage created by our lack of physical branches (*e.g.*, lack of customer convenience that a local branch provides) though both technology and competitive rates. Since Online Banks have lower non-interest expenses (*i.e.,* they do not have to pay for maintaining branches, ATMs, physical cash availability, physical security, etc.), they compete for deposits by paying a higher interest rate that reflects their lower-cost structure and offsets the competitive disadvantage of not having a local physical presence. TIAA believes that currently the interest rate differential between Online Banks and brick and mortar banks is on the order of 150 to 200 basis points for savings accounts reflecting this competitive dynamic. Accordingly, TIAA believes that the rate cap for Online Banks should be increased by 75 to100 basis points (for a total margin over the national rate of 150 to 175 basis points) in order to reflect the rate pricing structure inherent in their business model. This “adjusted rate-cap” for Online Banks would simply adjust the rate cap to account for the higher proportion of an Online Bank’s all-in cost of deposits, which reflects interest expense rather than non-interest expense.

14. <u>How should deposits with promotional or special features be treated with respect to the national rate or the prevailing market rate?</u>

TIAA believes that deposits with promotional or special features should receive special treatment under the rate cap calculation methodology. Online Banks use promotional interest rates, one-time payments and special features as a means to acquire new deposit customers and incentivize particular customer behaviors. Bonus rate offers and special one-time payments are often offered by Online Banks to reward new customers that sign up for direct deposit or enhance the appeal of a digital marketing campaign. They are marketing tools that tend to attract prospective customers’ attention through a better financial value proposition. Banks market their products through various means (digital media, traditional print media advertising, direct mail, branch, and rate). By solely constraining marketing through means that impact interest expense, while not constraining other forms of marketing (and related non-interest expense), the rate cap may force changes in Online Banks’ marketing that increase costs, reduce customer value, and decrease overall safety and soundness. One way the FDIC could address these concerns is to establish a per-new-account fixed-dollar cap for the cost of such promotional or special features that would not count against the rate cap.

15. <u>How should the rates offered by internet-based or electronic commerce-based institutions be calculated?</u>

As discussed above, Online Banks have a different set of strategic advantages and disadvantages than brick and mortar banks, and Online Banks may need to offer higher rates in order to attract customers. As discussed in response to questions 13 and 14, TIAA believes adjusted rate caps should apply to such institutions to reflect their models of client acquisition and retention.

Conclusion

TIAA appreciates the FDIC's focus on this important topic. We believe that the recommendations discussed in this letter, if followed by the FDIC, would substantially improve and modernize the current regulatory framework for brokered deposits. Most notably, we believe that excluding affiliate referral deposits from being characterized as "brokered" will make banks more stable and better able to survive, and even thrive, in times of financial crisis, ultimately serving the goals that Section 29 was originally drafted to achieve. We welcome the opportunity to engage further on any aspect of the foregoing.

Sincerely yours,

[redacted]

John Douglas