

SUNRISE BANKS

May 7, 2019

Submitted via Email at: comments@fdic.gov

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

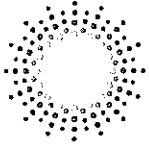
Re: Federal Deposit Insurance Corporation
Comments of Sunrise Banks, N.A., in Response to Advance Notice of Proposed Rulemaking and
Request for Comment on December 19, 2018

Dear Mr. Feldman:

This letter is submitted by Sunrise Banks, N.A. ("Sunrise") in response to the Federal Deposit Insurance Corporation (the "FDIC") Advance Notice of Proposed Rulemaking and Request for Comment on December 19, 2018 regarding brokered deposit and interest rate regulations (the "ANPR"). The ANPR seeks public input regarding the FDIC's regulatory approach to brokered deposits and interest rate restrictions, including, notably, comments addressing whether types of deposits that are currently considered brokered that should not be considered brokered.

We respond to the ANPR to address the treatment of prepaid deposits by the FDIC in its advisory documents, including Financial Institution Letters FIL-2-2015 (the "Initial FAQ Answers"), as modified by FIL-51-2015 (the "First Revised FAQ Answers"), and FIL-42-2016 (the "Second Revised FAQ Answers," and, collectively with the First Revised FAQ Answers, the "Revised FAQ Answers").¹ Specifically, we note that in both the Initial FAQ Answers and the Revised FAQ Answers, the FDIC indicates that deposits associated with prepaid accounts are generally considered "brokered" for purposes of the Federal Deposit Insurance Act (the "FDI Act"). Sunrise believes that such treatment is unwarranted because the market participants in the prepaid industry are either not in the business of placing or facilitating the placement of deposits, or have a different primary purpose than the placement of deposits.

¹ FDIC, FIL-2-2015, Guidance on Identifying, Accepting, and Reporting Brokered Deposits, (January 5, 2015), available at <https://www.fdic.gov/news/news/inactivefinancial/2015/fil15002.html>; FDIC, FIL-51-2015, FDIC Seeking Comment on Frequently Asked Questions Regarding Identifying, Accepting, and Reporting Brokered Deposits (Nov. 13, 2015), available at <https://www.fdic.gov/news/news/financial/2015/fil15051.pdf>; FDIC, FIL-42-2016, Frequently Asked Questions on Identifying, Accepting and Reporting Brokered Deposits, (June 30, 2016), available at <https://www.fdic.gov/news/news/financial/2016/fil16042b.pdf> (as further revised July 14, 2016 to address a technical correction).



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We support the positions and analysis presented by the Innovative Payments Association in their response to the ANPR dated as of April 16, 2019 (the "IPA Response"); this letter is intended to amplify certain positions presented by the IPA, as well as present to the FDIC our experience with prepaid program managers ("Program Managers"), as support for the proposition that Program Managers are not "deposit brokers" because the "primary purpose" of the relationship we have with our Program Managers is not for them to place deposits with us.

Sunrise respectfully submits that the FDIC's current treatment in the Revised FAQ Answers of companies that distribute financial products such as prepaid accounts – which include, but are not limited to, certain prepaid cards - that provide access to funds at an insured depository institution (an "IDI") is not consistent with the statutory definition of "deposit broker" under the FDI Act. Accordingly, in the FDIC's effort to revise its regulatory approach to brokered deposits, we encourage the FDIC to clarify the term "deposit broker" to narrowly tailor the definition to apply to those who are specifically in the business of placing, or facilitating the placement of, brokered deposits, and not to every business that, as part of its core services, engages in the secondary *activity* of facilitating deposits merely to effectuate the utility of its services and products. Companies in the prepaid account industry would generally fall within the latter description, and therefore should not be included in the definition of "deposit broker."

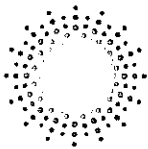
While there are a number of reasons set forth in the IPA Response why it is advisable that the FDIC make the revisions proposed above, we focus our comments on the application of the deposit broker definition to Program Managers, which is inconsistent with the purpose of the FDI Act; reclassifying prepaid deposits as exceptions to brokered deposits would be consistent with the primary purpose exceptions.

Section 29 of the FDI Act restricts institutions that do not meet minimum capital requirements from accepting funds obtained by or through a deposit broker.² Pursuant to the statutory language of Section 29 of the FDI Act, companies in the prepaid account distribution chain, as further identified in the attached White Paper, should not be deemed "deposit brokers" and therefore deposits made with an IDI pursuant to a prepaid account program should not be deemed "brokered deposits."

Section 337.6 of the FDIC's Rules and Regulations implements Section 29 of the FDI Act. Both Section 29 and Section 337.6 define a deposit broker, in pertinent part, as "any person *engaged in the business of* placing deposits, or facilitating the placement of deposits, of third parties with insured depository institutions or the business of placing deposits with insured depository institutions for the purpose of selling interests in those deposits to third parties."³ This definition contains limiting language (*i.e.*, "*engaged in the business of*") that is focused on the business of the entity and effectively excludes all entities that are not *engaged in the business of* placing deposits, or facilitating the placement of deposits, with IDIs from the definition of deposit broker. Properly viewed in light of the facts and circumstances

² FDIC, FIL-87-2018, Reciprocal Deposit Rulemaking and Request for Comments on Brokered Deposit and Interest Rate Restriction Issues, Advance Notice of Proposed Rulemaking Relating to Brokered Deposits (Dec. 19, 2018), available at <https://www.fdic.gov/news/news/financial/2018/fil18087.pdf> [hereinafter FDIC, ANPR].

³ 12 U.S.C. § 1831f(g)(1)(A) (2017) (emphasis added); 12 C.F.R. § 337.6(a)(5)(A) (2018) (emphasis added).



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pertaining to the companies in the prepaid financial services industry, as described further below, such companies are not "*engaged in the business of placing deposits, or facilitating the placement of deposits.*"⁴ Thus, companies in the prepaid distribution chain, or companies that use prepaid accounts as an alternative form of disbursement of their own funds, should not fall within the purview of the statutory definition of "deposit brokers."

The Revised FAQ Answers reach the conclusion that the deposits associated with most prepaid account programs should be treated as "brokered deposits"; however, the Revised FAQ Answers arrive at this conclusion by omitting the limiting language in the statute focused on the business of the entity. To reach the conclusion that actors in the prepaid account industry (such as Program Managers) are functioning as deposit brokers, the reasoning in the Revised FAQ Answers overlook key language of the relevant statute and regulations. For example, Revised FAQ Answer A2 states that, subject to certain exceptions, a deposit broker is any person engaged in "placing deposits" belonging to others or "facilitating the placement of deposits" belonging to others.⁵ Revised FAQ Answer E9 states that "the applicability of the primary purpose exception depends upon the intent of the third party in placing deposits (or facilitating the placement of deposits)."⁶ Both of these answers effectively ignore the statute's limiting language focusing on the business of the entity, rendering that language surplusage. Although the Supreme Court's "preference for avoiding surplusage constructions is not absolute," the rule against reading words out of a statute is compellingly in play when doing so also conflicts with "the fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme."⁷ Thus, the Revised FAQ Answers' conclusion that actors in the prepaid account industry should be treated as deposit brokers is anomalous and inappropriate because it results from an omission of key statutory language.

Program Managers are not providing deposit-placing services to its customers, nor in our experience do they offer placement of deposits to banks. We think Program Managers would not reasonably be considered deposit brokers "*engaged in the business of placing deposits, or facilitating the placement of deposits.*"⁸ Any activity related to deposits is secondary to a Program Managers' core business offering of prepaid payments products. In our business, deposits are linked to a prepaid card or subaccount, issued in connection with an underlying cardholder agreement that enables the customer to *spend* an amount of money associated with their card or subaccount. Our Program Managers offer programs under which they offer, for example, gift cards for consumer purchase, or offer corporate incentive cards to merchants, which are provided as an inducement to consumers to try or buy a good or service. The placement of deposits at Sunrise is an ancillary result of a negotiated, multi-year agreement between Sunrise and a Program Manager, under which each party has certain rights and obligations with respect to the provision and servicing of the prepaid cards and accounts. The core purpose of these agreements is to provide goods and services to potential customers, it is not to induce Program Managers to place deposits with

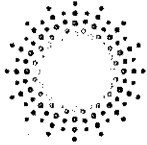
⁴ 12 U.S.C. § 1831f(g)(1)(A) (emphasis added).

⁵ FDIC, *Revised FAQ Answers*, *supra* note 2, at Answer A2.

⁶ FDIC, *Revised FAQ Answers*, *supra* note 2, at Answer E9.

⁷ *King v. Burwell*, 135 S. Ct. 2480, 2492 (2015).

⁸ *Id.* (emphasis added).



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Sunrise. The Revised FAQ Answers contain an overly broad conception of deposit broker. Revised FAQ Answer E11, which discusses the primary purpose exception to the deposit broker definition as applied to distribution of general purpose prepaid accounts, focuses on whether a prepaid account itself provides *access* to a depository account as the litmus test for determining that prepaid account companies generally qualify as deposit brokers, and that the deposits are accordingly classified as brokered deposits.⁹ Such a test simply is not consistent with the statutory language, which asks instead whether any of the participants in the prepaid account industry are *engaged in the business of* placing, or facilitating placement of, deposits.¹⁰ It is also a business that is fundamentally not the same as traditional deposit brokerages, which introduced rapid growth and volatility elements to IDIs that the FDIC previously identified to be fundamental characteristics of brokered deposits.

Conclusion

Because of the nature of Program Managers' business, and the length of time banks such as Sunrise enter into agreements with Program Managers, we encourage the FDIC to revise the FAQ to acknowledge that Program Managers business is not in placing or brokering deposits, but to provide services to customers, in some circumstances with the support of an IDI such as Sunrise.

We appreciate the opportunity to submit feedback on the ANPR. If you have any questions, please do not hesitate to contact me at the number listed below or at: andrew.toftey@sunrisebanks.com.

Sincerely,


Andrew Toftey
Corporate Counsel
Sunrise Banks, N.A.
(651) 927-1512

⁹ FDIC, *Revised FAQ Answers*, *supra* note 2, at Answer E11.

¹⁰ 12 U.S.C. § 1831f(g)(1)(A).