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Robert E. Feldman
Executive Secretary
Attention: Comments/Legal ESS
Federal Deposit Insurance Corporation
550 17th Street, NW
Washington, DC 20429

Via E-Mail to comments@fdic.gov

Re: Unsafe and Unsound Banking Practices: Brokered Deposits Restrictions
RIN 3064–AE94

Dear Sir or Madam:

As a former General Counsel of the FDIC, who served from 2007-2008 during the most recent financial crisis, I am highly concerned over the FDIC's Notice of Proposed Rulemaking on Brokered Deposits ("the Proposal").

The need to regulate brokered deposits is straightforward: if a bank has a wholly or largely indirect relationship with a customer, that customer's deposits with the bank are, on balance, more volatile than the bank's core deposits.

By building on this relatively simple proposition, a robust brokered deposit regulation serves a vital role in preserving the safety and soundness of our insured depository institutions. The rule protects FDIC-insured deposits, helps ensure a level playing field among depository institutions of different sizes and business models, and ensures the viability of the FDIC Deposit Insurance Fund via appropriate and risk-based premiums. In so doing, the regulation of brokered deposits ultimately shields U.S. taxpayers from loss.

To be sure, the FDIC has a continuing responsibility to ensure its regulations and practices are modernized to maintain their relevance and practical application. In particular, I appreciate that the Proposal is an acknowledgement of banks' use of new technologies to engage and interact with customers. The potential of the "bank stack" offers an exciting possibility as financial institutions transform themselves into digital platforms upon which outside developers can layer new interfaces and build new products for consumers.[1] As Chairman McWilliams has astutely pointed out:

> The cost to innovate is in many cases prohibitively high for community banks. They often lack the expertise, the information technology, and research and development budgets to independently develop and deploy their own technology. That is why partnering with a fintech that has already developed, tested, and rolled out new technology is often a critical mechanism for a community [bank].[2]

But as we collectively move to the future, the FDIC must also maintain its role as the steward of the underlying purposes of the brokered deposits regulation, the safety and soundness of the banks it supervises, and the integrity of the Deposit Insurance Fund. Modernization should not be a zero-sum game, such that broker dealer and FinTech firms can attract more customers at the expense of the Deposit Insurance Fund. Rather, the brokered deposit rule is one of the most critical means that the FDIC has to enable responsible innovation via partnerships between third parties and banks that reflect the potential risks posed by the relationships, in addition to the enormous benefits that I do not contest may exist.

In adding unnecessary process and complexity, and reducing transparency given the presence in the relationship of a non-bank (uninsured) intermediary, the Proposal makes it much more difficult to accurately determine the underlying risk associated with a bank's deposit base. Indeed, the proposal risks indirectly removing the category of brokered deposits altogether.

My comments focus on three primary substantive concerns with the Proposal:

- The Proposal should focus on the risks underlying the need to regulate brokered deposits: identifying deposits that are qualitatively more volatile than core deposits.

    - The dramatic expansion of the primary purpose exemption will likely allow nearly all third-party deposit placement arrangements by any intermediary, far more entities than currently qualify, to qualify for this exception to the definition of brokered deposits. This would be the case, regardless of the actual underlying terms of the arrangement, including aspects relating to the degree of control the bank has over the account and customer relationship.

    - If the FDIC looks more closely, it would see that not all transaction accounts are created equal.

[1] See, *e.g.*, Federal Reserve Governor Lael Brainard, Where Do Banks Fit in the Fintech Stack? (April 28, 2017), https://www.federalreserve.gov/newsevents/speech/brainard20170428a.htm.
[2] Keynote Remarks by FDIC Chairman Jelena McWilliams on the "The Future of Banking" at The Federal Reserve Bank of St. Louis; St. Louis, Missouri (Oct. 1, 2019), https://www.fdic.gov/news/news/speeches/spoct0119.html.

    - The FDIC must consider additional factors in its proposed carve-outs for broker-dealer sweeps.

- Further, the proposed carve outs for transactional accounts and broker-dealer sweeps may extend the FDIC insurance safety net to customers of non-banks. This will bring large numbers of new non-bank products to the marketplace, confusing consumers about whether their funds are protected by FDIC insurance and posing important operational and consumer risks.

- Most importantly, the FDIC needs to consider the risks to the Deposit Insurance Fund, community banks, and the overall stability of the financial system, if the Proposal's exemptions help foster the entry of the largest technology firms into providing financial services through increased access to FDIC deposit insurance for their customers.

My comments also highlight three of the Proposal's procedural deficiencies:

- Finalizing the brokered deposit rules should be delayed while the FDIC and broader financial services industry navigate the current global pandemic.

- The FDIC must finalize the brokered deposit rule in accordance with the Administrative Procedure Act, Pub. L. 79-404, 60 Stat, 5 U.S. Code, Chapter 5, which requires that sufficient notice be provided within a rulemaking proposal so as to enable informed comment upon the proposal.

    - In this context, the proposal should include the simultaneous identification of the status of existing interpretive letters relating to the current brokered deposit rule, in light of the Proposal (*i.e.*, how these interpretive letters are impacted by the Proposal).

    - Additionally, any changes to the brokered deposit rules should be driven by additional data collection and analysis by the FDIC and other bank regulators.

- Finally, the FDIC should abandon the primary purpose application process as laid out in the Proposal and instead reserve any primary purpose application procedure for addressing truly novel or innovative questions posed by the industry.

Substantive Concerns

The Proposal should focus on the risks underlying the need to regulate brokered deposits: identifying deposits that are qualitatively more volatile than core deposits.

I worry that the underlying purpose of the brokered deposit rule has been abandoned by this Proposal. The rule is not an inconvenient barrier that must be "modernized" by evisceration.

In a time of financial system risk, such as this, the FDIC's ability to understand the deposit volatility and balance sheet risks of its supervised institutions would be severely weakened if the brokered deposits classification were to be eroded. Data from the FDIC's own Statistics on Depository Institutions database show that many banks turned to brokered deposits during the last financial crisis.[3] If the Proposal were to enlarge the exceptions to the ability for the FDIC to monitor such deposits, it would weaken a critical tool for the FDIC, and other regulators, to understand and manage the underlying risks relating to such deposits, which would still be present notwithstanding any of the Proposal's classification changes.

In that regard, although the FDIC and other prudential regulators have designed other methods to address the risk posed by the different volatility of deposits – for instance through capital and Deposit Insurance Fund rules – the applicability of these rules are tied to whether the deposits are defined as brokered in the first instance. These additional protections against volatility would not apply to deposits that fall outside of the brokered deposit definition. Banks with material concentrations of funds from more attenuated, potentially volatile relationships remain at increased risk even if the Proposal classifies deposits from those relationships as core deposits. And there will be no way to systematically track, monitor, and address this aggregate risk to the banking system.

Clearly these deposits are not and should not be treated as interchangeable with an insured depository institution's core deposits. Given the tension between the essential goal of managing the risk associated with volatile deposits and the modernization goal of facilitating new technologies to acquire deposits, many of the provisions of the Proposal, as well as the additional views (not within the Proposal itself) of the FDIC, raise alarm bells for someone who witnessed the last financial crisis and bank resolutions up close from the unique vantage point of the FDIC.

[3] FDIC, Statistics on Depository Institutions – Compare Banks, https://www7.fdic.gov/sdi/index.asp (last visited April 2, 2020).

The dramatic expansion of the primary purpose exemption will likely allow nearly all third-party deposit placement arrangements by any intermediary, far more entities than currently qualify, to qualify for this exception to the definition of brokered deposits. This would be the case, regardless of the actual underlying terms of the arrangement, including aspects relating to the degree of control the bank has over the account and customer relationship.

In that regard, the Proposal sets out a formalistic "primary purpose" analysis that effectively creates "bright line" carve outs from regulation. Yet, several of the deposit placement arrangements that would be exempted from regulation pose the very risks underlying the need to regulate brokered deposits: potentially volatile deposits that cannot responsibly be treated as interchangeable with core deposits. If the FDIC is determined to exempt deposits sourced by banks via consumers' relationships with broker dealers and third-party fintech firms, the FDIC should collaborate with the other prudential regulators to set a consistent supervisory approach that reflects the potentially volatile nature of such deposits.

If the FDIC looks more closely, it would see that not all transaction accounts are created equal.

The FDIC proposes that the placement of customer funds at insured depository institution that "enables its customers to make transactions" qualify for the primary purpose exception. Yet the Proposal offers no data to support a presumption that deposits that enable consumers to make transactions are less volatile than non-transaction accounts. Further, although the Proposal would include a number of additional qualifying factors and a complex application process, its ultimate criteria for this carve out fails to take into account the most important factor in the overall analysis: who has the relationship with the depositor?[4]

Consider, on the one hand, a transactional account where the depositor maintains a relationship with a third party, who then facilitates the placement of those deposits with an underlying bank. For all practical purposes, the customer relationship is with the third party, not with the underlying bank. So, when the third party opts to work with a new bank partner (as Aspiration Financial L.L.C. moved from Radius Bank to Coastal Community Bank), it ultimately will take those deposits with it. Accordingly, those deposits should still be treated as brokered even if placed in a transactional account at the insured depository institution, since the nature of the underlying risk still exists.

In contrast, consider on the other hand a transactional account in which deposits sourced by a third party are held by a bank, with no further engagement by the third party with that transactional account at the bank. The depositor's relationship would be with the bank, not the

[4] Under the proposed application process, the applicant would submit information to the FDIC, including the contracts, a description of the deposit placement arrangement(s), remuneration arrangements, and an explanation of how customers would utilize the arrangement for the purpose of making payments and not for the receipt of a deposit placement service or deposit insurance, etc.

third party. In such cases, the deposits would be much more comparable to an insured depository institution's core deposits.

The FDIC must consider additional factors in its proposed carve-outs for broker-dealer sweeps.

Similarly, the proposed exception dramatically widens the FDIC's current exception regarding the placement of less than 10 percent by an affiliated broker-dealer. Moving to a 25 percent threshold will essentially capture nearly all reasonable cash allocations within investment portfolios. But more importantly, the proposed exception again reflects a rulemaking centered on non-bank third parties, whereas the FDIC's mandates and responsibilities direct the agency to be doggedly focused on the impact of these relationships to the insured depository institutions that it insures and supervises.

In that regard, 25 percent of the customer assets under management of a broker-dealer may represent an extremely outsized proportion of an insured depository institution's deposit base. The FDIC well knows from its own experience that such funding can disappear with the speed of a wire funds transfer, immediately eliminating the ability of an insured depository institution to fund itself. In such a case, and as described earlier, if the third party opts to move the funds to another bank or non-bank partner – or if the third party suffers an operational failure – there could be an enormous impact to a small insured depository.

Accordingly, when considering broker-dealer sweeps, the FDIC should not be focused on what percentage of a third party's carefully crafted "business line" can be deposited in a bank, but rather on what percentage of an insured depository institution's deposits that third party deposit would represent. Additionally, the FDIC should not expand this exception to include sweeps from non-affiliated broker dealers. Currently, under the existing interpretive letters, this exception is only available to affiliated broker-dealers. And, at least the bank's regulator has some visibility into an affiliated broker-dealer's relationship to its affiliate bank. This makes regulators more likely to be able to predict the stability and safety to that particular bank of such deposit funding.

Further, the proposed carve outs for transactional accounts and broker-dealer sweeps may extend the FDIC insurance safety net to customers of non-banks. This will bring large numbers of new non-bank products to the marketplace, confusing consumers about whether their funds are protected by FDIC insurance and posing important operational and consumer risks.

If the Proposal is finalized in its current form, the Proposal may have the practical effect of extending the protections of the Deposit Insurance Fund to the customers of a wide swath of non-bank third parties, such as broker dealers, FinTech businesses, and potentially even the world's largest technology companies. Such non-banks are notably outside of the supervisory reach of the FDIC and other prudential regulators. These non-banks and their holding companies are not subject to the requirements and oversight of the Federal Reserve. In most cases, the closest scrutiny that such non-bank third parties can expect would be the third-party risk management processes of their bank partners.

Robinhood Market's recent (and multiple) failures to provide continuing access to their customers' funds underscore the risks associated with these arrangements and should serve as a cautionary tale for us all.[5] And that's just one recent example.

In 2019, Chime's over 5 million users suffered two different outages in as many months.[6]

And as the CFPB described the failure of UniRush in 2017, "a rash of preventable failures . . . meant that many customers could not use their RushCard to get their paychecks and other direct deposits, take out cash, make purchases, pay bills, or get accurate balance information. UniRush then failed to provide customer service to many consumers who reached out for help during the service breakdown."[7] In particular:

> UniRush delayed processing direct deposits for more than 45,000 consumers, and did not process or improperly returned deposits of 2,000 others. As a result, consumers could not access their paychecks or government benefits. UniRush also erroneously

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[5] See, *e.g.*, Chris Morris, Robinhood crashes for third time as markets tank, Fortune (March 9, 2020), https://fortune.com/2020/03/09/robinhood-crash-third-time-stock-market/ ("Robinhood was down last week during the market's biggest one-day gains in its history. As it misses one of the biggest drops, it raises additional questions about the company's reliability, which could hurt its userbase.").

[6] See, *e.g.*, Donna Fuscaldo, Chime Suffers Outage That Prevents Customers From Making Purchases, Accessing Cash, Forbes (Oct. 17, 2019), https://www.forbes.com/sites/donnafuscaldo/2019/10/17/chime-suffers-outage-that-prevents-customers-from-making-purchases-accessing-cash.

[7] Consumer Financial Protection Bureau, CFPB Orders Mastercard and UniRush to Pay $13 Million for RushCard Breakdowns That Cut Off Consumers' Access to Funds (Feb. 1, 2017), https://www.consumerfinance.gov/about-us/newsroom/cfpb-orders-mastercard-and-unirush-pay-13-million-rushcard-breakdowns-cut-consumers-access-funds/.

> double posted deposits and did not promptly process electronic debit transactions, which falsely inflated those RushCard holders' account balances. As a result, thousands of consumers accidentally spent more money than was loaded on their RushCard. With no advance notice to consumers, UniRush used funds consumers subsequently loaded onto their RushCards to offset negative balances caused by its processing errors.[8]

In the case of Moven, the fintech simply decided to exit the business. In doing so it gave its customers, and presumably its bank partner, notice that the accounts would be closed by the end of the month.[9]

This isn't to say that the FDIC should oppose bank partnerships with fintech firms. These third-party relationships are important for the modernization of banks both large and small. But, as the FDIC moves to modernize its regulation, and the community bank ecosystem as a whole, the agency still has a responsibility to recognize that deposits channeled to banks by these partnerships should be treated differently from core deposits. Accordingly, any exceptions to the definition of brokered deposits must be narrowed to ensure alignment with the intent of the rule. And to the extent that the FDIC proceeds with such broad exceptions, the FDIC should collaborate with the other prudential regulators to set a consistent supervisory approach that reflects the potentially volatile nature of such deposits.

Most importantly, the FDIC needs to consider the risks to the Deposit Insurance Fund, community banks, and the overall stability of the financial system, if the Proposal's exemptions help foster largest technology firms' entry to financial services.

The FDIC needs to consider the potential for the Proposal, by increasing access to bank balance sheets through brokered deposits, to rapidly accelerate the entry of the world's largest technology firms into financial services – and the potential risk that raises to the Deposit Insurance Fund, the community banks the Proposal intends to support, and the financial system overall. Last year, Federal Reserve Vice Chair of Supervision and Financial Stability Chair Randal Quarles observed that "[o]ver the last decade, the world has witnessed an explosion of large technology firms that are weaving themselves into our daily lives: for example, Facebook, Amazon, Apple, Tencent, and Baidu." Vice Chair Quarles noted that although the firms are currently "only dipping their toes into the edges of the financial services water, the effects they have on the

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[8] Id.

[9] See, *e.g.*, Penny Crossman, Why Moven, one of the first challenger banks, is calling it quits, American Banker (March 27, 2020), https://www.americanbanker.com/news/why-moven-one-of-the-first-challenger-banks-is-calling-it-quits.

provision of financial services could grow *enormously* if they were to dive in."[10] The Proposal would throw gas on the fire by essentially treating large proportions of deposits sourced by such giant technology firms as core deposits for those firms' would-be-bank partners.

In the latest of a series of reports discussing the financial stability impacts of the large technology firms' potential entry to banking, the Financial Stability Board notes: that "BigTech firms can achieve scale very quickly in financial services by leveraging several comparative advantages, ranging from large customer networks, brand recognition, proprietary customer data, and state-of-the-art technology."[11] The report notes that mobile payment platforms (a prime candidate for the Proposal's carve out for transactional accounts) can be a useful example, where integration with social networking platforms has "seen rapid uptake by hundreds of millions of users across dozens of jurisdictions."

The Financial Stability Board raised five risks from the entry into financial services by the largest technology firms; I highlight three below:

"Issues arising from competition with incumbent financial institutions"

The Financial Stability Board flags that "[i]ncreased competition – either directly from BigTech entrants or indirectly for their displacement of customer relationships – could affect the profitability of financial institutions."[12] And while "[i]t is not the role of authorities to protect financial institutions from competition," the Financial Stability Board emphasizes that "regulators and supervisors should pay close attention to the impact of competition on the viability of business models [ ]."

Indeed, the Financial Stability Board raises competition for deposit-like transactional accounts as a "key example" in many countries, noting that "[w]here stored value payment products (*e.g.*, mobile wallets) become prominent, a relatively large and potential mobile pool of funds may be controlled by outside the banking system," even if the funds are "ultimately deposited with banks." The report describes data from China showing the exact types of risks that the brokered deposits rule was meant to protect against: given the large volumes of funds held in digital wallets, Chinese banks were forced to increase the interest rates they offered on deposits in order to retain consumers, increasing the banks' overall funding costs. Further, the Financial Stability Board emphasizes, as I have argued above, that "the greater mobility of this pool of funds compared with the customer deposits may also reduce the stability of bank funding." It

[10] Vice Chair for Supervision and Chair of the Financial Stability Board Randal K. Quarles, The Financial Stability Board in 2019 (March 28, 2019), https://www.federalreserve.gov/newsevents/speech/quarles20190328a.htm (emphasis added).
[11] Financial Stability Board, BigTech in Finance: Market Developments and Potential Financial Stability Implications (Dec. 9, 2019), https://www.fsb.org/wp-content/uploads/P091219-1.pdf.
[12] Id. at 23.

should not be lost on the FDIC, nor any other stakeholders in this process, that the Proposal would exempt the transactional accounts that are the first step in the chain of events described in the Financial Stability Board's report.

Further, the FDIC should consider the particular impact to community banks posed by the entry of such large technology players. In that regard, I read the Proposal as an extension of the FDIC's general overarching prioritization of "fostering technology solutions and encouraging innovation at community banks," particularly by "encouraging innovation and partnerships."[13] Opening the doors to treating brokered deposits as interchangeable with core deposits could create a veritable tidal wave of new deposits fostered by major technology "partners," such as Google, Apple, Facebook, and Amazon. No community bank can deploy deposits of that volume. Even a network of community banks, banded together to "partner" with a large technology firm, would likely have limited ability to exert actual authority in contract negotiations or day-to-day operations with the massive technology partners. More likely, the primary recipients of the new deposit flow would have to be a small handful of the world's largest banks (for whom the FDIC is not the primary regulator) that "partner" with a Google, Apple, Facebook, or Amazon. Can any community bank – even partnered with a cutting edge fintech firm – compete for digital deposits in that environment? If the FDIC seeks to aid the community banks it supervises, it should tailor its approach to those banks.

"Issues arising from operational links between BigTech and incumbents"

Second, the Financial Stability Board notes that partnerships between big technology firms and incumbent banks could potentially create new operational/financial links and dependencies," which "can increase the complexity of the financial system and provide new channels for the propagation of risks." In other words, and as described above with respect to smaller fintech firms, "this might accentuate the risk of contagion from an operational failure of a financial shock – for example, if a BigTech firm that was partnered with a financial institution experienced an operational or financial failure that prevented its customers assessing financial services."[14]

As with the fintech firms described earlier, large technology firms raise concerns about the limitations of supervisory oversight, but on an exponentially larger scale. In that regard, the Proposal would have the effect of extending the guarantee of the Deposit Insurance Fund to funds deposited by consumers at these large technology firms. Yet these large technology firms would sit comfortably outside the supervisory reach of the FDIC and other prudential regulators.

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[13] See, *e.g.*, Statement of FDIC Chairman Jelena McWilliams on Oversight of Prudential Regulators: Ensuring the Safety, Soundness, Diversity, and Accountability of Depository Institutions before the Committee on Financial Services U.S. House of Representatives (Dec. 4, 2019), https://www.fdic.gov/news/news/speeches/spdec0419.pdf.
[14] Id. at 24.

The non-banks and their holding companies are not subject to the requirements and oversight of the Federal Reserve, which is particularly troubling, given the current COVID crisis.

The difference in scale is particularly important when considering the one tether the large technology firms would have to supervision: the third-party oversight responsibilities of their bank partners. Query whether most banks have sufficient sophistication or bargaining power to ensure adequate oversight with a Google, Apple, Facebook, or Amazon on the other side of the table, given the imbalance in the relative scale of their businesses. If a partner bank lacks the ability to negotiate and enforce appropriate controls, then those risks could be difficult for regulators to identify and address.

When describing bank partnerships with smaller fintech firms earlier in this comment letter, I emphasize that my concerns about the Proposal should not be construed as being an argument against bank partnerships with fintech firms, more generally. Rather, it's a matter of the FDIC recognizing the different nature of deposits directed to banks by those relationships, so that the supervisory framework can appropriately account for the potential additional risk to consumers and the Deposit Insurance Fund. With that said, the influence of a pool of deposits on the scale of the large technology firms over the FDIC's stewardship of the Deposit Insurance Fund would be unprecedented. Keynes once observed, "Owe your banker £1,000 and you are at his mercy; owe him £1 million and the position is reversed." We are about to learn to learn this lesson yet again on the lending side of bank balance sheets. We should not extrapolate those same dynamics to the liability side by unnecessarily weakening brokered deposit regulation and oversight.

"Issues arising from competition"

Finally, the Financial Services Board raises concerns that large technology firms' network effects and access to data could potentially mean that they would dominate financial services.[15] They note that such firms could "potentially seek to consolidate their positions in the future by raising barriers to entry or increasing the costs users incur in switching to other platforms." The large technology firms could reduce the impact of competition by cross-subsidization of business lines, product bundling, or by purchasing potential competitors. The Financial Stability Board notes that this behavior could "amplify some of the risks to financial stability discussed above," including risks arising from the firms' scale, potential effects on the profitability and behavior of incumbent institutions, and concentration in the provision of financial services.

[15] Financial Stability Board, BigTech in Finance: Market Developments and Potential Financial Stability Implications at 26.

Procedural Concerns

In addition to the substantive issues raised above, the Proposal suffers from a number of procedural concerns that must be remedied before the FDIC moves forward.

Finalizing the brokered deposit rules should be delayed while the FDIC and broader financial services industry navigate the current global pandemic.

The FDIC and the broader financial services industry are currently navigating a global pandemic, which may result in unforeseen economic consequences. Such consequences, which may include serious disruptions of our securities markets as well as to bank and non-bank funding, will also pose a severe challenge to many as-yet untested FinTech business models (*e.g.*, fintech broker dealers, such as Robinhood, mentioned above). For better or for worse, the current crisis may actually be an opportunity to observe how the different classifications (and related safeguards) for deposits operate under stress.

Clearly, however, the FDIC should not alter, or in my view eviscerate, critical safety and soundness rules in the middle of an unprecedented economic crisis. The FDIC should not inject unnecessary additional uncertainty for banks and their deposit customers at this point in time. On this basis alone, this Proposal should be tabled for the foreseeable future as we all focus our attention on minimizing the potential impact of the current crisis on the banking system and its customers. If the FDIC moves forward to finalize this Proposal at this time, I fear that its lack of awareness of current and looming economic conditions will be long noted and remembered.

The FDIC must finalize the brokered deposit rule in accordance with the Administrative Procedure Act, Pub. L. 79-404, 60 Stat, 5 U.S. Code, Chapter 5, which requires that sufficient notice be provided within a rulemaking proposal so as to enable informed comment upon the proposal.

In this context, the proposal should include the simultaneous identification of the status of existing interpretive letters relating to the current brokered deposit rule, in light of the proposal (i.e., how these interpretive letters are impacted by the Proposal).

The public cannot provide meaningful comment on this Proposal without simultaneously understanding the status of the long-standing interpretive letters that give critical definition. The Administrative Procedures Act mandates notice of the scope and content of the proposed rule, which is missing here. This is all the more troubling where, as here, not all of the changes are within the proposed regulatory text itself, but rather are set forth as views of the FDIC.

Moreover, no procedures or substantive standards are articulated within the proposal for the apparently broadly available and non-transparent primary purpose application process it creates.

If further clarity and transparency is desired, it would be far more efficacious, while preserving the safety and soundness of insured depository institutions, for the FDIC to make public the interpretive letters that it intends to retain or modify, even those interpretations that are currently available only via a formal FOIA request. Such disclosure should occur in a systematic and organized manner to provide the opportunity, in the sunlight of public view, for sufficient notice and comment, ideally prior to, or at least at the same time, as any proposed rule. Where public comments point out needed changes, consistent with safety and soundness and its obligations under the Administrative Procedure Act, the FDIC could modify its interpretations.

Additionally, any changes to the brokered deposit rules should be driven by additional data collection and analysis by the FDIC and other bank regulators.

If the FDIC is determined to exempt deposits sourced by banks via a consumer's relationships with third-party fintech firms, the FDIC should collaborate with the other prudential regulators to set a consistent supervisory approach that reflects the potentially volatile nature of such deposits. To the extent that data regarding the use of brokered deposits by insured depository institutions has been collected in the past, there is much evidence that brokered deposits are highly correlated with bank failures and outsized losses to the FDIC fund.[16] Any such data collection could be targeted, but should certainly focus on the impact of deposits gathered by the use cases that the Proposal would potentially exempt.

Finally, the FDIC should abandon the primary purpose application process as laid out in the Proposal and instead reserve any primary purpose application for addressing truly novel or innovative questions posed by the industry.

If one of the motivations of the Proposal is to eliminate confusion and lack of knowledge of the parameters of the rule, the creation of a "black box" application process will not cure such a problem. Many deposit brokers already understand the applicability of the current rule to their business practices. It is more likely that many of them wish that they were outside of the definition. The proposed application process is inconsistent with the FDIC's policy objective of transparency. An application process should not be needed if the FDIC first establishes clear criteria supporting the "deposit broker" definition. Once the definition is clarified, insured depository institutions would be better positioned to apply the law to their specific facts. Compliance could be obtained through the longstanding processes of bank examination and regulatory agency oversight.

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[16] See, *e.g.*, Statement of Martin J. Gruenberg, Member (and former Chairman) of the FDIC Board of Directors, December 12, 2019.

If the FDIC determines an application process is necessary, the "primary purpose" exception criteria should be made clear and available to the public, with the application process narrowly used by the FDIC to address innovative deposit-taking not previously publicly considered. Any application process should only be available to an insured depository institution, not to non-bank third parties, given that insured depository institutions are ultimately responsible for the accuracy of regulatory reporting and monitoring. Requiring insured depository institutions to: track whether a third party has applied to the FDIC; be aware of what, if any constraints, are placed by the FDIC on the third-party's conduct; and report and monitor the third-party's subsequent behavior and compliance is unrealistic and burdensome on the IDI. At best, it will result in industry confusion, complexity, and costly compliance. It also will make it impossible for the FDIC and other bank regulators to monitor across the financial system the use of otherwise "brokered deposits" permitted through this application process.

Similarly, the Proposal currently suggests that the reporting requirements, including the frequency and any calculation methodology, would be specific to its written approval to each applicant. Yet, concerns about transparency and, indeed, fairness would direct that the FDIC's reporting requirements and calculation methodology be standardized and made public for all applications that are granted – in addition to the granted applications themselves.

In addition, the FDIC should consider whether different standards might apply to bank-to-bank (vs. bank-to-non-bank brokered deposits), due to the fact that both sides of such an arrangement are subject to supervision, examination and reporting requirements.

Conclusion

Modernization and growth are important goals that I applaud the FDIC for championing. But data and experience consistently show that the growth of insured depository institutions should not be fueled by "hot money" that promises to enable such institutions to "grow out of their problems." That strategy always fails and results in huge losses to the Deposit Insurance Fund and to uninsured bank depositors. These losses during the Bank and Thrift Crisis in the late '80's and early 90's directly hit U.S. taxpayers and could do so again.

Respectfully submitted,

Sara A. Kelsey