KASASA

May 27, 2020

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

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

Dear Secretary Feldman:

We appreciate the opportunity to provide comments in response to the Federal Deposit Insurance Corporation ("FDIC") request for comment on the proposed rulemaking regarding brokered deposits restrictions ("Proposal").[1] We recognize the challenges associated with implementing Section 29 of the Federal Deposit Insurance Act ("FDI Act"), including the definition of "deposit broker," in this rapidly evolving financial services marketplace. We also understand the challenges facing the FDIC and our nation's community banks in light of the COVID-19 pandemic and the impact this public health crisis has had on the banking system and the broader economy. In the course of this rulemaking, we believe that prudent safety and soundness protections must be balanced with the ability for insured depository institutions ("IDI") to use external resources (i.e., third-party service providers) to drive operational efficiencies and deliver the modern financial products, services, and digital banking capabilities that consumers and businesses desire.

We recognize that articulating this delicate balance in concept, as well as in specific rule language, is a difficult task, but we believe it is critical at this inflection point in our nation's history. Moreover, we believe that regulatory certainty is imperative at this time of broader economic uncertainty: the FDIC should drive the brokered deposit rulemaking to conclusion so that community banks and other IDIs clearly understand the rules of the road as they navigate these challenging times. Failure to do so would paralyze community bank investment decisions and ultimately limit the financial products and services available to individuals who are currently managing through health and safety concerns, job loss, and economic uncertainty.

Kasasa, Ltd. ("Kasasa") is a third-party service provider whose primary mission is to help community financial institutions serve their communities and compete with our nation's financial technology ("fintech") providers and larger regional and global systemically important banks.[2] Kasasa supports more than 900 community financial institutions across all 50 states, by providing professional banking services, innovative digital enablement platforms, and retail offerings to help such institutions reduce operational

[1] 85 Fed. Reg. 7,453 (Feb. 10, 2020).

[2] Kasasa was created in 2003 with a singular mission: Enable a powerful network of community financial institutions to re-establish themselves as the go-to place for banking products and services and compete successfully against our country's large national banks. In pursuit of this goal, Kasasa provides community financial institutions with a host of professional banking services, enablement platforms, and retail products and financial services to assist them to, among other things, drive operational savings, increase executional efficiencies, enhance consumer transparency, and develop deeply connected, long-lasting, in-market, "core" customer relationships. Kasasa operates "behind the scenes" and under the direction and management of our clients: We do not build, own or control any consumer relationships; we do not have any control over any consumer banking decisions; and we have no ability to influence, facilitate, place or move any consumer funds with or between any insured depository institutions. Kasasa has been recognized as a Top 100 FinTech Firm (IDC; September 2018, 2019); the 2nd Best FinTech Company to Work For (American Banker, March 2018); Best New Innovation / Best of Show (Finovate, 2008, 2009, 2016, 2018); Best Consumer Lending Platform (FinTech BreakThrough, April 2019); and Best Lending Platform (Benzinga, June 2018).

expenses, increase executional efficiencies, enhance user experiences, and establish direct relationships, which the institution owns and controls, with individual depositors who live and work within their communities.[3]

Kasasa greatly appreciates the FDIC's engagement on this issue of primary importance to the community IDIs Kasasa serves. We are grateful for the collaborative discussions we have had with the FDIC on this subject over the past six years and we are hopeful that a reasoned final rule will emerge to help community banks not only survive but thrive, as they serve communities that are often overlooked or abandoned by some of our nation's larger financial institutions. We thank the FDIC staff ("Staff") for its continuing dialogue with industry stakeholders during this comment period, and appreciate the staff memorandum posted to the rulemaking docket ("Staff Memo").[4]

Fundamentally, Section 29 is a narrowly drawn provision that seeks to prevent troubled or less than well-capitalized IDIs from relying on volatile funding that could be withdrawn quickly, leaving the IDI, the Deposit Insurance Fund ("Fund"), and taxpayers exposed.[5] By contrast, third-party service providers like Kasasa enable IDIs to establish direct relationships, which the institution owns and controls, with individual depositors who live and work within the community the IDI serves. These depositors typically use a wide range of banking services (e.g., direct deposit, online bill pay, debit card, and online banking) from the IDI, and their associated deposits serve as a low-cost, stable source of funds upon which the IDI can profitably operate its business.[6]

We believe that these types of individually established, direct depositor relationships, owned and controlled by the institution, advance the interests of the FDIC. While we agree with the FDIC's stated desire to update the brokered deposits rule to reflect today's technology-driven banking practices and consumer preferences, we believe the Proposal, as currently written, is substantially flawed for the following reasons:

1. The Proposal would put the viability of community banks at greater risk and would adversely impact their ability to offer innovative and technology-based banking services in a competitive manner;
2. The Proposal fails to acknowledge the fundamental difference between the role of third-party service providers, like Kasasa, that help IDIs establish direct relationships with individual depositors, which the IDI owns and controls, and the types of deposit-controlling program managers ("Deposit Controllers") that the FDIC intends to capture under the Proposal; and

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[3] Over the past 17 years, our community bank clients have distributed over $2.4 billion in account rewards to more than 3 million individual depositors. At the same time, our community bank clients have received over $3.7 billion in non-interest income from these individual (and loyal) depositors, who are almost three times more profitable for community banks than traditional free checking accountholders. Additional detail on rewards checking accounts is available in Appendix A.

[4] Staff Memorandum to Public File – Brokered Deposits Restrictions, Vivek Khare, Counsel, FDIC, March 2, 2020, https://www.fdic.gov/regulations/laws/federal/2020/2020-unsafe-unsound-banking-practices-brokered-deposits-3064-ae94-staff-001.pdf. The Staff Memo responds to questions received by FDIC regional and field office staff about the impact of the proposed rule.

[5] *See, e.g.*, Testimony of Sen. Frank H. Murkowski (R-Alaska), "Insured Brokered Deposits and Federal Depository Institutions," Hearing before the Subcomm. on General Oversight and Investigations of the House Comm. on Banking, Finance and Urban Affairs, 101st Cong., 1st Sess., 7, 9–10 (May 17, 1989) (explaining that the goal and purpose of Section 29 is "to prevent the flagrant abuse of the deposit insurance system by troubled institutions that take excessive risks and leave the taxpayers to suffer the consequences. . . . This is not a blanket prohibition on the use of brokered deposits, *but a narrowly drawn provision* that specifically targets the most flagrant abusers.") (emphasis added).

[6] Appendix A provides additional information on the stable and low-cost nature of reward checking accounts.

3. The Proposal would vastly expand the scope of regulated brokered deposits in a manner that is inconsistent with Section 29 of the FDI Act.

Following discussion of these three issues, we offer specific proposed regulatory text that we believe would address these issues, while achieving the balance that the FDIC is trying to strike in its modernization initiative.

I. KEY ISSUES RELATED TO THE PROPOSAL

A. The Proposal Would Put the Viability of Community Banks at Greater Risk and Severely Impact Their Ability to Compete by Restricting Their Use of Service Providers

We understand that the FDIC intends to promulgate a rule consistent with the text of Section 29. However, by defining the activities that constitute "facilitating the placement of deposits" with expansive language, the Proposal would severely limit community banks' ability to use third-party service providers in a manner that exceeds the text and purpose of the FDI Act. The statute defines a deposit broker as any person engaged in the business of placing deposits of third parties or "facilitating the placement of deposits, of third parties." A person who facilitates the placement of deposits of a bank's customers is one who aids another entity (e.g., a Deposit Controller) that is gathering and placing deposits on behalf of individual customers. The statute does not reach the facilitation of deposits made by individual customers; that is, the FDI Act cannot reasonably be read to apply to entities whose services make it easier for banks and individual customers to establish depositor relationships over which the service provider has no control. The purpose of Section 29, as reflected in its legislative history, was to restrict the facilitation of deposit gathering that was being misused by troubled banks.[7]

Broadening the types of deposits that are determined to be "brokered" would impact the capital requirements for community banks, as well as their deposit insurance assessments, resulting in a *de facto* prohibition on community banks' use of such third-party service providers. Without the support of third-party service providers, the viability of community banks would be uncertain, at best. Our nation's COVID-19 crisis has given us a firsthand look into the future of banking – a digital marketplace that community banks are humbly realizing they are ill prepared for. Despite a decade of warnings to embrace digital banking, we estimate that 40 percent of all community banks do not have online account-opening capabilities and 60 percent of the community banks that offer online account opening utilize inferior software that consumers rapidly abandon once they begin the application process. Sadly, many institutions struggled with something as simple as updating their websites to include a loan application page for small businesses to apply for CARES Act Paycheck Protection Program loans.

The future of banking is clearly digital and tech-driven, and community banks do not have the "in-house" budgets, technologies, programming resources and digital expertise that the megabanks and fintechs enjoy. Without assistance from industry innovators and external resources, the very existence of our nation's community banking system could be threatened. Moreover, consumers in communities that megabanks choose not to serve would lose physical access to banking products, services and the local, personal and expert financial advice and guidance that community banks provide.

Chairman McWilliams recognized this threat when she stated:

> *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*

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[7] *See supra* note 5.

fintech that has already developed, tested, and rolled out new technology is often a critical mechanism for a community [bank].

The business case for collaboration is clear. Fintech firms are built on a digital infrastructure that can develop and offer consumer products quickly and with requisite agility as consumer demand evolves. Banks have a built-in customer base, an understanding of regulatory requirements, access to the payment system, and deposit insurance.

…It is my goal that the FDIC lays the foundation for the next chapter of banking by encouraging innovation that meets consumer demand, promotes community banking, reduces compliance burdens, and modernizes our supervision. …We must lay this foundation because the survival of our community banks depends on it….

While the FDIC has limited ability to address the direct cost of developing and deploying technology at any one institution, there are things that we can do to foster innovation across all community banks and to reduce the regulatory cost of innovation. …We have to get on the ground, roll up our sleeves, and get to work on supporting and advancing scalable technological change that works for community banks.

…I do not profess to know what the right number of banks in the U.S. is, but I recognize that community banks have to be competitive in order to survive. …The FDIC stands ready to take on the challenge of innovation and to create a regulatory environment that will make it easier for small banks to adopt new technologies and thrive.[8]

As the Chairman recognizes, in order for community banks to continue to serve their customers in the way that customers want to be served, community banks must have access to external resources to help the bank deploy the innovative banking products and services consumers desire. There is no clear reason why the Proposal should penalize the outsourcing of certain activities that would otherwise be permissible if conducted directly by an IDI.

Megabanks spend billions of dollars to build digital businesses, and fintechs have fully functioning financial technology platforms: community banks have neither. To put the challenges faced by community banks into perspective, megabanks spend on average approximately 50 basis points of their asset size on technology and innovation, while community banks spend on average approximately 22 basis points of their asset size on technology and innovation, with only 12 percent of these funds allocated for new products and services.[9] Megabanks are making multi-billion dollar investments in digitizing customer journeys, automating the back office to improve speed and reduce costs, and making bets on next-gen functionality. Community banks lack the resources to compete in any of these areas: Consider that one megabank reportedly spent more money on technology in 2018 than all 59 U.S. banks with between $10 billion and $50 billion in total assets combined.[10] That is a comparison of one megabank against 59 regional banks. Community banks with less than $1 billion in total assets have even fewer resources to spend on technology. It is essential that the FDIC keep in mind that community banks do not have balance sheets, trained personnel or budgets that can compete with the level of technology investment being made by large and regional banks. And, as evidenced by the COVID-19 crisis, community banks have no choice but to expand

[8] Jelena McWilliams, Chairman, FDIC, Keynote Remarks at The Federal Reserve Bank of St. Louis, "The Future of Banking" 9, 10, 14 (Oct. 1, 2019).

[9] Celent, Bankrate.com, July 2018.

[10] McKinsey & Co., "Six Keys to Success for US Regional and Mid-Cap Banks" (Dec. 12, 2019), https://www.mckinsey.com/industries/financial-services/our-insights/banking-matters/six-keys-to-success-for-us-regional-and-mid-cap-banks.

their customer acquisition and support capabilities beyond their brick-and-mortar branch networks and into the digital world, services that third-party service providers like Kasasa can help with.

The Chairman also has repeatedly talked about the transformative power of technology and how technology, along with partnerships with third-party service providers as well as industry innovators, can serve as a "great equalizer" for community banks who often lack the in-house capabilities and economies of scale that our nation's larger financial institutions enjoy:

> *As a matter of public policy, we should encourage banks to leverage technology to reach consumers, improve the customer experience, lower transaction costs, and increase credit availability. There is certainly an opportunity to utilize technology and innovation to both expand the availability of banking services to those who are already banked and to reach consumers who are not. Bringing consumers – particularly those who are disenfranchised – into the banking fold gives those consumers an opportunity to become a part of the system and to benefit from its offerings.*[11]

In light of the challenges faced by our nation's community banks and FDIC leadership's policy directive, the FDIC should exclude from the scope of any final brokered deposits rule the types of third-party service providers that community banks rely on to help them establish direct banking relationships, owned and controlled by the bank, with their customers and secure the relationship-based, stable deposits that allow community banks to compete with megabanks and fintechs. Without clarification, the Proposal would restrict community banks from utilizing a wide range of beneficial services. The rule should expressly recognize that community banks may rely on third parties for a wide range of support services including:

- Advisory and consulting services that help banks operate more effectively and more profitably;
- Market research and product design services that enable banks to offer innovative financial products, services, and digital capabilities to customers;
- Technology and operational services that assist banks in operating more efficiently (e.g., processors and payment card networks);
- Information services, data augmentation, data mining, artificial intelligence and digital delivery of services that enable banks to serve their customers more personally;
- Benchmarking and industry forums, including those provided through trade associations and other industry groups;
- Rewards management services that enable consumers to receive economic benefits for adopting technology-driven banking practices; and
- Traditional and digital marketing services and sites that assist banks in promoting their institution and their products, services and capabilities to consumers.

Consistent with the clarifications in the Staff Memo, the services that Kasasa provides to its community financial institution clients are not the placement of deposits or other types of services performed by a Deposit Controller that owns or controls the depositor relationship and manages the depositor's funds. The activities listed above are not associated with of the type of deposit brokers that we believe, and the Staff Memo suggests, the FDIC is trying to address within its Proposal. The types of services performed by third parties like Kasasa are executed under the direct supervision of a bank's management team and are performed in support of that institution's strategic objectives and business plan. Furthermore, such services do not pose risks to the safety and soundness of the IDI or to the Fund.

[11] Jelena McWilliams, Chairman, FDIC, Remarks at the CATO Institute Summit on Financial Regulations, "If You Build It, They Will Come" 3 (June 12, 2019).

Instead, service providers like Kasasa promote the safety and soundness of the IDI by enabling the IDI to compete via the receipt of expert advice, the use of innovative technologies and the implementation of proven business practices. For example, ensuring that community banks have access to and can leverage internal and external data enhances the institutions' ability to identify fraudulent activities and provide their customers with real-time activity and service alerts. As currently written, it is our understanding that the Proposal would consider such data services to be "brokering" merely because a third party was involved. Rendering deposits to be brokered simply because a consumer interacts with a third-party service provider, who has no control over that consumer's deposits or banking decisions or the banking relationship, and who is only providing a contracted service on behalf of a community bank, would fail to recognize the vital role that third-party service providers play in enabling IDIs to support their customers in the manner in which those customers want to be served.

Declaring such deposits to be brokered could force community banks to pay a higher price for deposit insurance, restrict banks' ability to accept such deposits altogether without holding additional capital, and function as a *de facto* prohibition on community banks offering popular deposit accounts that provide economic benefits to their customers. Such treatment would be particularly harsh given Staff's focus, and reiteration in the Staff Memo, on "activities that indicate…a level of influence or control over the deposit account even after the account is open," as compared to relationship-based account deposits where a *bona fide* independent relationship has been established directly between an individual depositor and the depositor's bank and where that bank owns and controls that depositor relationship.

Moreover, we believe deposits that are associated with individual depositors who have established a direct relationship with an individual bank and where that bank, not the third party, owns and controls that depositor relationship, should not be subjected to brokered deposit treatment, regardless of whether the third-party service provider assists the bank in making the deposit product(s) available to the market. These deposits carry the hallmark of "core" deposits; that is, the deposits are stable and lower cost, and are individually gathered funds of customers who have a deep and often multi-service relationship with the bank. These deposits do not pose the volatility issues that Section 29 is intended to address.

We further note that many of the services that community banks receive from third parties are provided in reliance upon Advisory Opinions previously published by the FDIC. Industry participants and community banks have made significant investments, including investments in the products, platforms and services enabled by Kasasa, based in reliance upon these Advisory Opinions and the protections they provide. The Proposal indicates that the FDIC will codify staff opinions of general applicability that continue to be relevant and applicable post final rule, and will rescind any Advisory Opinions that are superseded or obsolete or are no longer relevant or applicable. Eliminating the ability of community banks to continue to rely on these existing Advisory Opinions would further harm community banks and industry participants as it would prevent all parties from realizing the return on the investments they have made in reliance upon these Advisory Opinions. Moreover, the failure to provide near-term certainty around the reliability of existing Advisory Opinions has paralyzed the market at a critical moment for economic stability. Acknowledging the 30 months the FDIC and Kasasa collaboratively invested in discussions to develop the Advisory Opinions, Kasasa respectfully recommends that the following Staff Advisory Opinions be codified in any eventual final rule as "relevant" and "generally applicable", as discussed further below in Section II.E:

- Advisory Opinion 15-02 – June 6, 2014
- Advisory Opinion 15-03 – December 18, 2014

B. There is a Fundamental Difference Between the Role of a Service Provider, Like Kasasa, and the Types of Deposit Controllers that the FDIC Intends to Capture under the Proposal

When previewing the Proposal the day before it was announced, Chairman McWilliams confirmed the FDIC's desire for IDIs to have direct relationships with individual depositors, and that partnerships with third parties that result in such direct relationships being established between an IDI and individual depositors should not result in the depositor's funds being declared brokered. Specifically, the Chairman stated:

> *The proposal will clarify that various types of existing partnerships in which a consumer maintains a direct relationship with a bank generally would not result in a brokered deposit.*[12]

As a result, we believe the FDIC does NOT intend for deposits residing in transaction or relationship-based accounts, where a *bona fide* independent relationship has been established directly between an individual depositor and a bank, and where that bank owns and controls that depositor relationship, to be treated as brokered. We believe these deposits are "core" deposits as the accounts they reside in are offered directly to the market by the IDI, without regard to whether the IDI utilizes a third party to assist it in making the deposit products available to individual depositor customers.

Therefore, we ask the FDIC to clearly distinguish the difference between (1) a direct deposit relationship established between an individual depositor and their bank, and the stable nature of that depositor's associated funds; and (2) the types of programmatic deposits that are managed by Deposit Controllers that place or facilitate deposits, like programs managed by Chime and SoFi, and not the bank, which have the potential to create safety and soundness risk for less than well-capitalized IDIs and to the Fund. There are clear distinctions that can be drawn between these two models, and codifying these distinctions in any eventual final rule would provide certainty to the market and advance the FDIC's purposes in a more targeted manner. To aid with making appropriate revisions to the Proposal, we offer the following "evaluation matrix" to help delineate the distinctions:

[12] Jelena McWilliams, Chairman, FDIC, Keynote Remarks at the Brookings Institution, "Brokered Deposits in the Fintech Age" 4 (Dec. 11, 2019).

	Bank Deposit Products Supported by a Bank Service Provider ("Service Provider")	Deposits Controlled by a Third Party ("Deposit Controllers")
Account titling	The deposit accounts are titled in the name of the individual customer.	The deposit account is generally titled in the Deposit Controller's name, for the benefit of the Deposit Controller's customers.
Marketing strategies	The bank name is prominent.	The Deposit Controller has the prominent, and often exclusive, branding.
Placement authority	The individual customer has the authority to select, initiate, and terminate the accountholder relationship.	The Deposit Controller generally retains the authority to select the bank and initiate the banking relationship, as well as the discretion to terminate the accountholder relationship.
Control of terms	The bank controls the deposit account terms.	The Deposit Controller sets and controls the terms of the deposit account, including with respect to eligibility and underwriting.
Depositor relationship	The depositor relationship is between the bank and the individual customer.	The depositor relation not with the bank. Instead, the relationship between the Deposit Controller and the Deposit Controller's customer.
Data regarding the deposit account	Data regarding the deposit account is subject to the bank's GLBA privacy policy.	Data regarding the deposit account is generally subject to the Deposit Controller's GLBA privacy policy.
Objectives of the third party	The service provider's objectives are to help the bank develop, deepen and maintain both new and current customer relationships and serve the customer in the manner in which the customer wants to be served.	The Deposit Controller's objectives are to provide a deposit-like service to the Deposit Controller's customers.
What happens when the program terminates	The depositor relationship remains with the account-holding bank.	The deposit-like relationship typically moves with the Deposit Controller.

Kasasa believes that deposits supported by a service provider that meet the criteria listed in the left column above are neither the type of deposits that the FDI Act clearly authorizes the FDIC to treat as brokered nor the type of deposits the FDIC is trying to address in its Proposal, because they do not pose the type of risk to the safety and soundness of the IDI or to the Fund that the statute addresses or that we believe the FDIC intended to address in its Proposal. The Staff Memo supports this view by citing the language in the preamble that provides that "[t]he proposed 'facilitation' definition is intended to capture activities that indicate that the person takes an active role in the opening of an account or maintains a level of influence or control over the deposit account even after the account is open."[13] We encourage the FDIC to clarify this intention within the text of any final rule.

[13] 85 Fed. Reg. at 7,457.

As discussed further below, narrowing the scope of deposits that are considered brokered and/or excluding third-party service providers from the definition of deposit broker generally, would avoid the result that these "core" deposits would be improperly viewed and treated as brokered deposits for purposes of the rule.

C. The Proposal Represents a Vast Expansion of the Scope of the Brokered Deposits Rule

The Proposal, as drafted, would greatly expand the entities that would be viewed as "deposit brokers," and, thus, the deposits that would be regulated as "brokered deposits." Specifically, the proposed definition of "facilitating the placement of deposits" is overbroad and inconsistent with the text and purpose of the FDI Act. Three of the four proposed definitional prongs would capture activities that are inconsistent with the common understanding of the phrase "facilitating the placement of deposits of third parties."

1. Including the Sharing of Third-Party Information is Overbroad

As currently drafted, the first prong ("sharing of third-party information") would restrict an IDI's ability to receive any external information (and, by extension, any corresponding insights) about its own customers or potential customers. This restriction flies in the face of existing banking practices where internal information is augmented by external data to enable IDIs to analyze financial activities, suggest next-best actions, and provide depositors information about the products and services they are most likely to be interested in or benefit from. We recognize that the Staff Memo suggests a narrowing of this prong to "third-party depositor information"; however, this would not alleviate the issue, even if it were to be codified as such in any eventual final rule.

Increased access to third-party depositor data provides IDIs with the ability to engage with their customers and to prospect in a more personalized fashion, while also reducing the IDI's operational expenditures. As discussed previously, third-party depositor data also provides safety and soundness protections by providing IDIs with the ability to detect fraudulent activities and provide real-time activity and service alerts to impacted customers, as well as the ability to tailor personalized offers to sell appropriate add-on products and services based on an individual's recent purchases. Data utilization also makes it easier for customers to do business with a bank by enabling the prefilling of forms, prequalifying for incentives, and allowing for quicker user authentication and access to their financial information.

Linking the definition of "facilitating the placement of deposits" with the sharing of third-party information, or third-party depositor information, with an IDI is overbroad and does not appear consistent with the text and purpose of the statute. Specifically, it is unclear how the exchange of relevant information that benefits consumers and IDIs alike, suggests that the third party has control or influence over the account, introduces safety and soundness issues, or threatens the Fund. While we do not want to mischaracterize or misinterpret the FDIC's intentions, respectfully, the language of the Proposal is unclear. Given the statement made by Chairman McWilliams in her October 1, 2019 "The Future of Banking" speech, we believe that it cannot be the FDIC's intention to deny community banks access to data augmentation, artificial intelligence, database marketing and marketing technology resources to help the institution better understand and deliver upon the financial needs of its customers and consumers who tend to live within its market area. Specifically, Chairman McWilliams stated as follows:

> *Data is the new capital. Financial service providers are using data and technology to develop new services for consumers. These providers often rely on data aggregators to consolidate a customer's financial information from one or more institutions. The data aggregator can then present the consolidated information in a user-friendly format to these service providers.*[14]

[14] Jelena McWilliams, Chairman, FDIC, Keynote Remarks at The Federal Reserve Bank of St. Louis, "The Future of Banking" 6 (Oct. 1, 2019).

2. Including Entities Providing Advisory Services Could Create Safety and Soundness Concerns

As currently drafted, the third prong ("advisory services") would restrict, rather than enable, an IDI's use of consulting and advisory services to develop, deliver and improve its retail deposit offerings. As such, consultants, trade associations, core processors and other companies who provide market research, product development and analysis, price elasticity studies, profitability assessments, retail optimization services, behavioral and activity insights, asset liability management advice, overdraft protection services, account-opening incentives, rewards and customer loyalty programs—and the list goes on and on—would all be "deposit brokers" under the Proposal, even if they have no direct or indirect relationship with an individual depositor or any control over that individual depositor's banking decisions, funds, or financial activities.

Despite the clear direction from Chairman McWilliams to foster innovation in banking, the proposed language would make it more difficult for IDIs to develop innovative deposit products since the language would arbitrarily and unreasonably prohibit the use of banking consultants and hamper an IDI's ability to receive valuable advisory services. Again, we do not want to mischaracterize or misinterpret the FDIC's intentions, but the Proposal's language is unclear.

We believe that it cannot be the intention of the Staff to deny IDIs, including community banks, access to and use of third-party service providers and financial experts that help them design, develop, deliver and optimize deposit offerings that assist the institution in attracting new consumers, engaging disenfranchised individuals within their communities, and strengthening their current customer relationships. Implementing innovative multi-feature, multi-faceted deposit offerings is a difficult task, particularly for resource-constrained community banks. We do not believe it is the FDIC's intent to address safety and soundness issues by preventing community banks from engaging industry experts and benefitting from data-driven insights and experienced advice that result in an IDI attracting, developing and maintaining direct relationships with individual depositors. Fundamentally, we believe the "facilitation" definition needs to be revised to hew more closely to the language and purpose of Section 29 and to the FDIC's stated purpose in the Proposal of creating the defined term, as recognized in the Staff Memo:

> *The proposed "facilitation" definition is intended to capture activities that indicate that the person takes an active role in the opening of an account or maintains a level of influence or control over the deposit account even after the account is open. It is the FDIC's view that a level of control or influence indicates that the deposit relationship is between the depositor and the person rather than the depositor and the insured depository institution…. Ultimately, <u>the FDIC believes that if the person is not engaged in any of the activities above, then the needs of the depositor are the primary drivers of the selection of a bank, and therefore the person is not facilitating the placement of deposits</u>.*[15]

For products and services similar to those offered by Kasasa, the depositor is always the primary driver of the selection of the bank, and, as illustrated by the comparison table above, Kasasa exercises no control over the depositor's decisions, funds or financial activities. Accordingly, these types of advisory and consulting services should not be viewed as "facilitation."

We acknowledge and support the clarification in the Staff Memo that "[a]ctivities which would not be covered by the 'facilitating' definition, absent more involvement, include, for example: Market research or advertising by simply including a link on a website; and General consulting and other advisory services."[16] This clarification is important because it demonstrates that the FDIC does not intend to cover entities that provide marketing and other support to IDIs if such entities do not exert control over the account

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[15] 85 Fed. Reg. at 7,457 (emphasis added).

[16] Staff Memo, *supra* note 4, at 1.

relationship. We are encouraged by these statements in the Staff Memo; however, the FDIC should make explicit in the final rule itself that these activities are not viewed as "facilitation."

3. The Scope of the Intermediary Services Prong is Ambiguous

As currently drafted, the fourth prong could limit the third-party services IDIs could receive to purely administrative activities (e.g., reporting and bookkeeping). Once again, we seek to understand as we do not want to mischaracterize or misinterpret the FDIC's intentions, or misconstrue information within the Staff Memo, but the language of the Proposal is unclear.

The Proposal's current language could be interpreted to mean that if a person is involved in any non-administrative activities during the deposit process, that person would be considered a deposit broker and all associated deposits would be treated as brokered. This proposed approach is counterintuitive given the recognized transformative power that technology has to reach the unbanked and the disenfranchised and the various ways consumers can use new technologies and digital devices to interact with their bank and manage their financial activities.

Moreover, this proposed language could be read to limit IDIs' use of search engine optimization, geolocation, artificial intelligence, pattern identification, online account opening, identity verification, fraud detection, digital document delivery, voice/identity recognition and activation, and many other services that are involved in technology-driven deposit placement practices. We believe that it cannot be the FDIC's intent to limit an IDI's use of third parties within today's technology-driven banking and deposit-taking practices solely to after-the-fact transaction reporting and accounting activities.

4. Broadly, the Proposed "Facilitating" Definition Is Fundamentally Flawed

In contrast to the Chairman's stated goal of providing the industry with bright-line clarity, as currently worded and constructed, the Proposal would make it more difficult to determine what activities constitute "facilitating the placement of deposits."

We believe that the fundamental issue in the approach outlined within the Proposal is that the Proposal focuses upon the "actions of the third party" leading up to the placement of the deposit, rather than on the "direct relationship established between an individual depositor and the bank of their own choosing" when that deposit is placed.

We believe a better approach would be to focus on the strength and characteristics of the direct relationship that is established between the individual depositor and their IDI (and the stable nature of that depositor's associated funds) rather than on an IDI's use of a third party or third-party service, provided that the third party has no contractual relationship with the individual depositor to place, manage or control the individual depositor's funds, banking decisions or financial activities.

As illustrated by the comparison table above, there are clear, control-related distinctions to be made between (1) third parties that support direct deposit relationships being established between an individual depositor and their bank; and (2) programmatic deposits managed by Deposit Controllers that have the potential to create safety and soundness risk for less than well-capitalized IDIs and to the Fund. By focusing on the "direct relationship established between an individual depositor and the bank of their own choosing" rather than "the activities of a third party" the FDIC would, in fact, provide the industry with the bright-line clarity it set out to deliver with its modernization of the current brokered deposits rule.

II. Specific Fixes for the Above-Discussed Issues

As we acknowledged above, modernizing the brokered deposit rule is a difficult drafting exercise. Kasasa proposes the following revisions to the language in the Proposal to address the above-discussed concerns and to better align the Proposal with the text and purpose of Section 29:

A. The FDIC should create an express exclusion from the definition of "brokered deposit" for transaction and relationship-based account deposits where a *bona fide* independent relationship is established directly between an individual depositor and a bank and that bank owns and controls that depositor relationship;

B. The FDIC should create an express exclusion from the definition of "deposit broker" for third-party service providers to IDIs that enable community banks to offer and market these same types of transaction and relationship-based accounts;

C. The FDIC should create bright-line standards, within the rule, under the primary purpose exemption for third parties that enable banks to enter into direct deposit relationships with individual depositor customers where a third party has no contractual relationship with an individual depositor to place, manage or control the individual's deposits, banking decisions or financial activities, which would help to narrow the number of entities that would potentially be required to submit applications;

D. The FDIC should clarify and narrow the definition of "facilitating the placement of deposits" to cover only those activities that present risk to the safety and soundness of any IDIs or the Fund, or otherwise trigger the policy concerns underlying Section 29; and

E. The FDIC should codify existing Staff Advisory Opinions that benefit consumers and community banks.

These proposed revisions are discussed in turn below.

A. The FDIC should create an express exclusion from the definition of "brokered deposit" for transaction and relationship-based account deposits where a *bona fide* independent relationship is established directly between an individual depositor and a bank and that bank owns and controls that depositor relationship.

We recommend that the FDIC create a narrow, express exclusion from the definition of "brokered deposit" in 12 C.F.R. § 337.6(a)(2) for transaction and relationship-based account deposits where a *bona fide* independent relationship is established directly between an individual depositor and a bank and that bank owns and controls that depositor relationship, using language similar to the following:

> ***Brokered deposit*** *means any deposit that is obtained, directly or indirectly, from or through the mediation or assistance of a deposit broker.*
>
> *i.* *<u>Brokered deposit does not include a deposit held in a deposit account provided by an insured depository institution where the account is:</u>*
>
> *A.* *<u>Pursuant to a bona fide independent relationship established directly between the individual depositor and the insured depository institution, for the primary purpose of enabling the individual depositor to make payments or other transactions or to reach savings goals;</u>*
>
> *B.* *<u>Titled and held in the name of the same individual depositor;</u>*
>
> *C.* *<u>Governed by terms established by the insured depository institution; and</u>*
>
> *D.* *<u>Controlled by the depository institution and where only the same individual depositor has the authority to close or withdraw funds from the account.</u>*

This narrow exclusion clearly would not cover deposits placed by third parties that control the depositor relationship. Instead, this narrow exclusion would only cover stable sources of funding. Specifically, any final rule should exclude transaction and savings account deposits and other deposits where a tangible, *bona fide* relationship is clearly in place between the depositor and their bank; that is, a relationship evidenced by the depositor utilizing multiple financial products and services from their institution (e.g., transaction account, savings account, loan, credit card, online banking, direct deposit, online bill pay, debit card, CDs), provided that such accounts are opened by the individual depositor, held in the name of that same individual depositor, utilized by that individual depositor, and only that individual depositor is authorized to designate withdrawals to be made from the account. Transaction and savings account deposits and deposits associated with a tangible and direct depositor relationship do not pose risks to the safety and soundness of the bank, nor do they introduce risk to the Fund. These deposits are "sticky" deposits that serve as a stable source of funds upon which the bank can safely and prudently operate.

B. The FDIC should create an express exclusion from the definition of "deposit broker" for third-party service providers to IDIs that enable IDIs to offer transaction and relationship-based accounts.

The FDIC should create an express exclusion for third-party service providers that support IDIs, recognizing the fundamental distinction highlighted in the evaluation matrix above between such service providers and Deposit Controllers, by adding language similar to the following at the end of 12 C.F.R. § 337.6(a)(5)(iii), as redesignated:

> *[The term deposit broker does not include] <u>(K) A person that provides services to an insured depository institution in connection with a deposit account established directly between the insured depository institution and the individual depositor where the insured depository institution owns and controls the depositor relationship.</u>*

C. The FDIC should create bright-line standards within the rule under the primary purpose exemption for third parties that enable banks to enter into direct deposit relationships with individual depositor customers where the third party has no contractual relationship with an individual depositor to place, manage or control the individual's deposits, banking decisions or financial activities.

To the extent that the FDIC does not create an express exclusion for third-party service providers under the definition of a deposit broker, as discussed in revision (B) above, the FDIC should include language similar to the following in Section 337.6(a)(5)(iii)(I), as redesignated:

> *[The term deposit broker does not include] (I) An agent or nominee whose primary purpose is not the placement of funds with depository institutions if and to the extent, the FDIC determines that the agent or nominee meets this exception under the application process in 12 CFR 303.243(b)~~; or~~.*
>
> *<u>a. An agent or nominee shall be determined not to be engaged in the primary purpose of the placement of funds with insured depository institutions, and such an agent or nominee need not make an application under 12 CFR 303.243(b), if the agent or nominee:</u>*
>
> *<u>i. Enables an insured depository institution to offer to depositors a deposit account provided by the insured depository institution that is:</u>*
>
> *<u>A. Opened directly by an individual depositor;</u>*

B. *Governed by terms established by that insured depository institution*

C. *Titled and held in the name of such individual depositor at the same insured depository institution for the primary purpose of that same individual depositor to make payments or other transactions or reach savings goals; and*

D. *Subject to only the authority of the same individual depositor to close or withdraw funds; or*

ii. Enables the placement of a depositor customers' funds into deposit accounts held at insured depository institutions and the amount of customer funds that it places at the insured depository institutions represents less than 25 percent of the total amount of customer assets the agent or nominee manages for depositor customers; or

iii. Provides services to an insured depository institution in connection with a deposit account established directly between the insured depository institution and the individual depositor, and has no contractual relationship with the individual depositor to place, manage or control the individual's deposits, banking decisions or financial activities; or

We believe that this language for the primary purpose exception would help to narrow the number and types of entities that would be required to submit an application under the application process in proposed new 12 C.F.R. § 303.243(b), while at the same time ensuring coverage of third parties that control the depositor relationship.

Without bright-line standards within the primary purpose exception, countless third-party service providers would be subjected to a time- and resource-intensive application process, as well as the potential for ongoing reporting obligations, without posing the type of risk to the safety and soundness of IDIs or the Fund upon which the FDIC is focused. The FDIC's own burden estimate, which we believe vastly understates the number of applications and all associated ongoing reporting obligations, would be tens of thousands of hours, and this estimate does not cover third-party service providers. To avoid an expansive, expensive and unduly burdensome application process, the FDIC should require applications only from entities whose activities fall outside of the bright-line standards that our recommended language would create within the primary purpose exception. To do otherwise would rest upon the most costly alternative, imposing a lengthy and uncertain application process while the FDIC decides who is a deposit broker (within and outside the primary purpose exception), which would cause material economic harm to community banks and their third-party service providers while they await the decision.

Moreover, terms like "a level" and "influence" that are used in the Staff Memo do not lend themselves to clear bright lines. Any eventual final rule should focus on who, in fact, owns the depositor relationship and who controls the terms of the deposit relationship. In the absence of control, a third-party service provider should not be determined to be deposit broker.

D. The FDIC should clarify and narrow the definition of "facilitating the placement of deposits" to cover only those activities that present risk to the safety and soundness of any IDIs or the Fund, or otherwise trigger the policy concerns underlying Section 29.

For the reasons discussed above, the FDIC should clarify and narrow the definition of "facilitating the placement of deposits", with language similar to the following in proposed Section 337.6(a)(5)(ii):

(ii) Engaged in the business of facilitating the placement of deposits. A person is engaged in the business of facilitating the placement of deposits of third parties with insured depository institutions, by, while engaged in business, engaging in one or more of the following activities:

(A) ~~The person directly or indirectly shares any third party information with the insured depository institution;~~

~~(B)~~ The person has legal authority, contractual or otherwise, to close the account or move the third party's funds to another insured depository institution;

(B~~C~~) The person ~~provides assistance or is involved in setting~~ negotiates or sets the rates, fees, terms, or conditions ~~for~~ of the deposit account; or

(C~~D~~) The person is acting, directly or indirectly, with respect to the placement of deposits, as an intermediary between a third party that is placing deposits on behalf of a depositor and an insured depository institution, other than ~~in a purely administrative capacity~~ as a service provider to the insured depository institution for the purposes of creating and maintaining the insured depository institution's depositor relationship.

E. The FDIC should codify existing Advisory Opinions that benefit consumers and community banks.

As discussed above, the FDIC recognizes within the Proposal that IDIs and third-party service providers may be operating under existing Staff Advisory Opinions. The FDIC states that it intends to evaluate existing Advisory Opinions to identify those that are no longer relevant or applicable based on any revisions that are made to the brokered deposit regulations. The Proposal states that the FDIC "plans as part of any final rule to codify staff opinions of general applicability that continue to be relevant and applicable, and to rescind any staff opinions that are superseded or obsolete or are no longer relevant or applicable." Moreover, the Proposal asks whether there are "particular FDIC staff opinions of general applicability that should or should not be codified as part of the final rule? If so, which ones, and why?"

Kasasa respectfully recommends that the following Advisory Opinions be codified as relevant and generally applicable within the final rule:

- Advisory Opinion 15-02 – June 6, 2014
- Advisory Opinion 15-03 – December 18, 2014

While not reflected by the dates shown above, these two advisory opinions were issued during and after 30 months' worth of discussions with Staff that began in mid-2012. At that time, Kasasa hosted a website that listed our financial institution clients and provided consumers with information regarding those institutions' locations, office hours and product offerings. After expressly selecting an institution on the website, the consumer could fill out a generic application to apply for a deposit account at that particular institution, and the completed application information would be sent to the institution that the consumer selected. The chosen institution would then follow up directly with the consumer, and the institution was responsible for all decisions associated with that application and owned the resulting depositor relationship. The website's generic application process was designed as a consumer convenience to avoid the hassle of filling out common information multiple times.

Over this extended period of time, Kasasa executives worked collaboratively with Staff to provide the agency with a comprehensive understanding of our business model, the products and services we provide to community banks, the compensation we receive for the capabilities we provide, and the contractual relationship we have with the community banks that we support. These discussions culminated in the

Advisory Opinions listed above, as well as the question and answer identified as B5 within the FDIC's revised July 14, 2016 FAQs regarding brokered deposits.

With the understanding of these long-standing, published opinions, Kasasa helps community financial institutions attract, develop and maintain deeply connected direct relationships with loyal, individual depositors living and working within their local communities. And, as documented in Appendix A, due to the nature of the rewards programs we help our clients offer, the deposits associated with these individual customer relationships are low cost, extremely stable and highly profitable for our client institutions.

In light of the above, we respectfully request that Advisory Opinions 15-02 and 15-03 be codified as relevant and generally applicable within the FDIC's final rule on the brokered deposit regulations. We also respectfully request that the FDIC expressly recognize that hosting a directory website that lists a service provider's IDI clients for the purpose of providing individual depositors with information regarding those IDIs' locations, office hours, and product offerings, should not be viewed as "facilitating the placement of deposits."

This conclusion should not change if the consumer is able to expressly select an IDI, fill out a generic application on the directory website to apply directly to the selected IDI for a deposit account, where the website would transmit the application information to the institution that the consumer selected. Such an application process would be provided as a consumer convenience—i.e., to avoid the hassle of filling out common information multiple times—but the directory website host would not have any influence, control, or role in the consumer's selecting an IDI or reviewing or decisioning the consumer's application.

We believe that offering such a directory website would be of significant value to both consumers and community banks, and that any concern about the directory website host's role in opening the deposit account could be addressed with a clear disclosure on the website and ensuring that any fee paid by a listed institution to the website host is commensurate with standard depositor acquisition costs.

This result would be entirely consistent with Staff's view that the host is playing a passive role in the deposit-gathering process and does not exercise any influence or control over the depositor, and, thus, is not "facilitating the placement of deposits", and the site would not constitute "brokered deposits", if the needs of the depositor are the primary drivers of the selection of a bank.[17]

III. The FDIC Has Clear Authority under the FDI Act to Adopt These Recommendations

The FDIC has clear authority under the FDI Act to adopt these recommendations, including the express exclusion for third-party service providers.[18] Nonetheless, if the FDIC believes the above recommendations may be exploited in some manner, the FDIC could explicitly reserve the right within the rule to find excluded deposits to be brokered deposits by rule or by order under particular circumstances as they arise. This reservation of the right to prevent circumvention or evasion is a common regulatory construct.[19] Such a provision would give the FDIC the ability to address broad-based evasions by rule and address more individual evasions by order, while still operating within the procedural protections of the Administrative Procedure Act.

[17] 85 Fed. Reg. at 7,457.

[18] *See, e.g.*, 12 U.S.C. §§ 1819(a)(Tenth), 1820(g), 1831f(f).

[19] *See, e.g.*, 12 C.F.R. § 325.1(c) (reservation of authority regarding annual stress tests); 12 C.F.R. § 304.14 (reservation of authority regarding implementation of reduced reporting requirements); 12 C.F.R. § 204.2(e)(6) (reserving discretion for the Federal Reserve Board under Regulation D), 12 C.F.R. § 235.6 (prohibition on circumvention or evasion under the Federal Reserve Board's Regulation II).

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*   *   *

The principle-based recommendations outlined above align with the text and purpose of Section 29; the Chairman's statements regarding the Proposal; the FDIC policy goals underlying the Proposal; and the FDIC's intent to address situations where the deposit relationship is contractually established between the depositor and a third party, rather than a direct deposit relationship that is contractually established between the depositor and an IDI. Our recommendations also enable community banks to use third-party service providers, for a variety of valuable purposes, without fear of triggering the deposit broker rule, provided the third party has no contractual relationship with an individual depositor to place, manage or control the individual's deposits, banking decisions or financial activities. To reduce any administrative burdens, an IDI could verify that the third party has no such agreement with depositors via its vendor due diligence process and FDIC examiners could document that such verifications are in place during their normal supervisory activities.

Moreover, our recommendations would avoid interference with the substantial investments that have been made by community banks and third parties like Kasasa in reliance on the FDIC's specific assurances that specified activities would not make a company a deposit broker. After years of industry reliance on specific interpretations, the FDIC bears a high legal burden to explain the reasons for expanding the scope of activities that make a company a deposit broker. The Proposal also rests upon the most costly alternative, imposing a lengthy and uncertain application process while the FDIC decides who is a deposit broker (within and outside of the "primary purpose" exception), which would cause material economic harm to community banks and their third-party service providers while they wait for the decision.

The Chairman has publicly stated that the FDIC is constrained by Section 29 and has urged Congress to amend Section 29 to modernize the statute. We believe that with a reorientation of the Proposal (1) to recognize the fundamental difference between brokered deposits and the establishment of individual direct depositor relationships with banks, and (2) to narrow the scope of deposits, as well as the categories of third-party services to which the rule applies, the modernized brokered deposit regime would complement the types of amendments suggested by Chairman McWilliams, if Congress were to choose to review, revise or replace some or all of Section 29.

Specifically, a revised rule that incorporates our recommended fixes, would be the first step in creating a regulatory environment that enables community banks to reach unbanked individuals, serve their communities effectively, and compete with our nation's large financial institutions and fintech providers. As demonstrated by the FDIC's own Quarterly Banking Profiles, community banks do not have the luxury of time as, on average, our nation has lost a community bank (defined as less than $1 billion in assets) every business day over the past 16 years.[20] The urgency is amplified in this time of significant economic uncertainty. The regulatory uncertainty resulting from the FDIC's brokered deposits rulemaking is forcing community banks to delay investments and incur costs. These costs and delays ultimately impact individual depositors, in the form of increased fees or delays in the development of new and innovative products and services. We urge the FDIC to drive this brokered deposit rulemaking to conclusion so that community banks, and the market more generally, clearly understand the rules of the road as they navigate these challenging times. At minimum and in the near-term, to provide greater regulatory certainty, the FDIC should publish a list of Advisory Opinions that remain effective, whether through an interim final rule or otherwise.

Again, we commend the FDIC for undertaking a review and modernization of the brokered deposit regime and continuing our long-standing dialogue. We would be pleased to make ourselves available, at your convenience, to discuss key issues that we have raised in this letter. Left unchanged, it is our view that

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[20] FDIC Quarterly Banking Profile (Nov. 26, 2019).

community banks and, as a result, consumers would be significantly harmed rather than helped by the Proposal.

Sincerely,

[redacted]

Patrick J. Laughlin
Senior Vice President
Kasasa, Ltd.
4516 Seton Center Parkway, Suite 300
Austin, TX 78759

APPENDIX A – THE STABLE & LOW-COST NATURE OF REWARD CHECKING ACCOUNTS

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]