

June 8, 2020

Via E-Mail to [comments@fdic.gov](mailto:comments@fdic.gov)

Federal Deposit Insurance Corporation  
550 17<sup>th</sup> Street N.W.  
Washington, D.C. 20429

RE: RIN 3064-AE94, Brokered Deposits

To Whom it May Concern:

BBVA USA (“BBVA”) appreciates the opportunity to comment on the Notice of Proposed Rulemaking (“NPR”) from the Federal Deposit Insurance Corporation (“FDIC”) regarding Section 29 of the Federal Deposit Insurance Act (the “FDI Act”). We are pleased to see that the FDIC recognizes that the banking industry has experienced significant changes in technology, business models, and product types since the FDIC’s adoption of its brokered deposit regulation nearly 30 years ago, and would like to take this opportunity to comment on the FDIC’s regulatory approach to Section 29 by responding to selected questions within the NPR.

### **About BBVA**

BBVA is a Sunbelt-based commercial bank wholly owned by BBVA USA Bancshares, Inc., Houston, Texas, a registered bank holding company which, in turn, is wholly owned by BBVA, S.A., Madrid, Spain. BBVA has 649 branches, including 336 in Texas, 89 in Alabama, 63 in Arizona, 61 in California, 45 in Florida, 37 in Colorado and 18 in New Mexico. BBVA ranks among the top 25 largest U.S. commercial banks based on deposit market share and ranks among the largest banks in Alabama (2nd), Texas (4th) and Arizona (6th). BBVA also owns several operating subsidiaries that offer financial products to customers digitally throughout the United States.

### **The Importance of a Modernized Approach to the Implementation of Section 29**

There have been numerous changes in the industry over the past few decades that necessitate a modernized approach to the implementation of Section 29, a few of which are mentioned below.

Technological advances may be the most obvious change. The development of smartphones resulted in the advent of online and mobile banking — channels for providing banking services that were not yet contemplated when Section 29 was enacted. Since 1989, we have also seen the emergence of the universal bank model and the rise of the fintech industry. Many fintech and neobank models that collaborate with, or compete with, IDIs were not contemplated when Congress adopted the statute or when the FDIC adopted its implementing rule. Customers now demand, and deserve, a more comprehensive suite of product types as well as efficiencies in how these products are marketed and delivered.

Federal regulations, including the brokered deposit rule, must be applied in a way that protects the Deposit Insurance Fund and provides for the safety and soundness of the banking system that Congress intended to protect, but leaving antiquated rules in place does not promote safety and soundness. If banks are not allowed to change and evolve while their competitors do so, bank safety and soundness may be

negatively impacted. The banking industry needs to be allowed to continue to evolve, grow, compete and adapt in an ever-changing environment and applicable regulation should do the same.

We note that it is not just business models and customer expectations that have changed since adoption of the FDIC's brokered deposit regulations. Regulatory schemes have changed too. The result is that additional implications now arise when the FDIC deems stable deposits to be brokered. For example, banks may be required to pay additional deposit insurance assessments and ratings agencies may downgrade banks based on the characterization of objectively stable bank deposits as brokered.

Finally, the legislative history associated with Section 29 reveals Congress intended to create a relatively narrow law intended to target abusers of brokered deposits in a manner detrimental to the Deposit Insurance Fund and taxpayers.<sup>1</sup> Over the years, the FDIC has expanded the scope of Section 29. We appreciate the FDIC's proposal of a new framework that is consistent with the original intent of the Section 29, and BBVA supports the FDIC's willingness to modernize the implementation of Section 29 and believes the NPR takes many positive steps to accomplish that goal.

However, there are three primary areas in which BBVA is concerned that the proposed regulations introduce uncertainty and/or risk capturing deposits that should not be categorized as brokered. The first relates to the treatment of IDI affiliates, which we believe results in the inappropriate classification of operating subsidiaries and other affiliates of IDIs as deposit brokers. The second relates to the broad definition of facilitation. The third relates to how the proposal affects the primary purpose exception.

### **Operating Subsidiaries and Other Affiliates of IDIs Should not be Considered Deposit Brokers**

For the reasons discussed below, it is our view that deposits held at an IDI and arising out of an IDI's relationship with an operating subsidiary or other affiliate should not be classified as brokered deposits.

*Question 6: Is it appropriate for a separately incorporated operating subsidiary to be included in the IDI exception?*

*Question 7: Are the criteria for including an operating subsidiary in the IDI exception too broad or too narrow?*

*Question 19: Are there other deposit placement arrangements with respect to which the FDIC should provide additional clarity as part of this rulemaking?*

We support the FDIC's proposal to reasonably broaden the scope of the FDI Act's IDI exception.<sup>2</sup> It has long been our view that there is no practical difference between deposits placed at an IDI by a division of the IDI versus deposits placed by a wholly-owned subsidiary of the IDI and to treat them differently is not supportable.

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<sup>1</sup> For an overview of the legislative history, see American Bankers Association, Letter to The Honorable Jelena McWilliams (Feb. 28, 2019), attached Memorandum at pg. 3-8, available at <https://www.aba.com/advocacy/policy-analysis/aba-fdic-chairman-mcwilliamsbrokered-deposits>.

<sup>2</sup> 12 U.S.C. § 1831f(g)(2)(A).

In addressing the IDI exception, the FDIC previously took an unnecessarily narrow view of the statutory exception.<sup>3</sup> In addressing the IDI exception, the FDIC concluded that the IDI exception does not apply to a company affiliated with the IDI, including the IDI's "parent or subsidiary" while recognizing that a parent or subsidiary "might not be a deposit broker for other reasons.

Notably, this FAQ does not specifically address the status of an operating subsidiary.<sup>4</sup> Operating subsidiaries of an IDI are under the exclusive control of the parent IDI, engage only in activities permissible for an IDI and are treated as a division of the IDI for an array of regulatory purposes. In general, operating subsidiaries are subject to the same regulatory oversight as the parent IDI and its financial statements are consolidated with those of the IDI. Such subsidiaries are, for all intents and purposes, the equivalent of operating divisions of the IDI but, for specific business reasons, are operated through a legal entity that is a direct subsidiary of the IDI.<sup>5</sup> Because an operating subsidiary is the equivalent of an operating division of the bank, deposits generated by the operating subsidiary are appropriately viewed as the equivalent of deposits generated by the bank. As a result, the IDI exception should be applicable, and bank deposits originated through operating subsidiaries should not be classified as brokered deposits.

We note that operating subsidiaries could be made operating divisions of the IDI by merging them into the IDI and operating them as an unincorporated division. There is no doubt that the IDI exception would then be applicable and that the deposits resulting from their activities would not be brokered deposits for purposes of Section 29. However, there are a range of business reasons for utilizing a subsidiary structure including, but not limited to, brand recognition, maintaining a separate corporate culture, or financial considerations. Furthermore, we are not aware of any substantive rationale supportive of, or regulatory purpose furthered by, a determination that deposits generated by an operating subsidiary should be treated differently depending upon the corporate structure for operations chosen by an IDI. So, we strongly support the FDIC's proposal that a separately-incorporated operating subsidiary be included in the IDI exception. However, we believe that the proposed criteria for the IDI exception are too narrow.

Under the FDIC's proposal, a subsidiary of an IDI would qualify for the IDI exception if it meets the following criteria:

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<sup>3</sup> See FIL-42-2016, Frequently Asked Questions on Identifying, Accepting and Reporting Brokered Deposits (June 30, 2016, rev. July 14, 2016) (the "FAQs") at question E2.

<sup>4</sup> In concluding that the IDI Exception does not apply to affiliates of the IDI, the FAQ relied in part on FDIC Advisory Opinion 92-68, which is not related to operating subsidiaries, but instead specifically addresses the placement of deposits in excess of the insurance limits with affiliated depository institutions in order to maximize the customer's deposit insurance. Unlike an IDI's placement of excess deposits with an affiliated IDI, placement of funds by an operating subsidiary with its parent IDI does not affect the obligations of the insurance fund differently than the customer placing deposits directly with the IDI.

<sup>5</sup> Other federal financial regulators equate an operating subsidiary (also known as an "operations subsidiary") to a division of the parent bank. See, e.g., 12 C.F.R. § 250.141(c) ("The [Federal Reserve] Board now considers that the incidental powers clause permits a bank to organize its operations in the manner that it believes best facilitates the performance thereof. One method of organization is through departments; another is through separate incorporation of particular operations. In other words, a wholly owned subsidiary corporation engaged in activities that the bank itself may perform is simply a convenient alternative organizational arrangement"); see also, Office of the Comptroller of the Currency, Interpretive Letter No. 971 (Sept. 2003) ("Because the activities of an operating subsidiary are limited to activities in which the parent bank could engage directly, an operating subsidiary is in practice a separately incorporated division or department of the parent bank."), available at <https://www.occ.gov/topics/licensing/interpretations-and-actions/2003/int971.pdf>.

- i. The parent insured depository institution owns 100 percent of the subsidiary's outstanding stock;
- ii. The wholly owned subsidiary places deposits of retail customers exclusively with its parent insured depository institution; and
- iii. The wholly owned subsidiary engages only in activities permissible for the parent insured depository institution.

To avoid the potential consequences of unnecessarily characterizing too any deposits as “hot money” and stifling innovation, the FDIC should consider broadening the first criterion to enable IDIs to partner more closely with tech companies (and others) in the development of new deposit product sets and features. Specifically, BBVA suggests that the FDIC replace the “wholly owned” concept with a requirement that operating subsidiaries be “IDI-controlled.” In terms of the stickiness of the deposits (and otherwise), there is little or no difference between an operating subsidiary that is wholly-owned and one that is less than wholly-owned but still controlled by the IDI.

This could be particularly impactful with respect to fintech partnerships, in which there may be a benefit to banks partnering with entrepreneurs in connection with development efforts or to providing a small equity stake to managers of a bank subsidiary. In certain cases, innovative partnerships that place deposits may prove more viable if a third party is allowed to own part of the operating subsidiary. For example, if a third party could bring technological expertise, a more innovative corporate culture or proprietary intellectual property to an innovative partnership with an IDI, the third party may be more willing to do so on the condition of partial ownership (*i.e.*, a share of the equity or potential profits). Nonetheless, so long as the IDI retains control of the management and operations of the operating subsidiary,<sup>6</sup> the spirit of the FDIC’s proposed revision is retained – there is still “little practical difference” between deposits placed at an IDI by a division of the IDI versus deposits placed by an operating subsidiary controlled by the IDI.<sup>7</sup>

Another criterion that we believe is too narrow is the requirement that “[t]he subsidiary place[] deposits of retail customers exclusively with the parent IDI”. Fintech companies often provide a variety of products and services and some of those are via different IDIs. Some of those arrangements might only be possible if the fintech company also places deposits with an unrelated IDI. Certainly the deposits placed with the unrelated IDI would not be subject to the IDI exception, but the fact that a fintech places deposits

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<sup>6</sup> Although the FDIC could implement many tests for determining whether an IDI controls its operating subsidiary, the OCC’s operating subsidiary regulation, set forth at 12 C.F.R. § 5.34, should be considered. More specifically, 12 C.F.R. § 5.34(e)(2) generally prohibits a national bank from investing in an operating subsidiary unless:

- (A) The bank has the ability to control the management and operations of the subsidiary, and no other person or entity exercises effective operating control over the subsidiary or has the ability to influence the subsidiary's operations to an extent equal to or greater than that of the bank;
- (B) The parent bank owns and controls more than 50 percent of the voting (or similar type of controlling) interest of the operating subsidiary, or the parent bank otherwise controls the operating subsidiary and no other party controls a percentage of the voting (or similar type of controlling) interest of the operating subsidiary greater than the bank's interest; and
- (C) The operating subsidiary is consolidated with the bank under generally accepted accounting principles (GAAP).

<sup>7</sup> 85 Fed. Reg. 7453, 7458 (Feb. 10, 2020).

with multiple IDIs should not render those placed with its parent company (to which it is an operating subsidiary) brokered.<sup>8</sup>

In addition, the FDIC should also exclude from the definition of brokered deposits any deposits generated by an IDI's affiliate that is not a bank operating subsidiary and where the bank and the affiliate are both wholly-owned, directly or indirectly, by the same holding company. It is our view that treating certain forms of deposits as core deposits rather than as brokered deposits – specifically, those generated by all bank affiliates – would in no way diminish the safety and soundness of the banking system. Subsidiaries and other affiliates have strong incentives to ensure the deposits they generate for their IDIs are stable and sticky. In our experience, deposits generated through subsidiaries and affiliates have not shown a tendency to be less stable than comparable deposits generated by an IDI.

Since the promulgation of Section 29 many banks have adopted a universal bank model whereby they have expanded affiliations with non-bank financial companies. This diversification of products and services is good for the safety and soundness of banks, and it has added a degree of customer convenience. These arrangements allow banks and their affiliates to provide customers with a complete financial services experience and enable those services to be provided in a more personally tailored and cost-efficient manner. Consequently, we believe that it would be reasonable for the FDIC deem deposit placement arrangements with bank's commonly controlled financial affiliates as outside the scope of the definition of deposit broker.

Finally, given that the statute differentiates between the IDI itself and an IDI's employee (which both fall under separate exceptions), the FDIC should also specifically clarify that an employee of such an operating subsidiary or other affiliate is also exempt from being considered a deposit broker.

### **The Proposed Definition of “Facilitation” Should be Narrowed**

*Question 2: Is the FDIC's proposed definition of “engaged in the business of facilitating the placement of deposits” appropriate?*

*Question 3: Is the FDIC's list of activities that would determine whether a person meets the “facilitation” prong of the “deposit broker” definition appropriate?*

Under the FDIC's proposal, a person would meet the "facilitation" prong of the deposit broker definition by, while engaged in business, engaging in any one, or more than one, 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;
- (C) The person provides assistance or is involved in setting rates, fees, terms, or conditions for the deposit account; or,
- (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.

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<sup>8</sup> It seems that the real difficulty here is with the definitions - definitionally, there is no way to have brokered deposits without a “deposit broker”. In this particular example, the operating subsidiary would not be a “deposit broker” for its parent IDI, but might be for another IDI.

We believe that the first prong of the definition (the information sharing factor) is overly broad and should be removed altogether. Merely providing information to an IDI should not result in the provider of that information being viewed as facilitating the placement of deposits.

Today, information is routinely shared between IDIs and third parties under a variety of circumstances in the normal course of business, including payment processing, data processing, web servicing, consulting, advertising, and marketing<sup>9</sup>. Moreover, in some cases, information sharing is required to comply with law or regulation. The act of sharing information does not give a third party a level of influence or control over a deposit account or necessarily make the deposit more volatile, particularly when the depositor selects the IDI, and opens and funds the account directly.

We believe that the third prong of the definition should also be revised so that it only applies to those third parties which have control over the rates, fees, terms, or conditions for the deposit account. The use of the language “provides assistance or is involved in” is overly broad and reaches beyond the FDIC’s stated intent to capture those third parties with a level of influence or control.<sup>10</sup>

As the FDIC considers revisions to the definition of facilitation, we urge the FDIC to focus on activities that are reflective of a level of influence or control. We caution against any potential prong of this definition that would unnecessarily define any person as facilitating the placement of deposits solely because such person has authority to execute transactions on an account. Many businesses utilize third parties in connection with payment processing or bookkeeping services, and those services are generally provided without regard to which IDI an account holder has selected as its banking institution. Considering such service providers to be engaged in the business of facilitating the placement of deposits could unnecessarily complicate payments which are made in the ordinary course of business.

### **The Primary Purpose Exemption Should be Available to Certain Third Parties and Types of Deposits Without Requiring an Application**

*Question 10: Is it appropriate to make available the primary purpose exception to third parties whose business purposes is to place funds in transactional accounts to enable transactions or make payments?*

The NPR proposes that, subject to approval of a deposit broker’s application for eligibility for the primary purpose exception, the primary purpose of “an agent’s or nominee’s business relationship with its customers will not be considered to be the placement of funds if the agent or nominee places [and its “business purpose” is to place] depositors’ funds into transactional accounts for the purpose of enabling payments” (the “Enabling Payments Designation”). We support the availability of the primary purpose exception to an agent or nominee that qualifies for the Enabling Payments Designation, and endorse the

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<sup>9</sup> With respect to advertising and marketing specifically, the FDIC should take into account vast advances in the area of marketing technology, including online and social media advertising, among others. Customers prefer to explore bank products in a much different manner than when Section 29 was enacted, and banks now have opportunities to serve customers through innovative partnerships and referral arrangements. Furthermore, deposits acquired from customers entering into a direct relationship with the IDI are not more volatile simply because the customer was made aware of the bank’s products through a relationship with a marketing partner. The need to comply with the requirements of Section 29 simply because a marketing or advertising partner shared information with the bank would needlessly complicate arrangements that do not pose increased risks to the insurance fund and have the potential to benefit both banks and consumers.

<sup>10</sup> See 85 Fed. Reg. 7453, 7457 (Feb. 10, 2020).

request from others<sup>11</sup> that an application should not be required in order for such agent or nominee to qualify for the primary purpose exception.

However, we do request that the FDIC clarify certain requirements for an agent or nominee to qualify for the Enabling Payments Designation. The NPR's test has two prongs: (1) 100% of its customer funds must be placed into transaction accounts at IDIs; and (2) "No fees, interest, or other remuneration is provided to the depositor." The NPR is unclear whether the term "depositor" refers to the agent/nominee placing the deposits, or the underlying owner of the funds being deposited. We request clarification from the FDIC that the term "depositor" means the underlying owner of the funds, not the entity that "places" (or "facilitates the placement of") the deposits, and that payments to the agent or nominee by the IDI would not forfeit the agent or nominee's ability to qualify for the primary purpose exception based on the Enabling Payments Designation (or trigger increased scrutiny of any application). We also request clarification that applications from persons that meet the definition of "deposit broker" due to their "facilitation" of the placement of deposits (rather than the direct placement of deposits) would be eligible to receive the same Enabling Payments Designation as if those persons directly placed the deposits.

*Question 14: Is the application process proposed for the primary purpose exception appropriate?*

*Question 16: Are there additional ways that the FDIC could better ensure that the primary purposes exception is applied consistently, transparently, and in accordance with the statute?*

We believe that, by requiring applications for the primary purpose exception to be determined on a case-by-case basis, the FAQs<sup>12</sup> broadened the scope of deposits treated as volatile "hot money" in a manner well beyond the original intent of Congress when it adopted Section 29. The NPR proposes to make the primary purpose exemption unavailable unless the IDI or third party makes an application to the FDIC. The high number of applications that are likely to be made could result in inefficiencies for all parties. In addition, we have concerns that the requirement would create uncertainties while applications are pending, as there is a possibility that the number of applications submitted would make it impossible for the FDIC to respond to each one in a timely manner. Codifying exemptions would eliminate unnecessary inefficiencies for all parties so that applications do not have to be submitted for categories of deposits or third parties for which applications would be regularly issued.

We support the positions set forth by others on this issue.<sup>13</sup> We also request that the FDIC create an expeditious avenue for appealing decisions applying the primary purpose exception to ensure consistency between staff members' interpretations.

### **Other Comments**

We believe that, with respect to the modifications addressed in this letter, the FDIC has the authority to broadly interpret the statute consistently with congressional intent.<sup>14</sup> For example, Section 29 is titled

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<sup>11</sup> See, e.g., letters from the American Bankers Association and Bank Policy Institute submitted to the FDIC in response to the NPR.

<sup>12</sup> FAQs, question E9.

<sup>13</sup> See, e.g., letters from the American Bankers Association, Bank Policy Institute, and the Consumer Bankers Association submitted to the FDIC in response to the NPR.

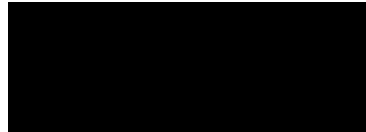
<sup>14</sup> For an in-depth discussion of this topic, see American Bankers Association, Letter to The Honorable Jelena McWilliams (Feb. 28, 2019), available at <https://www.aba.com/advocacy/policy-analysis/aba-fdic-chairman-mcwilliamsbrokered-deposits>.

“Brokered deposits” and does not directly define the term “brokered deposit.” Nevertheless, the FDIC has previously defined the term by deriving its meaning from the statutory definition of “deposit broker.”<sup>15</sup> We urge the FDIC to consider updating the definition of “brokered deposit” to exclude any deposit in a deposit account that pays the depositor no interest or a rate of interest below the national average. We acknowledge that the interest rate paid on a deposit can have a significant impact on its stability or volatility.<sup>16</sup> However, paying low interest rates is unlikely to attract the “hot-money” deposits that initially prompted the enactment of Section 29 and accordingly such a revision to the definition of “brokered deposit” should not be viewed as inconsistent with statutory intent.

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Thank you for the opportunity to share our comments on the NPR. We would be pleased to answer any questions you may have and to further assist the FDIC in its effort to modernize the federal rules to reflect the changing landscape within the banking industry.

Sincerely,

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Vice President & Corporate Counsel

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<sup>15</sup> The FDIC currently defines a brokered deposit as “any deposit that is obtained, directly or indirectly, from or through the mediation or assistance of a deposit broker.” 12 C.F.R. § 337.6(a)(2).

<sup>16</sup> Federal Deposit Insurance Corporation, Study on Core Deposits & Brokered Deposits (July 8, 2011), pg. 48-49.