Promontory Interfinancial Network

Promontory Interfinancial Network, LLC
1300 North 17th Street
Suite 1800
Arlington, VA 22209-3810

T 703-292-3400
F 703-528-5700

www.promnetwork.com

June 9, 2020

comments@fdic.gov

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

Re: RIN 3064-AE94

Ladies and Gentlemen:

On behalf of Promontory Interfinancial Network, LLC ("*Promontory Network*"),[1] I write to comment on the *Notice of Proposed Rulemaking on Unsafe and Unsound Banking Practices: Brokered Deposits Restrictions*, issued by the Federal Deposit Insurance Corporation (the "*FDIC*") and published in the Federal Register on February 10, 2020 (the "*NPR*").[2]

INTRODUCTION

The NPR requests comment on proposed revisions in FDIC brokered deposit regulations.[3] The NPR states that "the FDIC intends to modernize its brokered deposit regulations to reflect recent technological changes and innovations that have occurred."[4] According to the NPR, "the FDIC's brokered deposit regulations will continue to promote safe and sound practices while ensuring that the classification of a deposit as brokered appropriately reflects changes in the banking landscape since 1989, when the law on brokered deposits was first enacted."[5]

Promontory Network applauds the FDIC's goal of bringing deposit regulations up to date for 2020 and beyond. Nevertheless, we believe that some of the language in the proposed rule could inadvertently defeat its purpose. For that reason, we recommend that the proposed rule be slightly modified so that it better fulfills the FDIC's stated objectives.

---

[1] Founded in 2002, Promontory Network provides services to the banking and brokerage industries. Promontory Network's deposit allocation and sweep services include CDARS®, the Certificate of Deposit Account Registry Service®, for time deposits, ICS®, the Insured Cash Sweep® service, for non-time deposits, and IND®, the Insured Network Deposits® service, for non-time deposits swept to banks primarily by broker-dealers.

[2] FDIC, *Unsafe and Unsound Banking Practices: Brokered Deposits Restrictions*, 85 Fed. Reg. 7,453 (Feb. 10, 2020).

[3] *Id*. at 7,453.

[4] *Id.*

[5] *Id*.

The proposed rule would expand the circumstances in which an agent or nominee is excluded from the definition of deposit broker because its "primary purpose is not the placement of funds with depository institutions."[6] The rule would permit an agent or nominee, such as a broker-dealer that places sweep deposits at banks with which it is not affiliated, to apply to the FDIC for treatment of the deposits as non-brokered under the primary purpose exception. At present, broker-dealer sweep deposits at unaffiliated banks are treated as brokered.

Promontory Network does not take a position on whether broker-dealer sweep deposits at unaffiliated banks should be non-brokered. We understand that banks may have differing opinions on this question. Some banks we work with may welcome such a change, whereas other client banks may believe that the primary beneficiaries would be the largest banks or would not be banks at all, but non-bank entities that could use sweep arrangements to compete with banks for deposits. We defer to the banking industry and its trade groups to express their views regarding whether expansion of the primary purpose exception in this manner is appropriate.

If the final rule makes unaffiliated sweep deposits eligible for non-brokered treatment, however, there will be a critical need to modify the proposed rule's statement of what it means to be engaged in the business of "facilitating the placement of deposits." As currently drafted, the language on this question is, we assume unintentionally, structured in a way that could be interpreted as including an array of vital functions by third parties that make sweep deposits stable. As a result, the proposed rule could discourage or prevent the very measures that provide a policy justification for treating unaffiliated sweep deposits as non-brokered.[7]

OVERVIEW

A. The proposed "facilitating" provision should be changed to avoid making unaffiliated sweep deposits <u>less</u> stable.

   1. Sweep allocation service providers perform functions that are vital to the stability and accessibility of sweep deposits as reliable sources of bank funding.

      a. Using a sweep allocation service provider is critical for making sweep deposits stable and, in particular, "sticky."

      b. Using a sweep allocation service provider makes broker-dealer sweep deposits accessible to community and regional banks.

      c. Sweep allocation service providers promote regulatory compliance.

---

[6] 12 U.S.C. § 1831f(g)(2)(I); 12 C.F.R. § 337.6(a)(5)(ii)(I).

[7] The NPR also addresses when deposits are "accepted" for purposes of brokered deposit restrictions. NPR at 7,463. As discussed below, the proposed treatment of this question departs from the plain meaning of the Federal Deposit Insurance ("*FDI*") Act and should be modified.

2. The provision on "facilitating" could potentially be read as capturing the very matching and allocation services that make sweep deposits stable.

    a. Merely sharing information is not "facilitating" deposit placement.

    b. Proposing funds allocations for a broker-dealer sweep program is not "facilitating" deposit placement.

    c. Contracting with banks to match a broker-dealer's deposit needs and terms with the deposit capacity of participating banks is not "facilitating" deposit placement.

    d. Providing matching and allocation services for a broker-dealer sweep program is not "facilitating" deposit placement.

3. The "facilitating" language of the proposed rule can readily be changed to avoid the problems described above.

    a. The rule should acknowledge that a person is not facilitating deposit placement if the person performs a function for a broker-dealer that the broker-dealer would be permitted to perform for itself without making the deposits brokered.

    b. The rule should exclude administrative and technology services, including sweep matching and allocation services, not only from the "intermediary" element, but from all four elements of the provision on "facilitating" deposit placement.

    c. The specific elements of the "facilitating" provision should be changed.

B. The proposed standard for when deposits are "accepted" is contrary to the plain meaning of the FDI Act.

DISCUSSION

A. The proposed "facilitating" provision should be changed to avoid making unaffiliated sweep deposits <u>less</u> stable.

Unaffiliated broker-dealer sweep deposits are stable because third parties, such as Promontory Network, provide matching and allocation services that make them a stable funding source for banks large and small. Promontory Network provides these services to broker-dealers and other agents or nominees through IND, the Insured Network Deposits service. Other firms provide similar services. We refer in this letter to a provider of such services as a "sweep allocation service provider," or, more simply, as an "allocation provider."

The essential role of a sweep allocation service provider makes it critically important that, if unaffiliated sweep deposits are treated as non-brokered under the primary purpose exception, they not immediately revert to brokered status merely because such an allocation provider is involved. Unfortunately, the "facilitating" language in its current form threatens to produce that harmful result.

1. Sweep allocation service providers perform functions that are vital to the stability and accessibility of sweep deposits as reliable sources of bank funding.

A sweep allocation service provider performs functions that make broker-dealer sweep deposits a reliable source of funding for a wide range of banks by enabling multiple banks to maintain consistent balance amounts over time, providing access to sweep deposits for community and regional banks as well as the largest banks, and helping sweep programs comply with regulatory requirements.

a. Using a sweep allocation service provider is critical for making sweep deposits stable and, in particular, "sticky."

A single broker-dealer sweep program that uses unaffiliated banks typically sweeps customer deposits to at least 12 different banks and usually more, for several reasons. A large broker-dealer's total sweep balances are usually much greater than any one bank is prepared to accommodate. In addition, although most broker-dealer customers maintain cash balances of much less than $250,000 in their brokerage accounts, some have significantly larger balances, leading to the use of multiple banks. Further, customers are given the option to exclude participating banks at which they have other deposits.

For each unaffiliated sweep program, a sweep allocation service provider such as Promontory Network matches the broker-dealer with a diverse collection of banks for which the aggregate deposit capacity is approximately equal to the broker-dealer's expected sweep balances. The allocation provider identifies banks that wish to receive sweep funding in specified amounts, over specified time periods, at costs of funds that are mutually acceptable to the broker-dealer and the banks. The provider then works on an ongoing basis to allocate funds so that each bank can maintain a contracted target balance amount and not more than a contracted maximum balance amount. These functions are imperative for enabling banks to use sweep deposits as a "sticky" funding source that will reliably supply the bank with desired balances over a term that is typically measured in years.

Although sweep balances for an entire program may be relatively constant from one day to the next, individual customer balances fluctuate on a daily basis as customers deposit or withdraw cash and buy or sell securities. In addition, broker-dealers may drop or add business lines, and banks may choose to leave or join a sweep program. An allocation provider manages the allocation across banks in a manner that is designed not only to enable the program to satisfy securities law requirements, but also to enable each bank to maintain desired balances for a desired period despite the balance and program changes that occur. If deposit amounts at a particular bank would otherwise be too low or too high, the allocation provider works to revise allocations and restore balances to an appropriate level.

For example, banks that participate in a sweep service such as Promontory Network's IND service often participate in multiple broker-dealer sweep programs and can join more such programs through IND if needed. The diversification of both deposit sources and deposit capacity means that, if the supply of sweep deposits from one broker-dealer falls short of a receiving bank's target, Promontory Network can allocate deposits so that deposits from other broker-dealers balance the allocation and permit the bank to maintain its aggregate target balance amounts. Likewise, if a bank that has been receiving deposits terminates its participation, Promontory Network has a pre-existing set of multiple contracted sweep banks from which it can readily replace the lost bank capacity.

An allocation provider such as Promontory Network is not in the flow of customer funds. It does not act as an agent for the depositor and does not have custody of the funds. Such an allocation provider has no power to transfer funds on its own. It can only provide allocations that must be implemented through a settlement approved by the broker-dealer or other agent or nominee for the depositor.

The alternative to use of an allocation provider is that the broker-dealer sweeps balances to one or more bank charters of its own or to unaffiliated banks at which it deposits the funds on its own. If the broker-dealer sweeps deposits only to an affiliated bank, balances above the applicable deposit insurance amount will be uninsured, which may detract from their stability. If the broker-dealer sweeps deposits to unaffiliated banks without the assistance of an allocation provider, the deposits are subject to potentially abrupt changes that are substantially more difficult to mitigate. As a result, balances at the banks in the sweep program may fall or rise precipitously and frustrate the balance objectives of these banks.

If a sweep allocation service provider's performance of essential functions for efficiently maintaining consistent target balance amounts were deemed to be "facilitating" deposit placement, making otherwise non-brokered sweep deposits brokered again, the result would be sadly ironic. Less stable sweep deposits placed ad hoc by a broker-dealer, despite being more readily movable and less sticky, would be treated as non-brokered under the primary purpose exception, but more stable sweep deposits placed with the aid of an allocation provider, despite being more sticky, would be treated as brokered. Such a result would turn the brokered deposit standard upside down.

b. Using a sweep allocation service provider makes broker-dealer sweep deposits accessible to community and regional banks.

A sweep allocation service provider enables community and regional banks, not just the largest money center banks, to acquire stable sweep broker-dealer sweep deposits. Unlike the largest banks, community and regional banks often do not have relationships with large broker-dealers that would enable such banks to share in the sweep deposit funding that the largest banks can more readily obtain. Community and regional banks can typically find matching supplies of sweep deposits only in a program served by an allocation provider, which among other things can accommodate balance targets for such banks that are much lower than those of the largest banks.

Treating unaffiliated sweep deposits as non-brokered, but preventing or discouraging the use of allocation providers, would place community and regional banks at a deep disadvantage in attracting stable sweep funding. Community and regional banks would have great difficulty attracting broker-dealer sweep deposits if sweep programs did not use allocation providers, and if such a bank were able to participate in a program still served by an allocation provider, the bank would bear the heavy competitive detriment of having to treat the deposits as brokered when the largest banks could obtain non-brokered sweep deposits elsewhere. The result would be to benefit the largest banks at the expense of the rest.

c. Sweep allocation service providers promote regulatory compliance.

Sweep allocation service providers perform important functions that help banks and broker-dealers comply with regulatory requirements. For example, sweep guidelines of the Securities and Exchange Commission ("*SEC*") provide for daily reconciliation of aggregate deposit sweep balances between broker-dealers and banks.[8] Promontory Network provides an innovative service called the Reconciliation Dashboard which supports this daily reconciliation in an efficient, auditable manner. Although the reconciling parties enter information themselves, if the reconciliation process reveals a mismatch between the records of the broker-dealer and the bank, Promontory Network alerts the broker-dealer and the bank to the mismatch.

The SEC sweep guidelines also require that the deposit account agreement for the sweep deposits contain "no-lien" language under which the bank agrees not to allow any liens to be imposed on the deposit account containing customer funds because of debts of the bank or the broker-dealer. Promontory Network, in its contracts with banks that participate in the IND deposit sweep service, requires that the no-lien language appear in the account agreements between the broker-dealer and the bank. In doing so, Promontory Network helps ensure that the SEC guidelines are met and the depositors are protected.

Until recently, Regulation D of the Board of Governors of the Federal Reserve System limited withdrawals or transfers from a money market deposit account ("*MMDA*") to six per month or other statement cycle.[9] Broker-dealer sweep programs have typically used a dual account structure involving transaction accounts and MMDAs. Promontory Network manages the allocation process so that withdrawals or transfers, either from a customer's MMDA or from an omnibus MMDA, do not exceed six per month at any one bank.[10]

At present it is not known whether the six-withdrawal limit of Regulation D will be restored after the current national emergency. If it is, or if other restrictions on such accounts apply, allocation providers will play an important role in supporting Regulation D compliance.[11]

---

[8] Securities and Exchange Commission, *Draft Guidelines Regarding Bank-Sweep Programs* (2006). Although the SEC sweep guidelines have technically been in "draft" form for more than 15 years, the SEC and FINRA examiners regularly refer to the guidelines and generally require compliance with them.

[9] Board of Governors of the Federal Reserve System, *Regulation D: Reserve Requirements of Depository Institutions*, 85 Fed. Reg. 23,445, 23.446 (Apr. 28, 2020).

[10] After a fifth withdrawal, all funds are moved from the customer MMDA to the transaction account for the remainder of the month to preserve the customer's access to the funds.

[11] Under a provision of Regulation D that the Federal Reserve did not change in its recent rulemaking, *supra* note 9, the bank must reserve the right to require seven days' advance notice of withdrawal from an MMDA. 12 C.F.R. § 204.2(d). Although banks rarely if ever exercise this right, an allocation provider such as Promontory Network works to ensure that banks include it as necessary in applicable agreements.

2. The provision on "facilitating" could potentially be read as capturing the very matching and allocation services that make sweep deposits stable.

a. Merely sharing information is not "facilitating" deposit placement.

In the proposed rule, subsection (a)(5)(ii)(A) of section 336.7 of title 12 states that a person is "facilitating" deposit placement if "[t]he person directly or indirectly shares any third party information with the insured depository institution."[12] The subsection does not define "third party." Nor does it qualify "information" in any way. Many different forms of information sharing with banks are routine across a broad range of business activities. As a result, although we assume that the intent is otherwise, the proposed subsection could be read as making almost anyone a deposit broker, causing almost any deposit to be treated as brokered.

A sweep allocation service provider may provide information, primarily to broker-dealers, but also to banks, in data files, reports, or other forms. For example, in supporting the required daily reconciliation of balances between a broker-dealer and a bank in the IND deposit sweep service, Promontory Network will alert the bank to mismatches between aggregate balance data from the broker-dealer and from the bank. As part of its monitoring of transactions to support compliance with Regulation D, Promontory Network also provides on request to participating banks reports that document such compliance.

These activities conceivably could be said to be "directly or indirectly" sharing "third party information," namely the broker-dealer's balance information or transaction information, with an "insured depository institution," namely the bank that is being alerted of the mismatch or provided with a report of Regulation D compliance. It would be extremely harmful for such necessary and proper sharing of information to make otherwise non-brokered sweep deposits brokered.[13]

b. Proposing funds allocations for a broker-dealer sweep program is not "facilitating" deposit placement.

The proposed subsection (a)(5)(ii)(B) of section 336.7 states that a person is "facilitating" deposit placement if the person has "legal authority, contractual or otherwise, to close the account or move the third party's funds to another insured depository institution."[14]

In the IND deposit sweep service, because Promontory Network is not in the flow of customer funds, it has no authority to "move" customer funds on its own. Exclusive final authority to approve daily funds settlement rests with the broker-dealer or other agent or nominee. As a

---

[12] NPR at 7,472 (proposed § 337.6(a)(5)(ii)(A)).

[13] In the IND deposit sweep service, for any data on individual customer balances or transactions that Promontory Network receives from the broker-dealer, the individual customers are described only by alphanumeric identifiers that Promontory Network has no ability to link to named individuals. Only the broker-dealer can make that link. As a result, none of the information that may be shared with a bank is personally identifiable financial information.

[14] NPR at 7,472 (proposed § 337.6(a)(5)(ii)(B)).

result, the only person with authority to make the determination to close an account or move a depositor's funds is the agent or nominee that approves settlement.

But a sweep allocation service provider such as Promontory Network submits to the broker-dealer an allocation of deposits to banks in accordance with their target balances. The allocation provider also prepares instructions for account opening or closing or funds movements to implement allocations, consistent with the contracted target and maximum balance amounts, through the transactions that are implemented at settlement. These functions make sweep deposits more stable and are not a reason to treat the deposits as brokered.

If the subsection were limited to exclusive contractual authority to move funds, it would probably not be objectionable. In the IND service, Promontory Network clearly does not have such contractual authority, given the requirement for settlement approval. But the reference to "legal authority, contractual or otherwise," suggests that the provision may have a reach of unknown proportions. It is not clear what sort of legal authority, other than contractual authority, a person that is not an agent or nominee might have to move a third party's funds, but the language implies that some such authority could exist. The rule should not leave open the possibility that the provision could be inappropriately extended.

c. Contracting with banks to match a broker-dealer's deposit needs and terms with the deposit capacity of participating banks is not "facilitating" deposit placement.

The proposed subsection (a)(5)(ii)(C) of section 336.7 states that a person is "facilitating" deposit placement if the person provides "assistance" with, or is "involved" in, "setting rates, fees, terms, or conditions for the deposit account."[15]

As noted above, Promontory Network contracts with banks in the IND deposit sweep service to accept stable sweep deposits. The IND agreements specify that broker-dealer account agreements with banks must include no-lien language required by SEC guidelines, as well as other terms that promote regulatory compliance and protect depositors and other participants.[16] They also reflect the standard arrangement in which the cost of funds that a bank incurs includes both interest that will be paid to the broker-dealer's customer, as determined by the broker-dealer, and fees that will be paid to the broker-dealer and allocation provider.

The broker-dealer specifies the portion of the cost of funds that will be paid as interest, and the bank pays it as interest.[17] Nevertheless, a sweep allocation service provider such as Promontory Network cannot bring a bank into its service and match the bank with a relevant broker-dealer unless the provider establishes with the bank a cost of funds that the bank is willing to incur, along with target and maximum balance amounts and contract duration. The provider

[15] NPR at 7,472 (proposed § 337.6(a)(5)(ii)(C)).

[16] For example, *see supra* note 11 (seven-day notice under Regulation D).

[17] Broker-dealer sweep deposits are minimally rate-sensitive. The deposits consist of idle cash from brokerage accounts, not from any directed investment. The cash is typically kept in the account for convenience to support brokerage transactions, not to pursue high interest rates.

must ensure that the cost of funds that the bank is willing to incur satisfies a given broker-dealer's requirements before allocating the broker-dealer's funds to that bank. If the allocation provider could not provide these services without making the deposits brokered, the allocation provider would not be able to perform its role, which promotes the safety of such deposits through diversification of deposit sources and capacity.

d. Providing matching and allocation services for a broker-dealer sweep program is not "facilitating" deposit placement.

The proposed subsection (a)(5)(ii)(D) of section 336.7 states that a person is "facilitating" deposit placement if the person acts "directly or indirectly" with respect to deposit placement as an "intermediary" between a third party that is placing deposits and a bank, "other than in a purely administrative capacity."[18] The proposed rule does not define "intermediary," and it provides only isolated examples of what is or is not an "administrative" function.

As written, this element could be said to make deposits brokered whenever an allocation provider matches a bank with a broker-dealer that has a sweep program for which the bank may be a suitable recipient of deposits. There is no basis for such a result, which would be very counterproductive.

The NPR, highlighting the "intermediary" language, explains that the proposed "facilitating" provision seeks "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."[19] The NPR states: "It is the FDIC's view that a level of control or influence indicates that the deposit relationship is <u>between the depositor and the person rather than the depositor and the insured depository institution</u>."[20]

As the NPR recognizes, however, the "business relationship" in the primary purpose context is "<u>between the agent or nominee</u> [in a broker-dealer sweep program, the broker-dealer] <u>and its customers</u>."[21] A third party that provides matching and allocation services for a broker-dealer sweep program typically has <u>no</u> relationship with the broker-dealer's customers, which are the depositors. As a result, it has <u>no</u> control or influence over the depositor.

The NPR further states that "[h]aving a level of control or influence over the depositor allows the person to influence the movement of funds between institutions and makes the deposits less stable . . . ."[22] Having no control or influence over the depositor, however, a provider of matching and allocation services does nothing to make the deposits <u>less</u> stable. On the contrary, as outlined above, the involvement of such an allocation provider and the diversification of deposit

---

[18] NPR at 7,472 (proposed § 337.6(a)(5)(ii)(D)).

[19] NPR at 7,457.

[20] *Id*. (emphasis added).

[21] *Id.* at 7,459 (emphasis added).

[22] *Id.* at 7,457.

sources and deposit capacity makes sweep deposits more stable by enhancing the ability of the sweep program to keep banks funded at the levels they desire. The allocation provider's contractual commitments to banks prevent destabilizing arbitrary movements of funds. Without an allocation provider, a broker-dealer if anything would be more likely to move funds, or threaten to move funds, to maximize its own revenues.

3. The "facilitating" language of the proposed rule can readily be changed to avoid the problems described above.

There are several measures that would solve the problems with the proposed rule as it relates to facilitating deposit placement. The first is to provide in the rule that a person is not facilitating deposit placement merely because the person performs a function for a broker-dealer or other agent or nominee that the agent or nominee would be permitted to perform for itself without making the deposits brokered. The second is to exclude not only from proposed section 336.7(a)(5)(ii)(D), but from all four subsections of section 336.7(a)(5)(ii), administration and allocation services. The third is to modify each subsection of section 336.7(a)(5)(ii).

a. The rule should acknowledge that a person is not facilitating deposit placement if the person performs a function for a broker-dealer that the broker-dealer would be permitted to perform for itself without making the deposits brokered.

We recommend adding the following provision to the proposed rule:

Notwithstanding subsection (a)(5)(ii), if the placement of deposits by a broker-dealer or other agent or nominee satisfies the primary purpose exception, and the agent or nominee would be permitted to perform a function with respect to the placement without being deemed a deposit broker, the performance of the function by another person for the agent or nominee is not "facilitating the placement of deposits."

When a broker-dealer is sweeping funds for a primary purpose other than deposit placement, a sweep allocation service provider is most appropriately regarded as facilitating the broker-dealer's primary purpose, not as facilitating something that is not the broker-dealer's primary purpose. As a result, the allocation provider should not be deemed to be facilitating the placement of deposits.

For example, the broker-dealer – albeit less efficiently than an allocation provider – can attempt to identify a sufficient number of unaffiliated banks that will receive deposits, establish costs of funds acceptable to them, obtain their commitments to receive funds in specified amounts over specified periods, manage bank entries and departures, and try to manage, on an ongoing basis, the allocation of deposits consistent with all the requirements of these arrangements. If the broker-dealer acts with a primary purpose other than deposit placement, these necessary activities by the broker-dealer do not render the deposits brokered. There is no reason to treat the deposits as brokered if the broker-dealer instead determines that a third party can more efficiently perform the same activities and better manage the overall process.

The FDIC should encourage, not render difficult or impossible, the use of allocation providers that make sweep deposits more stable and give community and regional banks access to stable sweep funding. Excluding from "facilitation" the activities of parties that provide matching and allocation services for sweep programs is essential to achieving this goal.

Some of the language in the NPR indicates that this approach may actually be what the FDIC intends. For example, the NPR states: "[I]f [a] person meets the primary purpose exception, then the person is excepted from the definition of 'deposit broker' and <u>any deposits that it places with insured depository institutions are not brokered deposits</u>."[23] This language states what should be reflected in the rule. Any deposits that a person such as a broker-dealer places pursuant to the primary purpose exception are not brokered, even if another person assists in performing functions that might be considered "facilitating" deposit placement if performed for an agent or nominee that was acting for the primary purpose of deposit placement.

The NPR also states, in the primary purpose context: "The FDIC also believes that establishing a transparent, bright line test is beneficial for all parties."[24] For the test to be transparent and provide a bright line, the result must be that, as stated in the NPR, "[i]f the person meets the primary purpose exception, then . . . any deposits that [the person] places . . . are not brokered deposits."[25] The proposed rule would fail to establish a transparent, bright line test if an agent or nominee could meet the primary purpose exception, but still find its deposits treated as brokered because the activities of an allocation provider are deemed to be "facilitating" deposit placement, despite the primary purpose being something <u>other</u> than deposit placement.

Elsewhere, however, the NPR appears to contradict the passages quoted above when it states: "[I]f an agent or nominee that meets the primary purpose exception uses an intermediary (in a manner that is not purely administrative) in placing, or facilitating the placement of, deposits, then the intermediary would be a deposit broker, and the resulting deposits would be brokered."[26]

If the agent or nominee acting for a primary purpose that is not deposit placement determines that an "intermediary" (a term that is undefined in the rule) can more efficiently perform a function in support of the agent or nominee's primary purpose, there is no reason to insist that the function be performed less efficiently by the agent or nominee itself to preserve non-brokered status for the deposits. Rather, as discussed above, discouraging the use of a sweep allocation service provider would actually make unaffiliated sweep deposits less stable. In doing so it would produce the perverse result that the less stable deposits would be treated as non-brokered and the more stable deposits, to the extent they remained, would be treated as brokered.

---

[23] NPR at 7,459 (emphasis added).

[24] *Id*.

[25] *Id*.

[26] *Id*. at 7,457.

b. The rule should exclude administrative and technology services, including sweep matching and allocation services, not only from the "intermediary" element, but from all four elements of the provision on "facilitating" deposit placement.

The proposed subsection (a)(5)(ii)(D) of section 336.7 states that a person is "facilitating" deposit placement if the person acts "directly or indirectly" as an "intermediary" between a third party that is placing deposits and a bank, "other than in a purely administrative capacity."[27] The proposed rule does not define "intermediary" or "administrative," but the modifiers "directly or indirectly" and "purely" seem to encourage a broad reading of "intermediary" and a narrow reading of "administrative," with no stated justification.

The NPR states:

> Administrative functions would include, for example, any reporting or bookkeeping assistance provided to the person placing its customers' deposits with insured depository institutions. Administrative functions would not include, for example, assisting in decision-making or steering persons (including the underlying depositors) to particular insured depository institutions.[28]

The NPR's only examples of administrative functions are extremely narrow. For example, if a person provides "reporting or booking assistance" to a person placing deposits, the function is "administrative," but if a person provides reporting or bookkeeping to a bank, the function is not identified as being administrative. Yet no reason is given for treating reporting or bookkeeping assistance as administrative and not administrative in the other. Not only is "administrative" undefined, but no principle is given for defining it other than by the few examples.

Moreover, in the proposed rule, the administrative exception does not apply at all to the first three elements of "facilitating" deposit placement. For example, a person is "facilitating" if the person "directly or indirectly shares any third party information with the insured depository institution."[29] Providing reporting or bookkeeping assistance to a bank could be said to involve "directly or indirectly shar[ing] any third party information." But even if reporting or bookkeeping assistance to a bank were treated as an administrative function, as it should be, the administrative exception would be unavailing because it is limited to the fourth element.

All four elements should be subject to the following exception:

> **Notwithstanding subsection (a)(5)(ii), if a person is providing administrative or technology services, which may include matching and allocation services, to a broker-dealer or other agent or nominee that is placing deposits pursuant to**

[27] NPR at 7,472 (proposed § 337.6(a)(5)(ii)(D)).

[28] *Id*. at 7,457.

[29] NPR at 7,472 (proposed § 337.6(a)(5)(ii)(A)).

the primary purpose exception, the person is not "facilitating the placement of deposits."

The rule should define "administrative or technology services" as follows:

"Administrative or technology services" means administrative, bookkeeping, processing, reporting, technology, or other services that support the placement of deposits, including matching and allocation services for a broker-dealer or other agent or nominee that places deposits pursuant to the primary purpose exception. Providing administrative or technology services includes administering a deposit sweep program, but does not include exercising sole legal authority over the opening or closing of a deposit account.

As reflected in the proposed definition, "administrative or technology services" should be defined in accordance with the ordinary meaning of the terms. The terms "directly or indirectly" and "purely," which can only skew interpretations in unpredictable ways, should be removed. The NPR's stated exclusions from administrative functions should also be modified. "[A]ssisting in decision-making," such as by proposing efficient allocations, is quite properly described as an administrative function under the plain meaning of the term. Indeed, the term "administrative" in common parlance encompasses actions that involve making decisions and not just assisting with them, although a sweep allocation service provider such as Promontory Network does not have final authority over daily settlement. Likewise, "steering" is a loaded term that does not furnish a meaningful standard and should not be used to define "administrative."

c. The specific elements of the "facilitating" provision should be changed.

The proposed subsection (a)(5)(ii)(A) of section 336.7 of title 12, which states that a person is "facilitating" deposit placement if "[t]he person directly or indirectly shares any third party information with the insured depository institution,"[30] should be deleted. If it is not deleted, it should be changed to provide that a person is "facilitating" deposit placement if:

The person shares any personally-identifiable financial information of a depositor with the insured depository institution to enable the institution to solicit deposits from the depositor.

The proposed subsection (a)(5)(ii)(B), which states that a person is "facilitating" deposit placement if the person has "legal authority, contractual or otherwise, to close the account or move the third party's funds to another insured depository institution,"[31] should be changed to provide that a person is "facilitating" deposit placement if:

The person has exclusive legal authority, under a contract with a depositor, to close the depositor's deposit account or move the depositor's funds to another

---

[30] *Id.*

[31] *Id.* (proposed § 337.6(a)(5)(ii)(B)).

> **insured depository institution, other than at the direction of an agent or nominee acting on behalf of the depositor.**

The proposed subsection (a)(5)(ii)(C), which states that a person is "facilitating" deposit placement if the person provides any "assistance" with, or is in any way "involved" in, "setting rates, fees, terms, or conditions for the deposit account,"[32] should be changed to provide that a person is "facilitating" deposit placement if:

> **The person has exclusive legal authority, under a contract with the insured depository institution, to determine the interest rate for a deposit account at the insured depository institution, other than at the direction of an agent or nominee acting on behalf of the depositor.**

The proposed subsection (a)(5)(ii)(D), which states that a person is "facilitating" deposit placement if the person acts "directly or indirectly" with respect to deposit placement as an "intermediary" between a third party that is placing deposits and a bank, "other than in a purely administrative capacity,"[33] should be deleted because the terms "intermediary" and "administrative" are undefined. If it is not deleted, it should be changed to provide that a person is "facilitating" deposit placement if:

> **The person is acting, 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, but the performance of administrative or technology services for a broker-dealer or other agent or nominee acting pursuant to the primary purpose exception shall not constitute acting as such an intermediary.**

The proposed definition of "administrative or technology services" provided above should apply.

In past advisory opinions on "administrative" services for affiliated sweep programs under the primary purpose exception, the FDIC has demanded that a service provider be compensated only on the basis of a particular FDIC-selected compensation arrangement such as a flat fee.[34] No such requirement appears in the NPR, none should be applied by FDIC staff, and any such opinions should be treated as obsolete.

A sweep allocation service provider is entitled to be compensated for its services. Mandating any particular means of compensation for administrative or technology services would needlessly displace market determination of appropriate service pricing, making the process less economically efficient, to the detriment of all parties. Mandating a flat fee would also force the parties to adopt a fee structure that does not adequately link fees to transaction volume, which is the best determinant of work volume for the provider. Because the broker-dealer or other agent or

---

[32] *Id.* (proposed § 337.6(a)(5)(ii)(C)).

[33] *Id.* (proposed § 337.6(a)(5)(ii)(D)).

[34] *See, e.g.*, FDIC Advisory Opinion 05-02 (Feb. 3, 2005); FDIC Advisory Opinion 20-01 (Mar. 19, 2020).

nominee controls the deposit volume, compensating the allocation provider on the basis of volume would not create any inappropriate incentive for the provider.

A broker-dealer that places deposits pursuant to the primary purpose exception under the proposed rule will be subject to no restrictions on the type of fee it can receive or the methodology for computing the fee, nor should it be. Subject to SEC disclosure requirements, the broker-dealer can adopt the customary practice of having the bank pay a cost of funds rate that includes both customer interest and fees. Given that the broker-dealer is properly paid in this manner, there would be no reason for FDIC staff to force an allocation provider to accept a compensation arrangement outside this structure. The FDIC should make clear that it will not do so.

B. The proposed standard for when deposits are "accepted" is contrary to the plain meaning of the FDI Act.

The NPR states that the FDIC is considering an "approach" to when deposits are "accepted" under which "non-maturity brokered deposits are viewed as 'accepted' for the brokered deposits restrictions at the time any new non-maturity deposits are placed at an institution by or through a deposit broker." [35]

The approach described in the NPR appears to be a largely verbatim copy of language that appeared in a previous notice of proposed rulemaking on interest rate restrictions, except that the phrase "interest rate restrictions" is changed to "brokered deposits restrictions."[36] Promontory Network submitted comments on the previous notice in a letter to the FDIC dated November 4, 2019. Promontory Network attaches a copy of the 2019 letter and here incorporates the prior comments by reference, *mutatis mutandis*.

In the present letter, we simply note that the proposed interpretation in both notices is contrary to the plain meaning of "accepted" in the FDI Act. As the NPR initially recognizes, under the clear language of section 29(e) of the FDI Act, brokered deposits restrictions do not apply to "balances in a money market [deposit] account or other savings account, as well as transaction accounts, at the time an institution falls below well capitalized . . . ."[37]

The NPR goes on to say, however, that, under the FDIC's proposed interpretation, if funds are deposited in an account after a bank becomes not well capitalized, "the entire balance of the account would be subject to the brokered deposits restrictions,"[38] including the funds that were indisputably deposited, and therefore accepted, before the change in capital category.

---

[35] NPR at 7,463.

[36] FDIC, *Notice of Proposed Rulemaking on Interest Rate Restrictions on Institutions That Are Less Than Well Capitalized*, 84 Fed. Reg. 46,470, 46,479 (Sept. 4, 2019).

[37] NPR at 7,463.

[38] *Id.*

Because the statutory language is unambiguous, however, the FDIC has no statutory authority to declare that non-brokered deposits a bank indisputably "accepted" free of restrictions while well capitalized will retroactively be deemed to have been transformed into brokered deposits after the bank is no longer well capitalized.[39] As the NPR concedes just a few lines earlier, these deposits are not statutorily subject to the brokered deposits restrictions.[40]

As noted in Promontory Network's letter of November 4, 2019, the FDIC has long interpreted "accept," and has more recently interpreted the related word "receive," in a manner consistent with the plain language of the FDI Act. On several occasions, the FDIC has even corrected documents that suggested otherwise. The 2019 letter provides numerous examples.

* * *

Thank you for considering our comments. Should you wish to discuss them further, please contact the undersigned at (703) 292-3338 (dphillips@promnetwork.com).

Sincerely,

[redacted]

Douglas E. Phillips
Senior Vice President and General Counsel

Attachment

---

[39] As the Supreme Court famously declared in *Chevron U.S.A. Inc. v. National Resources Defense Council, Inc.*, 467 U.S. 837 (1984), courts and agencies alike "must give effect to the unambiguously expressed intent of Congress." *Id.* at 842-43.

[40] NPR at 7,463.

Promontory Interfinancial Network

Promontory Interfinancial Network, LLC
1300 North 17th Street
Suite 1800
Arlington, VA 22209-3810

T 703-292-3400
F 703-528-5700

www.promnetwork.com

November 4, 2019

comments@fdic.gov

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

Re: RIN 3064-AF02

Ladies and Gentlemen:

On behalf of Promontory Interfinancial Network, LLC ("*Promontory Network*"),[1] I write to comment on the Notice of Proposed Rulemaking on the Interest Rate Restrictions on Institutions That Are Less Than Well Capitalized, issued by the Federal Deposit Insurance Corporation (the "*FDIC*") and published in the Federal Register on September 4, 2019 (the "*NPR*").[2]

INTRODUCTION AND SUMMARY

The NPR requests "comment on a proposal that attempts to ensure that deposit interest rate caps appropriately reflect the prevailing deposit interest rate environment, while continuing to ensure that less than well capitalized institutions do not solicit deposits by offering interest rates that significantly exceed prevailing rates on comparable deposit products."[3]

In addition to proposing a change in how interest rate ceilings are determined, the NPR states that the FDIC is "considering an interpretation" of the Federal Deposit Insurance Act (the "*FDI Act*") that addresses when "non-maturity deposits are viewed as 'accepted' and 'solicited' for purposes of the interest rate restrictions."[4] The NPR also mentions that the FDIC plans to institute a future rulemaking on the meaning of the term "accepted."[5]

---

[1] Founded in 2002, Promontory Network provides services to the banking and brokerage industries. Promontory Network's deposit allocation and sweep services include CDARS®, the Certificate of Deposit Account Registry Service®, for time deposits, ICS®, the Insured Cash Sweep® service, for non-time deposits, and IND®, the Insured Network Deposits® service, for non-time deposits swept to banks primarily by broker-dealers.

[2] FDIC, *Notice of Proposed Rulemaking on Interest Rate Restrictions on Institutions That Are Less Than Well Capitalized*, 84 Fed. Reg. 46,470 (Sept. 4, 2019).

[3] *Id*. at 46,471.

[4] *Id*. at 46,479.

[5] *Id*.

The NPR acknowledges – quite correctly, in Promontory Network's view – that section 29(e) of the FDI Act restricts interest rates only on deposits that a bank accepts while the bank is not well capitalized. Consistent with section 29(e), the NPR states that, under the proposed interpretation, no rate restriction applies to deposits that are accepted in a non-maturity deposit account before a bank becomes not well capitalized.[6] The NPR adds – again quite correctly, we believe – that "the balance in the initial account would continue to not be subject to the interest rate restrictions so long as no additional funds were accepted" in that account.[7]

The NPR also states, however, that, under the proposed interpretation, the interest rate for an entire account will be restricted if any new deposits are added to it.[8] Promontory Network agrees that, in such circumstances, a limitation that applies to an entire account might be appropriate if there could be only one interest rate for the entire account. But interest rates for an account can be tiered in a way that applies different interest rates to different parts of the balance. When a bank finds that it can more efficiently use a tiering approach to comply with a rate restriction, the bank should be permitted do so.

In addition, the FDIC should reconsider its stated plan to address in a future rulemaking when deposits are "accepted" for purposes of restrictions related to prompt corrective action ("*PCA*"). The FDI Act's language is unambiguous, and the FDIC has long interpreted "accept," and has more recently interpreted the related word "receive," in a manner consistent with the statutory language. Suggesting that the meaning is in doubt when there is no valid ground for doubt would not be helpful.

DISCUSSION

A. The NPR correctly acknowledges that, under section 29(e) of the FDI Act, no rate restriction applies to deposits that a bank accepts while it is well capitalized.

In keeping with the clear language of section 29(e) of the FDI Act, the NPR recognizes that interest rate restrictions do not properly apply to "balances in a money market [deposit] account or other savings account, as well as transaction accounts, at the time an institution falls below well capitalized."[9]

Paragraph (1) of section 29(e) defines "covered insured depository institution" as an insured depository institution that:

---

6 *Id.*

7 *Id.*

8 *Id.*

9 *Id.*

(i) under subsection (c) or (d), accepts funds obtained, directly or indirectly, by or through a deposit broker; or

(ii) . . . accepts reciprocal deposits while not well capitalized.[10]

All the funds and reciprocal deposits described in paragraph (1) are funds or reciprocal deposits that a bank accepts while not well capitalized. Subsection (c) of section 29 permits a bank that is adequately capitalized, but not well capitalized, to accept brokered deposits pursuant to an FDIC waiver, and subsection (d) of section 29 permits acceptance of brokered deposits while not well capitalized for certain conservatorships.[11] Subsection (i) of section 29 permits a bank that is not well capitalized to accept reciprocal deposits under certain circumstances.[12]

Paragraph (2) of section 29(e) states:

> A covered insured depository institution may not pay a rate of interest on <u>funds or reciprocal deposits described in paragraph (1)</u> that, at the time that the funds or reciprocal deposits are accepted, significantly exceeds the limit set forth in paragraph (3).[13]

Because all the "funds or reciprocal deposits described in paragraph (1)" are funds or reciprocal deposits that a bank accepts while not well capitalized, the prohibition in paragraph (2), by its terms, applies only to such funds or reciprocal deposits.

B. The NPR states that the interest rate on an entire account will be restricted if any new deposits are added to it, but the statutory language does not support this result.

The NPR states that, under the FDIC's proposed interpretation, if funds are deposited in an account after a bank becomes not well capitalized, "the entire balance of the account would be subject to the interest rate restrictions."[14] The NPR makes it possible to avoid this result only by accepting no new dollars or by depositing new dollars in a new account: "If, however, the same customer deposited funds into a new account and the balance in that account was subject to the interest rate restrictions, the balance in the initial account would continue to not be subject to the interest rate restrictions so long as no additional funds were accepted."[15]

---

[10] 12 U.S.C. § 1831f(e)(1).

[11] *Id.* §§ 1831f(c), 1831f(d).

[12] *Id.* § 1831f(i).

[13] *Id.* § 1831f(e)(2) (emphasis added).

[14] NPR, *supra* note 2, at 46,479.

[15] *Id.* As a threshold point, Promontory Network notes that NPR initially states in general terms that the FDIC "is considering an interpretation under which nonmaturity deposits are viewed as 'accepted' and 'solicited' for purposes of the interest rate restrictions at the time any new non-maturity deposits are placed at an institution." *Id.* If the proposed interpretation asserted that <u>all</u> non-maturity deposits could be viewed as accepted or solicited at the time <u>any</u>

Seeking to provide a practical way to monitor application of rate restrictions to non-maturity deposits is understandable and reasonable. If an account contains $100 that an institution accepted while it was well capitalized, and a new $50 is added to the account after the institution becomes not well capitalized, the FDI Act restricts the interest rate only on the additional $50. But if a single rate applies to the entire $150 balance, then that rate must remain within the rate restriction to comply for the added $50. In many cases, the easiest solution may be simply to open a separate account for new dollars that will be subject to the restriction. The proposed interpretation recognizes that such a solution is fully compliant.

Nevertheless, the proposed interpretation appears to rest on an unstated assumption, which is that only one interest rate can apply to the entire balance in a single account. Contrary to this assumption, banks can and do pay "tiered interest," and in one form of tiered interest, a bank pays interest at different rates on different parts of a depositor's balance.[16] There is no apparent reason a bank could not tier interest in a way that would apply an unrestricted rate to the part of the balance that consists of brokered or reciprocal deposits received before the bank became not well capitalized and apply a restricted rate only to new brokered or reciprocal deposits in the account.[17]

With interest tiering, the restricted rate would apply on a last-in, first-out basis. After the bank became not well capitalized, the interest rate on the previously-accepted deposits in the account would – as under the statute it must – remain unrestricted, and only the rate on new deposits in the account would be restricted. Any withdrawal would then deplete the part of the account containing such new deposits ("*restricted-rate funds*") until no more restricted-rate funds were in the account. For example, if the account held $100 when the bank became not well capitalized, an additional $50 deposited in the account would be restricted-rate funds. A subsequent $30 withdrawal would deplete the restricted-rate funds, leaving intact $20 in restricted-rate funds as well as the original $100, for which the rate would not be restricted. A further $40 withdrawal would delete the remaining $20 of the restricted-rate funds plus $20 of the original $100, leaving funds to which no restriction applied ("*unrestricted-rate funds*") in the amount of $80. Thereafter, no more than $80 would be unrestricted-rate funds, and the process would

---

new non-maturity deposits were placed <u>at an institution</u>, then it would be inconsistent not only with the plain language of the statute, but also with the more detailed description of the proposed interpretation in the NPR.

The NPR states that, if the same customer deposits any new funds into a new account, "the balance in the initial account would continue to not be subject to the interest rate restrictions so long as no additional funds were accepted." *Id*. We therefore understand that the proposed interpretation is <u>not</u> one in which <u>all</u> non-maturity deposits are viewed as accepted or solicited when any new such deposits are placed at the bank, but one in which all non-maturity deposits <u>in an account</u> are viewed as accepted or solicited when any new such deposits are placed <u>in the account</u>.

[16] *See* Bureau of Consumer Financial Protection, Regulation DD, 12 C.F.R. Part 1030, app. A, part I(D), Tiering Method B (describing interest tiering in which different rates apply to different parts of the balance).

[17] A calculation of annual percentage yield ("*APY*") might be complicated, but Regulation DD often does not require an APY disclosure for accounts that hold brokered or reciprocal deposits. When a custodian rather than a consumer holds an account, as is usually the case for such deposits, only the advertising requirements apply. *See* 12 C.F.R. §§ 1030.1(c), 1030.2(a) (referring to the advertising requirements of 12 C.F.R. § 1030.8). The advertising requirements mandate disclosure of an APY only "[i]f an advertisement states a rate of return." 12 C.F.R. § 1030.8(b).

continue. The effect would be the same as if deposits after the bank became not well capitalized were placed in a separate account from which withdrawals occurred before depletion of the original account. The following table illustrates:

Last-In, First-Out Tiering Illustration

Day	Category/Transaction	Total Balance	Unrestricted-Rate Balance	Restricted-Rate Balance
1	Bank Is Well Capitalized	$100	$100	$0
2	Bank Becomes Not Well Capitalized	$100	$100	$0
3	$50 Deposit	$150	$100	$50
4	$30 Withdrawal	$120	$100	$20
5	$40 Withdrawal	$80	$80	$0
6	$30 Deposit	$110	$80	$30

Although banks might opt for the separate account method outlined in the NPR, the objective of providing a practical way to monitor application of the rate restrictions can be equally well met if a bank determines that it can more efficiently apply the restrictions through a single account with such a tiering approach, perhaps through the use of sub-accounting for internal tracking of the separate components of the balance. As long as the tiering approach prevents the payment of interest at a prohibited rate on brokered or reciprocal deposits that the bank accepts while not well capitalized, such an alternative solution is also fully compliant.

In one of the questions for comment, the NPR specifically asks with respect to the proposed interpretation: "Would there be substantial operational difficulties for institutions to monitor additions to these existing accounts in order to determine when they would be subject to the interest rate restrictions?"[18] The desire not to create operational difficulties at an already challenging time for a bank supports giving banks the option of complying either through a new account or through rate-tiering as described above.

Adding the rate-tiering option not only would bring the NPR's interpretation into more complete harmony with the statute, but also would further the policy goal of protecting the safety and soundness of weakened banks. The NPR itself recognizes that statutory terms such as "significantly exceeds" reflect the importance of avoiding excessive restriction of interest rates that could impair "create an unintentional liquidity strain" and prevent them from being competitive "when they are most in need of predictable liquidity," thus potentially "creat[ing] severe funding problems."[19]

If a bank must reduce the rate at which it pays interest on previously-accepted deposits in an account merely because the bank chooses to apply a rate restriction through rate-tiering, rather

[18] NPR, *supra* note 2, at 46,493.

[19] *Id.* at 46,473.

than establishing a separate account, the bank may lose vital funding for no good reason. This effect is more likely to harm the Deposit Insurance Fund than to help it.

C. The FDIC should reconsider its stated plan to address in a future rulemaking when deposits are "accepted."

The NPR states: "The FDIC plans to address in a future rulemaking when deposits are 'accepted' for purposes of [specified] PCA-related restrictions, both for non-maturity deposits, such as transaction accounts and MMDAs, as well as for certificates of deposits and other time deposits."[20] Because the statutory language is unambiguous, however, the FDIC cannot depart from it.[21] By seeming to suggest that the FDIC might even consider departing from the statutory language, a rulemaking could unintentionally create an unnecessary problem.

The FDIC has long interpreted "accept," and has more recently interpreted the related word "receive," in a manner consistent with the plain language of the FDI Act. On several occasions, the FDIC has even corrected documents that suggested otherwise. For example:

- In January 2015, the FDIC issued a financial institution letter accompanied by an FAQ document.[22] The document erroneously suggested that section 29(a) of the FDIC Act, which prohibits not well capitalized institutions from accepting brokered deposits, prohibits such an institution "from continuing to hold brokered" non-maturity deposit accounts and declared that the institution "must close these accounts."[23] After this issue was raised with senior officials, the FDIC corrected the error in FAQ F5 by withdrawing the erroneous statement quoted above when it issued a revised FAQ document for public comment on November 13, 2015.[24]

- Although no commenter disagreed with the revised FAQ F5, on June 30, 2016, the FDIC issued a new financial institution letter with a further revised version of the FAQs that reinserted erroneous language, indicating that an adequately capitalized institution would be required to request a waiver from the FDIC to "retain or accept" brokered deposits.[25] The issue was again raised with senior officials. The FDIC then issued a further revised version of the FAQ document with a technical correction that deleted

[20] *Id*. at 46,479

[21] As the Supreme Court famously declared in *Chevron U.S.A. Inc. v. National Resources Defense Council, Inc.*, 467 U.S. 837 (1984), courts and agencies alike "must give effect to the unambiguously expressed intent of Congress." *Id.* at 842-43.

[22] FIL-2-2015, *Guidance on Identifying, Accepting, and Reporting Brokered Deposits* (Jan. 5, 2015).

[23] *Id*., FAQ F5, accompanying FIL-2-2015.

[24] FIL 51-2015 (Nov. 13, 2015).

[25] FIL 42-2016 (June 30, 2016).

"retain or," clarifying that section 29(a) of the FDI Act applies only to deposits that arrive after an institution becomes not well capitalized.[26]

- More recently, in September 2018, the FDIC issued a Notice of Proposed Rulemaking to implement section 202 of the Economic Growth, Regulatory Relief, and Consumer Protection Act. That document contained language that could have been taken to mean that the so-called "special cap" of section 29(i) of the FDI Act, which pertains to the amount of reciprocal deposits that certain institutions can "receive," also restricted the amount of reciprocal deposits that such institutions could "maintain," "retain," or "hold."[27] In December 2018, the FDIC issued the final rule and stated: "Transactional reciprocal deposits are viewed as being 'received' daily."[28] Subsequently, however, the FDIC issued a technical correction modifying the Final Rule to eliminate that language, noting that "[t]he FDIC does not intend [the problematic language] to change existing interpretations related to accepting or receiving deposits."[29]

Other publications from the FDIC further confirm its longstanding interpretation of the term "accept" in the context of section 29:

- In a June 2009 report, the FDIC's Office of Inspector General ("*OIG*") reproduced excerpts from the FDIC's standard form of notification letter to institutions that have dropped to adequately capitalized status. The letter states that "[b]rokered deposits that were previously accepted while the institution was well capitalized . . . do not require a waiver."[30]

- In an earlier advisory opinion on pass-through insurance for employee benefit plans, which at the time of the guidance were eligible for pass-through insurance only if the bank could accept brokered deposits, the FDIC advised that, if an existing deposit had "a stated maturity," such as a time deposit, and was "renewed or 'rolled over' after the prohibition [of the acceptance of brokered deposits became] applicable," the deposit would be "considered newly accepted at the time of renewal and no longer eligible for

---

[26] FDIC, *Identifying, Accepting and Reporting Brokered Deposits, Frequently Asked Questions*, F1 (June 30, 2016, with technical correction on July 14, 2016), https://www.fdic.gov/news/news/financial/2016/ fil16042b.pdf.

[27] FDIC, *Limited Exception for a Capped Amount of Reciprocal Deposits From Treatment as Brokered Deposits*, 83 Fed. Reg. 48,562, 48564 (Sept. 26, 2018).

[28] FDIC, *Limited Exception for a Capped Amount of Reciprocal Deposits From treatment as Brokered Deposits*, 84 Fed. Reg. 1,346, 1349 n.28 (Feb. 4, 2019).

[29] FDIC, *Limited Exception for a Capped Amount of Reciprocal Deposits From treatment as Brokered Deposits; Technical Amendments*, 84 Fed. Reg. 15,096 (Apr. 15, 2019).

[30] FDIC, Office of Inspector General, *FDIC's Brokered Deposit Waiver Application Process*, Report No. AUD-09-015, https://www.fdicig.gov/publications/reports09/09-015-508.shtml, at 15 (June 2009) (emphasis added). The reason that funds that were "previously accepted" do not require a waiver is that section 29 does not prohibit a bank from continuing to "hold" or "retain" such funds, so there is no prohibition to be waived.

> pass-through insurance."[31] The advisory opinion added, however, that funds previously "deposited with no stated maturity" would not be deemed to have been "renewed or 'rolled over'" after the prohibition of acceptance and therefore would "continue to be eligible for pass-through insurance until withdrawn."[32]

Although the NPR refers to a planned future rulemaking on when deposits are "accepted" for purposes of PCA-related restrictions, the current rulemaking already applies "accepted" in the context of rate restrictions, which are PCA-related. In applying the term, the current rulemaking necessarily rejects any idea that a bank somehow repeatedly "accepts" or "receives" the same non-maturity deposit after the bank has already credited the funds to an account. If existing balances were treated as being re-"accepted" or re-"received" every day on which they were retained, for example, the NPR simply could not say, as it does, that, if a customer "deposited funds into a new account and the balance in that account was subject to the interest rate restrictions, the balance in the initial account would continue to not be subject to the interest rate restrictions so long as no additional funds were accepted."[33] It is not clear why the FDIC would continue to apply existing practice in the current rulemaking, but simultaneously signal that a future rulemaking conceivably might adopt an unsupported interpretation of the FDI Act.

Accordingly, we suggest that the notice of the final rule in the current rulemaking simply affirm the plain meaning outlined above, rather than – by suggesting that there is an open issue on the question – creating confusion and uncertainty where none should exist. At a minimum, the notice should make clear that the FDIC, in any proposed new rule, will not adopt an interpretation that would be inconsistent with the necessary premise of the current interpretation that, for PCA-related purposes, a bank does not again "accept" or "receive" the same non-maturity deposit after the funds have already been credited to an account at the bank.

* * *

[31] FDIC, *Advisory Opinion* 92-96 (Dec. 18, 1992), https://www.fdic.gov/regulations/laws/rules/4000-7870.html. Then-effective rules did not provide for insuring an employee benefit plan deposit "accepted by an insured depository bank which, at the time the deposit is accepted, may not accept brokered deposits." 58 Fed. Reg. 29,952 (May 25, 1993). As a result, the FDIC interpretation under this rule is instructive. Indeed, the FDIC stated that it viewed its approach under these rules as consistent with its brokered deposit regulations. FDIC, *Advisory Opinion* 92-96, *supra*.

[32] *Id*.

[33] NPR, *supra* note 2, at 46,479.

Thank you for considering our comments. Should you wish to discuss them further, please contact the undersigned at (703) 292-3338 (dphillips@promnetwork.com).

Sincerely,

[redacted]

Douglas E. Phillips
Senior Vice President and General Counsel