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June 9, 2020

Submitted Electronically

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

Re: Brokered Deposits (RIN 3064-AE94)

Dear Mr. Feldman:

U.S. Bank National Association (U.S. Bank or the Bank) appreciates the opportunity to comment on the Federal Deposit Insurance Corporation's (FDIC) notice of proposed rulemaking (NPR) in connection with the FDIC's regulatory framework for brokered deposits.[1] We appreciate the effort the FDIC has put into modernizing its approach towards brokered deposits and support the overall goal of a revised framework that accounts for the advances in technology, business practices, and products that have occurred since the brokered deposit regulations were issued in 1990.[2]

U.S. Bancorp, with over 70,000 employees and $543 billion in assets as of March 31, 2020, is the parent company of U.S. Bank, the fifth-largest commercial bank in the United States. We strive to create products and services that are beneficial to our customers and that serve all members of our community. As consumer tastes and preferences change, we blend our relationship teams, branches, and ATM network with mobile and online tools that allow customers to bank how, when, and where they prefer.

We agree with the FDIC that an updated and transparent framework that aligns more closely to the letter and spirit of the statute[3] will encourage banks to engage in the development of innovative products, services, and delivery channels to meet evolving customer needs that are at the core of a stable deposit funding strategy.[4] In order to achieve this objective, the final rule must be simple, easy to understand, and provide transparency regarding the FDIC's perspective on its application. In our view, this is best accomplished by providing bright-line standards in the rule text and through explicit examples to bring clarity to existing practices; by formalizing a process for stakeholders to seek interpretive guidance regarding novel practices, which is made public, including the facts and analysis supporting such guidance; and by finalizing existing guidance through incorporation into a final rule, rescission, or a notice and comment process.

[1] FDIC, Unsafe and Unsound Banking Practices: Brokered Deposits Restrictions, Notice of Proposed Rulemaking and Request for Comment, 85 Fed. Reg. 7453 (Feb. 10, 2020).
[2] FDIC, Unsafe and Unsound Banking Practices, Final Rule, 55 Fed. Reg. 39135 (Sep. 25, 1990).
[3] Section 29 of the Federal Deposit Insurance Act.
[4] FDIC Fact Sheet, Notice of Proposed Rulemaking on Brokered Deposit Restrictions (December 12, 2019), available at https://www.fdic.gov/news/brokerdep.pdf.

We have contributed to the responses by the Bank Policy Institute, American Bankers Association, and the Consumer Bankers Association (the Trade Groups) and generally agree with their positions regarding the proposal. In particular, we support the following points:

- The final rule should not deem parties merely sharing certain information with insured depository institutions to be "engaged in the business of facilitating the placement of deposits."
- The final rule should provide bright-line criteria for the primary purpose exemption, similar to the approach taken for definition of "deposit broker," rather than establishing a mandatory application and reporting process.

In addition, we believe that the FDIC should revise its brokered deposits framework as follows:

- The final rule should exclude affiliate sweep deposits from the definition of brokered deposits.
- The final rule should provide non-exclusive examples of relationships that would not be considered facilitating the placement of deposits.
- The final rule should permit fees and interest to be paid by an IDI to depositors in the context of the payments enabling exception.
- The final rule should revisit certain FDIC staff advisory opinions.

Finally, the FDIC should work with other agencies to conform the liquidity and tailoring rules to the new brokered deposit framework.

I. The final rule should not deem parties merely sharing certain information with insured depository institutions to be "engaged in the business of facilitating the placement of deposits."

We agree with the comments made by the Trade Groups that the FDIC should not include third party information sharing as a necessary prong of the proposed definition of facilitating the placement of deposits. Under the proposal, one can be considered a deposit broker if engaged in the business of facilitating the placement of deposits. However, the proposed definition of "facilitating" includes a person that merely "directly or indirectly shares any third party information with the insured depository institution" ("information sharing prong").[5]

The preamble to the proposed rule states that the facilitating definition is intended to capture activities "that indicate 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 opened."[6] Based on the FDIC's stated intent, we do not believe that the mere sharing of third party information leads to the conclusion that an entity is facilitating the placement of deposits. Rather, we believe the other activities proposed by the FDIC[7] reflect conduct of a person taking an active role in the opening of an account, which necessarily

[5] 85 Fed. Reg. at 7472.
[6] 85 Fed. Reg. at 7457.
[7] In addition to the information prong, the facilitating the placements of deposits definition would also comprise the following: (1) The person has legal authority, contractual or otherwise, to close the account or move the third party's funds to another insured depository institution; (2) The person provides assistance or is involved in setting rates, fees, terms, or conditions for the deposit account; or, (3) 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.

includes the sharing of customer information. This means that the information sharing prong is not necessary to achieve the FDIC's goal and could lead to confusion.

In order to execute on the conduct described in the definition, customer information must be shared. Simply sharing information about a potential depositor with a bank does not indicate that the third party takes an active role in opening an account or that it maintains influence or control over the account after it is opened. In addition, information sharing arrangements have become more commonplace with the proliferation of technology; so much so that inclusion of this prong as a stand-alone factor is overinclusive and would likely expand the types of accounts subject to the brokered deposit rule. Moreover, this definition would obviate the proposed definition of deposit broker and return us to a state similar to the current framework where any third-party interaction with regards to a customer account could make the resultant deposit brokered, albeit now with a mandatory application and reporting process. Such expansion is contrary to the stated aims of the FDIC towards a consistent and efficient administrative process.

For the reasons outlined above, the final rule should not include information sharing activities as part of the facilitation definition.

II. The final rule should provide bright-line criteria for the primary purpose exemption, similar to the approach taken for definition of "deposit broker," rather than establishing a mandatory application and reporting process.

We agree with the comments made by the Trade Groups that the administration of the primary purpose exception and the purpose of Section 29 of the Federal Deposit Insurance Act would best be served by a framework that consists of bright-line criteria that banks may independently apply to their individual circumstances, rather than a mandatory application and reporting process. This would be consistent with the FDIC's proposed approach towards the definition of "deposit broker."

The FDIC should instead offer a process for stakeholders to seek interpretive guidance for innovative activities that clearly do not meet all of the criteria set forth in the final rule. Rather than inundate the FDIC with large numbers of applications for accounts whose brokered deposit status could otherwise be determined under bright-line criteria, an interpretive guidance process for unsettled or novel matters would serve to provide the FDIC and the industry insight into new and emerging relationships that do not neatly fit within the new brokered deposit framework. Such a process, in conjunction with a set of bright-line criteria, would not only provide clarity for the applicants, but also would benefit the FDIC by providing valuable information regarding developments in the marketplace. By providing bright-line criteria and a voluntary interpretive guidance process in which decisions, and the bases upon which these decisions are made would be public, the FDIC would be able to achieve its goal of transparency and leveling the playing field for all market participants.

Finally, we are concerned that the proposal as written would create such a large number of application filings on primary purpose questions that it would backlog the FDIC and prevent the agency from working with banks on truly innovative products and services. For instance, under the current proposal we may need to file an application for each of our prepaid account customers, which would comprise thousands of employers under one program. Many of our products are simple, easy-to-understand, and standardized, such that they could neatly fit within a well-defined rule. A transparent framework with bright-line criteria and a voluntary process to seek interpretive guidance would instead allow us to focus on partners that develop new types of products, including those that serve an underbanked or unbanked population, and to bring those relationships to the FDIC's attention when there are specific areas of ambiguity.

Regardless of the final scope of the formal process, the FDIC should publish its decisions regarding the status of potential brokered deposit relationships. When publishing such decisions, the FDIC should also include the basic facts and substantive analysis which informed the conclusion of the agency so the entire industry, including customers, can understand the rationale for these decisions. This request recognizes and supports the need to protect the identity of an applicant and potential sensitive trade secrets and proprietary information. Without publication of decisions in detail, the brokered deposits regulatory framework will continue to remain fragmented and opaque.

III. The final rule should exclude affiliate sweep deposits from the definition of brokered deposits.

The final rule should exclude affiliate sweep deposits from client investment accounts from the definition of brokered deposits because affiliate employees or their affiliate employers, in fulfilling a client service, should not be considered deposit brokers. The proposal would adopt a process by which almost all third parties placing deposits at insured depository institutions (IDIs), regardless of affiliate status, would be considered deposit brokers unless they apply to the FDIC for a determination that the primary purpose exception to the deposit broker definition applies to that third party. While the proposed rule would recognize that the primary purpose exception should cover certain broker-dealer placement activities, the rule, as proposed, would nevertheless require an application from affiliates. The final rule should not require an application from affiliates for the reasons outlined below.

Affiliate employees refer customers to an IDI as part of an established banking relationship that provides a broader suite of products and services to the customer. For example, brokerage accounts that "sweep" customers' uninvested cash balances into deposit accounts at an IDI generally leads to long-term customer relationships similar to those in which the customer's first contact is with the bank itself. Indeed, as the FDIC noted in its 2011 Core Deposits Study, "[affiliate] referrals are ancillary to the affiliates' legitimate businesses and are usually based upon a relationship between the customer and the affiliate," and "because depositors have a relationship with an affiliate of the bank, these deposits may behave more like deposits where the bank itself has a relationship with the depositor, and thus may be more stable and less likely to leave for higher rates or when the bank is under stress."[8] The statutory definition of "deposit broker" does not encompass deposits that result from affiliate employee referrals in connection with providing access to banking services to meet customer needs. Therefore, the FDIC should not treat such affiliate employees (or affiliates such as broker-dealers) engaging in these activities as deposit brokers.

Furthermore, the statutory exclusions from the "deposit broker" definition in Section 29[9] were included based on the conduct of the business of banking at the time the statute was enacted. To reflect contemporary banking practices and to appropriately ground future affiliate interpretations within the language of and Congressional intent behind Section 29, the final rule should exclude affiliate sweep deposits from the definition of brokered deposits.

IV. The final rule should provide non-exclusive examples of relationships that would not be considered facilitating the placement of deposits under the rule.

The final rule should provide examples of relationships that would generally not be implicated the facilitation prong of the brokered deposit definition. For example:

[8] FDIC Study on Core Deposits and Brokered Deposits (July 8, 2011), at 56-57.
[9] 12 U.S.C. § 1831f(g)(2).

- *Marketing and advertising partnerships*. The final rule should explicitly state that marketing and advertising arrangements do not constitute facilitating the placement of deposits, as long as (1) the arrangement results in a direct relationship between a depositor and an IDI and (2) the marketer or advertiser does not have an ongoing contractual or other right to move the depositor's funds to another IDI. This would be consistent with Chairman McWilliams' statement that "[t]he proposal [clarifies] that various types of existing partnerships in which a consumer maintains a relationship directly with a bank generally would not result in a brokered deposit."[10] Furthermore, the staff Memorandum on the Notice of Proposed Rulemaking Brokered Deposits Restrictions provides that market research, advertising by simply including a link on a website, or general consulting and other advisory services would not cause a person to be a deposit broker.[11] These types of arrangements, such as internet marketing, mobile, and internet-based partnerships, including the use of application programming interfaces, or APIs, allow a bank to connect directly with and strengthen relationships with customers, which is a common aim of every business.

- *Affinity groups*. The final rule should exclude affinity groups from the definition of deposit broker where their activities do not meet the placement or facilitating criteria of the rule (as modified) and which results in a direct relationship between a depositor and a bank. The FDIC has previously provided guidance in Advisory Opinions No. 93-30 and 93-71 and FAQ B4 indicating that limited types of activities by affinity groups are not considered to be brokered. In conjunction with new standards in a modified proposed rule, explicitly excluding affinity group activities would provide clarity to these types of bank partnerships.

V. The final rule should permit fees and interest to be paid by an IDI to depositors in the context of the payments enabling exception.

We appreciate the proposal by the FDIC not to consider the primary purpose of an agent's or nominee's business relationship with its customers to be the placement of funds if the agent or nominee places depositors' funds into transactional accounts for the purpose of enabling payments. This reflects the purpose and function of our long-standing and stable customer payments relationships and encourages responsible innovation.

Consistent with our recommendations in Section II, the final rule should not subject programs qualifying for the payments enabling exception to a mandatory application and reporting process. Whether or not the final rule adopts a simple and more transparent bright-line rule or retains the proposed application requirement for the primary purpose exception, the criteria for the payments enabling exception should be revised to allow for nominal incentives and minimal interest to be paid by an IDI to depositors. Such practices, though minimal, encourage customers to remain in the banking system and to adopt simple practices towards building wealth. A brokered deposit designation for these types of products increases the costs to IDIs of offering such products, which generally leads to reduced availability.

Under the proposed rule, third parties would qualify for the primary purpose exception based on the placement of customer funds, with respect to a particular business line, at IDIs to enable customers to make transactions. As part of the application process, however, if *any* remuneration is paid (including minimal interest or fees paid to the deposit account), the FDIC "would more closely scrutinize the

[10] Remarks by Chairman Jelena McWilliams, "Brokered Deposits in the Fintech Age" (December 11, 2019), available at: https://www.fdic.gov/news/news/speeches/spdec1119.pdf, at 4.
[11] Memorandum Notice of Proposed Rulemaking - Brokered Deposits Restrictions (March 2, 2020), available at: https://www.fdic.gov/regulations/laws/federal/2020/2020-unsafe-unsound-banking-practices-brokered-deposits-3064-ae94-staff-001.pdf.

agent's or nominee's business to determine whether the primary purpose is truly to enable payments,"[12] but does not provide a rationale for this concern. The final rule should allow nominal incentive payments in this area without the need for further scrutiny from the FDIC. For instance, small incentive fees may be offered to cardholders to enroll in certain prepaid card programs. These incentives, albeit nominal, encourage the initial adoption of innovative payment methods. Such minimal payments should not be indicative of an engagement in the business of facilitating the placement of deposits. Similarly, payment of limited interest on such products does not indicate a primary purpose other than enabling transactions or payments, because the reason for the product itself, such as a prepaid card, and the terms surrounding its use, is to enable transactions.

Furthermore, some prepaid programs may include a voluntary savings feature in which some amount of the prepaid card funds is transferred to a savings account at the IDI. Such arrangements involving non-transaction accounts also should not be disqualified from the primary purpose exception or require extra scrutiny. In these cases, such as prepaid cards provided to employees, cardholders are offered the option to automatically transfer money to a savings account in the name of and controlled by the cardholder. These cardholders are often underbanked or unbanked and the account provides a means to build a small amount of savings. The design of these programs is not to encourage the placement of additional deposits at an IDI but rather to support wealth creation of existing customers. The purpose of such an arrangement would be consistent with the primary purpose exception as proposed.

VI. The final rule should revisit certain FDIC staff advisory opinions.

The final rule should codify certain FDIC staff advisory opinions that are consistent with the proposed rule, have been discussed in numerous comment letters over the years, and are relied upon by IDIs in their daily customer interactions. Similarly, the FDIC should rescind certain opinions that are clearly inconsistent with the final rule. Finally, we support the FDIC's review of remaining advisory opinions, subject to notice and comment, for continued applicability following publication of the final rule.

A. Codification of certain FDIC staff advisory opinions

- *Sweep Deposits*. If the FDIC retains a mandatory application process as proposed, the final rule should codify Advisory Opinion No. 05-02[13] as a self-executing primary purpose exception to the deposit broker definition. Requiring banks or broker-dealers that rely on this guidance to apply for the primary purpose exception would be extremely disruptive to many existing relationships. The rule should also clarify that broker-dealers under this exception would be permitted to sweep cash balances of brokerage accounts into deposit accounts at unaffiliated depository institutions provided the other substantive qualifications established in Advisory Opinion No. 05-02 are satisfied. Our experience with such accounts has shown that these deposits represent a stable and consistent source of funding and are reflective of long-standing relationships between the bank and its broker-dealer customers and a high customer retention rate.

- *SEC Rule 15c3-3(e) and CFTC Rule 1.20 Accounts*. FDIC staff has previously opined that placing of customer funds at a bank by broker-dealers under SEC Rule 15c3-3(e) does not constitute deposit brokering under the primary purpose exception. This is because "[t]he funds

[12] 85 Fed. Reg. at 7460. The preamble indicates that the analysis is determined by whether remuneration is provided to the depositor. "Under the proposal, if an agent or nominee places 100 percent of its customer funds into transaction accounts at depository institutions and no fees, interest, or other remuneration is provided *to the depositor*, then it would meet the primary purpose exception of enabling payments, subject to providing information as part of the application process." 85 Fed. Reg. at 7459 (emphasis added). The actual text of the proposed rule does not, however, limit closer scrutiny only to those fees, interest or other remuneration made to the depositor. The final rule should clarify this point with the suggested modifications.
[13] FDIC Advisory Opinion No. 05-02 (Feb. 3, 2005).

are placed in the depository institution for a substantial purpose other than to gain deposit insurance coverage," namely, "to satisfy the mandate of Rule 15c3-3(e)" [14] The FDIC used similar logic in its analysis of funds placed at IDI by futures commission merchants under CFTC Rule 1.20.[15] These opinions should be codified in the final rule.

- *Property Management, Mortgage Servicer, and Escrow Services*. In Advisory Opinion No. 17-02, the FDIC reached a number of common-sense conclusions related to the management of property and mortgages related to real estate. Firms or servicers that place these deposits in an IDI do so on behalf of the underlying depositors for a primary purpose that reflects their business model, e.g., the management of upkeep, income, and expenses of a property, the collection of mortgage payments to fulfill lender requirements, or the collection of escrow to facilitate real estate transactions. As FDIC staff concluded, the primary purpose of these arrangements is therefore something other than placement or facilitating the placement of deposits. Customers and IDIs who serve those customers would benefit from certainty surrounding the treatment of these deposits in a final rule.

- *Reclassification of deposits as non-brokered*. Under FAQ F2 and FAQ F3, an IDI may reclassify previously brokered maturity deposits or non-maturity deposits as non-brokered deposits at the time of renewal or rollover or after 12 months, respectively, if no third party is "involved in the account."[16] The ability to reclassify deposits after a certain period sensibly reflects the direct relationships that banks have with customers. In light of the new definitions provided under the proposed rule, additional, potentially conflicting, guidance with regards to these deposits would cause confusion. Therefore, final rule should codify the simple renewal concept embodied in these FAQs and apply that concept to maturity and non-maturity deposits, with reference to the placement of or facilitating the placement of deposits prongs of the new brokered deposit definition and not a vague "involved in the account" standard.

B. Rescission of certain opinions

- *Active v. passive marketing*. Consistent with the comments regarding marketing and advertising partnerships above, the proposed rule provides a new framework that revises the definition of "engaged in the business of facilitating the placement of deposits." This definition would supersede the FDIC's prior guidance relating to marketing relationships, particularly the distinction between "active" and "passive and indirect" marketing. As a result, the FDIC should rescind FAQs B4 and B8, and Advisory Opinion 93-71 (with respect to its discussion of "passive and indirect marketing").

- *Prepaid cards and programs.* The FDIC should rescind E10, E11, and E12 of its 2016 FAQs, which present a view that virtually all deposits placed in connection with prepaid card programs are brokered. The proposed rule would create a new framework for addressing prepaid products and programs. This framework, including the modifications discussed above, would allow IDIs to offer innovative features demanded by customers. Retaining the 2016 FAQs related to these

[14] FDIC Advisory Opinion No. 94-39 (Aug. 17, 1994).
[15] FDIC Advisory Opinion No. 17-02 (June 19, 2017).
[16] FAQ F3 provides that "involvement by a third party" includes (1) holding the account in the name of the deposit broker as agent for one or more customers; (2) the deposit broker's continuing to receive account fees after the account is opened; (3) the deposit broker's having the authority to make withdrawals or additional deposits; or (4) the deposit broker's having continued access to the account. "Continued access means that a third party will continue to receive access to the customer's account information that has been provided for the purpose of offering guidance to the customer as to the investment of the funds in the account."

products and programs after finalization of the rule would create confusion regarding the status of these important means of payment.

VII. The FDIC should work with other agencies to conform the liquidity and tailoring rules to the new brokered deposit framework.

The FDIC should work in concert with the Office of Comptroller of the Currency and the Board of Governors of the Federal Reserve System to update the Liquidity Coverage Ratio (LCR) and proposed Net Stable Funding Ratio (NSFR) rules and related reports and reporting instructions to conform them with the new brokered deposit framework. In addition, in light of the new brokered deposit framework, the agencies should review the treatment of brokered sweep deposits under the short-term wholesale funding calculation for purposes of the banking agencies' tailoring rules.[17] The success of the FDIC's new brokered deposits framework in encouraging innovation will otherwise be limited by the legacy treatment of brokered deposits under rules that utilize the brokered deposit designation for purposes unforeseen by the original statute.

For example, the FDIC and other federal banking regulators should revise the LCR and the proposed NSFR to align the treatment of deposits with the FDIC's brokered deposit regulations by not including sweep deposits that qualify for the primary purpose exception in the definition of "brokered sweep deposits." The punitive treatment of brokered deposits in these rules increases the cost of offering these products to customers and impacts the ability of banks to remain agile in response to customer demand and ever-changing market forces. Furthermore, the use of terms such as 'brokered sweep deposits," which are not found in the FDIC's brokered deposit rule (even as proposed) but still reference that rule, does not provide the full clarity and transparency that IDIs, regulators, and the market seek when attempting to understand an IDI's liquidity and funding profile. Therefore, these rules, as well as the tailoring rules, should be modified to remain consistent with a more rational and transparent brokered deposits framework.

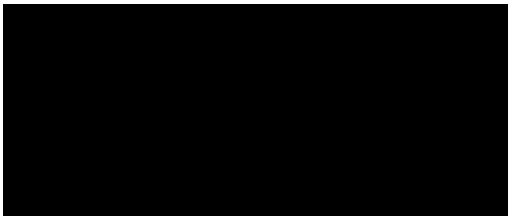
Conclusion

We continue to support the FDIC's efforts to modernize its deposit insurance framework, including those efforts to align its treatment of brokered deposits more closely with Congressional intent.

We appreciate the opportunity to provide these comments in response to the NPR and thank the FDIC for its consideration of the suggestions contained in this letter. Should you have any questions or would like to discuss these comments further, please do not hesitate to contact Jason Fincke in our Legal Regulatory Group at 612.965.6878 or jason.fincke@usbank.com.

[17] All retail deposits identified as brokered deposits and brokered sweep deposits under the LCR are reported on Form FR Y-15 as retail brokered deposits and sweeps for purposes of the tailoring rules' weighted short-term wholesale funding indicator. 84 Fed. Reg. 59230, 59242 (Nov. 1, 2019).

Sincerely,



John C. Stern
Executive Vice President and Treasurer

cc: David H. Wright, Director of Regulatory Services