FEDERAL DEPOSIT INSURANCE CORPORATION

12 CFR Parts 303

and 337

RIN 3064–AF99

Unsafe and Unsound Banking Practices: Brokered Deposits Restrictions

AGENCY: Federal Deposit Insurance Corporation (FDIC).

ACTION: Notice of proposed rulemaking.

SUMMARY: The FDIC is inviting comment on proposed revisions to its regulations relating to the brokered deposits restrictions that apply to less than well-capitalized insured depository institutions. The proposed rule would revise the "deposit broker" definition and would amend the analysis of the "primary purpose" exception to the "deposit broker" definition. The proposed rule would also amend two of the designated business relationships under the primary purpose exception and make changes to the notice and application process for the primary purpose exception. In addition, the proposed rule would clarify when an insured depository institution can regain status as an "agent institution" under the limited exception for a capped amount of reciprocal deposits.

DATES: Comments must be received by the FDIC no later than **[INSERT DATE 60 DAYS AFTER DATE of PUBLICATION IN THE *FEDERAL REGISTER*]**.

ADDRESSES: You may submit comments on this document using any of the following methods:

- *Agency Website https://www.fdic.gov/resources/regulations/federal-register-publications/.* Follow the instructions for submitting comments on the agency website.
- *Email:* comments@fdic.gov. Include RIN 3064–AF-99 in the subject line of the message.
- *Mail:* James P. Sheesley, Assistant Executive Secretary, Attention: Comments – RIN 3064–AF-99, Federal Deposit Insurance Corporation, 550 17th Street, N.W., Washington, D.C. 20429.
- *Hand Delivery:* Comments may be hand delivered to the guard station at the rear of the 550 17th Street NW Building (located on F Street) on business days between 7 a.m. and 5 p.m.
- *Public Inspection:* Comments received, including any personal information provided, may be posted without change to *https://www.fdic.gov/resources/regulations/federal-register-publications/.* Commenters should submit only information that the commenter wishes to make available publicly. The FDIC may review, redact, or refrain from posting all or any portion of any comment that it may deem to be inappropriate for publication, such as irrelevant or obscene material. The FDIC may post only a single representative example of identical or substantially identical comments, and in such cases will generally identify the number of identical or substantially identical comments represented by the posted example. All comments that have been redacted, as well as those that have not been posted, that contain comments on the merits of the notice will be retained in the public comment file and will be

considered as required under all applicable laws. All comments may be accessible under the Freedom of Information Act.

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SUPPLEMENTARY INFORMATION:

I. Introduction and Policy Objectives

The FDIC's mission is to maintain stability and public confidence in the nation's financial system by, among other things, overseeing financial institutions for safety and soundness and insuring deposits. Since the enactment of section 29 of the Federal Deposit Insurance Act (FDI Act),[1] which prohibits less than well-capitalized[2] insured depository institutions[3] (IDIs) from accepting brokered deposits,[4] the FDIC has continued to study the role of brokered deposits in the performance of IDIs, their impact on the safety and soundness of IDIs, and how they affect losses to the Deposit Insurance Fund (DIF) when an IDI fails.

[1] 12 U.S.C. 1831f.
[2] For purposes of section 29 of the FDI Act and section 337.6 of the FDIC's Rules and Regulations, 12 CFR 337.6, the terms "well capitalized," "adequately capitalized," and "undercapitalized" have the same meaning as to each IDI as provided under the regulations implementing section 38 of the FDI Act issued by the appropriate federal banking agency for that institution. *See* 12 CFR 337.6(a)(3)(i).
[3] Insured depository institutions include banks and savings associations insured by the FDIC. *See* 12 U.S.C. 1813(c)(2).
[4] The FDIC may, on a case-by-case basis and upon application by an adequately capitalized IDI, waive the restriction. *See* 12 U.S.C. 1831f(c).

The FDIC has found significant reliance on brokered deposits increases an institution's risk profile, particularly as its financial condition weakens. The FDIC's statistical analyses and other studies have found that an IDI's use of brokered deposits in general is correlated with a higher probability of failure and higher losses to the DIF upon failure.[5]

On December 15, 2020, the FDIC Board adopted a final rule that established a new framework for analyzing whether certain deposit arrangements qualify as brokered deposits (the 2020 Final Rule).[6] After the 2020 Final Rule took effect, the FDIC initially observed a significant decline in reported brokered deposits. IDIs reported a nearly $350 billion, or 31.8 percent, decline in brokered deposits between the first and second quarters of 2021 after the 2020 Final Rule became effective, which is the largest quarterly decline since brokered deposit reporting began in 1983.[7] This significant decline can be interpreted as IDIs reclassifying a considerable amount of deposits from brokered to not brokered, as a result of the 2020 Final Rule.

This is because, in large part, the changes made by the 2020 Final Rule have narrowed the types of deposit-related activities that are considered brokered; in the FDIC's view, this narrowing is problematic because these deposits continue to present the same risks as before the 2020 Final Rule. The 2020 Final Rule also expanded the

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[5] *See* FDIC, Study on Core Deposits and Brokered Deposits (July 8, 2011), available at *https://www.fdic.gov/regulations/reform/coredeposit-study.pdf.* *See also* 84 FR 2366, 2369 (Feb. 6, 2019). The FDIC updated its analysis in the 2011 Study on Core Deposits and Brokered Deposits with data through the end of 2017. *See id.* at 2384-2400 (Appendix 2).

[6] *See* FDIC, Press Release: FDIC Board Approves Final rule on Brokered Deposit and Interest Rate Restrictions (Dec. 15, 2020), available at *https://www.fdic.gov/news/press-releases/2020/pr20136.html.* The 2020 Final rule was published in the Federal Register on January 22, 2021. *See* Unsafe and Unsound Banking Practices: Brokered Deposits and Interest Rate Restrictions Final Rule, 86 FR 6742 (Jan. 22, 2021). *See also infra* Section II.B (discussing the 2020 Final Rule).

[7] *See infra* Section II.C. As of December 31, 2023, reported brokered deposit balances have since increased to $1.35 trillion. *See infra* Section II.C.

types of business relationships that are eligible to be excepted from the "deposit broker" definition. For instance, the 2020 Final Rule excluded certain factors, such as the payment of fees, from the "deposit broker" definition that had historically been viewed as relevant to whether a deposit is brokered. The 2020 Final Rule also expanded the scope of the primary purpose exception to the deposit broker definition, which has allowed for a significant number of business lines to be excluded from the deposit broker definition.[8] As a result, this has led to certain deposit arrangements that would have been viewed as brokered prior to the 2020 Final Rule as no longer being classified as brokered, even though such deposits present the same or similar risks as brokered deposits.

Based on the FDIC's experience, the decline in reported brokered deposits is also due, in part, to some IDIs misunderstanding and misreporting deposits under the 2020 Final Rule. Despite the FDIC's efforts in conducting industry outreach and providing clarifying information,[9] the FDIC has observed a number of challenges with entities understanding certain provisions of the 2020 Final Rule, which has resulted in some level of inaccurate and inconsistent application of the rule. Many of these challenges arise from § 337.6(a)(5)(v)(I)*(1)(i)* in the rule allowing third parties to provide a notice regarding the 25 percent test primary purpose exception. For example, the FDIC has observed that some IDIs receiving deposits through a sweep arrangement have incorrectly relied upon a third party's 25 percent primary purpose exception notice to not

[8] *See e.g.*, FDIC, Public Report of Entities Submitting Notices for a Primary Purpose Exception (PPE) As of 03/15/2024, available at https://www.fdic.gov/resources/bankers/brokered-deposits/public-report-ppes-notices.pdf.

[9] For example, the FDIC maintains a dedicated brokered deposits webpage that includes "Questions and Answers Related to Brokered Deposits Rule" and a "Statement of the [FDIC] Regarding Reporting of Sweep Deposits on Call Reports," among other resources. *See* FDIC, Banker Resource Center Brokered Deposits, available at *https://www.fdic.gov/resources/bankers/brokered-deposits/.*

report certain deposits as brokered, without conducting analyses, or without having access to the appropriate documentation to conduct analyses, and despite the involvement of an additional third party that meets the "deposit broker" definition.[10] In turn, this has resulted in some deposits that meet the "brokered deposit" definition under the 2020 Final Rule not being correctly reported as brokered on IDIs' Consolidated Reports of Condition and Income (Call Reports).[11]

If left unchanged, this underreporting of brokered deposits could have serious consequences for IDIs and the DIF, which is used to protect depositors of insured banks and to resolve failed banks, as such underreporting impedes the ability to evaluate the extent of reliance on brokered deposits and the effects on an IDI's risk profile for supervisory and deposit insurance pricing purposes. Moreover, the FDIC is concerned that these issues expose IDIs individually and the banking system more broadly to the type of risk the brokered deposit restrictions are intended to address—namely that a less than well-capitalized institution could rely on less stable third-party deposits for rapid growth that may weaken the safety and soundness of IDIs and the banking system and expose the FDIC to increased losses.

Additionally, experiences since the 2020 Final Rule have shown that some of the underlying reasons to narrow the coverage of the rule have proved to be problematic. For

[10] *See e.g.*, FDIC, Decision of the Supervision Appeals Review Committee, In the Matter of * * *, Case No. 2022-02 (Apr. 26, 2023), available at *https://www.fdic.gov/resources/regulations/appeals-of-material-supervisory-determination/appeals/sarc202202.pdf.*

[11] "Call Reports" consist of the Consolidated Reports of Condition and Income for a Bank with Domestic and Foreign Offices (FFIEC 031), the Consolidated Reports of Condition and Income for a Bank with Domestic Offices Only (FFIEC 041), and the Consolidated Reports of Condition and Income for a Bank with Domestic Offices Only and Total Assets Less than $5 Billion (FFIEC 051).

example, First Republic Bank,[12] which failed in May 2023 after contagion effects from the failure of Silicon Valley Bank, experienced a significant run on affiliated sweep deposits, and in particular uninsured affiliated sweep deposits.[13] This suggests that in the case of First Republic, affiliated sweeps were no more "sticky" than unaffiliated sweeps, contrary to the exemption in § 337.6(a)(5)(iii)(C)*(1)* for affiliated entities. Moreover, in the case of the failure of crypto company Voyager,[14] it was not considered a "deposit broker" – and Voyager deposits were not considered brokered – because it had an exclusive deposit placement arrangement with one IDI. Under the 2020 Final Rule, exclusive deposit placement arrangements are excluded from the definition of a "deposit broker" even though Voyager's activities were the same as a "deposit broker," and the failure of Voyager created the same legal, operational, and liquidity risks for its partner IDI as if it had, say two partner banks, and had been classified as a deposit broker. FDIC staff is concerned that less than well-capitalized IDIs may seek these exclusive deposit placement arrangements as their condition is deteriorating without being subject to the limitations on brokered deposits, even though the risk is the same.

To address these concerns and challenges, the FDIC is proposing amendments that would (1) simplify certain definitions of the 2020 Final Rule to reduce operational challenges and reporting burdens on IDIs; (2) help ensure uniform and consistent reporting of brokered deposits by IDIs; and (3) strengthen the safety and soundness of the

[12] *See* Off. of Inspector Gen., FDIC, Material Loss Review of First Republic Bank, Report No. EVAL-24-03 (Nov. 28, 2023) available at *https://www.fdicoig.gov/sites/default/files/reports/2023-12/EVAL-24-03.pdf.*
[13] During the quarter leading up to failure, First Republic Bank reported a sharp decline in affiliate sweep deposits that were not fully insured, from $8.3 billion to $1.1 billion from December 31, 2022 to March 31, 2023; they also experienced a decline from $1.9 billion to $1.4 billion in insured affiliated sweep deposits. Over the same period, First Republic Bank reported an increase in fully insured non-affiliate sweep deposits, from $7.3 billion to $8.7 billion.
[14] *See In re* Voyager Digital Holdings, Inc. et al., No. 22-10943, (Bankr. S.D.N.Y July 6, 2022).

banking system by ensuring that less than well-capitalized institutions are restricted from relying on brokered deposits to support risky, rapid growth.

II. Background

A. Brokered Deposits – A History of Concerns and Related Research

Brokered and high-rate deposits became a concern among bank regulators and Congress before any statutory restrictions were enacted. This concern arose because: (1) such deposits could facilitate a bank's rapid growth in risky assets without adequate controls; (2) once problems arose, a problem bank could use such deposits to fund additional risky assets to attempt to "grow out" of its problems, a strategy that ultimately increased the losses to the DIF when the institution failed; and (3) brokered and high-rate deposits were sometimes considered less stable because at that time, deposit brokers (on behalf of customers), or the customers themselves, were often drawn to high rates and prone to leave the bank quickly to obtain a better rate or if they became aware of problems at the bank.[15]

The FDIC has recognized that "historically, most institutions that use brokered deposits have done so in a prudent manner and appropriately measure, monitor, and control risks associated with brokered deposits."[16] However, an IDI's use of brokered

[15] Brokered deposits are not considered core deposits or a stable funding source due to the brokered status and wholesale characteristics. *See* FDIC RMS Manual of Examination Policies, Section 6.1 Liquidity and Funds Management at 6.1-9 (Apr. 2024). Core deposits are not defined by statute. Rather, core deposits are defined for analytical and examination purposes in the Uniform Bank Performance Report (UBPR) as the sum of all transaction accounts, money market deposit accounts (MMDAs), nontransaction other savings deposits (excluding MMDAs), and time deposits of $250,000 and below, less fully insured brokered deposits of $250,000 and less.

[16] *See* Unsafe and Unsound Banking Practices: Brokered Deposits and Interest Rate Restrictions Advance Notice of Proposed Rulemaking, 84 FR 2366 (Feb. 6, 2019).

deposits often raises its risk profile, which has long been a concern among bank regulators[17] and Congress.[18]

Brokered Deposits and Troubled Institutions

As early as the 1970s, the FDIC noted concerns about brokered deposits, as stated in the FDIC's Division of Bank Supervision Manual: "The use of brokered deposits has been responsible for abuses in banking and has contributed to some bank failures, with consequent losses to the larger depositors, other creditors, and shareholders."[19] For example, in 1982, brokered deposits were found to have been a key cause of the largest payout of insured deposits at that time with the failure of Penn Square Bank. Brokered deposits contributed to Penn Square Bank's rapid deposit growth, which were used to fund high risk loans. About $1 billion of these loans were then sold to Continental Illinois Bank, which then suffered significant deposit withdrawals related to problem loans and required open-bank assistance from the FDIC.[20]

Brokered Deposits in Bank Failures 2007–2017

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[17] The FDIC recognizes that institutions sometimes are concerned that the use of brokered deposits can have other regulatory consequences, or may be viewed negatively by investors or other stakeholders.
[18] Congressional hearings regarding brokered deposits were held between 1984 and 1988, and in 1989, as part of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 (FIRREA). *See* 84 FR at 2368. *See also* "Problems of the Federal Savings and Loan Insurance Corporation: Hearings Before the Committee on Banking, Housing, and Urban Affairs of the United States Senate," (part II) 101st Cong., 1st Sess. 230–231 (1989). *See also*, *e.g.*, Congressional testimony of Senators Graham and Sarbanes on Comprehensive Deposit Insurance Reform and Taxpayer Protection Act of 1991, Proceedings and Debates of the 102nd Cong., 1st Sess., November 21, 1991, 137 Cong. Rec. S17322-01, 1991 WL 243977 ("One of the lessons from the thrift crisis is their ability to gather deposits through brokered deposits and increase the size of the institution and the funds they had available very rapidly without additional capital and, quite frankly, without additional management. Then, to take these funds out and invest them in what turned out to be very risky matters, is certainly a lesson America has to learn and look at.") (referring to testimony of the President of the Independent Bankers Association provided in April 1990).
[19] *See* FDIC, Division of Bank Supervision Manual, Section L, page 3 (Nov. 1, 1973).
[20] 84 FR 2366, 2367 (Feb. 6, 2019); FDIC, History of the Eighties—Lessons for the Future, Chapters 2 and 9, *passim* (Dec. 1997), available at *https://www.fdic.gov/bank/historical/history/*; Phillip L. Zwieg, Belly Up: The Collapse of the Penn Square Bank, Chapter 9 (1985).

The FDIC and the DIF were significantly affected by the financial crisis between 2007 and 2017. During this time, excluding Washington Mutual, Inc., 530 IDIs failed and were placed in FDIC receivership and, as of March 31, 2024, the estimated loss to the DIF for these institutions is $71.9 billion.[21]

Based on Call and Thrift Financial Report data, 47 institutions that failed relied heavily on brokered deposits and each caused an estimated loss to the DIF[22] of over $100 million as of December 31, 2017. These 47 institutions held total assets representing 20.9 percent of the $396.9 billion in aggregate total assets of the 530 failed institutions, but accounted for $27.3 billion in estimated losses to the DIF, representing 38 percent of the $71.9 billion in all estimated losses to the DIF for that same period.[23] For example, the largest of these 47 institutions was IndyMac Bank, F.S.B. (IndyMac), which failed on July 11, 2008. As of March 31, 2024, the estimated loss to the DIF for IndyMac is $12.0 billion, representing 39 percent of IndyMac's $30.7 billion in total assets at failure and approximately 16.7 percent of the total $71.9 billion in estimated losses to the DIF from bank failures between 2007 and 2017. In its last Thrift Financial Report (TFR) filed prior to failure, as of June 30, 2008, IndyMac reported brokered deposits of $5.5 billion, which represented 29.0 percent of the institution's $18.9 billion in total deposits.[24] In its TFR

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[21] The estimated loss data is available at: https://banks.data.fdic.gov/bankfind-suite/failures.

[22] Specifically, these failed institutions reported a ratio of brokered to total deposits greater than 10 percent in their last quarter prior to failure or three years prior to failure, and reported annual average asset growth of at least 30 percent during the three years leading to failure, or during the five years leading to failure, or between three and five years prior to failure, and were estimated to cost the DIF over $100 million as of December 31, 2017.

[23] The estimated loss data is as of March 31, 2024, available at: *https://banks.data.fdic.gov/bankfind-suite/failures.*

[24] Of the $5.5 billion in brokered deposits that IndyMac reported on its TFR for June 30, 2008, 98.4 percent were in brokered certificates of deposits documented as master certificates of deposits issued in the name of CEDE & Co, a subsidiary of DTC, as sub-custodian for deposit brokers.

filed for the third quarter of 2005, approximately 12 quarters before the institution failed, IndyMac reported $1.4 billion in brokered deposits, representing 18.4 percent of its then $7.4 billion in total deposits. This data demonstrates that IndyMac accelerated its use of brokered deposits as its problems mounted.[25]

Another example is ANB Financial National Association (ANB Financial), which failed on May 9, 2008. As of March 31, 2024, the estimated loss to the DIF for ANB Financial was $1.0 billion, representing 54 percent of the institution's $1.9 billion in total assets at failure. In its Call Report filed prior to failure, i.e., as of March 31, 2008, ANB Financial reported brokered deposits of $1.6 billion, which represented 87.0 percent of the institution's $1.8 billion in total deposits. In the Call Report filed for the second quarter of 2005, approximately 12 quarters before the institution failed, ANB Financial reported $257 million in brokered deposits, representing 50.5 percent of its then $508 million in total deposits.[26]

Brokered Deposits – Historical Research and Changes in Law and Regulation

In the aftermath of the financial crisis of 2008 and 2009, section 1506 of the Dodd-Frank Wall Street Reform and Consumer Protection Act directed the FDIC to conduct a study of core and brokered deposits, which the FDIC completed in 2011. In the FDIC's *Study on Core Deposits and Brokered Deposits*,[27] the FDIC found that higher

[25] *See* Off. of Inspector Gen., U.S. Dep't of Treasury, Safety and Soundness: Material Loss Review of IndyMac Bank, FSB (Feb. 26, 2009), available at *https://oig.treasury.gov/sites/oig/files/Documents/oig09032.pdf*.

[26] *See* Off. of Inspector Gen., U.S. Dep't of Treasury, Safety and Soundness: Material Loss Review of ANB Financial National Association (Nov. 28, 2008), available at *https://www.govinfo.gov/content/pkg/GOVPUB-T72-PURL-LPS107594/pdf/GOVPUB-T72-PURL-LPS107594.pdf*.

[27] *See* FDIC, Study on Core Deposits and Brokered Deposits (July 8, 2011), available at *https://www.fdic.gov/regulations/reform/coredeposit-study.pdf*.

brokered deposit use was associated with higher probability of bank failure and higher DIF losses, and that, on average, brokered deposits were correlated with higher levels of asset growth, higher levels of nonperforming loans, and a lower proportion of core deposit funding.[28] For example, the FDIC's study describes the following characteristics of brokered deposits that have posed risks to the DIF: (1) rapid growth—brokered deposits could be gathered quickly and used imprudently to fund risky assets or investments; and (2) less stable nature (described in the study as "volatility")—brokered deposits might flee if the broker (or the underlying customer) moves funds to another IDI, if the IDI holding the deposit becomes troubled, or if rates or terms are more appealing elsewhere.[29]

In December 2017, the FDIC published *Crisis and Response: An FDIC History, 2008–2013*, which showed that failures and CAMELS rating downgrades were more concentrated among IDIs that made relatively greater use of wholesale funding sources, which includes brokered deposits. Further, it indicated that significant reliance on wholesale funds could reflect an IDI's decision to pursue aggressive growth, and that if an IDI were under stress, wholesale counterparties may be more inclined to withdraw deposits or demand additional collateral.[30]

Moreover, the Inspectors General of the federal banking agencies have prepared reports detailing how brokered deposits were sometimes used by failed banks between

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[28] *See* 84 FR 2366, 2369 (Feb. 6, 2019).
[29] However, the volatility of brokered deposits tends to be mitigated somewhat by deposit insurance, as insured depositors have less incentive to flee a problem situation. *See* 84 FR 2366, 2369 (Feb. 6, 2019).
[30] FDIC, Crisis and Response: An FDIC History, 2008–2013 at 121-22 (2017), available at *https://www.fdic.gov/resources/publications/crisis-response/index.html.*

2007 and 2017.[31] In these reports, brokered deposits were commonly cited as contributing to problems at troubled and failed institutions, and IDIs that failed were typically subject to the brokered deposit restrictions because their capital levels deteriorated to below well capitalized.[32]

In 2019, the FDIC updated its analysis in the 2011 Study on Core Deposits and Brokered Deposits with data through the end of 2017.[33] As part of that update, statistical analysis found that brokered deposit use is associated with higher probability of an IDI's failure and higher DIF loss rates. Brokered deposits may elevate an IDI's risk profile in part because they are frequently used as a substitute for IDI's core deposits and, less frequently, for equity, and so from the FDIC's perspective, IDIs that use brokered deposits operate with a higher risk liability structure relative to IDIs that do not use brokered deposits.[34]

B. Current Statutory and Regulatory Framework

Section 29 of the FDI Act,[35] imposes restrictions on a less than well-capitalized IDI from accepting funds obtained, directly or indirectly, by or through any deposit broker for deposit into one or more deposit accounts (referred to as brokered deposits).[36]

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[31] *See* 84 FR 2366, 2369-70 (Feb. 6, 2019) (citing Safety and Soundness: Analysis of Bank Failures Reviewed by the Department of the Treasury Office of Inspector General, OIG–16–052 (Aug. 15, 2016); Off. of Inspector Gen., FDIC, Follow Up Audit of FDIC Supervision Program Enhancements, Report No. MLR–11–010 (Dec. 2011); Off. of Inspector Gen., Bd. of Governors of the Fed. Rsrv. Sys., Summary Analysis of Failed Bank Reviews (Sept. 2011)).

[32] *See* 84 FR 2366, 2369-70 (Feb. 6, 2019).

[33] *See* 84 FR at 2384-2400 (Appendix 2).

[34] *See* 84 FR 2366, 2385 (Feb. 6, 2019).

[35] 12 U.S.C 1831f.

[36] 12 U.S.C. 1831f(a). An "undercapitalized" depository institution is prohibited from accepting deposits from a deposit broker. An "adequately capitalized" insured depository institution may accept deposits from a deposit broker only if it has received a waiver from the FDIC. *See* 12 U.S.C. 1831f(c). A waiver may be granted by the FDIC "upon a finding that the acceptance of such deposits does not constitute an unsafe or unsound practice" with respect to that institution. *See id.* Well-capitalized insured depository institutions are not restricted from accepting deposits from a deposit broker. The statute also restricts a less than well-

Section 29 does not directly define the term “brokered deposit.” Section 337.6 of the FDIC’s Rules and Regulations implements section 29[37] and provides that a “brokered deposit” is a deposit obtained, directly or indirectly, from or through the mediation or assistance of a deposit broker.[38] Thus, the meaning of the term “brokered deposit” turns upon the definition of “deposit broker.”

Under section 29, a “deposit broker” includesany person engaged in the business of placing third-party deposits, or facilitating the placement of third-party deposits, with IDIs or the business of placing deposits with IDIs for the purpose of selling interests in those deposits to third parties.[39] An agent or trustee also meets the “deposit broker” definition when establishing a deposit account to facilitate a business arrangement with an IDI to use the proceeds of the account to fund a prearranged loan.[40]

The “deposit broker” definition is subject to the following nine statutory exceptions:[41]

1. An insured depository institution, with respect to funds placed with that depository institution;

2. An employee of an insured depository institution, with respect to funds placed with the employing depository institution;

capitalized institution generally from offering interest rates that significantly exceed the market rates offered in an institution’s normal market area. *See* 12 U.S.C. 1831f.

[37] 12 CFR 337.7 implements section 29’s interest rate restrictions. The proposed rule would not amend these provisions.

[38] 12 CFR 337.6(a)(2).

[39] 12 U.S.C. 1831f(g)(1)(A).

[40] 12 U.S.C. 1831f(g)(1)(B).

[41] 12 U.S.C. 1831f(g)(2).

3. A trust department of an insured depository institution, if the trust in question has not been established for the primary purpose of placing funds with insured depository institutions;

4. The trustee of a pension or other employee benefit plan, with respect to funds of the plan;

5. A person acting as a plan administrator or an investment adviser in connection with a pension plan or other employee benefit plan provided that that person is performing managerial functions with respect to the plan;

6. The trustee of a testamentary account;

7. The trustee of an irrevocable trust (other than one described in 12 U.S.C. 1831f(g)(1)(B)), as long as the trust in question has not been established for the primary purpose of placing funds with insured depository institutions;

8. A trustee or custodian of a pension or profit sharing plan qualified under section 401(d) or 403(a) of the Internal Revenue Code of 1986; or

9. An agent or nominee whose primary purpose is not the placement of funds with depository institutions (the "primary purpose exception").

Section 337.6 includes the statutory exceptions to the "deposit broker" definition plus a tenth exception for an IDI acting as an intermediary or agent of a U.S. government department or agency for a government sponsored minority or women-owned depository institution program.[42]

Deposit Broker Definition in the 2020 Final Rule

[42] *See* 12 CFR 337.6(a)(5)(v)(J).

In the 2020 Final Rule, the FDIC amended the brokered deposit regulation to further define circumstances under which a third party is a "deposit broker." More specifically, the 2020 Final Rule provides a person is *engaged in the business of placing deposits* if that person receives third party funds and deposits those funds at more than one IDI.[43] It also provides that a person is *engaged in the business of facilitating the placement of deposits* if that person is engaging in any of the following activities with respect to third-party deposits placed at more than one IDI:

- The person has legal authority, contractual or otherwise, to close the account or move the third party's funds to another IDI;
- The person is involved in negotiating or setting rates, fees, terms, or conditions for the deposit account; or
- The person engages in matchmaking activities.[44]

A person is engaged in "matchmaking activities" if the person proposes deposit allocations at, or between, more than one IDI based upon both the particular deposit objectives of a specific depositor or depositor's agent, and the particular deposit objectives of specific IDIs.[45] The "matchmaking activities" definition further provides that a proposed deposit allocation is based on the particular objectives of:

- A depositor or depositor's agent when the person has access to specific financial information of the depositor or depositor's agent and the proposed deposit allocation is based upon this information; and

[43] 12 CFR 337.6(a)(5)(ii).
[44] *See* 12 CFR 337.6(a)(5)(iii) (*emphasis added*).
[45] *See* 12 CFR 337.6(a)(5)(iii)(C)(1).

- An IDI when the person has access to the target deposit-balance objectives of specific IDIs and the proposed deposit allocation is based upon this information.[46]

The "matchmaking activities" definition, however, excludes deposits placed by a depositor's agent with an IDI affiliated with the depositor's agent.[47]

Exclusive Deposit Placement Arrangements in the 2020 Final Rule

As noted above, the 2020 Final Rule provides that a person is engaged in the business of placing deposits or facilitating the placement of deposits of third parties if that person receives third-party funds and deposits those funds *at more than one IDI* or if that person is engaged in certain activities with respect to deposits placed *at more than one IDI*.[48] The preamble to the 2020 Final Rule specified that any person that has an exclusive deposit placement arrangement with *one* IDI and is not placing or facilitating the placement of deposits at any other IDI, will not be "engaged in the business" of placing, or facilitating the placement of, deposits at IDIs and therefore will not meet the "deposit broker" definition.[49]

The Primary Purpose Exception in the 2020 Final Rule

The 2020 Final Rule provides that the primary purpose exception applies when, with respect to a particular business line, the primary purpose of the agent's or nominee's business relationship with its customers is not the placement of funds with depository institutions.[50] Moreover, the 2020 Final Rule identifies the following fourteen designated

[46] *See id.*
[47] *See id.*
[48] 12 CFR 337.6(a)(5)(ii)-(iii) (*emphasis added*).
[49] *See* 86 FR 6742, 6745 (Jan. 22, 2021) (*emphasis added*).
[50] *See* 12 CFR 337.6(a)(5)(v)(I).

business exceptions as meeting the primary purpose exception where, with respect to a particular business line:

1. Less than 25 percent of the total assets that the agent or nominee has under administration for its customers is placed at depository institutions (25 percent test);

2. 100 percent of depositors' funds that the agent or nominee places, or assists in placing, at depository institutions are placed into transactional accounts that do not pay any fees, interest, or other remuneration to the depositor (enabling transactions test);

3. A property management firm places, or assists in placing, customer funds into deposit accounts for the primary purpose of providing property management services;

4. The agent or nominee places, or assists in placing, customer funds into deposit accounts for the primary purpose of providing cross-border clearing services to its customers;

5. The agent or nominee places, or assists in placing, customer funds into deposit accounts for the primary purpose of providing mortgage servicing;

6. A title company places, or assists in placing, customer funds into deposit accounts for the primary purpose of facilitating real estate transactions;

7. A qualified intermediary places, or assists in placing, customer funds into deposit accounts for the primary purpose of facilitating exchanges of properties under section 1031 of the Internal Revenue Code;

8. A broker dealer or futures commission merchant places, or assists in placing, customer funds into deposit accounts in compliance with 17 CFR 240.15c3–3(e) or 17 CFR 1.20(a);

9. The agent or nominee places, or assists in placing, customer funds into deposit accounts for the primary purpose of posting collateral for customers to secure credit-card loans;

10. The agent or nominee places, or assists in placing, customer funds into deposit accounts for the primary purpose of paying for or reimbursing qualified medical expenses under section 223 of the Internal Revenue Code;

11. The agent or nominee places, or assists in placing, customer funds into deposit accounts for the primary purpose of investing in qualified tuition programs under section 529 of the Internal Revenue Code;

12. The agent or nominee places, or assists in placing, customer funds into deposit accounts to enable participation in the following tax-advantaged programs: Individual retirement accounts under section 408(a) of the Internal Revenue Code, Simple individual retirement accounts under section 408(p) of the Internal Revenue Code, or Roth individual retirement accounts under section 408A of the Internal Revenue Code;

13. A Federal, State, or local agency places, or assists in placing, customer funds into deposit accounts to deliver funds to the beneficiaries of government programs; and

14. The agent or nominee places, or assists in placing, customer funds into deposit accounts pursuant to such other relationships as the FDIC specifically identifies as a designated business relationship that meets the primary purpose exception. [51]

[51] *See* 12 CFR 337.6(a)(5)(v)(I)(1).

As noted, the 2020 Final Rule allows the FDIC to identify additional relationships as designated business exceptions to the primary purpose exception.[52] On January 10, 2022, the FDIC published an additional designated exception for certain non-discretionary custodians engaging in specific arrangements related to the placement of deposits.[53]

For the 25 percent and enabling transactions test exceptions, a third party or an IDI on behalf of a third party must file a notice with the FDIC for a particular business line.[54] Under the current process, the FDIC provides immediate email acknowledgement of receipt of the notice filing and the third party that is the subject of the notice may rely upon the applicable designated exception for the particular business line. Notice filers under the 25 percent test must also satisfy quarterly reporting requirements, while notice filers under the enabling transactions test must provide an annual certification.[55] For the other designated exceptions, no notice, application, or reporting is required.

For agents or nominees that do not meet one of the designated business exceptions, such third parties, or an IDI on behalf of a third party, may apply for a primary purpose exception in accordance with the requirements contained in § 303.243(b).[56] Moreover, the 2020 Final Rule provides a specific application process for a primary purpose exception to enable transactions with fees, interest, or other remuneration provided to the depositor.[57]

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[52] *See* 12 CFR 337.6(a)(5)(v)(I)(1)(xiv).
[53] *See* Unsafe and Unsound Banking Practices: Brokered Deposits, 87 FR 1065 (Jan. 10, 2022).
[54] *See* 12 CFR 303.243(b). Where customer funds placed at depository institutions are placed into transaction accounts, and fees, interest, or other remuneration are provided to the depositor, an applicant can apply for a primary purpose exception, with respect to the particular business line, according to the requirements listed in 12 CFR 303.243(b)(4)(i).
[55] *See* 12 CFR 303.243(b)(3(v).
[56] *See* 12 CFR 337.6(a)(5)(v)(I)(2).
[57] *See* 12 CFR 303.243(b)(4)(i).

The Reciprocal Deposits Limited Exception

In 2018, section 29 of the FDI Act was amended as part of the Economic Growth, Regulatory Relief, and Consumer Protection Act (EGRRCPA), to allow "agent institutions" to except a capped amount of "reciprocal deposits" from treatment as brokered deposits.[58] Section 29 generally provides that reciprocal deposits are excepted when the total amount of reciprocal deposits held by an agent institution does not exceed the lesser of $5 billion or 20 percent of the total liabilities of the agent institution. [59]

Reciprocal deposits are defined by statute to mean deposits received by an agent institution through a deposit placement network with the same maturity (if any) and in the same aggregate amount as covered deposits placed by the agent institution in other network member banks.[60] A "covered deposit" is a deposit that is submitted for placement through a deposit placement network by an agent institution and does not consist of funds that were obtained (directly or indirectly) by a deposit broker before their submission for placement in a deposit placement network.[61] A "deposit placement network" is a network in which IDIs participate for processing and receipt of reciprocal deposits.[62]

On December 18, 2018, the FDIC adopted a final rule (the 2018 Reciprocal Deposits Rule), to amend its regulations that implement brokered deposits and interest rate restrictions to conform with the changes to section 29 by EGRRCPA.[63] Consistent

[58] 12 U.S.C. 1831f(i)(2)(E).
[59] 12 U.S.C. 1831f(i)(1).
[60] 12 U.S.C. 1828f(i)(2)(E).
[61] 12 U.S.C. 1831f(i)(2)(B).
[62] 12 U.S.C. 1831f(ii)(2)(C).
[63] *See* 84 FR 1346 (Feb. 4, 2019). The Reciprocal Deposits Rule was effective March 6, 2019. Section 337.6(e) of the FDIC's Rules and Regulations, 12 CFR 337.6(e), implements section 29's limited exception for reciprocal deposits.

with section 29, the 2018 Reciprocal Deposits Rule defines "agent institution" to mean an IDI that places a covered deposit through a deposit placement network at other IDIs in amounts that are less than or equal to the standard maximum deposit insurance amount, specifying the interest rate to be paid for such amounts, if the IDI:

- As of its most recent annual examination under 12 U.S.C. 1820(d), was found to have a composite condition of outstanding or good and is well capitalized;
- Has obtained a brokered deposit waiver from the FDIC;[64] or
- Does not receive an amount of reciprocal deposits that causes the total amount of reciprocal deposits held by the agent institution to be greater than the average of the total amount of reciprocal deposits held by the agent institution on the last day of each of the four calendar quarters preceding the calendar quarter in which the agent institution was found not to have a composite condition of outstanding or good or was determined to be not well capitalized.[65]

Under the 2018 Reciprocal Deposits Rule, an "agent institution" can except reciprocal deposits from being classified as brokered deposits up to its applicable statutory caps—the "general cap" or "special cap." Under the "general cap," an agent institution may except reciprocal deposits up to the lesser of the following amounts from being classified as brokered deposits: $5 billion or an amount equal to 20 percent of the agent institution's total liabilities. Reciprocal deposits in excess of the general cap, as well as those reciprocal deposits that do not meet section 29's limited exception, may not

[64] The FDIC can only grant brokered deposit waivers for institutions that are classified as adequately capitalized; IDIs that are well capitalized but not well rated or are undercapitalized are not eligible. *See* 12 U.S.C. 1831f; 12 CFR 337.6(c).
[65] 12 CFR. 337.6(e)(2)(i).

take advantage of the limited exception and are to be reported as brokered deposits. The "special cap" applies if the IDI either was found to not have a composite condition of outstanding or good when most recently examined under section 10(d) of the FDI Act or is not well capitalized and has not received a waiver from the brokered deposit restrictions under section 29(c). In this case, the IDI may still meet the "agent institution" definition if the IDI does not receive reciprocal deposits that result in its total reciprocal deposits to be in excess of the "special cap." The "special cap" is the average amount of reciprocal deposits held at the IDI on the last day of each of the four calendar quarters preceding the calendar quarter in which the agent institution was found not to have a composite condition of outstanding or good or was determined to be not well capitalized. If, after the IDI becomes subject to the "special cap", an IDI receives reciprocal deposits that result in its total reciprocal deposits to be in excess of its special cap, it is no longer an agent institution. If an IDI is not an agent institution, it is not eligible to use the limited exception, and all of its reciprocal deposits should be reported as brokered deposits.

As such, the amount of reciprocal deposits excepted from being considered brokered turns on whether the IDI qualifies as an agent institution and if so, whether the IDI is subject to the special cap.

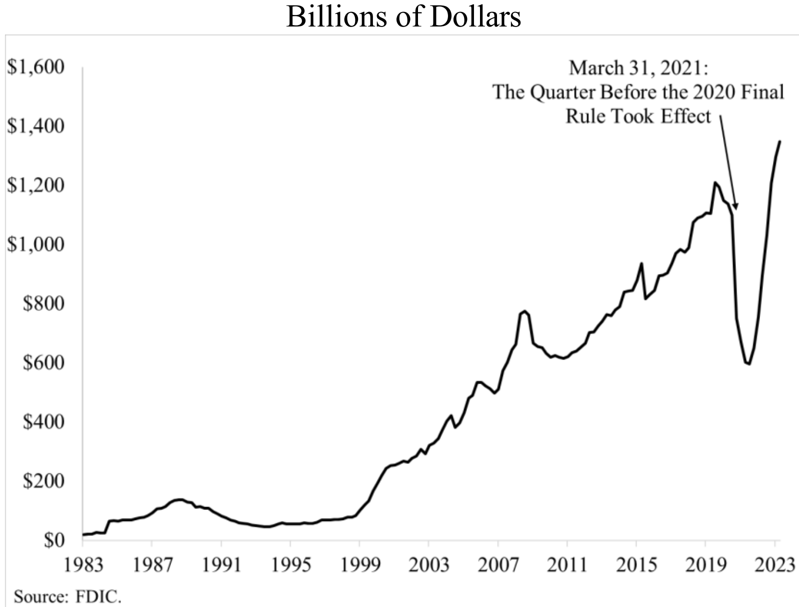
C. Developments Post-2020 Final Rule

Call Report Brokered Deposits Data

As stated above, following the April 1, 2021 effective date of the 2020 Final Rule, IDIs reported a significant decrease in brokered deposits in their Call Report filings. As illustrated in Chart 1, from March 31, 2021 to June 30, 2021, brokered deposits declined by nearly $350 billion, or 31.8 percent, the largest decline since brokered deposit reporting began in 1983. Brokered deposit balances continued to decline through March 31, 2022, following the extended compliance date of January 1, 2022. The FDIC notes, however, that as of the fourth quarter of 2023, brokered deposits at all IDIs are 22.5 percent higher than the quarter before the 2020 Final Rule took effect (first quarter 2021), despite the considerable amount of deposits that are no longer considered brokered based on the 2020 Final Rule changes. This increase in reported brokered deposits is due to increases in insured brokered deposit balances, including brokered reciprocal deposits. These increases may be driven in part by higher interest rates, which have exacerbated competition for deposit funding, and depositors seeking additional deposit insurance coverage, particularly following the failures that occurred in the first half of 2023.

Chart 1 – Brokered deposits reported by all IDIs from Q3 1983 through Q4 2023

Billions of Dollars



Expansion of Certain Third-Party Arrangements that Deliver Deposits to IDIs

Since the April 1, 2021 effective date of the 2020 Final Rule, the FDIC has observed the continued expansion of IDI arrangements with third parties to deliver deposit products (particularly those with transactional features) for a variety of IDI objectives, including to expand geographic reach, offer innovative products, and raise deposits. In these arrangements, an IDI typically makes deposit products or services available through an arrangement in which a third party, rather than the IDI, markets, distributes, or otherwise provides access to or assists in the placement of customer deposits at particular IDIs. Depending on the services provided by the third party, and the availability of regulatory exceptions to the "deposit broker" definition (e.g., the "enabling transactions" test under the primary purpose exception or the exclusive placement arrangement exception), the deposits may or may not be considered brokered.

Recent events, however, underscore the precarious nature of these funding arrangements as they can be highly unstable, with either the third party or the underlying customers moving funds based on market conditions or other factors. These arrangements can also be prone to other forms of disruption such as the potential or actual insolvency of the third party, as recently demonstrated by the bankruptcy of Synapse Financial Technologies, Inc. (Synapse).[66] Synapse, sometimes referred to as a fintech "middleware" company, was a deposit broker that facilitated the placement of customer deposits for various fintech companies looking for banking services with IDIs. Moreover, the rapid growth with such deposits without corresponding growth in risk management practices can expose IDIs to operational, liquidity, and legal risks.

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[66] *See In re* Synapse Fin. Tech., Inc., No. 1:24-bk-10646-MB (Bankr. C.D. Cal. R. Apr. 22, 2024).

In certain circumstances, these arrangements are excluded from the brokered deposit definition pursuant to changes implemented by the 2020 Final Rule, even though the arrangements exhibit the same risks as brokered deposits. An example is the failure of Voyager, which was exempted from the brokered deposit definition by virtue of the exclusive deposit placement arrangement exception. Where less than well-capitalized institutions may be able to continue to grow with such deposits, because they are not currently treated as brokered deposits, the FDIC believes that these arrangements have the potential to undermine the safety and soundness of such institutions individually, and financial stability more broadly.

D. Need for Rulemaking

Under the current regulations, less than well-capitalized IDIs have unrestricted access to third-party deposits that are excluded from being classified as brokered because certain provisions in the current rule do not fully consider important safety and soundness considerations. This in turn raises the risk that less than well-capitalized IDIs may rely on less stable third-party deposits for rapid growth that could ultimately expose the DIF to increased losses.

In addition, as discussed above, many IDIs do not correctly apply the definitions in the rule, particularly with respect to the involvement of additional third parties within a deposit placement arrangement. This issue has led to a number of IDIs misreporting brokered deposits as nonbrokered. This is particularly concerning because all IDIs, even well-capitalized IDIs, have an obligation to file Call Reports accurately[67] and are responsible for understanding the regulation and how the involvement of third parties

[67] Under section 7 of the FDIC Act, 12 U.S.C. 1817, IDIs are responsible for filing accurate Call Reports, including reporting accurately the amount of brokered deposits.

within a deposit placement arrangement may, or may not, result in the deposits being brokered.[68]

With respect to the 2018 Reciprocal Deposits Rule, the rule states how an IDI may meet the "agent institution" definition, but does not address how an IDI that no longer meets the definition may regain its status as "agent institution" to qualify for the exception. The FDIC has received several questions from IDIs on this issue since the 2018 Reciprocal Deposits Rule took effect.

III. Discussion of the Proposed Rule

To address the issues raised above, the FDIC is proposing a rule that would strengthen its brokered deposit regulations by revising certain provisions to further support the statutory language and purpose of the brokered deposit restrictions, as well as simplifying certain provisions that pose operational challenges. To achieve these objectives, and as discussed in more detail below, the proposed rule would:

- Revise certain provisions of the "deposit broker" definition, including removing the "matchmaking activities" prong and replacing it with a deposit allocation provision;
- Eliminate the exclusive deposit placement arrangement exception to restore the regulations' applicability to a third party that otherwise meets the definition of a "deposit broker," when that third party is involved with deposits placed at one or more IDIs;

[68] *See* 86 FR at 6756 (stating in the preamble to the 2020 Final Rule that "IDIs that receive deposits from agents or nominees that meet the primary purpose exception should be aware of any other third parties involved in the placement of deposits and whether those other third parties meet the deposit broker definition in order to properly complete their . . . [Call Reports], which require reporting of brokered deposits held by IDIs.").

- Amend the analysis underlying the "primary purpose" exception to the "deposit broker" definition, including revising the 25 percent test designated exception and eliminating the enabling transactions designated exception; and
- Update the application and notice processes for the primary purpose exception and limit such processes to IDIs.

As part of the proposal, IDIs relying on an existing approved primary purpose exception application, a 25 percent test designated exception notice, or an enabling transactions designated exception notice or application, would no longer be able to rely on such exceptions. Such IDIs would need to submit a new primary purpose exception application based upon updated criteria or, if applicable, rely upon a new designated business exception that meets the primary purpose exception based upon the proposed changes discussed below. If a deposit placement activity, however, meets one of the designated exceptions that are preserved under the proposal, the IDI may continue to rely upon the primary purpose exception without further action.

Finally, as part of this release, the FDIC is also proposing to clarify when an IDI that has lost "agent status" because it no longer qualifies for the reciprocal deposit exception, can regain status as an "agent institution".

The FDIC invites comments on all aspects of this proposal, as well comments in response to specific questions in section VII of this notice.

A. Deposit Broker Definition

The proposed rule would amend the "deposit broker" definition by revising the "engaged in the business of placing deposits" ("placing") and "engaged in the business of facilitating the placement of deposits" ("facilitating") prongs. The revised "deposit broker" definition would (1) combine the "placing" and "facilitating" prongs, (2) remove the term "matchmaking activities" and replace it with a deposit allocation provision, and (3) add a new factor related to fees. Specifically, the proposed rule would provide that a person is engaged in the business of placing or facilitating the placement of deposits of third parties if that person engages in one or more of the following activities:

- The person receives third party funds and deposits those funds at one or more IDIs;
- The person has legal authority, contractual or otherwise, to close the account or move the third party's funds to another IDI;
- The person is involved in negotiating or setting rates, fees, terms, or conditions for the deposit account;
- The person proposes or determines deposit allocations at one or more IDIs (including through operating or using an algorithm, or any other program or technology that is functionally similar); or
- The person has a relationship or arrangement with an IDI or customer where the IDI, or the customer, pays the person a fee or provides other remuneration in exchange for or related to the placement of deposits.

Engaged in the Business of Placing and Facilitating

Under the 2020 Final Rule, the "placing" and "facilitating" prongs are currently separate provisions under the "deposit broker" definition. Under section 29, a "deposit broker" includes "any person engaged in the business of placing deposits, or facilitating the placement of deposits, of third parties."[69] The proposed rule would combine the "placing" and "facilitating" parts of the deposit broker definition into a single definition of when a third party is "engaged in the business of placing of placing, or facilitating the placement of deposits, of third parties" with a single set of factors. From the FDIC's experience, some IDIs and other stakeholders have been misapplying the current "deposit broker" definition by only looking at one of these two parts of the "deposit broker" definition in determining whether a particular third party meets the definition. For example, an IDI or other stakeholder may correctly determine that a third party's conduct falls outside the "placing" provision under the current rule but may still incorrectly determine that the deposits are not brokered by failing to review whether the same conduct meets the "facilitating" provisions. The FDIC believes this proposed change of combining the "placing" and "facilitating" regulatory provisions would better align the regulatory text with the statutory language, while also making the "deposit broker" definition more straightforward for IDIs and other stakeholders to apply because it would require review of a single set of closely related factors rather than a review of multiple provisions.

Deposit Allocation

The proposal would retain the first two prongs of the current facilitation definition,[70] however, it would remove the term "matchmaking activities" and provide that a person who proposes or determines deposit allocations would meet the "deposit broker" definition.

[69] *See* 12 U.S.C. 1831f(g)(1)(A).
[70] The proposed rule would retain 12 CFR 337.6(a)(5)(iii)(A)-(B).

The FDIC has observed a number of IDIs and other stakeholders incorrectly determining that a third-party deposit allocator is not a "deposit broker" by misapplying the current "matchmaking activities" definition. The FDIC provided clarifications through the issuance of *Questions and Answers Related to the Brokered Deposits Rule*;[71] however, the industry continues to misconstrue this provision. Additionally, IDIs have informed the FDIC of the difficulties in obtaining necessary information, such as third-party contracts, to effectively evaluate whether any party in a deposit arrangement, including any additional third party, meets the "matchmaking" definition and thus the "deposit broker" definition. These challenges have resulted in some IDIs misreporting a significant amount of deposits as nonbrokered.

As such, the FDIC believes eliminating the current "matchmaking activities" definition and replacing it with the proposed deposit allocation provision would make it more operationally workable for IDIs and other stakeholders while continuing to focus the definition on the specific conduct that indicates a third party is facilitating the placement of customer deposits—proposing or determining deposit allocations of third-party deposits. The proposal would specify that a "deposit broker" includes a person who proposes or determines deposit allocations, including through the operation or use of an algorithm or functionally similar program or technology. The FDIC views this conduct as objectively within the "deposit broker" definition if the algorithm or functionally similar program or technology proposes or determines deposit allocations among IDIs by directing the flow, or facilitating the flow, of third-party funds to be deposited at a particular IDI.

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[71] *See* FDIC, Questions and Answers Related to Brokered Deposits Rule – As of July 15, 2022, available at *https://www.fdic.gov/resources/bankers/brokered-deposits/brokered-deposits-qa.pdf.*

Moreover, unlike the "matchmaking activities" definition under the 2020 Final Rule, the proposed prong related to deposit allocation services would not exclude third parties that provide these services between affiliated entities. As discussed in the preamble to the 2020 Final Rule, the matchmaking activities prong would not include persons that engage in activities that would otherwise satisfy the matchmaking prong if, the activities are conducted between an IDI and an affiliated party.[72] Under the proposed rule, the FDIC would no longer view deposit allocation functions of third parties as administrative in nature merely due to the affiliated relationship between the person placing or facilitating the placement of deposits and the IDI. Rather, recent experience has demonstrated that third parties do propose or determine deposit allocations at both unaffiliated and affiliated IDIs and these deposits, when uninsured, do not seem to act in a more "sticky" manner just because there is an affiliation between a broker and an IDI. Accordingly, the FDIC would treat affiliated and unaffiliated third parties similarly under the proposed deposit allocation prong of the "deposit broker" definition.

Fees

Finally, the proposed rule would add that a person is "engaged in the business of placing or facilitating the placement of deposits of third parties" if that person has a relationship or arrangement with an IDI or customer where the IDI, or the customer, pays the person a fee or provides other remuneration in exchange for or related to the placement of deposits. The statutory definition of "deposit broker" includes any third party that is *engaged in the business of* placing deposits, or facilitating the placement of deposits, on behalf of third parties (i.e., a depositor) with IDIs. As such, the FDIC

[72] 86 FR 6742, 6747 (Jan. 22, 2021).

believes that including fees or other remuneration in determining whether a third party meets the "deposit broker" definition is consistent with the statute as the receipt of fees indicates that the third party is *engaged in the business* of providing deposit placement services or facilitating the placement of deposits. Fees that would be covered under the proposed "deposit broker" definition would include fees for administrative services provided in connection with a deposit placement arrangement.

Moreover, the FDIC had, for the more than thirty years since enactment of section 29 up until the adoption of the 2020 Final Rule, considered fees in analyzing deposit broker relationships, including whether a person receives fees from IDIs based upon the number of accounts opened or the volume of deposits placed. In the past, FDIC generally found that the amount, nature, and purpose of fees paid for the placement of third-party deposits were relevant to the analysis of the relationship among the IDI, depositor, and third-party intermediary. This was because fees paid to a third-party intermediary reflected whether the involvement of the third-party intermediary was to earn fees (*engaged in the business*) through placing or facilitating the placement of third-party deposits to the IDI. For example, the FDIC often found that fees paid to a third-party intermediary would play a key role in incentivizing referral volume of third-partydeposits to the IDI. Since the 2020 Final Rule took effect, the FDIC has continued to observe that third-party intermediaries receive fees or other remuneration in exchange for or related to the placement of third-party deposits, including volume-based fees, but may not be defined as a "deposit broker" under the current regulations. Without a consideration of fees or other remuneration, and assuming the third party does not meet one of the other parts of the "deposit broker" definition, a less than well-capitalized IDI could accept third-party deposits that share characteristics with deposits the FDIC has historically observed as constituting a brokered deposit. For example, such third-party deposits may be more likely to leave the IDI if another IDI were to offer more favorable terms or pay a higher fee, putting stress on the IDI to replace the withdrawn funds on reasonable terms in a timely manner.

Accordingly, the FDIC believes that fees and other remuneration are important considerations when determining whether a person is a "deposit broker" and explicitly including this factor within the definition would be appropriate to further align the regulation with section 29's statutory purpose of restricting less than well-capitalized IDIs' access to brokered deposits.[73]

Passive Listing Services. Under the proposed rule, it is the FDIC's view that a passive listing service that only advertises information on interest rates offered by IDIs on deposit products would not meet the "deposit broker" definition. It is the FDIC's understanding that such passive listing services do not receive or deposit third party funds at one or more IDIs nor have the legal authority to close a deposit account or move third party's funds to another IDI. Any funds to be invested in deposit accounts are remitted directly by the depositor to the IDI and not, directly or indirectly, by or through the passive listing service. In addition, such passive listing services are not involved in negotiating or setting rates, fees, terms, or conditions for the deposit account. Further, passive listing services do not propose, allocate, facilitate, or determine deposit allocations. Rather, the passive listing services are simply providing information on the

[73] *See* 12 U.S.C. 1831f. Notwithstanding the presence of fees, under the proposed rule, the FDIC could grant a primary purpose exception based on a consideration of factors related to the purpose of placing of deposits. *See infra* section III.C.

interest rates offered by various IDIs but not directing depositors to a particular IDI. Lastly, the FDIC believes that any fees paid to passive listing services are not in exchange for or related to the placement of deposits. Instead, passive listing services receive subscription fees paid by subscribers for information on the rates gathered by the listing service and listing fees paid by IDIs for the opportunity to list or "post" the IDIs' rates.

B. Exclusive Deposit Placement Arrangement

Under the FDI Act, the term "deposit broker" is defined, in relevant part, to include "any person engaged in the business of placing deposits, or facilitating the placement of deposits, of third parties ***with insured depository institutions*** . . . ."[74] In the 31 years between when Congress adopted the brokered deposit restrictions in 1989, until the 2020 Final Rule, the FDIC had never construed the reference to "insured depository institutions" in the deposit broker definition to exclude deposits to a single IDI. Call Report instructions for reporting brokered deposits had never excluded deposits where a third party was involved with deposits at only one IDI. This prior approach was consistent with the general statutory interpretation rule that provides that words importing the plural include the singular, unless the statutory context indicates otherwise.[75]

The 2020 Final Rule amended the FDIC's regulations so that the brokered deposit restrictions do not apply where a third party that otherwise meets the definition of deposit broker has an exclusive deposit placement arrangement at only one IDI.[76]

[74] 12 U.S.C. 1831f(g)(1) (*emphasis added*).
[75] *See* 1 U.S.C. 1.
[76] *See* 12 CFR 337.6(a)(5)(ii) and (iii).

Under this change, an IDI can rely for one hundred percent of its deposits on an unaffiliated third party without any of those deposits considered brokered. The IDI can fall below well capitalized and still rely on those third party placed deposits for one hundred percent of its funding without any of those deposits being considered brokered, which provides an avenue for less than well-capitalized IDIs to obtain and retain brokered deposits that appears to conflict with intent of the statutory prohibition. An IDI can form multiple "exclusive" third party relationships to fund itself without any of those deposits considered brokered. Thus, the current regulation exposes the banking system to the kind of risk the brokered deposit restrictions were intended to address.

Further, there has never been any dispute that the brokered deposit restrictions are intended to apply to brokered certificates of deposit (CDs). While the 2020 Final Rule makes clear that a brokered CD is not eligible for a primary purpose exception, a market participant has pointed out to the FDIC that, because of the exclusion, the plain meaning of the definitions of "engaged in the business of placing deposits" and "engaged in the business of facilitating the placement of deposits" could be read to exclude a third party that arranges the issuance of a brokered CD for only one IDI.

For these reasons, and to mitigate any unintended effects of the interpretation as related to the statute's purpose and its application to brokered CDs, the FDIC is proposing to revise the brokered deposit regulations to restore their applicability to any third party that meets the definition of deposit broker, including those involved in placing deposits at only one IDI.

C. Primary Purpose Exception Analysis

The proposed rule would revise the analysis for determining when an agent or nominee meets the primary purpose exception to the "deposit broker" definition. Currently, the statute and regulation state that the term "deposit broker" does not include an agent or nominee whose primary purpose is not the placement of funds with IDIs.[77] In connection with this provision, the preamble to the 2020 Final Rule provided that the primary purpose exception would apply when the agent's or nominee's business relationship with its customers is not the placement of funds with IDIs.[78]

Accordingly, the current regulation focuses the primary purpose exception analysis on the third party's business relationship with its customers. While that is an important part of analyzing the exception, the FDIC believes that the relationship between the IDI and third party is also important in determining the purpose motivating the placement of third-party deposits and if the primary purpose is or is not the placement of funds with IDIs.

The statutory definition of the "primary purpose exception" excludes an agent or nominee whose primary purpose is not the placement of third-party funds with IDIs from being considered a "deposit broker."[79] Consistent with the statutory language, the focus of the exception is on the role of the agent or nominee (or third party) and whether that third party places customer deposits at an IDI as a secondary purpose in furtherance of some other "primary purpose." Understanding the intent *of the third party* in placing those deposits at a particular IDI or IDIs is necessary in determining whether the deposit placement activity is primary. As such, in understanding why the third party is placing

[77] 12 CFR 337.6(a)(5)(v)(I).
[78] *See* 86 FR 6742, 6750 (Jan. 22, 2021).
[79] *See* 12 U.S.C. 1831f(g)(2)(I).

deposits on behalf of customers at particular IDIs, consideration should be given to both the customer-third party relationship and the third party-IDI relationship. This is because the primary purpose of a customer's business relationship with a third party may be distinct from the intention of the third party in placing those customer funds at particular IDIs.

For example, a third party that meets the primary purpose exception under the current rule may also be steering its customers to particular IDIs in an effort to maximize its own fees for the placement of customer deposits. The current rule, however, does not consider this latter purpose in analyzing whether the third party meets the primary purpose exception.

Accordingly, the proposal provides that the primary purpose exception to the "deposit broker" definition would apply when an agent or nominee whose primary purpose in placing customer deposits at IDIs is for a substantial purpose other than to provide a deposit-placement service or FDIC deposit insurance with respect to particular business lines.[80]

The proposed interpretation of the primary purpose exception would be similar to how the FDIC historically interpreted the exception before 2020. Prior to the 2020 Final Rule, the FDIC through long-standing staff advisory opinions and published FAQs interpreted the primary purpose exception to apply when the intent of the third party, in placing deposits or facilitating the placement of deposits, was to promote some other goal

[80] The FDIC would view a third party placing funds for the primary purpose of providing FDIC deposit insurance to third parties as not meeting the statutory exception, as the purpose of providing FDIC insurance coverage is indistinguishable from the placement of deposits.

(i.e., other than the goal of placing deposits for others).[81] As part of its analysis, the FDIC considered the relationship between the third party and the IDI, including whether fees were paid to the third party, in determining whether the third party's primary intent, or primary purpose, was the placement of deposits. For instance, the FDIC stated, through the published FAQs, that the primary purpose exception would not apply when the intent of the third party was to earn fees through the placement of deposits.[82]

The FDIC believes that restoring this aspect of the primary purpose exception analysis is necessary to fully consider the intent driving the placement of third-party deposits at an IDI. As detailed below, the proposal would provide additional factors to consider, including fees and other remuneration provided to the third party, in determining whether the intent of the third party in placing deposits at an IDI is for a substantial purpose other than to provide a deposit-placement service or FDIC deposit insurance.

Application process under the primary purpose exception.

1. Eligible applicants for the primary purpose exception process

The proposed rule would also update the primary purpose application process under § 303.243(b). The 2020 Final Rule allows a third party or an IDI on behalf of a third party to submit a primary purpose exception application. From the FDIC's experience, some third parties have provided insufficient information for the FDIC to process an application, such as failing to provide required information on all parties within a deposit arrangement, including the receiving IDIs. Moreover, the FDIC has

[81] *See* FDIC, *Frequently Asked Questions Regarding Identifying, Accepting, and Reporting Brokered Deposits*, E7 (Nov. 13, 2015) (inactive) *available at https://www.fdic.gov/sites/default/files/2024-03/fil15051b.pdf.*
[82] *See id.*

observed some IDIs misunderstand the primary purpose exception application approvals provided to third-party applicants, as the IDI was not the applicant and the approval does not apply to its particular deposit placement activity with the third party; these misunderstandings have contributed to problems with IDIs filing accurate Call Reports.

For these reasons, the FDIC proposes to no longer allow third parties to apply for a primary purpose exception. As proposed, each IDI wishing to rely on a primary purpose exception would be required to submit an application for the specific deposit placement arrangement that it has with the third party involved. This would provide the FDIC the opportunity to review the specific facts and circumstances surrounding the deposit placement activity between the individual IDI applicant and the third party in determining whether a primary purpose exception should be approved.

2. Proposed additional factors for primary purpose exception application

Under the 2020 Final Rule, applicants that seek a primary purpose exception, other than applications for primary purpose exception to enable transactions with fees, interest, or other remuneration, must include, to the extent applicable, the following information:

- A description of the deposit placement arrangements between the third party and IDIs for the particular business line, including the services provided by any relevant third parties;
- A description of the particular business line;
- A description of the primary purpose of the particular business line;
- The total amount of customer assets under management by the third party, with respect to the particular business line;

- The total amount of deposits placed by the third party at all IDIs, including the amounts placed with the applicant, if the applicant is an IDI, with respect to the particular business line;
- Revenue generated from the third party's activities related to the placement, or facilitating the placement, of deposits, with respect to the particular business line;
- Revenue generated from the third party's activities not related to the placement, or facilitating the placement, of deposits, with respect to the particular business line;
- A description of the marketing activities provided by the third party, with respect to the particular business line;
- The reasons the third party meets the primary purpose exception;
- Any other information the applicant deems relevant; and
- Any other information that the FDIC requires to initiate its review and render the application complete.[83]

The proposed rule would add new factors to be considered as part of the primary purpose exception application. Specifically, the proposed rule would amend § 303.243(b)(4)(ii) to include consideration of whether:

- The IDI, or customer, pays fees or other remuneration to the agent or nominee for deposits placed with the IDI and the amount of such fees or other remuneration, including how the amount of fees or other remuneration is calculated;

[83] *See* 12 CFR 303.243(b)(4)(ii).

- The agent or nominee has discretion to choose the IDI(s) at which customer deposits are or will be placed; and
- The agent or nominee is mandated by law to disburse funds to customer deposit accounts.

The proposed rule would also require IDIs to provide copies of contracts relating to the deposit placement arrangement, including all third-party contracts, to supplement the IDI's description of the deposit placement arrangement that is currently required under the 2020 Final Rule. These new factors would supplement the factors that were provided under the 2020 Final Rule.[84] The FDIC believes consideration of these factors, in conjunction with the existing factors, is necessary to fully consider the purpose of the placement of third-party deposits at an IDI and whether the third party is eligible for a primary purpose exception. Below, the FDIC discusses how the new factors would be viewed as part of its analysis, but notes that approval of a primary purpose exception application would be based on the consideration of all applicable factors and any additional information provided by the applicant.

Fees. By including the amount of fees or other remuneration, and how the amount is determined, that an IDI or customer pays to the agent or nominee for deposits placed with the IDI, the FDIC would obtain relevant information to help determine whether the third-party intermediary is placing deposits for a substantial purpose other than to provide a deposit-placement service or FDIC deposit insurance. The FDIC would balance the information on fees with the other factors in determining whether the primary purpose exception should be approved.

[84] *See* 12 CFR 303.243(b)(4)(ii).

Discretion. A third party with discretion to choose the IDI(s) to place customer deposits may base their deposit placement decisions on factors such as interest rate competition or fees generated, and may be more likely to move customer funds to other IDIs in a way that makes the deposits less stable. Whether a third party has discretion, however, would be viewed in conjunction with the other factors in determining whether the primary purpose exception is applicable.

*Legal obligatio*n. In contrast, a third party disbursing funds mandated by law is discharging its legal obligation and may be less likely to move customers deposits to other IDIs. For example, a third party disbursing customer funds as part of court-mandated settlements could support a finding that the primary purpose in placing customer deposits at IDIs is for a substantial purpose other than to provide a deposit-placement service or FDIC deposit insurance. The FDIC, however, would balance this consideration with the other factors, such as the payment of fees, in determining the third party's primary purpose in placing deposits.

Accordingly, the FDIC believes consideration of these proposed factors, in conjunction with the existing application factors,[85] would be necessary in analyzing applications under the proposed revised primary purpose exception analysis. Furthermore, under the proposal, primary purpose exception applications previously approved pursuant to the 2020 Final Rule would be revoked. As a result, IDIs and third parties relying on previously approved applications would no longer be able to do so under the proposed rule. IDIs would be required to submit a new application to seek a

[85] *See* 12 CFR 303.243(b)(4)(ii).

primary purpose exception and report the associated deposits as brokered, until and unless an application is approved.

D. Designated Exceptions

The proposed rule would amend the 25 percent test and eliminate the enabling transactions test designated exception. In contrast to the other designated business exceptions, based on the FDIC's experience, these exceptions are overly broad and cover a variety of different business lines rather than a narrow set of business lines intended by the FDIC's bright-line designated exceptions. Further, the FDIC would likely find that the current 25 percent and enabling transactions tests would not meet the primary purpose exception under the proposed analysis in that the primary purpose of these arrangements in placing customer deposits at IDIs would often not be for a substantial purpose other than to provide a deposit-placement service or FDIC deposit insurance. Moreover, the current notice process does not allow the FDIC to review submissions before an entity can invoke the exception, and many of the submissions have been incomplete, inaccurate, or vague. For these reasons, and as discussed in more detail below, the FDIC is amending the 25 percent test and eliminating the enabling transactions test in a manner that aligns with the proposed updated analysis of the primary purpose exception.

1. 25 Percent Test Designated Exception

The 2020 Final Rule provides that the primary purpose of an agent's or nominee's business relationship with its customers will not be considered to be the placement of funds at a depository institution, if less than 25 percent of the total assets that the agent or nominee has under administration for its customers, in a particular business line, is placed at IDIs.[86] Third parties relying on the 25 percent test or an IDI on its behalf must file a notice with the FDIC.[87]

Before 2005, all sweeps from broker-dealers were defined as brokered deposits because the broker-dealer was placing third-party (customer) funds at IDIs. Between 2005 and 2020, FDIC staff interpreted the primary purpose exception to apply to a broker-dealer that swept customer funds to an affiliated IDI if the activity was conducted within certain parameters. Among the parameters were that (1) swept deposits did not exceed 10 percent of the affiliate's assets and (2) related fees paid by the IDI to the broker-dealer were "flat" fees (i.e., a "per account" or "per customer" fee) as payment for recordkeeping or administrative services and not payment for placing deposits.

Under the 2020 Final Rule, a broker-dealer that sweeps customer funds to IDIs meets the "deposit broker" definition but is eligible for the primary purpose exception where less than 25 percent of that broker-dealer's total assets under administration for its customers is placed at IDIs.[88] The presence of a broker-dealer operating under a primary purpose exception, regardless of whether or not the broker-dealer is affiliated with the IDI receiving the deposits, will not, in and of itself, permit an IDI to report such deposits as nonbrokered. As described above, the 2020 Final Rule included in the "deposit broker" definition a "matchmaking services" prong intended to cover third-party deposit allocation service providers when an additional third party is used to place deposits between a broker-dealer and an IDI that is unaffiliated with the broker-dealer.[89]

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[86] *See* 12 CFR 337.6(a)(5)(v)(I)(1)(i).
[87] *See* 12 CFR 303.243(b).
[88] 12 CFR 337.6(a)(5)(v)(I)*(1)(i)*. To operate under a PPE based on less than 25 percent of the total assets that the agent or nominee has under administration for its customers is placed at depository institutions, a notice was required to be filed with the FDIC. 12 CFR 303.243(b)(3)(i)(A).
[89] 12 CFR 337.6(a)(5)(iii)(C).

Since the implementation of the 2020 Final Rule, the FDIC has encountered a number of challenges with notice filings submitted under the 25 percent test and with reporting associated with sweep deposits. The challenges became more apparent since the new reporting items related to sweep deposits were added to the Call Report shortly after the 2020 Final Rule became effective.[90] The FDIC anticipated that most unaffiliated sweep deposits would be classified as brokered deposits because of the understanding that most broker-dealers, even those with valid primary purpose exceptions, outsourced their deposit allocation functions to an intervening third party providing "matchmaking activities" and these additional third parties would thus meet the "deposit broker" definition. This has resulted in a large number of unaffiliated sweep deposits being misreported as nonbrokered.[91] Approximately 27 percent of all IDIs reported a non-zero amount for total sweep deposits that are not brokered deposits as of December 31, 2023. For additional Call Report information, see Tables in Appendix 1.

Reporting Issues with the 25 percent test. Since the 2020 Final Rule became effective, the FDIC has observed several reasons for this misreporting. An IDI must conduct a detailed analysis to accurately determine the status of all third parties involved in a sweep deposit program. The analysis may include a review of the agreements between the broker-dealer and any additional third party within the deposit placement arrangement, including third parties with which an IDI may not have a direct contractual relationship.[92] The FDIC acknowledges that there may be challenges that IDIs and

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[90] 86 FR 27961 (May 24, 2021).

[91] The FDIC has identified a few IDIs that retain these functions in house and are properly reporting unaffiliated sweep deposits as not brokered.

[92] *See* FDIC, *Statement of the [FDIC] Regarding Reporting of Sweep Deposits on Call Reports*, (July 15, 2022) *available at https://www.fdic.gov/resources/bankers/brokered-deposits/statement-sweep-deposits.pdf.*

regulators face in conducting due diligence with respect to these agreements, particularly in situations when the IDI is not a party to the agreements between the broker dealers and the additional third parties. Additionally, as explained above, the FDIC has observed a number of IDIs and other stakeholders misunderstanding the current "matchmaking activities" definition. This indicates that the "matchmaking activities" definition has not been uniformly understood across the industry. This lack of understanding has likely contributed to IDIs overreporting sweep deposits as not brokered when these deposits should be considered brokered.

Proposed Broker-Dealer Sweep Primary Purpose Exception

The proposed rule would revise the current "25 percent test" designated exception and its notice process to (1) align with the proposed analysis of the primary purpose exception; and (2) ensure that the FDIC and the IDI can properly determine whether any additional third parties meet the "deposit broker" definition before the exception can be invoked. In order to more clearly describe the business arrangements intended to qualify for this primary purpose exception, the proposed rule would revise the "25 percent test" and rename it as the "Broker-Dealer Sweep Exception."

As proposed, subject to the additional conditions below, the Broker-Dealer Sweep Exception would be available only to a broker-dealer or investment adviser registered with the Securities and Exchange Commission and only if less than 10 percent of the total assets that the broker-dealer or investment adviser, as agent or nominee, has under management for its customers, in a particular business line, is placed into non-maturity accounts at one or more IDIs, without regard to whether the broker-dealer or investment adviser and depository institutions are affiliated.

The FDIC is proposing the Broker-Dealer Sweep Exception because a third party that places less than 25 percent of its customer's assets under administration in a bank account does not, by itself, demonstrate that the deposit-placement activity is for a goal other than to provide deposit insurance or a deposit placement service. Rather, placing less than 10 percent of customer funds at IDIs would be more indicative that the primary purpose for broker dealers and investment advisers in placing customer funds at IDIs is to temporarily safe-keep customer free cash balances (e.g., uninvested funds) that are awaiting reinvestment. The FDIC views that the 10 percent threshold as evidence that a de-minimis amount of customer funds are placed into deposit accounts for the primary purpose of re-investment rather than to provide a deposit placement service or deposit insurance. Further, lowering the threshold to 10 percent may reduce potential risks to safety and soundness and to the DIF by providing more transparency regarding the characteristics of the deposits so placed. Despite the business relationship between the IDI and the third party placing those deposits, the latter may well have a fiduciary duty and other incentives to transfer those deposits if the IDI is perceived to be weak.

In addition, the proposal would amend one of the key measures used as part of this designated exception from "customer assets under administration" to "customer assets under management." From the FDIC's experience with the 2020 Final Rule, "customer assets under administration" is a more appropriate measure when including a broader group of business relationships and business lines, whereas "assets under management" would be appropriate under the proposed rule to accurately reflect the scope of the types of services provided by broker dealers and investment advisers. The proposed rule would define "assets under management" to mean securities portfolios and cash balances with respect to which an investment adviser or broker-dealer provides continuous and regular supervisory or management services.

Prior notice requirement for the Broker-Dealer Sweep Exception when no additional third parties are involved. In order to ensure accurate and uniform reporting by depository institutions receiving sweep deposits from broker-dealers, the proposed rule would allow an IDI to file a designated exception notice for the Broker-Dealer Sweep Exception on behalf of broker-dealers that place deposits at the IDI only if *no additional third party* (including any affiliate) is involved in the sweep program.

Under the proposed rule, an IDI would be required to provide a written notice with the following information:

- A description of the deposit placement arrangement between the IDI and the broker-dealer or investment adviser for the particular business line;
- The registration and contact information for the broker-dealer or investment adviser;
- The total amount of customer assets under management by the broker-dealer or investment adviser;
- The total amount of deposits placed by the broker-dealer or investment adviser on behalf of its customers at all IDIs; and
- A certification that no additional third parties are involved in the deposit placement arrangement.

IDIs would be able to rely on the Broker-Dealer Sweep Exception if the FDIC has not provided a written disapproval within 90 days from submission. The FDIC, within its discretion, could extend the time period for an additional 90 days to provide a written notice of disapproval to the IDI. Further, the FDIC would be able to request additional information at any time after receipt of a written notice. Submissions that fail to include the required information would be considered incomplete and disapproved. Moreover, notice filers with an effective notice would be required to provide quarterly updates within 30 days of the quarter end, with monthly figures for the quarter, to demonstrate continuous compliance with the exception. Lastly, the proposed rule provides that the FDIC would be able to revoke an effective Broker-Dealer Sweep Exception notice within 15 days of providing the IDI written notice if:

- The broker-dealer or investment adviser no longer meets the criteria to rely on the Broker-Dealer Sweep exception;
- An additional third party is involved in the business line;
- The notice or subsequent reporting is inaccurate; or
- The notice filer fails to submit one or more required reports.

The FDIC believes the Broker-Dealer Sweep Exception notice requirement would be helpful in ensuring the parties who meet the exception can rely on it. The FDIC also believes this notice process would be more operationally workable than the current 25 percent test notice process as the required information would be tailored to specific information to which the receiving IDI should have access or be able to obtain from the broker-dealer or investment adviser.

Application process for sweep arrangements that use additional third parties. In an effort to ensure that the FDIC has the ability to properly scrutinize the role of additional third parties as part of sweep programs, the proposal would create an application process for IDIs that wish to invoke the Broker-Dealer Sweep Exception when additional third parties are involved in the arrangement. As provided above, the notice process is not available for sweep programs that use additional third parties. The application process would review whether the broker-dealer or investment adviser meets the criteria under the Broker-Dealer Sweep Exception and it would review whether any additional third party involved in the deposit placement arrangement meets the "deposit broker" definition. If the additional third party meets the "deposit broker" definition, then the FDIC would deny the application and the deposits being placed through the sweep program would be brokered notwithstanding the broker-dealer itself qualifying for a primary purpose exception. The proposed rule would require an application regardless of whether the sweep arrangement involves IDI-affiliated parties. The FDIC believes treating affiliated and unaffiliated relationships the same when an additional third party is involved would help ensure consistent and equitable treatment of sweep deposits across the industry.

The proposed rule would amend § 303.243(b) to describe a new primary purpose exception application process for sweep arrangements that use additional third parties. Specifically, an IDI, on behalf of a broker dealer or investment adviser that places less than 10 percent of customer funds under management into IDIs through the use of an additional third party, would be required to provide the following as part of an application:

- A description of the deposit placement arrangement between the IDI, the broker-dealer or investment adviser, and the additional third party, including the services provided by the additional third party, for the particular business line, and copies of contracts relating to the deposit placement arrangement, including all third party contracts;

- The total amount of customer assets under management by the broker-dealer or investment adviser;
- The total amount of deposits placed by the broker-dealer or investment adviser on behalf of its customers at all IDIs;
- Information on whether the additional third party places or facilitates the placement of deposits at IDIs;
- Information on whether the additional third party has legal authority, contractual or otherwise, to close the account or move the third party's funds to another IDI;
- Information on fees and the amount of fees paid from any source to the additional third party with respect to its services provided as part of the deposit placement arrangement;
- Information on whether the additional third party has discretion to choose the IDIs at which customer deposits are or will be placed; and
- Any other information that the FDIC requires to initiate its review and render the application complete.

Moreover, the FDIC would be able to request additional information from the applicant at any time during processing of the application.

The proposed rule provides that within 120 days of receiving a complete application, the FDIC would issue a written determination, but the FDIC could extend its review by 120 additional days, with notice. If necessary, the FDIC could further extend its review period, which is more likely when an application involves complex or novel arrangements or issues. If the FDIC receives an incomplete application, the FDIC would, as soon as possible, notify the applicant and explain what is needed to render the application complete. The FDIC would also be able to request additional information at any time during the processing of the filing.

The FDIC would approve an application under this provision if the FDIC finds that the applicant demonstrates that, with respect to the IDI and the particular business line, the (1) broker-dealer or investment adviser meet the criteria for the Broker-Dealer Sweep Exception and (2) the additional third party involved in the deposit placement arrangement is not a "deposit broker" as defined under the proposed rule.

2. Enabling Transactions Designated Exception

Prior to the 2020 Final Rule, the FDIC did not distinguish between acting with the purpose of placing deposits for other parties and acting with the purpose of enabling other parties to use deposits to make purchases. The 2020 Final Rule distinguished these two purposes and created a primary purpose exception for third parties that place deposits to allow their customers to enable transactions. IDIs receiving deposits from deposit brokers relying on this exception do not report these deposits as brokered; however, as described below, many of these deposits would not satisfy the proposed primary purpose exception analysis.

A third party qualifies for the current enabling transactions primary purpose exception by either submitting an application or submitting a notice. In a deposit placement arrangement where interest, fees, or other remunerations are provided to the depositor, the agent or nominee must receive prior approval before relying on the enabling transactions primary purpose exception by submitting an application to the FDIC.[93] Under the enabling transactions test, where 100 percent of customer funds that have been placed at depository institutions, with respect to a particular business line, are placed into transaction accounts, and no fees, interest, or other remuneration is provided to the depositor, the agent or nominee may file a notice with the FDIC to rely on the enabling transactions designated exception.[94]

The current enabling transactions test would not satisfy the proposed primary purpose exception, because placing deposits into accounts with transactional features would not, by itself, prove that the substantial purpose of the deposit placement arrangement is for a purpose other than providing deposit insurance or a deposit-placement service. The FDIC believes that there is no relevant difference between an agent or nominee's purpose in placing deposits to enable transactions and placing deposits to access a deposit account and deposit insurance.

For these reasons, the FDIC is proposing to eliminate the enabling transactions test and the corresponding notice process. As proposed, IDIs that currently rely on a primary purpose of enabling transactions under the notice process could file an application under the general primary purpose exception application process under current § 303.243(b)(4)(ii) (subject to the amendments under the proposed rule), if they believe that the primary purpose in placing customer deposits at IDIs is for a substantial purpose other than to provide a deposit-placement service or FDIC deposit insurance with respect to the particular business line. As discussed above, only IDIs would be permitted to file an application under the proposed rule.

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[93] 12 CFR 303.243(b)(4)(i).
[94] 12 CFR 303.243(b)(3)(i)(B).

The proposed rule would also eliminate the application process for the enabling transactions exception where interest, fees, or other remuneration is provided to depositors under § 303.243(b)(4)(i). Applications previously approved under this provision would be rescinded. IDIs would be able to submit a new application to seek a primary purpose exception if they believe that the business line may be eligible for the general primary purpose exception.

3. Other Designated Business Exceptions

Under the 2020 Final Rule, the FDIC identified other designated business exceptions that meet the primary purpose exception in addition to the 25 percent and enabling transactions tests discussed above. The proposed rule would retain the remaining designated business exceptions listed in the 2020 Final Rule, as well as the additional designated exception for non-discretionary custodians engaged in the placement of deposits. While the primary purpose interpretation under the proposed rule differs from the interpretation contained in the 2020 Final Rule, the outcome of whether these specific arrangements meet the primary purpose exception would not necessarily change if evaluated under the proposed revised interpretation based on the FDIC's current understanding of these specific arrangements.

The FDIC believes the remaining existing designated business exceptions are narrowly tailored to address specific business lines or functions and would satisfy the proposed primary purpose exception analysis in that the primary purpose of these arrangements in placing customer deposits at IDIs is for a substantial purpose other than to provide a deposit-placement service or FDIC deposit insurance. However, the FDIC will continue to monitor these specific arrangements, and if any changes indicate that the primary purpose of any of these arrangements is to provide a deposit-placement service or FDIC deposit insurance, the FDIC would revise the designated exceptions through the notice and comment process.

E. Agent Institution Status for Reciprocal Deposits

As discussed above, the amount of reciprocal deposits an IDI can except from being considered brokered under the limited exception turns on whether the IDI qualifies as an agent institution and if so, whether the IDI is subject to the special cap. An IDI that meets the agent institution definition can lose its agent institution status due to no longer meeting the qualifying provisions under section 29 and the 2018 Reciprocal Deposits Rule. Section 29 and the 2018 Reciprocal Deposits Rule do not clarify how and when an IDI might regain agent institution status after losing such status. As a result, the FDIC has received numerous questions about this issue.

An IDI that is an agent institution may lose that status, and thereby lose the ability to use the exception. For example, if a well-capitalized IDI with a composite condition of outstanding or good has its CAMELS composite condition downgraded below outstanding or good at its most recent examination conducted under section 10(d) for the FDI Act, it becomes subject to a special cap. If the IDI subsequently receives reciprocal deposits that results in its total reciprocal deposits exceeding its special cap, it is no longer an agent institution. Thus, the IDI no longer qualifies for the limited exception and must report all its reciprocal deposits as brokered deposits.

In response to questions raised, and in recognition that the current statute and regulation do not provide clarity on this issue, the FDIC proposes to add a new § 337.6(e)(3) to provide a path for an IDI to regain agent institution status. An IDI that lost its agent institution status would be eligible to regain its agent institution status as follows:

- If the IDI is well capitalized, the date the IDI is notified that its CAMELS composite condition is rated outstanding or good at its most recent examination under 12 U.S.C. 1820(d);
- If the IDI is well-rated, the date the IDI is notified, or is deemed to have notice, that it is well capitalized under regulations implementing section 38 of the FDI Act issued by the appropriate federal banking agency for that institution;
- The date the FDIC grants a brokered deposit waiver; or
- On the last day of the third consecutive calendar quarter during which the IDI did not at any time receive reciprocal deposits that caused its total reciprocal deposits to exceed its special cap.

To illustrate, if as the result of an examination, a well-capitalized IDI that had had a CAMELS composite rating of "3" receives written notice, including, for example, a transmittal letter, informing it that it had received an upgrade to a composite rating of "2" the IDI would regain its agent institution status as of the date of the written notice under the proposal. If the FDIC grants a brokered deposit waiver to an adequately-capitalized IDI, the IDI would regain agent institution status on the date the FDIC grants the waiver. If the IDI does not fit into either of these categories and lost its agent institution status during the fourth quarter of 2024 but can demonstrate that it did not receive any reciprocal deposits that caused its total reciprocal deposits to exceed its special cap at any time during the first, second, or third quarters of 2025, it would regain agent institution status on the last day of the third quarter of 2025.

IV. Alternatives

As part of this proposal, the FDIC is also inviting comment on the following alternatives that are under consideration.

A. No Designated Exception for Sweep Deposits

As discussed above, the proposed rule would provide a Broker-Dealer Sweep Exception that would be available to a broker-dealer or investment adviser that places or facilitates the placement of less than 10 percent of the total assets that it has under management for its customers at one or more IDIs, and no additional third parties are involved in the deposit placement arrangement. Further the proposed rule would provide a specific application process for sweep arrangements that involve an additional third party.

The FDIC is considering whether a designated business exception for sweep deposits should instead be rescinded. Under this alternative, IDIs would be required to report all sweep deposits as brokered because the broker-deal or investment adviser would meet the "deposit broker" definition since it would be placing or facilitating the placement of the third-party deposits. IDIs receiving sweep deposits, however, could apply for the general primary purpose exception. Whether a broker-dealer or an investment adviser would meet the primary purpose exception under this alternative would not be based on a de-minimis amount of customer funds placed at one or more IDIs. Rather, an IDI would be required to submit the required information listed under the general primary purpose exception application process as described in the proposed rule to demonstrate that the deposit-placement activity of the sweep arrangement, including those with an additional third party, is for a substantial purpose other than to provide deposit insurance or a deposit placement service.

B. Designated Exception for Sweep Deposits to Affiliated IDIs

The FDIC is also considering whether instead to change the Broker-Dealer Sweep Exception to apply to a broker-dealer or investment adviser that sweeps customer funds to an *affiliated* IDI and meets other certain parameters. Under this alternative, a broker-dealer or investment adviser would meet the designated business exception if:

- The broker-dealer or investment adviser places or facilitates the placement of swept funds into non-maturity accounts at an affiliated IDI, and the amount of swept funds are less than 10 percent of the total assets that the broker-dealer or investment adviser has under management for its customers; and
- The related fees paid by the IDI to the broker-dealer or investment adviser are "flat fees" (i.e., a "per account" or "per customer" fee) as payment for recordkeeping or administrative services and not payment for placing deposits.

This alternative would be similar to the FDIC's treatment of affiliated sweep deposit arrangements prior to the 2020 Final Rule. Under this alternative, the exception would not apply to deposit arrangements where swept funds are placed at unaffiliated IDIs.

V. Expected Effects

As previously stated, the proposed rule would strengthen the FDIC's brokered deposit regulations by revising certain provisions to further support the statutory language and purpose of the brokered deposit restrictions, and clarifying and streamlining provisions that the FDIC observes have posed interpretive challenges. In summary, the proposed rule would (1) streamline and update certain provisions of the "deposit broker" definition; (2) eliminate the exclusive placement arrangement exception and restore the regulations' applicability to cases where a third party, that otherwise meets the definition of deposit broker, is involved with placing deposits at one or more IDIs; (3) amend the "primary purpose" exception to the "deposit broker" definition, including revising the "25 percent test" designated exception to a 10 percent test exception (and narrowing the scope of firms to which the exception may apply) and eliminating the "enabling transactions" designated exception; (4) update the primary purpose exception application and notice processes and make it so that only IDIs may submit an application and/or a notice on behalf of a third party; and (5) clarify how an IDI that loses its "agent institution" status regains that status.

The proposed rule would apply to all IDIs and affect any IDI that currently holds brokered deposits, or holds deposits that could be reclassified as brokered under the proposed rule, including IDIs that are less than well capitalized. As of March 31, 2024, there are 4,577 FDIC-insured depository institutions (IDIs) holding approximately $24.06 trillion in assets and $17.60 trillion in total domestic deposits. Additionally, of the 4,577 IDIs, 2,131 report holding $1.34 trillion in brokered deposits. Based on IDIs' reported capital ratios as of the same date, seven IDIs (0.15 percent) were considered less than well capitalized, which is 0.37 percentage points below the average percentage of IDIs considered to be less than well capitalized based on reported capital ratios over the ten-year period ending March 31, 2024 (0.52 percent). [95]

One likely aggregate effect of the proposed changes is that some deposits currently not reported as brokered would be reported as brokered deposits if the proposal is adopted. This may potentially affect IDIs, consumers, and nonbank firms that may be considered "deposit brokers" under the proposal.

Potential Effects on IDIs

The proposed rule would revise the "deposit broker" definition and would amend the analysis of the "primary purpose" exception to the "deposit broker" definition. The FDIC believes that under the proposed rule fewer entities are likely to be exempt from the definition of deposit broker than is the case currently. Additionally, to the extent such entities continue to place funds at IDIs, the amount of deposits at IDIs considered brokered under the proposed rule is likely to increase. The FDIC does not have the data necessary to estimate the amount of deposits that would be reclassified as brokered under the proposed rule. However, at the end of the first quarter during which the 2020 Final Rule was in effect—April through June of 2021—IDIs reported almost $350 billion fewer brokered deposits than in the previous quarter, a reduction in reported brokered deposits of more than 30 percent.[96] Therefore the FDIC believes a material amount of deposits could be reclassified as brokered.

[95] FDIC Call Report data, June 30, 2014, through March 31, 2024. For purposes of the analysis presented in the Expected Effects section, an IDI is considered less than well capitalized based on its reported capital ratios. Less than well-capitalized IDIs do not include any quantitatively well capitalized institutions that may have been administratively classified as less than well capitalized. *See generally* 12 CFR 324.403(b)(1)(d) (FDIC); 12 CFR 208.43(b)(1)(v) (Board of Governors of the Federal Reserve System); 12 CFR 6.4(c)(1)(v) (Office of the Comptroller of the Currency).

[96] FDIC Call Report Data from March 31, 2021, and June 30, 2021.

The remainder of this subsection considers first the proposed rule's potential effects on less than well-capitalized IDIs specifically, then discusses costs to IDIs more broadly (including those that may be less than well capitalized), and an overview of the proposed rule's expected effects on the number of applications and notices (collectively, filings) sent to the FDIC. The subsection concludes with a discussion of the proposed rule's potential benefits. The subsection Reporting Compliance Costs provides more detailed estimates on the expected effects of the proposed rule on the number of filings sent to the FDIC, and the expected dollar cost associated with those filings.

Potential Effects on Less Than Well-Capitalized IDIs

The acceptance of brokered deposits is subject to statutory and regulatory restrictions for banks that are not well capitalized. Adequately capitalized banks may not accept brokered deposits without an approved waiver from the FDIC, and banks that are less than adequately capitalized may not accept them at all. As a result, adequately capitalized and undercapitalized banks generally hold fewer brokered deposits. To the extent less than well-capitalized IDIs are able to rely on deposits that share the characteristics of brokered deposits (such as volatility) but are not currently reported as brokered, such IDIs can operate using a riskier liability structure than one reliant on more stable funding sources, thereby potentially increasing the risk of loss to the DIF. By generally increasing the scope of deposits that are considered brokered, the proposed rule limits the ability of less than well-capitalized banks to rely on potentially less stable third-party deposits that are currently reported as nonbrokered but would be reported as brokered under the proposed rule.

Based on IDIs' reported capital ratios as of March 31, 2024, there are seven less than well-capitalized IDIs, one of which reports holding some volume of brokered deposits.[97] These seven IDIs together report $1.1 billion in total assets, $1.0 billion in domestic deposits, and $137.0 million in brokered deposits.[98] Five of the less than well-capitalized IDIs are adequately capitalized as of March 31, 2024, one is undercapitalized, and one is significantly undercapitalized.[99]

As mentioned above, adequately capitalized banks may not accept brokered deposits without an approved waiver from the FDIC, and because the FDIC believes the proposed rule is likely to increase the amount of deposits considered brokered, it may increase the number of waiver applications the FDIC receives from adequately capitalized IDIs. This potential effect of the proposed rule is difficult to estimate because, as mentioned above, not only does the FDIC not possess the data necessary to estimate the amount of deposits that would be reclassified as brokered at specific banks under the proposed rule, but also the number of adequately capitalized banks depends on other factors, such as economic conditions and asset quality.

Potential Costs to IDIs of the Proposed Rule

The FDIC believes that if the proposed rule was adopted affected IDIs, including well-capitalized and less than well-capitalized IDIs, may incur some costs. First, the proposed rule may lead some IDIs to restructure their liabilities. Second, the proposed

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[97] March 31, 2024 Call Report data. For purposes of estimating the expected effects of the proposed rule, this analysis uses an IDI's reported capital ratios to determine whether that IDI is well capitalized. The determination does not take into account written agreements, orders, capital directives, or prompt corrective action directives issued to specific IDIs. *See generally* 12 CFR 324.403(b)(1)(d) (FDIC); 12 CFR 208.43(b)(1)(v) (Board of Governors of the Federal Reserve System); 12 CFR 6.4(c)(1)(v) (Office of the Comptroller of the Currency).
[98] *Id.*
[99] *Id.*

rule may affect certain regulatory ratios required to be calculated by some large IDIs. Third, affected IDIs may be incentivized to make changes to their organizational structure. Fourth, affected IDIs may need to make changes to internal systems, policies, or procedures that pertain to brokered deposits. Fifth, the proposed rule is expected to affect the number of filings that IDIs send to the FDIC. Finally, the proposed rule may affect some IDIs' FDIC deposit insurance assessments. Each of these potential costs is discussed below in turn.

IDIs affected by the proposed rule may incur costs associated with making changes to the structure of their liabilities. As discussed above, there was a drop in reported brokered deposits immediately after the effective date of the 2020 Final Rule. The FDIC believes that the changes in the proposed rule are likely to result in a greater proportion of nonbrokered deposits being reclassified as brokered. To the extent affected IDIs are currently operating at their desired ratios of brokered deposits to total liabilities and the proposed rule increases the amount of deposits considered brokered, some affected IDIs may find that, at least initially, the proposed rule may cause them to have a greater than desired share of brokered deposits to liabilities. The FDIC does not have the data to estimate the amount of deposits that would be reclassified as brokered by the proposed rule at particular IDIs, nor how many IDIs, if any, might make changes to the structure of their liabilities.

For some large IDIs, brokered deposits can affect the calculation of certain regulatory ratios, such as the Liquidity Coverage Ratio (LCR) and Net Stable Funding Ratio (NSFR). The FDIC does not have the data to estimate the amount of deposits that would be reclassified as brokered by the proposed rule at individual IDIs, and thus cannot estimate how many IDIs, if any, may incur costs associated with maintaining compliance with, or maintaining management buffers relative to, these regulatory ratios because of the proposed rule.

It is possible that some IDIs may choose to make changes to the organizational structure of their institutions if the proposed rule is adopted. In particular, IDIs that rely on the current exclusive placement exception to obtain nonbrokered deposits from affiliates may be incentivized to stop using these deposits or perhaps change their organizational structure as a result of the proposed rule. The FDIC does not have the information to estimate any such changes or attendant costs.

The FDIC believes that if the proposed rule was adopted, IDIs affected may incur some costs associated with making changes to their internal systems, policies, and procedures associated with deposit brokering activities and arrangements (especially those involving third parties). The FDIC does not have the data to be able to reliably estimate the costs associated with these changes, but expects that they are likely to be modest. Further, the FDIC believes that some of these costs may be ameliorated because the proposed rule is similar to the regulatory framework that existed prior to the 2020 Final Rule, therefore some affected entities may have experience with some of those policies and procedures.

Several aspects of the proposed rule may impact the number of filings that IDIs submit to the FDIC. First, as mentioned previously, the proposed rule may increase the number of brokered deposit waiver applications the FDIC receives from adequately capitalized IDIs. Second, the proposed rule eliminates the “enabling transactions” exception (including its attendant notice), and the FDIC believes that many entities that currently rely on this exception may work with IDIs to file primary purpose exception (PPE) applications. Third, the proposed rule replaces the current "25 percent test" notice exception with two similar but distinct exceptions: the Broker-Dealer Sweep Exception (BDSE) requiring a notice, for arrangements involving only an IDI and Broker-Dealer, and the BDSE requiring an application, for arrangements involving an IDI, Broker-Dealer, and additional third-party. The FDIC believes the BDSE notice will be more operationally workable than the current "25 percent test" notice process, as the information required to complete the BDSE notice would be tailored to specific information the receiving IDI should have access to or be able to obtain from the broker-dealer. Finally, concurrent with the finalization of the proposed rule, the FDIC would rescind notices and applications approved under the 2020 Final Rule, and would eliminate the ability of non-IDIs to file applications or notices. Therefore, the FDIC expects that the proposed rule could result in a significant increase in PPE applications from IDIs, especially in the period immediately following the effective date if the proposed rule were adopted. IDIs may incur costs associated with such submissions, including costs associated with gathering more information from third parties as part of the application process. See the **Reporting Compliance Costs** subsection for a more detailed discussion of the potential effects of the proposed rule on the number and types of filings sent to the FDIC.

The proposed rule could also affect FDIC deposit insurance assessments. Under the FDIC's assessment regulations, IDIs with a significant concentration of brokered deposits may pay higher quarterly assessments, depending on other factors.[100] To the

[100] *See* 12 CFR Part 327.

extent that deposits currently considered nonbrokered would be considered brokered deposits under the proposed rule, an IDI's assessment may increase. The FDIC does not have the information necessary to estimate the proposed rule's expected effects on deposit insurance assessments because it does not possess the data necessary to estimate the amount of deposits that would be reclassified as brokered at particular IDIs under the proposed rule.

Potential Benefits of the Proposed Rule

The FDIC believes that the proposed rule poses two primary benefits. First, the proposed rule clarifies certain concepts for affected IDIs. Second, the FDIC believes the proposed rule will improve the safety and soundness of the banking system. The benefits of improved safety and soundness are difficult to quantify, but such benefits are likely to accrue to the public and to all IDIs, not just those that are less than well capitalized. The FDIC discusses these potential benefits below in turn.

The FDIC believes that the proposed rule would improve the safety and soundness of the banking system, as well as covered IDIs. To the extent the proposed rule's changes better identify deposits that are currently not reported as brokered but share the risk characteristics of brokered deposits, the FDIC believes that the proposal enhances the ability of the FDIC to ensure the safety and soundness of the banking system. In particular, the rule would limit the ability for a less than well-capitalized institution to rely on a risky funding source and improve clarity so that reliance on brokered deposits, regardless of capitalization, is correctly reflected in an institution's regulatory reporting, deposit insurance assessments, and regulatory ratios.

As discussed above, the FDIC has found significant reliance on brokered deposits increases an institution's risk profile, particularly as its financial condition weakens. The FDIC's statistical analyses and other studies have found that the use of brokered deposits by IDIs in general is associated with a higher probability of failure and higher losses to the DIF upon failure. The use of brokered deposits by IDIs is correlated with (1) higher levels of asset growth; (2) higher levels of nonperforming loans; and (3) a lower proportion of core deposit[101] funding.[102] As previously described, 47 institutions that failed between 2007 and 2017 relied heavily on brokered deposits and each caused an estimated loss to the DIF of over $100 million as of December 31, 2017. While these 47 institutions held total assets representing nearly 21 percent of the aggregate total assets of the 530 institutions that failed over this period, their losses represented 38 percent of all estimated losses to the DIF for the same period. More recently, First Republic Bank, which failed in May of 2023, saw rapid growth in reported brokered deposits in the quarters leading up to its failure.[103]

The FDIC also believes that the proposed rule would benefit covered IDIs by clarifying certain practices and concepts. For example, the proposed rule includes a provision to clarify how an IDI may regain its "agent institution" status after losing it. The FDIC also believes that the proposed rule would benefit IDIs by promoting accurate

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[101] *See* FDIC, Study on Core Deposits and Brokered Deposits, (July 8, 2011), available at *https://www.fdic.gov/regulations/reform/coredeposit-study.pdf. See also* 84 FR 2366, 2369 (Feb. 6, 2019). The FDIC updated its analysis in the 2011 Study on Core Deposits and Brokered Deposits with data through the end of 2017 ("Updated Study"). "Core deposits" is defined in the updated study as total domestic deposits net of time deposits over the insurance limit and fully insured brokered deposits. *See* Updated Study at 2384. Prior to 2011, the definition of core deposits included fully insured brokered deposits.

[102] *See* Updated Study at 2384-2400 (Appendix 2).

[103] First Republic Bank's reported total brokered deposits went from $597 million as of June 30, 2022, to $7.1 billion as of March 31, 2023. *See* First Republic Bank's Call Report data.

reporting and understanding of the regulation and how the involvement of third parties within a deposit placement arrangement may, or may not, result in the deposits being brokered. Based on the FDIC's experience, the initial decline in brokered deposits following the effective date of the 2020 Final Rule was due, in part, to some IDIs misunderstanding and misreporting a significant amount of deposits as nonbrokered. The FDIC believes that increased clarity should reduce costs for affected IDIs and ensure more accurate reporting.

Potential Effects on Consumers

The proposed rule may affect consumers that utilize brokered deposits, deposit placement services or arrangements. To the extent that consumers utilize deposits currently, or in future periods, which are not classified as brokered, but would be as a result of the adoption of the proposed rule, they might experience changes in interest rates on those funds, or costs associated with placing those funds with different entities. The FDIC does not have the information necessary to estimate such changes, and therefore, discusses these effects qualitatively.

If adopted, the proposed rule may pose costs or benefits to consumers by incentivizing them to place their funds with different entities. To the extent that some entities cease offering, or change the terms of, certain services because of a desire to avoid the placement of deposits considered brokered under the proposal, or because IDIs would prefer not to accept deposits considered brokered under the proposal, certain deposit placement arrangements may change. In particular, consumers may change their relationships with certain third-party providers or third-party providers may change their relationships with certain IDIs. Further, to the extent that consumers consider other fund management options, such as money market mutual funds, as substitutes for certain brokered deposits, consumers may change fund placement arrangements. Finally, consumers considering using deposit placement services may also benefit from the increased clarity in the proposed rule on what is and is not considered brokered.

Potential Effects on Third Parties That May or May Not Be Deposit Brokers

The proposed rule may affect third parties directly or indirectly involved in the provision of brokered deposit products. To the extent that third parties are involved in the provision of deposits currently not designated as brokered, but would be if the proposed rule was adopted, such third parties may incur costs associated with making changes to systems, policies, and procedures. To the extent that third parties may have previously relied on exceptions that existed under 2020 Final Rule but no longer will exist under the proposed rule—such as the "enabling transactions" exception—they may experience costs associated with transitioning their business models (including potentially revising fees, changing revenue structures, etc.) to reflect the new rule.

Third parties may also incur costs associated with the submission of filings to the FDIC by affiliated IDIs on their behalf for deposit placement arrangements. As mentioned previously, the proposed rule rescinds existing primary purpose exceptions and notices granted under the 2020 Final Rule and restricts the application and notice process to IDIs. Therefore, to the extent that third parties who previously applied and received approval for a primary purpose exception wish to continue offering their services to covered IDIs, they may incur costs associated with providing information to those IDIs to support applications and notices to the FDIC. Finally, as the proposed rule's criteria for determining whether an entity is exempt from being considered a deposit broker are generally stricter than the criteria in the 2020 Final Rule, more third parties are likely to be considered deposit brokers under the proposed rule.

Reporting Compliance Costs

The FDIC believes the proposed rule, if adopted, would likely affect the number of applications and notices (collectively, filings) that IDIs submit to the FDIC for a number of reasons. First, the FDIC believes that the proposed rule may increase the share of filings made up of applications because the proposed rule would eliminate the "enabling transactions" notice exception. Based on the FDIC's supervisory experience, many "enabling transactions" notice filers will file primary purpose exception (PPE) applications through IDIs, therefore the proposed rule may result in an increase in filings overall as more deposits are likely to be considered brokered under the proposed rule. Second, the proposed rule would replace the current "25 percent test" notice exception with two similar but distinct exceptions: the Broker-Dealer Sweep Exception (BDSE) requiring a notice, for arrangements involving only an IDI and Broker-Dealer, and the BDSE requiring an application, for arrangements involving an IDI, Broker-Dealer, and an additional third party. Third, the FDIC believes that the proposed rule is likely to result in an increase in filings, at least initially, because the proposed rule would rescind approved applications and notices filed under the 2020 Final Rule. Finally, because the FDIC believes the proposed rule is likely to increase the amount of deposits classified as brokered, the FDIC believes the proposed rule may increase the likelihood that an adequately capitalized IDI submits a waiver application to accept brokered deposits to the FDIC. The FDIC does not have the information necessary to quantify the potential changes in filings that are likely to occur if the proposed rule was adopted. Therefore, to quantify the effect of the proposed rule on filing activity, the FDIC made certain assumptions it deemed reasonable based on its experience with administering the 2020 Final Rule, described below, and relied on the number of filings it received under the 2020 Final Rule as proxies for the number of filings it would receive under the proposed rule.

The proposed rule would likely increase the number of PPE applications received by the FDIC. As mentioned above, the proposed rule would eliminate the "enabling transactions" exception and the FDIC believes that many entities that relied on that exception may work with IDIs that file PPE applications. Thus, in addition to the 12 PPE applications that the FDIC received in the roughly three years since the effective date of the 2020 Final Rule (April 1, 2021 to March 15, 2024),[104] the FDIC believes it may receive an additional 77 PPE applications, based on the number of "enabling transactions" notices received over the same time period,[105] for an estimated total of 89 PPE applications. Of the 89 PPE applications, the FDIC estimates 21 unique filers of applications based on the number received during the three-year period since the effective date of the 2020 Final Rule, or 4.238 PPE applications per applicant and 7 applicants[106] per year. FDIC staff estimate that each PPE application requires 10 labor hours to complete, and 15 minutes of labor per quarter to fulfill associated reporting requirements if the application is approved. Therefore, if the FDIC were to approve all estimated PPE applications received each year under the proposed rule, the estimated associated labor

[104] FDIC applications data.
[105] *See https://www.fdic.gov/resources/bankers/brokered-deposits/public-report-ppes-notices.pdf*
[106] Seven applicants equals the quotient of 21 unique PPE filers over three years.

hours would be 330, representing 300 hours[107] to complete the applications and 30 hours[108] of annual reporting burden.[109]

The proposed rule would likely change the number of notices received by the FDIC. As mentioned previously, the proposed rule would eliminate the "enabling transactions" exception and its attendant notice if adopted. Further, the proposed rule would replace the "25 percent test" exception by the BDSE. When only an IDI and Broker-Dealer are involved, the BDSE requires a notice. The FDIC believes a reasonable proxy for the number of BDSE notices under the proposed rule is the number of "25 percent test" exception notices the FDIC received under the 2020 Final Rule for which it did not identify a potential third party,[110] as the information required for each type of notice is similar. Over the roughly three years since the effective date of the 2020 Final Rule, the received 24 such notices from 22 notificants, or seven notificants per year and 1.091 notices per notificant. FDIC staff estimate that each BDSE notice would take three hours of labor to complete, and 30 minutes of labor per quarter to satisfy reporting requirements. Thus, assuming the FDIC approves of all eight BDSE notices it is

[107] 300 hours equals the product of 7 applicants per year, 4.238 applications per applicant, and 10 hours per application. The result is 300 hours because the FDIC rounded the product of the first two numbers. Otherwise, the result would be 297 hours.

[108] Applicants must report quarterly for each business line for which an application is approved. Assuming every application is approved, applicants would submit a total number of quarterly reports per year equal to four multiplied by the number of applications per applicant (4 * 4.238 = 16.952). Thus, the annual reporting burden of PPE applications is estimated as 30 hours, which is the product of 7 applicants per year, 16.952 reports per applicant, and 0.25 hours per report.

[109] 330 hours equals 300 hours plus 30 hours.

[110] *See* the 25 percent notices at *https://www.fdic.gov/resources/bankers/brokered-deposits/public-report-ppes-notices.pdf* that are not marked with an asterisk.

estimated to receive each year, the FDIC estimates that entities would incur 40 labor hours; 24 hours[111] to complete the notices and 16 hours[112] for annual reporting.[113]

The proposed rule would adopt a new application process for arrangements between an IDI and a broker-dealer in which a third party is involved in the sweep of funds from the broker-dealer to the IDI (BDSE application). The FDIC believes a reasonable proxy for the number of BDSE applications is the number of "25 percent test" exception notices the FDIC received over the roughly three year period since the effective date of the 2020 Final Rule for which the FDIC believed a third party may be involved, as such arrangements are not eligible for the BDSE notice. The FDIC received 33 "25 percent test" exception notices from 29 unique notificants that it identified as potentially involving a third party over the roughly three year period since the effective date of the 2020 Final Rule,[114] or 10 notificants per year and 1.138 notices per notificant. FDIC staff believe the new BDSE application combines elements of the PPE application with reporting requirements of the BDSE notice, and therefore estimates that each BDSE application would take 10 hours of labor to complete, and 30 minutes of labor per quarter to satisfy reporting requirements. Thus, if the FDIC approved all 10 applications it receives each year, the FDIC estimates that entities would incur 133 labor hours; 110

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[111] 24 hours equals the product of 7 notificants per year, 1.091 notices per notificant, and 3 hours per notice. The result is 24 hours because the FDIC's burden calculator rounds the product of the first two numbers. Otherwise, the result would be 23 hours.

[112] Notificants must report quarterly for each business line for which a notification is approved. Assuming every notice is approved, notificants would submit a total number of quarterly reports per year equal to four multiplied by the number of notices per notificant (4 * 1.091 = 4.364). Thus the annual reporting burden of BDSE notices is estimated as 16 hours, which equals the product of 7 notificants per year, 4.364 reports per notificant, and 0.5 hours per report. The result is 16 hours because the FDIC rounded the product of the first two numbers. Otherwise, the result would be 15 hours.

[113] 38 hours equals 24 hours plus 14 hours.

[114] *See* the 25 percent notices at https://www.fdic.gov/resources/bankers/brokered-deposits/public-report-ppes-notices.pdf that are marked with an asterisk.

hours[115] to complete the applications and 23 hours[116] to comply with the annual reporting requirements.[117]

Based on the discussion above, the FDIC estimates that the proposed rule would impose 503 labor hours per year associated with reporting requirements if adopted; 434 labor hours to complete applications and notices and 69 labor hours of to satisfy reporting obligations associated with approved applications and notices.[118] Based on the FDIC's estimation of which occupations are associated with filing applications or notices and fulfilling their associated reporting requirements, the FDIC estimates an hourly cost of compensation of $101.07,[119] and thus estimates $50,838 in total annual reporting costs associated with the proposed rule.

VI. Administrative Law Matters

A. Regulatory Flexibility Act

[115] 110 hours is the product of 10 applicants per year, 1.138 application per applicant, and 10 hours per application. The result is 110 hours because the FDIC rounded the product of the first two numbers. Otherwise, the result would be 114 hours.

[116] Applicants must report quarterly for each business line for which an application is approved. Assuming every application is approved, applicants would submit a total number of quarterly reports per year equal to four multiplied by the number of applications per applicant (4 * 1.138 = 4.552). Thus the annual reporting burden of BDSE applications is estimated as 23 hours, which is the product of 10 applicants per year, 4.552 reports per applicant, and 0.5 hours per report.

[117] 133 hours equals 110 hours plus 23 hours.

[118] This estimate is 42 fewer hours than the total hours reported in the Paperwork Reduction Act subsection because it only includes reporting requirements affected by the proposed rulemaking. See Section VI. B.

[119] The FDIC used the following Bureau of Labor Statistics (BLS) data sources to estimate an hourly cost of compensation associated with the reporting requirements in the proposed rule: National Industry-Specific Occupational Employment and Wage Estimates (OEWS): Industry: Credit Intermediation and Related Activities (5221 And 5223 only) (May 2023), Employer Cost of Employee Compensation (ECEC) (March 2023), and Employment Cost Index (March 2023 and March 2024). To estimate the average cost of compensation per hour, the FDIC used the 75th percentile hourly wages reported by the BLS OEWS data for the occupations in the Depository Credit Intermediation sector the FDIC judges would be involved in satisfying the proposed rule's reporting requirements. However, the latest OEWS wage data are as of May 2023 and do not include non-wage compensation. To adjust these wages, the FDIC multiplied the OEWS hourly wages by approximately 1.53 to account for non-wage compensation, using the BLS ECEC data as of March 2023 (the latest published release prior to the OEWS wage data). The FDIC then multiplied the resulting compensation rates by approximately 1.04 to account for the change in the seasonally adjusted Employment Cost Index for the Credit Intermediation and Related Activities sector (NAICS Code 522) between March 2023 and March 2024.

The Regulatory Flexibility Act (RFA) generally requires an agency, in connection with a proposed rule, to prepare and make available for public comment an initial regulatory flexibility analysis that describes the impact of the proposed rule on small entities. However, an initial regulatory flexibility analysis is not required if the agency certifies that the proposed rule will not, if promulgated, have a significant economic impact on a substantial number of small entities.[120] The Small Business Administration (SBA) has defined "small entities" to include banking organizations with total assets of less than or equal to $850 million.[121] Generally, the FDIC considers a significant economic impact to be a quantified effect in excess of 5 percent of total annual salaries and benefits or 2.5 percent of total noninterest expenses. The FDIC believes that effects in excess of one or more of these thresholds typically represent significant economic impacts for FDIC-supervised institutions.

The FDIC does not believe that the rule will have a significant economic effect on a substantial number of small entities. However, some expected effects of the rule are difficult to assess or accurately quantify given current information. Therefore the FDIC has included an initial regulatory flexibility analysis in this section.

Reasons Why This Action Is Being Considered

As stated previously, the FDIC has found significant reliance on brokered deposits increases an institution's risk profile, particularly as its financial condition

[120] 5 U.S.C. 601 et seq.
[121] The SBA defines a small banking organization as having $850 million or less in assets, where an organization's "assets are determined by averaging the assets reported on its four quarterly financial statements for the preceding year." *See* 13 CFR 121.201 (as amended by 87 FR 69118, effective December 19, 2022). In its determination, the "SBA counts the receipts, employees, or other measure of size of the concern whose size is at issue and all of its domestic and foreign affiliates." *See* 13 CFR 121.103. Following these regulations, the FDIC uses an insured depository institution's affiliated and acquired assets, averaged over the preceding four quarters, to determine whether the insured depository institution is "small" for the purposes of RFA.

weakens. Adoption of the 2020 Final Rule led to certain deposit arrangements that were viewed as brokered prior to the 2020 Final Rule as no longer being classified as brokered, even though the FDIC believes such deposits present similar risks as brokered deposits and could pose serious consequences for IDIs and the DIF. Additionally, the FDIC has observed a number of challenges with entities understanding certain provisions of the 2020 Final Rule, which has resulted in inaccurate and inconsistent application of the rule. Finally, the FDIC wishes to better align certain of its brokered deposit regulations with the statutory language and purpose of section 29 of the FDI Act.

Policy Objectives

As mentioned above, the FDIC's proposal would clarify and revise certain of its brokered deposit regulations to better support the statutory language and purpose of the brokered deposit restrictions. Additionally, the FDIC seeks to revise the notice and application processes for certain primary purpose exceptions, and eliminate certain existing exceptions, with the objective of increasing industry safety and soundness and decreasing the frequency of misreporting of brokered deposits as nonbrokered. For further discussion of the policy objectives of the proposed rule please refer to section I.

Legal Basis

The FDIC is adopting this rule under authorities granted by section 29 of the FDI Act. The law defines key terms such as "deposit broker," and, among other things, restricts adequately capitalized IDIs from accepting funds obtained, directly or indirectly, by or through any deposit broker for deposit into one or more deposit accounts (referred to as brokered deposits) without a waiver, and prohibits less than adequately-capitalized banks from obtaining such funds altogether. For a more detailed discussion of the proposed rule's legal basis please refer to sections II and III.

Description of the Rule

In summary, the proposed rule would (1) streamline and update certain provisions of the "deposit broker" definition; (2) eliminate the exclusive placement arrangement exception and restore the regulations' applicability to cases where a third party, that otherwise meets the definition of deposit broker, is involved with placing deposits at one or more IDIs; (3) amend the "primary purpose" exception to the "deposit broker" definition, including revising the 25 percent test designated exception to a 10 percent test exception (and narrowing the scope of firms to which the exception may apply) and eliminating the enabling transactions designated exception; (4) update the primary purpose exception application and notice processes and make it so that only IDIs may submit an application and/or a notice on behalf of a third party; and (5) clarify how an IDI that loses its "agent institution" status regains that status. For a more detailed description of the proposed rule please refer to section III.

Small Entities Affected

As of the quarter ending March 31, 2024, the FDIC insures 4,577 depository institutions; of these, 3,259 are "small entities" by the terms of the RFA.[122] Additionally, of the 3,259 small, FDIC-insured institutions, 1,237 report holding some volume of brokered deposits. Finally, of the 3,259 small FDIC-insured institutions, 6 are less than

[122] March 31, 2024 Call Report data.

well-capitalized based on their reported capital ratios, and none of the 6 report holding brokered deposits.[123]

Expected Effects

There are five categories of effects of the proposed rule on small, FDIC-insured institutions: Effects applicable to potentially any small, IDI; effects applicable to small, less than well-capitalized institutions; effects applicable to nonbank subsidiaries or affiliates of small institutions that may or may not be deemed deposit brokers under the proposed rule; effects applicable to third parties that may or may not be deemed deposit brokers under the proposed rule, and reporting requirements for small, covered IDIs. Also, the proposed rule may affect certain consumers, however "natural persons" are not small entities for purposes of the RFA, therefore these potential effects are not discussed in this initial regulatory flexibility analysis.[124] For a discussion of the proposed rule's potential effects on consumers, see section V above.

All Small, FDIC-Insured Institutions

If adopted, the proposed rule could directly affect the 1,237 small IDIs that currently report positive amounts of brokered deposits. In addition, the proposed rule could affect all 3,259 small IDIs regarding the types of deposits they choose to accept in the future. The proposed rule would revise the "deposit broker" definition and would

[123] *Id.* March 31, 2024 Call Report data. For purposes of estimating the expected effects of the proposed rule, this analysis uses an IDI's reported capital ratios to determine whether that IDI is well capitalized. The determination does not take into account written agreements, orders, capital directives, or prompt corrective action directives issued to specific IDIs. *See generally* 12 CFR 324.403(b)(1)(d) (FDIC); 12 CFR 208.43(b)(1)(v) (Board of Governors of the Federal Reserve System); 12 CFR 6.4(c)(1)(v) (Office of the Comptroller of the Currency).

[124] The RFA applies to *small entities*, which is defined in 5 USC 601(6) as having "the same meaning as the terms "small business", "small organization" and "small governmental jurisdiction" defined in paragraphs (3), (4) and (5) of" 5 USC 601. As such, a rule or information collection that affects only natural persons does not affect any small entities.

amend the analysis of the "primary purpose" exception to the "deposit broker" definition. The FDIC believes that under the proposed rule fewer entities are likely to be exempt from the definition of deposit broker than currently, and to the extent such entities continue to place funds at IDIs, the amount of deposits at IDIs considered brokered under the proposed rule is likely to increase. The FDIC does not have data to be able to reliably estimate the amount of deposits that would be re-classified as brokered under the proposed rule. However, at the end of the first quarter during which the 2020 Final Rule was in effect—April through June of 2021—small IDIs reported only $276 million fewer brokered deposits than in the previous quarter on a merger-adjusted basis, a reduction in reported brokered deposits of less than three percent.[125] Therefore, the FDIC believes the amount of deposits reclassified as brokered at small IDIs under the proposed rule is likely to be modest, at least in the aggregate.

The remainder of the discussion in this subsection is divided into potential costs to small IDIs associated with the proposed rule, followed by potential benefits to small IDIs.

<u>Potential Costs to Small, FDIC-Insured Institutions</u>

Small IDIs affected by the proposed rule may incur costs if they choose to alter the composition of their liabilities as a result of the proposed rule. As discussed above, adoption of the 2020 Final Rule led to certain deposit arrangements that were viewed as brokered prior to the 2020 Final Rule as no longer being classified as brokered. The FDIC believes that the changes in the proposed rule are likely to result in a greater

[125] FDIC Call Report Data from March 31, 2021, and June 30, 2021. IDIs reporting during the aforementioned periods were merger-adjusted to March 31, 2024, and categorized as "small entities" or not based on the definition of "small entity" in effect as of March 31, 2024 in order to facilitate comparison with the small entities that may be affected by the proposed rule.

proportion of nonbrokered deposits being reclassified as brokered. To the extent affected IDIs are currently operating at their desired ratios of brokered deposits to total liabilities and the proposed rule increases the amount of deposits considered brokered, some affected IDIs may find that the proposed rule causes them to have a greater than desired share of brokered deposits to liabilities. The FDIC does not have the data to be able to estimate how many institutions might choose to change the composition of their liabilities because of the proposed rule or by how much, in part because the FDIC does not possess the information necessary to estimate for particular banks the amount of deposits, if any, that would be reclassified as brokered by the proposed rule.

If the proposed rule is adopted, it is possible that some small IDIs may choose to make changes to the organizational structure of their institutions if the proposed rule is adopted. In particular, small IDIs that rely on the current exclusive placement exception to obtain nonbrokered deposits from affiliates may be incentivized to stop using such deposits and perhaps change their organizational structure as a result of the proposed rule.

Small IDIs affected by the proposed rule may also incur some costs associated with changes to their internal systems, policies, and procedures associated with deposit brokering activities and deposit placement arrangements (especially those involving third parties). However, the FDIC believes that some of these costs may be ameliorated because the proposed rule is very similar to the regulatory framework that existed prior to the 2020 Final Rule, therefore some affected entities may have experience with some of those policies and procedures.

The FDIC also believes the proposed rule may affect the number of applications and notices (collectively, filings) that small IDIs may submit to the FDIC. The effect of the proposed rule on filings submitted by small IDIs is discussed below in the **Reporting Compliance Costs** subsection of this RFA analysis.

Finally, the proposed rule could also affect FDIC deposit insurance assessments at certain small IDIs. Under the FDIC's assessment regulations, IDIs with a significant concentration of brokered deposits may pay higher quarterly assessments, depending on other factors.[126] To the extent that deposits currently defined as nonbrokered would be considered brokered deposits under the proposed rule, a small IDI's assessment may increase. The FDIC does not have the information necessary to estimate the proposed rule's expected effects on deposit insurance assessments because it does not possess the data necessary to estimate the amount of deposits that would be reclassified as brokered at particular small IDIs under the proposed rule.

Potential Benefits to Small, FDIC-Insured Institutions

The FDIC believes a primary benefit of the proposed rule is that it will improve the safety and soundness of the banking system, including covered IDIs. As discussed in more detail in section II. A. Brokered Deposits – A History of Concerns and Related Research, and in the Expected Effects analysis in section V of this document, the FDIC's own analyses as well as other studies have found that IDI use of brokered deposits in general is associated with a higher probability of failure and higher losses to the DIF upon failure. IDI use of brokered deposits is correlated with (1) higher levels of asset growth; (2) higher levels of nonperforming loans; and (3) a lower proportion of core

[126] *See* 12 CFR Part 327.

deposit[127] funding.[128] Thus, to the extent the proposed rule's changes better identify deposits that are currently not reported as brokered but share the characteristics of brokered deposits, the proposal would enhance the ability of the FDIC to ensure the safety and soundness of the banking system by limiting the ability for a less than well-capitalized small institution to rely on a risky funding source and improve clarity so that reliance on brokered deposits, regardless of capitalization, is correctly reflected in an institution's regulatory reporting and deposit insurance assessments.

Another potential benefit to small IDIs of the proposed rule is the clarification of certain concepts and practices, and by promoting accurate reporting and understanding of the regulation and how the involvement of third parties within a deposit placement arrangement may, or may not, result in the deposits being brokered. For example, the proposed rule includes a provision to clarify how an IDI may regain its "agent institution" status after losing it. The FDIC believes that increased clarity should reduce costs for covered small IDIs and ensure more accurate reporting. As previously described, based on the FDIC's experience, the initial decline in brokered deposits following the effective date of the 2020 Final Rule was due, in part, to some IDIs misunderstanding and misreporting a significant amount of deposits as nonbrokered.

Less Than Well-Capitalized Institutions

The acceptance of brokered deposits is subject to statutory and regulatory restrictions for banks that are not well capitalized. Adequately capitalized banks may not

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[127] "Core deposits" is defined in the updated study as total domestic deposits net of time deposits over the insurance limit and fully insured brokered deposits. *See* Updated Study at 2385. Prior to 2011, the definition of core deposits included insured brokered deposits. *See* Updated Study at 2384.

[128] *See* FDIC, Study on Core Deposits and Brokered Deposits, (July 8, 2011), available at *https://www.fdic.gov/regulations/reform/coredeposit-study.pdf. See also* 84 FR 2366, 2369 (Feb. 6, 2019). *See* also Updated Study at 2384-2400 (Appendix 2).

accept brokered deposits without a waiver from the FDIC, and banks that are less than adequately capitalized may not accept them at all. As a result, adequately capitalized and undercapitalized banks generally hold fewer brokered deposits. To the extent less than well-capitalized IDIs are able to rely on deposits that share the characteristics of brokered deposits (such as volatility) but are not currently reported as brokered, such IDIs can operate using a riskier liability structure than one reliant on more stable funding sources, thereby potentially increasing the risk of loss to the Deposit Insurance Fund. By generally increasing the scope of deposits that are considered brokered, the proposed rule limits the ability of less than well-capitalized small banks to rely on potentially less stable third-party deposits that are currently reported as nonbrokered but would be reported as brokered under the proposed rule.

Based on IDIs' reported capital ratios as of March 31, 2024, there are six small, less than well-capitalized IDIs, none of which report holding any brokered deposits.129 These six IDIs together report $441 million in total assets and $402 million in domestic deposits.[130] Five of the six less than well-capitalized IDIs are adequately capitalized as of March 31, 2024, and one is undercapitalized.[131]

As mentioned above, adequately capitalized banks may not accept brokered deposits without a waiver from the FDIC, and the proposed rule generally increases the scope of deposits that are considered brokered. Thus, one potential effect of the proposed

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[129] March 31, 2024, Call Report data. For purposes of estimating the expected effects of the proposed rule, this analysis uses an IDI's reported capital ratios to determine whether that IDI is well capitalized. The determination does not take into account written agreements, orders, capital directives, or prompt corrective action directives issued to specific IDIs. *See generally* 12 CFR 324.403(b)(1)(d) (FDIC); 12 CFR 208.43(b)(1)(v) (Board of Governors of the Federal Reserve System); 12 CFR 6.4(c)(1)(v) (Office of the Comptroller of the Currency).

[130] *Id.*

[131] *Id.*

rule may be to increase the number of brokered deposit waiver applications submitted to the FDIC by adequately capitalized small banks. This potential effect of the proposed rule is difficult to estimate because, as mentioned above, not only does the FDIC not possess the data necessary to estimate the amount of deposits that would be reclassified as brokered at specific small banks under the proposed rule, but also the number of adequately capitalized small banks depends on other factors, such as economic conditions.

Nonbank Subsidiaries of Small, FDIC-Insured Institutions That May or May Not Be Deposit Brokers

The proposed rule could affect nonbank subsidiaries of small IDIs. In particular, nonbank subsidiaries of small IDIs that may not be considered deposit brokers under the 2020 Final Rule, but may be considered deposit brokers under the proposed rule. Additionally, under the 2020 Final Rule nonbanks may avail themselves of the notice or application process in order to seek certain primary purpose exceptions. However, under the proposed rule only IDIs may submit notices or applications with respect to primary purpose exceptions. In addition, to the extent a nonbank subsidiary of a small bank relies on the 2020 Final Rule's exclusive placement arrangement exception to place deposits solely at its parent IDI, the proposed removal of this exception could affect the subsidiary and its parent IDI.

Third Parties That May or May Not Be Deposit Brokers

As discussed in the Expected Effects section V, the proposed rule may affect third parties directly or indirectly involved with the provision of deposit products. The FDIC does not have information on the number or size of potentially affected third parties, however the FDIC believes it is likely that some affected third parties may be small entities.

First, concurrent with the finalization of the proposed rule, the FDIC would rescind existing primary purpose exceptions and notices granted under the 2020 Final Rule, and the proposed rule would restrict the application and notice process to IDIs. Therefore, to the extent that small third parties who previously applied and received approval for a primary purpose exception wish to continue offering their services to IDIs, they may incur costs associated with providing information to those IDIs to support applications and notices to the FDIC.

Second, to the extent that small third parties are directly or indirectly involved with the provision of deposits not currently designated as brokered deposits, but that would be if the proposed rule were adopted, such small third parties may incur costs associated with complying with the requirements in the proposed rule. Such costs include, but are not limited to: (1) costs associated with making changes to systems, policies, and procedures involved in the provision of brokered deposits; (2) costs associated with the submission of filings to the FDIC by affiliated IDIs on their deposit placement arrangements; and (3) other costs associated with transitioning their business models to incorporate the provision of brokered deposits (including potential changes to fees, revenue structures, etc.).

Third, small third parties who are engaged in the provision of deposits that are considered brokered may incur costs associated with making changes to systems, policies, and procedures to comply with the requirements in the proposed rule. Also, such small third parties may experience changes to fee and revenue structures as a result of the requirements in the proposed rule.

Finally, as the proposed rule's criteria for determining whether an entity is a deposit broker are generally stricter than the criteria in the 2020 Final Rule, more small third parties could be considered deposit brokers under the proposed rule.

Reporting Requirements

The FDIC believes the proposed rule would likely affect the number of applications and notices (collectively, filings) that IDIs submit to the FDIC for the reasons discussed in the Reporting Compliance Costs subsection of the Expected Effects analysis in section V above. Briefly, the FDIC believes the proposed rule would likely affect the number of filings because it eliminates the "enabling transactions" exception, and the FDIC's supervisory experience suggests many "enabling transactions" notice filers would file primary purpose exception (PPE) applications through IDIs. Second, the proposed rule would replace the current "25 percent test" notice exception with two similar but distinct exceptions: the Broker-Dealer Sweep Exception (BDSE) requiring a notice, for arrangements involving only an IDI and Broker-Dealer, and the BDSE requiring an application, for arrangements involving an IDI, Broker-Dealer, and an additional third party. Third, the FDIC believes that the proposed rule would likely result in an increase in filings, at least initially, because the proposed rule rescinds approved applications and notices filed under the 2020 Final Rule. Finally, because the FDIC believes the proposed rule would likely increase the amount of deposits classified as brokered, the FDIC believes the proposed rule may increase the likelihood that an adequately capitalized IDI submits a waiver application to accept brokered deposits to the FDIC.

While the FDIC does not have the information necessary to quantify the potential changes in filings by small IDIs that are likely to occur if the proposed rule was adopted, based on the number of filings received during the roughly three-year period since the 2020 Final Rule became effective, the FDIC believes the effect is likely to be modest. During the aforementioned period, five small IDIs (out of 29 total IDIs and 46 other entities) submitted a total of only six filings out of 147.

Other Statutes and Federal Rules

The FDIC has not identified any likely duplication, overlap, and/or potential conflict between this proposed rule and any other federal rule.

The FDIC invites comments on all aspects of the supporting information provided in this RFA section. In particular, would this proposed rule have any significant effects on small entities that the FDIC has not identified?

B. Paperwork Reduction Act

Certain provisions of the proposed rule contain "collections of information" within the meaning of the Paperwork Reduction Act (PRA) of 1995 (44 U.S.C. 3501 through 3521). In accordance with the requirements of the PRA, the FDIC may not conduct or sponsor, and the respondent is not required to respond to, an information collection unless it displays a currently valid Office of Management and Budget (OMB) control number. The information collections contained in the proposed rule have been submitted to OMB for review and approval by the FDIC under section 3507(d) of the PRA (44 U.S.C. 3507(d)) and § 1320.11 of OMB's implementing regulations (5 CFR part 1320). The FDIC proposes to extend for three years, with revision, the following information collection:

Title of Information Collection: Reporting and Recordkeeping Requirements for Brokered Deposits.

OMB Control Number: 3064-0099

Respondents: Insured state nonmember banks and state savings associations.

Current Actions: The proposed rule revises the currently-approved information collection as follows:

Section 303.243(b)(3), Notice Submission for Primary Purpose Exception Based on Placement of Less Than 10 Percent of Customer Assets Under Management – Implementation. An insured depository institution must notify the FDIC through a written notice that the insured depository institution will rely upon *the 10 percent* designated business exception described in 12 CFR § 337.6(a)(5)(iv)(I)(1)(i) of this chapter. See line item two of the table below.

Section 303.243(b)(3)(vii), Notice Submission for Primary Purpose Exception Based on the Placement of Less Than 10 Percent of Customer Assets Under Management – Ongoing. Notice filers that submit a notice under *the 10 percent test* described in 12 CFR § 337.6(a)(5)(iv)(I)(1)(i) of this chapter must provide to the FDIC quarterly updates of the figures that were provided as part of the notice. This is the corresponding ongoing reporting requirement associated with line item two. See line item five of the table below.

Section 12 CFR 303.243(b)(4)(i), Application for Primary Purpose Exception Based on 10 Test With Additional 3rd Party – Implementation. Applicants that seek the primary purpose exception where the broker dealer or investment adviser place less than 10 percent of customer funds into insured depository institutions through the use of an additional third party that does not meet the deposit broker definition must file a primary purpose exception application with the FDIC. See line item three of the table below.

Section 12 CFR 303.243(b)(4)(vi), Reporting for Primary Purpose Exception Based on the Placement of Less Than 10 Percent of Customer Assets Under Management with Additional 3rd Party – Ongoing. Applicants that receive a written approval for the primary purpose exception shall provide reporting to the FDIC. This is the corresponding ongoing reporting requirement associated with line item three. See line item six of the table below.

Estimated Annual Burden:

Summary of Estimated Annual Burden (OMB No. 3064-0099)					
Information Collection (IC) (Obligation to Respond)	Type of Burden (Frequency of Response)	Number of Respondents	Number of Responses per Respondent	Time per Response (HH:MM)	Annual Burden (Hours)
1. Application for Waiver of Prohibition on Acceptance of Brokered Deposits, 12 CFR 337.6(c) (Required to Obtain or Retain a Benefit)	Reporting (On Occasion)	3	2.375	06:00	42
2. Notice Submission for Primary Purpose Exception Based on Placement of Less Than 10 Percent of Customer Assets Under Management - Implementation, 12 CFR 303.243(b)(3) (Required to Obtain or Retain a Benefit)	Reporting (On Occasion)	7	1.091	03:00	24
3. Application for Primary Purpose Exception Based on 10 Test With Additional 3rd Party - Implementation, 12 CFR 303.243(b)(4)(i) (Required to Obtain or Retain a Benefit)	Reporting (On Occasion)	10	1.138	10:00	110

4. Application for Primary Purpose Exception Not Based on Business Arrangements that Meets a Designated Exception - Implementation, 12 CFR 303.243(b)(4)(ii) (Required to Obtain or Retain a Benefit)	Reporting (On Occasion)	7	4.238	10:00	300
5. Notice Submission for Primary Purpose Exception Based on the Placement of Less Than 10 Percent of Customer Assets Under Management- Ongoing, 12 CFR 303.243(b)(3)(vii) (Required to Obtain or Retain a Benefit)	Reporting (Quarterly)	7	4.364	00:30	16
6. Reporting for Primary Purpose Exception Based on the Placement of Less Than 10 Percent of Customer Assets Under Management with Additional 3rd Party- Ongoing, 12 CFR 303.243(b)(4)(vi) (Required to Obtain or Retain a Benefit)	Reporting (Quarterly)	10	4.552	00:30	23
7. Reporting for Primary Purpose Exception Not Based on the Business Arrangements that meets a Designated Exception - Ongoing, 12 CFR 303.243(b)(4)(vi) (Required to Obtain or Retain a Benefit)	Reporting (Quarterly)	7	16.952	00:15	30
				Total Annual Burden (Hours):	***545***

Note: The estimated annual time burden for a given collection is the product, rounded to the nearest hour, of the estimated annual number of responses and the estimated time per response. The estimated annual number of responses is the product, rounded to the nearest whole number, of the estimated annual number of respondents and the estimated annual number of responses per respondent. This methodology ensures the estimated annual burdens in the table are consistent with the values recorded in OMB's consolidated information system.

The total estimated annual burden for OMB No. 3064-0099 is 545 hours, an increase of 168 hours from the most recent Paperwork Reduction Act renewal.[132]

Comments are invited on: (a) Whether the collection of information is necessary for the proper performance of the FDIC's functions, including whether the information has practical utility; (b) the accuracy of the estimates of the burden of the information collection, including the validity of the methodology and assumptions used; (c) ways to enhance the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology. All comments will become a matter of public record.

C. Plain Language

Section 722 of the Gramm-Leach-Bliley Act requires the agencies to use plain language in all proposed and final rules published after January 1, 2000. The FDIC invites comment on how to make this proposed rule easier to understand.

For example:

- Have the agencies organized the material to inform your needs? If not, how could the agencies present the proposed rule more clearly?
- Are the requirements in the proposed rule clearly stated? If not, how could the proposal be more clearly stated?
- Does the proposed regulation contain technical language or jargon that is not clear? If so, which language requires clarification?

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[132] *See* FDIC Application for Waiver of Prohibition on Acceptance of Brokered Deposits Information Collection Request, OMB No. 3064-0099, *https://www.reginfo.gov/public/do/PRAViewICR?ref_nbr=202308-3064-001.*

- Would a different format (grouping and order of sections, use of headings, paragraphing) make the proposed regulation easier to understand? If so, what changes would achieve that?
- Is this section format adequate? If not, which of the sections should be changed and how?
- What other changes can the agencies incorporate to make the proposed regulation easier to understand?

D. Riegle Community Development and Regulatory Improvement Act of 1994

Pursuant to section 302(a) of the Riegle Community Development and Regulatory Improvement Act of 1994[133] (RCDRIA), in determining the effective date and administrative compliance requirements for new regulations that impose additional reporting, disclosure, or other requirements on IDIs, each Federal banking agency must consider, consistent with principles of safety and soundness and the public interest, any administrative burdens that such regulations would place on affected depository institutions, including small depository institutions, and customers of depository institutions, as well as the benefits of such regulations. In addition, section 302(b) of RCDRIA requires new regulations and amendments to regulations that impose additional reporting, disclosures, or other new requirements on IDIs generally to take effect on the first day of a calendar quarter that begins on or after the date on which the regulations are

[133] 12 U.S.C. 4802(a).

published in final form.[134] The FDIC invites comments that further will inform its consideration of RCDRIA.

VII. Request for Comments

The FDIC invites comment from all members of the public regarding all aspects of the proposal. In particular, the FDIC seeks feedback on the scope of the proposed rule and its requirements, and responses to the following specific questions:

Deposit Broker Definition

1. Does the FDIC's proposed amendment to the "deposit broker" definition align more closely with the statutory language and purpose of section 29 of the FDI Act? Why or why not?

2. Is the FDIC's proposed change to remove "matchmaking activities" from the "deposit broker" definition and proposal to add a deposit allocation provision appropriate? Why or why not?

3. Is the consideration of fees appropriate when determining whether a person is a "deposit broker"? Are there any additional factors the FDIC should consider adding to the "deposit broker" definition? Please explain and provide data to support your views.

Primary Purpose Exception Analysis

4. Is the proposed updated primary purpose exception analysis appropriate? Why or why not?

5. Are the proposed changes to the primary purpose exception application process appropriate? Is it appropriate to limit the application process to IDIs? Is the

[134] 12 U.S.C. 4802(b).

proposed process sufficiently clear to allow IDIs to obtain the required information on all third parties within a deposit placement arrangement?

6. Are there any additional factors the primary purpose exception application process should consider?

Designated Exceptions

7. Should previously approved primary purpose exceptions be added to the regulatory list of "designated exceptions" as meeting the primary purpose exception under the proposed rule if they satisfy the proposed primary purpose exception?

8. Should any of the designated exceptions be removed, or new ones added? Please explain.

9. Should the enabling transactions designated exception be amended to include only non-reloadable prepaid card programs, such as gift cards? Plese explain.

10. For the proposed Broker-Dealer Sweep Exception, is the use of "assets under management" appropriate? Is the definition of "assets under management" sufficiently clear under the proposed rule? Is it appropriate to request the total amount of deposits placed by the broker-dealer or investment adviser on behalf of its customers at all IDIs and the total amount of customer assets under management as of the last quarter and as of the date of the notice filing?

Reciprocal Deposits

11. Given that the limited reciprocal deposits exception is intended for IDIs that are in good condition and well managed, should there be any ability for an IDI to regain "agent status" absent a return to being a well-rated and well-capitalized IDI?

12. Can allowance of regaining “agent status” potentially run counter to the goals of having an IDI focus on addressing its problems because the exception would potentially allow an IDI that is less than well-capitalized and not well-rated to grow its deposits through this avenue?

13. If an IDI could regain “agent status” absent a return to being a well-rated and well-capitalized IDI, is it appropriate to allow the IDI to regain “agent status” after the third consecutive calendar quarter during which the IDI did not at any time receive reciprocal deposits that caused its total reciprocal deposits to exceed its special cap? Should it be a shorter or longer time period?

Alternatives

14. Would rescinding a designated exception for sweep deposits be appropriate? Why or why not?

15. Would limiting the Broker-Dealer Sweep Exception to sweep deposits placed at affiliated IDIs be appropriate? Why or why not?

16. Are there any additional alternatives the FDIC should consider?

APPENDIX 1: Sweep Deposits and Brokered Deposit Reporting, Call Report, December 31, 2023

PART I

Number of IDIs Reporting Sweep Deposits, and Related Data—Call Report, Schedule RC-E Memorandum Items 1.h and 1.i, December 31, 2023

		All IDIs	IDIs with TA>$100B	IDIs with TA>$50B <$100B	IDIs with TA>$10B<$50B	IDIs with TA>$5B <$10B	IDIs with TA <$5B
1	**Total Number of IDIs**	4,587	33	13	112	120	4,309
2	**# of IDIs Reporting Non-Zero Sweep Deposits**	1,375	31	12	85	86	1,161

3	**% of IDIs Reporting Non-Zero Sweep Deposits**	29.98%	93.94%	92.31%	75.89%	71.67%	26.94%
4	**Sweep Deposits as % of Total Deposits Average Among IDIs Reporting Sweep Deposits**	8.15%	11.16%	9.72%	15.88%	9.95%	7.35%
Affiliate Sweep Deposits							
5	**# of IDIs Reporting Affiliate Sweep Deposits**	132	19	4	17	10	82
6	**% of IDIs Reporting Affiliate Sweep Deposits**	2.88%	57.58%	30.77%	15.18%	8.33%	1.90%
7	**Affiliate Sweeps as % of Total Deposits—Average Among IDIs Reporting Sweeps**	12.97%	11.57%	6.97%	34.60%	9.42%	9.53%
8	**Largest Reported Affiliate Sweeps as % Total Deposits at an IDI**	100.00%	74.17%	18.53%	100.00%	66.49%	100.00%
Non-Affiliate Sweep Deposits							
9	**# of IDIs Reporting Non-Affiliate Sweep Deposits**	1,308	28	11	80	83	1,106
10	**% of IDIs Reporting Non-Affiliate Sweep Deposits**	28.52%	84.85%	84.62%	71.43%	69.17%	25.67%
11	**# of IDIs With No Affiliate Sweeps That Reporting All Non-Affiliate Sweeps as Not Brokered**[i]	895	3	2	28	42	820
12	**IDIs From Line 11 as Percentage of IDIs on Line 9**	68.4%	10.7%	18.2%	35.0%	50.6%	74.1%
13	**Non-Affiliate Sweeps as % of Total Deposits Average Among IDIs Reporting Sweeps**	7.26%	4.51%	8.07%	9.52%	9.18%	7.01%
14	**Greatest Non-Affiliate Sweeps as % of Total Deposits at an IDI**	101.65%	21.87%	21.82%	101.65%	35.26%	57.81%
15	**# of IDIs with Non-Affiliate Sweeps ≥ 50% of Total Deposits**	2	0	0	1	0	1
16	**# of IDIs with Non-Affiliate Sweeps ≥ 25% of Total Deposits**	47	0	0	6	4	37

17	**# of IDIs with Non-Affiliate Sweeps > 10% of Total Deposits**	336	3	2	24	33	274

PART II

Dollar Volumes of Sweep Deposits—Call Report, Schedule RC-E, Memorandum Items 1.h and 1.i, December 31, 2023

		All IDIs	IDIs with TA>$100B	IDIs with TA>$50B <$100B	IDIs with TA>$10B<$50B	IDIs with TA>$5B <$10B	IDIs with TA <$5B
1	**Reported Total Deposits at All IDIs**	18,813,298,058	13,232,515,916	740,962,100	1,972,296,250	685,082,045	2,182,441,747
2	**Reported Total Sweeps**	1,427,142,903	951,624,313	69,540,704	269,437,563	51,281,295	85,259,028
3	**Reported Total Affiliated Sweeps**	748,878,759	608,077,343	18,375,917	108,835,380	5,776,164	7,813,955
4	**Reported Total Non-Affiliate Sweeps**	678,264,144	343,546,970	51,164,787	160,602,183	45,505,131	77,445,073

Part III
Estimates of Unaffiliated Sweep Deposits Not Reported as Brokered Deposits, December 31, 2023. Dollar Amounts in Thousands.

		All IDIs	IDIs with TA>$100B	IDIs with TA>$50B <$100B	IDIs with TA>$10B<$50B	IDIs with TA>$5B <$10B	IDIs with TA <$5B
1	**Reported Total Sweeps Not Reported As Brokered**	1,130,350,872	748,795,994	47,741,450	224,773,693	40,435,786	68,603,949
2	**Reported Total Affiliate Sweeps (From Line 3 in Part II Above)**	748,878,759	608,077,343	18,375,917	108,835,380	5,776,164	7,813,955
3	**Reported Total Non-Affiliate Sweeps Estimated to Not Be Reported as Brokered (Line 1 minus Line 2 Above)[ii]**	381,472,113	140,718,651	29,365,533	115,938,313	34,659,622	60,789,994

4	**Reported Total Non-Affiliate Sweeps Confirmed to Be Correctly Reported as Non-Brokered**	97,479,855[iii]	66,427,468[iv]	0	31,052,387[v]	0	0
5	**Reported Total Non-Affiliate Sweeps Estimated to be Incorrectly Reported as Not Brokered (Line 3 minus Line 4 Above)**	283,992,258	74,291,183	29,365,533	84,885,926	34,659,622	60,789,994
6	**Reported Total Non-Affiliate Sweeps**	678,264,144	343,546,970	51,164,787	160,602,183	45,505,131	77,445,073
7	**Reported Total Non-Affiliate Sweeps Estimated to be Correctly Reported as Brokered (Line 6 minus Line 3 Above)**	296,792,031	202,828,319	21,799,254	44,663,870	10,845,509	16,655,079
8	**# of IDIs Reporting All Non-Affiliate Sweeps as Not Brokered[vi]**	895	3	2	28	42	820

[i] IDIs reporting: (1) no affiliate sweeps; (2) a non-zero value for non-affiliate sweeps; and (3) total non-affiliated sweeps that equal total sweeps not reported as brokered. The remaining IDIs represent: (1) IDIs that correctly reported all non-affiliated sweeps as brokered; (2) IDIs that correctly reported a portion of unaffiliated sweeps as non-brokered and incorrectly reported a portion of sweeps as non-brokered; (3) and IDIs with a portion of affiliate sweeps and a portion of non-affiliated sweeps that is either reported correctly or incorrectly.

[ii] Assumes all total affiliate sweeps are not reported as brokered. Under current regulations, affiliate sweeps would need to be associated with a "25 percent test" PPE through the notice process or the IDI is relying on the Exclusive Placement Arrangement for these deposits to be considered non-brokered.

[iii] This $97,479,855,000 amount is correctly reported as not brokered because it reflects amounts reported by two IDIs, which accept sweep deposits from a non-affiliated clearing broker that has filed a notice with the FDIC indicating that it operates under a primary purpose exception where less than 25% of assets under administration are placed at insured depository institutions, and do not use a 3rd party deposit allocation service. A review of other IDIs reporting of non-affiliate sweeps deposits as brokered may reveal other instances of non-affiliate sweeps deposits being correctly reported as non-brokered if the sweep deposits are coming from a broker-dealer or other custodian that has filed a primary purpose exception notice with the FDIC and no other third party is involved that provides matchmaking services or otherwise meets the *deposit broker* definition without an applicable exception.

[iv] This $66,427,468,000 amount is correctly reported as not brokered because it reflects amounts reported by an IDI, which accepts sweep deposits from a non-affiliated clearing broker that has filed a notice with the FDIC indicating that it operates under a primary purpose exception where less than 25% of assets under administration are placed at insured depository institutions and does not use a 3rd party deposit allocation service.

[v] This $31,052,387,000 amount is correctly reported as not brokered because it reflects amounts reported by an IDI, which accepts sweep deposits from a non-affiliated clearing broker that has filed a notice with the FDIC indicating that it operates under a primary purpose exception where less than 25% of assets under

administration are placed at insured depository institutions and does not use a 3rd party deposit allocation service.

[vi] IDIs reporting no affiliate sweeps, a non-zero value for non-affiliate sweeps, and total non-affiliated sweeps that equal total sweeps not reported as brokered.

List of Subjects

12 CFR Part 303

Administrative practice and procedure; Bank deposit insurance; Banks, banking; Reporting and recordkeeping requirements; Savings associations.

12 CFR Part 337

Banks, banking, Reporting and recordkeeping requirements, Savings associations, Securities.

Authority and Issuance

For the reasons stated in the preamble, the FDIC proposes to amend 12 CFR parts 303 and 337 as follows:

PART 303—FILING PROCEDURES

1. The authority citation for part 303 continues to read as follows:

Authority: 12 U.S.C. 378, 1464, 1813, 1815, 1817, 1818, 1819(a) (Seventh and Tenth), 1820, 1823, 1828, 1831a, 1831e, 1831o, 1831p–1, 1831w, 1835a, 1843(l), 3104, 3105, 3108, 3207, 5414, 5415 and 15 U.S.C. 1601– 1607.

2. Amend § 303.243 by revising paragraph (b) to read as follows:

§ 303.243 Brokered deposits.

* * * * *

(b) *Primary purpose exception notices and applications*—(1) *Scope*. This section sets forth a process for an insured depository institution to notify the FDIC that it will rely upon the designated exception in § 337.6(a)(5)(iv)(I)*(1)(i)* of this chapter and sets forth a process for an insured depository institution to apply for the primary purpose exception, as described in § 337.6(a)(5)(iv)*(I)(2)* of this chapter.

(2) *Definitions*. For purposes of this paragraph (b):

Notice filer means an insured depository institution that submits a written notice to the appropriate FDIC regional director indicating that the IDI's relationship with a broker-dealer or an investment adviser registered with the U.S. Securities and Exchange Commission qualifies for the designated business exception in § 337.6(a)(5)(iv)(I)*(1)(i)* of this chapter.

Applicant means an insured depository institution that applies for a primary purpose exception described in § 337.6(a)(5)(iv)(I)*(2)* of this chapter with respect to a particular business line between the insured depository institution and a deposit broker.

(3) *Prior notice requirement for 10 percent of assets under management designated business exception described in 12 CFR 337.6(a)(5)(iv)(I)(1)(i)*. An insured depository institution must notify the FDIC through a written notice that the insured depository institution will rely upon the 10 percent designated business exception described in § 337.6(a)(5)(iv)(I)*(1)(i)* of this chapter. An IDI may rely on the exception 90 days after filing a complete notice if the FDIC has not disapproved the notice. The FDIC, within its discretion, may extend the time period for an additional 90 days, with notice, to review and provide disapproval before the IDI may rely on the exception.

(i) *Contents of notice.* The notice must include:

(A) A description of the deposit placement arrangement between the insured depository institution and the broker-dealer or investment adviser for the particular business line;

(B) The registration and contact information for the broker-dealer or investment adviser;

(C) The total amount of customer assets under management (as defined in § 337.6(a)(11) of this chapter) by the broker-dealer or investment adviser as of the last quarter and as of the date of the filing;

(D) The total amount of deposits placed by the broker-dealer or investment adviser on behalf of its customers at all depository institutions as of the last quarter and as of the date of the filing.

(E) A certification that no additional third parties are involved in the deposit placement arrangement.

(ii) *Request for additional information for notices.* The FDIC may request additional information from the notice filer at any time after receipt of the notice.

(iii) *Notice timing.* Within 90 days of receipt of a submission under paragraph (b)(3)(i) of this section, the FDIC will inform the notice filer whether the submission is disapproved. The FDIC may extend its review period by an additional 90 days, as necessary, with notice.

(iv) *Notice disapproval.* Submissions that do not meet the 10 percent designated business exception (as described in 12 CFR § 337.6(a)(5)(iv)(I)*(1)(i)* of this chapter) will be disapproved. Submissions that fail to include the required information described in paragraph (b)(3)(i) of this section are incomplete and will be disapproved.

(v) *Additional notice filers identified by the FDIC at a later date.* The FDIC may include notice and/or reporting requirements as part of a designated exception identified under § 337.6(a)(5)(iv)(I)*(1)(xiv)* of this chapter.

(vi) *Subsequent notices.* A notice filer that previously submitted a notice under this section shall submit a subsequent notice to the FDIC if, at any point, the business line that is the subject of the notice no longer meets the designated business exception that was the subject of its previous notice.

(vii) Ongoing *requirements for notice filers.* Notice filers that submit a notice under *the 10 percent test described in 12 CFR § 337.6(a)(5)(iv)(I)(1)(i) of this chapter* must provide to the FDIC quarterly updates of the figures described in paragraph (b)(3)(i) of this section that were provided as part of the notice.

(viii) *Revocation of primary purpose exception.* The FDIC may, with notice, revoke a primary purpose exception under paragraph (b)(3)(iii) of this section, if:

(A) The broker dealer or investment adviser no longer meets the criteria to rely on the designated exception;

(B) The notice or subsequent reporting is inaccurate; or

(C) The notice filer fails to submit one or more required reports.

(4) *Application requirements.* An insured depository institution may submit an application to the FDIC seeking a primary purpose exception for business relationships not designated in § 337.6(a)(5)(iv)(I)*(1)* of this chapter.

(i) *For applications for primary purpose exception to place less than 10 percent of customer funds in insured depository institutions with the use of additional third parties that do not meet the deposit broker definition.* Applicants that seek the primary purpose exception where the broker dealer or investment adviser place less than 10 percent of customer funds into insured depository institutions through the use of an additional third party that does not meet the deposit broker definition must include the following information:

(A) A description of the deposit placement arrangement between the insured depository institution, the broker-dealer or investment adviser, and the additional third party, including the services provided by the additional third party, for the particular business line, and copies of contracts relating to the deposit placement arrangement, including all third party contracts;

(B) The total amount of customer assets under management by the broker-dealer or investment adviser;

(C) The total amount of deposits placed by the broker-dealer or investment adviser on behalf of its customers at all depository institutions;

(D) Information on whether the additional third party places or facilitates the placement of deposits at insured depository institutions, including through operating or using an algorithm, or any other program or technology that is functionally similar;

(E) Information on whether the additional third party has legal authority, contractual or otherwise, to close the account or move the third party's funds to another insured depository institution, including through operating or using an algorithm, or any other program or technology that is functionally similar;

(F) Information on the amount of fees paid to the additional third party from any source with respect to its services provided as part of the deposit placement arrangement;

(G) Information on whether the additional third party has discretion to choose the insured depository institution(s) at which customer deposits are or will be placed; and

(H) Any other information that the FDIC requires to initiate its review and render the application complete.

(ii) *Contents of applications for primary purpose exception not covered by paragraph (b)(4)(i) of this section.* Applicants that seek the primary purpose exception, other than applications under paragraph (b)(4)(i) of this section, must include, to the extent applicable:

(A) A description of the deposit placement arrangements between the third party and insured depository institutions for the particular business line, including the services provided by any additional third parties, and copies of contracts relating to the deposit placement arrangement, including all third-party contracts;

(B) A description of the particular business line;

(C) A description of the primary purpose of the particular business line;

(D) The total amount of customer assets under management by the third party, with respect to the particular business line;

(E) The total amount of deposits placed by the third party at all insured depository institutions, including the amounts placed with the applicant, with respect to the particular business line. This includes the total amount of term deposits and transactional deposits placed by the third party, but should be exclusive of the amount of brokered CDs, as defined in § 337.6(a)(5)(iv)(I)*(3)* of this chapter, being placed by that third party;

(F) Information on whether the insured depository institution or customer pays fees or other remuneration to the agent or nominee for deposits placed with the insured depository institution and the amount of such fees or other remuneration, including how the amount of fees or other remuneration is calculated;

(G) Information on whether the agent or nominee has discretion to choose the insured depository institution(s) at which customer deposits are or will be placed;

(H) Information on whether the agent or nominee is mandated by law to disburse funds to customer deposit accounts;

(I) A description of the marketing activities provided by the third party, with respect to the particular business line;

(J) The reasons the third party meets the primary purpose exception;

(K) Any other information the applicant deems relevant; and

(L) Any other information that the FDIC requires to initiate its review and render the application complete.

(iii) *Additional information for applications.* The FDIC may request additional information from the applicant at any time during processing of the application.

(iv) *Application timing.*

(A) An applicant that submits a complete application under this section will receive a written determination by the FDIC within 120 days of receipt of a complete application.

(B) If an application is submitted that is not complete, the FDIC will notify the applicant and explain what is needed to render the application complete.

(C) The FDIC may extend the 120-day timeframe to complete its review of a complete application, if necessary, with notice to the applicant, for 120 additional days. If necessary, the FDIC may further extend its review period.

(v) *Application approvals*. The FDIC will approve an application—
(A) Submitted under paragraph (b)(4)(i) of this section if the FDIC finds that the applicant demonstrates that, with respect to the particular business line, the additional third party involved in the deposit placement arrangement is not a *deposit broker,* as defined in § 337.6(a)(5) of this chapter, and the applicant otherwise qualifies for the 10 percent of assets under management designated business exception described in 12 CFR § 337.6(a)(5)(iv)(I)*(1)(i)* of this chapter.

(B) submitted under paragraph (b)(4)(ii) of this section if the FDIC finds that the applicant demonstrates that, with respect to the particular business line under which the third party places or facilitates the placement of deposits, the primary purpose of the third party's business relationship with the insured depository institution is for a substantial purpose other than to provide a deposit-placement service or FDIC deposit insurance for customer funds placed at the insured depository institution.

(vi) *Ongoing reporting for applications.*

(A) The FDIC will describe any reporting requirements, if applicable, as part of its written approval for a primary purpose exception.

(B) Applicants that receive a written approval for the primary purpose exception, shall provide reporting to the FDIC and to its primary Federal regulator, if required under this section.

(vii) *Requesting additional information, requiring re-application, imposing additional conditions, and withdrawing approvals.* At any time after approval of an application for the primary purpose exception, the FDIC may at its discretion, with written notice:

(A) Require additional information from an applicant to ensure that the approval is still appropriate, or for purposes of verifying the accuracy and correctness of the information submitted to the FDIC as part of the application under this section;

(B) Require the applicant to reapply for approval;

(C) Impose additional conditions on an approval; or

(D) Withdraw an approval.

PART 337—UNSAFE AND UNSOUND BANKING PRACTICES

3. The authority for part 337 continues to read as follows:

Authority: 12 U.S.C. 375a(4), 375b, 1463(a)(1), 1816, 1818(a), 1818(b), 1819, 1820(d), 1828(j)(2), 1831, 1831f, 5412.

4. Amend § 337.6 by:

a. Revising paragraph (a)(5);

b. Adding paragraphs (a)(9) through (11); and

c. Adding paragraph (e)(3) .

The revisions and additions read as follows:

§ 337.6 Brokered deposits.

(a) * * *

(5) *Deposit broker.*

(i) The term deposit broker means:

(A) Any person engaged in the business of placing or facilitating the placement of deposits of third parties with insured depository institutions;

(B) Any person engaged in the business of placing deposits with insured depository institutions for the purpose of selling those deposits or interests in those deposits to third parties; and

(C) An agent or trustee who establishes a deposit account to facilitate a business arrangement with an insured depository institution to use the proceeds of the account to fund a prearranged loan.

(ii) *Engaged in the business of placing or facilitating the placement of deposits.* A person is engaged in the business of placing or facilitating the placement of deposits of third parties if that person engages in one or more of the following activities:

(A) The person receives third party funds and deposits those funds at one or more insured depository institutions;

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

(C) The person is involved in negotiating or setting rates, fees, terms, or conditions for the deposit account;

(D) The person proposes or determines deposit allocations at one or more insured depository institutions (including through operating or using an algorithm, or any other program or technology that is functionally similar); or

(E) The person has a relationship or arrangement with an insured depository institution or customer where the insured depository institution or the customer pays the person a fee or provides other remuneration in exchange for deposits being placed at one or more insured depository institution.

(iiii) *Anti-evasion*. A person that structures a deposit placement arrangement in a way that evades meeting the deposit broker definition in this section, including a structure involving more than one person engaged in activities that result in placing or facilitating the placement of third party deposits, while still playing an ongoing role in placing or facilitating the placement of third party deposits or providing any function related to the placement or facilitating the placement of third party deposits, may, upon a finding by and with written notice from the FDIC, result in the person meeting the deposit broker definition.

(iv) The term *deposit broker* does not include:

(A) An insured depository institution, with respect to funds placed with that depository institution;

(B) An employee of an insured depository institution, with respect to funds placed with the employing depository institution;

(C) A trust department of an insured depository institution, if the trust or other fiduciary relationship in question has not been established for the primary purpose of placing funds with insured depository institutions;

(D) The trustee of a pension or other employee benefit plan, with respect to funds of the plan;

(E) A person acting as a plan administrator or an investment adviser in connection with a pension plan or other employee benefit plan provided that person is performing managerial functions with respect to the plan;

(F) The trustee of a testamentary account;

(G) The trustee of an irrevocable trust (other than one described in paragraph (a)(5)(i)(B) of this section), as long as the trust in question has not been established for the primary purpose of placing funds with insured depository institutions;

(H) A trustee or custodian of a pension or profit-sharing plan qualified under section 401(d) or 403(a) of the Internal Revenue Code of 1986
(26 U.S.C. 401(d) or 403(a)); or

(I) Primary purpose exception. An agent or nominee whose primary purpose in placing customer deposits at insured depository institutions is for a substantial purpose other than to provide a deposit-placement service or to obtain FDIC deposit insurance with respect to particular business lines between the individual insured depository institutions and the agent or nominee.

(1) *Designated business exceptions that meet the primary purpose exception*. Business relationships are designated as meeting the primary purpose exception, subject to § 303.243(b)(3) of this chapter, where, with respect to a particular business line:

(i) A broker-dealer or investment adviser that places or facilitates the placement of less than 10 percent of the total assets that it has under management for its customers is placed at depository institutions, and no additional third parties are involved in the deposit placement arrangement;

(ii) A property management firm places, or assists in placing, customer funds into deposit accounts for the primary purpose of providing property management services;

(iii) The agent or nominee places, or assists in placing, customer funds into deposit accounts for the primary purpose of providing cross-border clearing services to its customers;

(iv) The agent or nominee places, or assists in placing, customer funds into deposit accounts for the primary purpose of providing mortgage servicing;

(v) A title company places, or assists in placing, customer funds into deposit accounts for the primary purpose of facilitating real estate transactions;

(vi) A qualified intermediary places, or assists in placing, customer funds into deposit accounts for the primary purpose of facilitating exchanges of properties under section 1031 of the Internal Revenue Code;

(vii) A broker dealer or futures commission merchant places, or assists in placing, customer funds into deposit accounts in compliance with 17 CFR 240.15c3-3(e) or 17 CFR 1.20(a);

(viii) The agent or nominee places, or assists in placing, customer funds into deposit accounts for the primary purpose of posting collateral for customers to secure credit-card loans;

(ix) The agent or nominee places, or assists in placing, customer funds into deposit accounts for the primary purpose of paying for or reimbursing qualified medical expenses under section 223 of the Internal Revenue Code;

(x) The agent or nominee places, or assists in placing, customer funds into deposit accounts for the primary purpose of investing in qualified tuition programs under section 529 of the Internal Revenue Code;

(xi) The agent or nominee places, or assists in placing, customer funds into deposit accounts to enable participation in the following tax- advantaged programs: individual retirement accounts under section 408(a) of the Internal Revenue Code, Simple individual retirement accounts under section 408(p) of the Internal Revenue Code, and Roth individual retirement accounts under section 408A of the Internal Revenue Code;

(xii) A Federal, State, or local agency places, or assists in placing, customer funds into deposit accounts to deliver funds to the beneficiaries of government programs;

(xiii) The agent or nominee places customer funds at insured depository institutions, in a custodial capacity, based upon instructions received from a depositor or depositor's agent specific to each insured depository institution and deposit account, and the agent or nominee neither plays any role in determining at which insured depository institution(s) to place any customers' funds, nor negotiates or set rates, terms, fees, or condition, for the deposit account; and

(xiv) The agent or nominee places, or assists in placing, customer funds into deposit accounts pursuant to such other relationships as the FDIC specifically identifies as a designated business relationship that meets the primary purpose exception.

(2) *Approval required for business relationships not designated in paragraph (a)(5)(iv)(I)(1)*. An insured depository institution that does not rely on a designated business exception described in this section must receive an approval under the application process in § 303.243(b) of this chapter in order to qualify for the primary purpose exception.

(3) Brokered CD Placements Not Eligible for Primary Purpose Exception. An agent's or nominee's placement of brokered certificates of deposit as described in 12 U.S.C. 1831f(g)(1)(A) shall be considered a discrete and independent business line from other deposit placement businesses in which the agent or nominee may be engaged.

(4) Brokered CD means a deposit placement arrangement in which a master certificate of deposit is issued by an insured depository institution in the name of the third party that has organized the funding of the certificate of deposit, or in the name of a custodian or a sub-custodian of the third party, and the certificate is funded by individual investors through the third party, with each individual investor receiving an ownership interest in the certificate of deposit, or a similar deposit placement arrangement that the FDIC determines is arranged for a similar purpose.

(J) An insured depository institution acting as an intermediary or agent of a U.S. government department or agency for a government sponsored minority or women-owned depository institution deposit program.

(vi) Notwithstanding paragraph (a)(5)(iv) of this section, the term *deposit broker* includes any insured depository institution that is not well-capitalized, and any employee of any such insured depository institution, which engages, directly or indirectly, in the solicitation of deposits by offering rates of interest (with respect to such deposits) which are significantly higher than the prevailing rates of interest on deposits offered by other insured depository institutions in such depository institution's normal market area.

* * * * *

(9) *Broker-dealer* means a person that is registered with the United States Securities and Exchange Commission as either a broker, a dealer, or both types entities.

(10) *Investment Adviser* means a person that is registered with the United States Securities and Exchange Commission as an *investment adviser*.

(11) *Assets under management* means securities portfolios and cash balances with respect to which an investment adviser or broker dealer provides continuous and regular supervisory or management services.

* * * * *

(e) * * *

(3) *Regaining agent institution status*

(i) An insured depository institution that has lost its agent institution status for purposes of the limited exception for reciprocal deposits is eligible to regain its agent institution status as follows:

(A)

(1) When most recently examined under section 10(d) of the Federal Deposit Insurance Act (12 U.S.C. 1820(d)) was found to have a composite condition of outstanding or good; and

(2) Is well capitalized;

(B)

(1) As of the date the insured depository institution is notified, or is deemed to have notice, that it is well capitalized under regulations implementing section 38 of the FDI Act issued by the appropriate federal banking agency for that institution; and

(2) Is well-rated;

(C) Has obtained a waiver pursuant to paragraph (c) of this section; or

(D) *(1)* Does not receive an amount of reciprocal deposits that causes the total amount of reciprocal deposits held by the agent institution to be greater than the average of the total amount of reciprocal deposits held by the agent institution on the last day of each of the four calendar quarters preceding the calendar quarter in which the agent institution was found not to have a composite condition of outstanding or good or was determined to be not well capitalized, or

(2) an insured depository institution that is not in compliance with paragraph (e)(2)(C)(1) of this section may regain its status as an agent institution after complying with paragraph (e)(2)(C)(1) of this section continuously for two successive reporting quarters.

* * * * *

Federal Deposit Insurance Corporation.

By order of the Board of Directors.

Dated at Washington, DC, on [ ].

James P. Sheesley,

Assistant Executive Secretary.

BILLING CODE 6714-01-P