BANK POLICY INSTITUTE

June 5, 2020

Via Electronic Mail

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

Re: Brokered Deposits (RIN 3064-AE94)

Ladies and Gentlemen:

The Bank Policy Institute[1] appreciates the opportunity to comment on the Federal Deposit Insurance Corporation's notice of proposed rulemaking[2] relating to the FDIC's regulatory framework for brokered deposits. BPI has been an advocate of reform in this important area for many years.[3] Chairman McWilliams' and the FDIC staff's thoughtful review and study of brokered deposits issues are evident in both the Advanced Notice of Proposed Rulemaking[4] and the NPR. We agree that revisions to the brokered deposits framework are necessary and appropriate in light of the major advances in technology, business practices and products that have occurred since the FDIC's final brokered deposit regulations were issued in 1990.[5]

1 BPI is a nonpartisan public policy, research and advocacy group, representing the nation's leading banks and their customers. Our members include universal banks, regional banks and the major foreign banks doing business in the United States. Collectively, they employ almost 2 million Americans, make nearly half of the nation's small business loans and are an engine for financial innovation and economic growth.

2 FDIC, Unsafe and Unsound Banking Practices: Brokered Deposits Restrictions, Notice of Proposed Rulemaking and Request for Comment, 85 Fed. Reg. 7453 (Feb. 10, 2020) (the "NPR").

3 *See* Letter to FDIC, from the Bank Policy Institute re: Comments to the FDIC's Brokered Deposits ANPR (May 6, 2019) (the "ANPR Comment Letter"); Letter to FDIC, from The Clearing House Association L.L.C. (one of BPI's predecessor organizations), the American Bankers Association, the Financial Services Roundtable (one of BPI's predecessor organizations), the Independent Community Bankers of America, and the Institute of International Bankers re: Financial Institutions Letter FIL (51-2015): Request for Comment on Frequently Asked Questions Regarding Identifying, Accepting, and Reporting Brokered Deposits (Dec. 28, 2015); Letter to Charles Yi, General Counsel, FDIC, from The Clearing House Association L.L.C., the American Bankers Association, and the Institute of International Bankers re: Comments to January 5, 2015 Financial Institutions Letter (FIL-2-2015) (Aug. 11, 2015).

4 FDIC, Unsafe and Unsound Banking Practices: Brokered Deposits and Interest Rate Restrictions, 84 Fed. Reg. 2366 (Feb. 6, 2019).

5 FDIC, Unsafe and Unsound Banking Practices, Final Rule, 55 Fed. Reg. 39135 (Sep. 25, 1990).

We strongly support many of the revisions proposed in the NPR, as described below. However, further, critical change is warranted in several areas, and we suggest revisions in those areas. Our recommendations are intended to bring additional clarity to the brokered deposits framework, and to do so in a manner that promotes banks' safety and soundness, protects the Deposit Insurance Fund and is consistent with Congress's purpose in regulating brokered deposits, while allowing for the framework to meet the convenience and needs of consumers and to accommodate the current structure and needs of the financial services industry and future developments in technology and business practices.

I. Executive Summary.

BPI appreciates the FDIC's efforts to clarify and modernize the brokered deposits framework. We support many aspects of the proposed rule, but there are a number of critical changes that the FDIC should adopt in the final rule. In particular, the final rule should reflect the following changes:

- The definition of "deposit broker" should be revised.
  - The final rule should codify the FDIC's description in NPR's preamble (the "Preamble") of when a third party is "engaged in the business of placing deposits" as when "a person has a business relationship with its customers, and as part of that relationship, places deposits on behalf of the customer (e.g., acting as custodian or agent for the underlying depositor)".[6]
  - The proposed definition of "engaged in the business of facilitating the placement of deposits" is overly broad and should be revised so that persons that are not actually engaged in the business of facilitating the placement of deposits are not inappropriately classified as deposit brokers.
    - The third party information sharing prong should be removed.
    - The FDIC should revise the third prong of the definition of "engaged in the business of facilitating the placement of deposits" by deleting the term "provides assistance" and clarifying the meaning of the term "involved in".
    - The text of the final rule should provide that a third party must have a business relationship with a customer and facilitate the placement of the customer's deposits as part of that relationship in order to be deemed to facilitate the placement of deposits.
    - The FDIC should confirm that certain relationships identified in this letter do not result in a person being engaged in the business of facilitating the placement of deposits under the regulation.
  - The final rule should clarify that dual and dual-hatted employees are not typically considered to be engaged in the business of placing or facilitating the placement of deposits because they are not "engaged in business" for purposes of the deposit broker definition.
- The primary purpose exception should be revised.

6 85 Fed. Reg. at 7457.

    - The FDIC should eliminate the mandatory application process and instead provide bright-line criteria for the primary purpose exception and a supplementary voluntary application process to qualify under the exception for other activities.

    - The final rule should eliminate ongoing reporting or monitoring requirements for arrangements that qualify for the primary purpose exception.

    - The final rule should provide that the FDIC will modify or withdraw an approval for the primary purpose exception only if there has been a material change in circumstances.

    - The final rule should clarify certain aspects of the 25 percent of customer "assets under management" primary purpose exception.

        - The final rule should provide that a "business line" is determined by reference to a person's reasonable determination of its own business lines in the ordinary course of business.

        - The final rule should use a term other than "assets under management".

    - The final rule should include certain additional arrangements that we identify in this letter that would qualify for the primary purpose exception.

- The "IDI exception" should be revised.

    - A subsidiary of an insured depository institution ("IDI") should qualify for the IDI exception with respect to deposits placed with its parent regardless of whether the subsidiary also places deposits with other banks.

    - The final rule should clarify that the requirement to place deposits of retail customers exclusively with the parent bank does not prohibit the subsidiary from placing non-retail deposits with its parent bank or another bank.

    - The final rule should not require the operating subsidiary to be wholly owned.

- The final rule should include additional changes that would clarify important areas of the brokered deposits framework.

    - The final rule should exclude affiliate-generated deposits from the definition of "deposit broker".

    - The FDIC should codify or rescind advisory opinions only after notice of the specific guidance to be codified and an opportunity to comment.

    - BPI would support the codification of certain advisory opinions and other guidance after appropriate opportunity for notice and comment.

    - BPI would support the rescission of certain advisory opinions and other guidance after appropriate opportunity for notice and comment.

    - The FDIC and other regulators should revise other regulations that refer to brokered deposits to align the treatment of deposits in those regulations with the FDIC's brokered deposit regulations.

II. Background.

The legislative history of Section 29 of the Federal Deposit Insurance Act ("Section 29") demonstrates that Congress enacted Section 29 in response to the so-called "hot money" that exacerbated the savings and loan crisis of the 1980s, when troubled institutions with deteriorating loan portfolios and "regulators . . . breathing down [their] throat[s]" would buy funds through third-party brokers as their "only chance for survival".[7] Congress's principal concern was troubled institutions' reliance on "hot money" deposit brokers, *i.e.*, those brokers who, for the primary purpose of pecuniary gain based on the volume of deposits placed, actively placed deposits with higher-than-market interest rates on an unsolicited basis, with persons not necessarily having a previous relationship with the banking organization. In other words, these brokers were engaged in the business of (1) placing funds, or (2) facilitating the placement of funds, and the customer's relationship was with the deposit broker, who was seeking to place the funds at whichever IDI was then offering high interest rates, and not with an IDI selected by the customer.

When Section 29 was enacted, the only real consequence to banks was what Congress intended—to reduce the potential dangers of "hot money" by limiting the ability of less than well capitalized IDIs to accept these deposits and limiting the interest rate the bank could pay on deposits. In contrast, the consequences today of accepting deposits classified as brokered are much broader, and include adverse consequences that are entirely unrelated to the IDI's financial condition.[8] None of these consequences is required or was even contemplated when Section 29 was enacted, and the negative consequences of brokered deposits accrue to *all* institutions that accept deposits classified as brokered, not just those that are less than well capitalized.

Chairman McWilliams described the NPR as intended to clarify that many arrangements that result in a direct relationship between a customer and a bank do not also result in brokered deposits: "The first goal [of the proposed rule] is to develop a framework that encourages innovation . . . and allows banks to serve customers the way customers want to be served. . . . The proposal [clarifies] that various types of existing partnerships in which a consumer maintains a relationship directly with a bank generally would not result in a brokered deposit".[9] BPI strongly supports this goal, and our comments are intended to improve the proposed rule to better achieve it, consistent with Congress's objective in enacting Section 29, protection of the Deposit Insurance Fund, bank safety and soundness, and the convenience and needs of consumers.

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[7] Senate Congressional Record, Proceedings and Debates of the 101st Congress, First Session, 135 Cong. Rec. S4238-01, 1989 WL 191889 (April 19, 1989). Please refer to the ANPR comment letter at 3-4 for a more detailed discussion of the legislative history of Section 29.

[8] These can include (1) higher deposit insurance assessment rates, (2) requirements to maintain additional liquid assets to offset the higher outflow rates assigned to brokered deposits under the liquidity coverage ratio (brokered deposits also are generally assigned lower Available Stable Funding factors under the proposed net stable funding ratio), (3) expending additional time and resources on liquidity planning (*e.g.*, incorporating PCA-related downgrade triggers into contingency funding plans), and (4) reduced ability to compete with non-bank competitors that are not required to factor liquidity costs into product offerings that would result in brokered deposits for a bank (*e.g.*, prepaid cards). Please refer to the ANPR Comment Letter at 5-6 for a more detailed discussion of the adverse consequences associated with accepting brokered deposits.

[9] "Brokered Deposits in the Fintech Age", Brookings Institution, Wash. D.C. (Dec. 11, 2019) (Keynote Remarks by Chairman Jelena McWilliams), at 4.

III. Discussion of comments on the NPR.

A. The Definition of "Deposit Broker".

The FDIC should ensure that its effort to revise the definition of "deposit broker" is effective over the long term by clarifying the various elements of the definition with specific and objective standards and criteria.

1. The final rule should codify the FDIC's description in the Preamble of when a third party is "engaged in the business of placing deposits".

The FDIC states in the Preamble that it would view a person as being "engaged in the business of placing deposits" if the person "has a business relationship with its customers, and as part of that relationship, places deposits on behalf of the customer".[10] BPI supports this interpretation and suggests that the proposed rule be revised to set forth this specific definition in the regulation. The FDIC's formulation makes clear that a person must have a business relationship with another person that is the first person's customer and must place deposits on that customer's behalf in order to be a deposit broker under this prong of the deposit broker definition.[11]

The text of the proposed rule does not include a definition of "engaged in the business of placing deposits", however, which could lead to uncertainty and ambiguity, and leaves open the possibility of future interpretations that do not take the FDIC's intended interpretation into account. The final rule should include a specific definition of the phrase so that parties subject to the brokered deposits rules are able to plan their activities and products in reliance on a clear regulation.

2. The proposed definition of "engaged in the business of facilitating the placement of deposits" is overly broad and should be revised so that persons that are not actually engaged in the business of facilitating the placement of deposits are not inappropriately classified as deposit brokers.

BPI strongly supports including in the text of the regulation a clear and specific definition of "engaged in the business of facilitating the placement of deposits" (the "facilitation definition").[12] Under the FDIC's current regime, the lack of a clear interpretation of this aspect of the deposit broker definition has resulted in varying staff opinions that extend the scope of the phrase beyond what was contemplated by Congress, as well as confusion and inconsistent treatment in the market regarding whether deposits associated with particular arrangements are reported as brokered deposits.

The enumerated activities in the proposed rule that constitute a third party being "engaged in the business of facilitating the placement of deposits" are so broad as to lead to perverse, presumably unintended, results. Certain aspects of the definition are ambiguous and should be clarified to avoid inconsistencies in interpretation. The proposed definition should be revised to capture only persons actually (1) engaged in the business of (2) facilitating the placement of deposits. It is critical that the scope of the facilitation definition is appropriately tailored because only an agent or nominee of a depositor can qualify for the primary purpose exception.[13] The proposed facilitation

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10 85 Fed. Reg. at 7457.

11 The FDIC contrasts this with facilitation activity: "In contrast to the first prong of the definition, the 'facilitation' prong of the deposit broker definition refers to activities where the person does not directly place deposits on behalf of its customers with an insured depository institution". 85 Fed. Reg. at 7457.

12 Proposed section 337.6(a)(5)(ii), 85 Fed. Reg. at 7472.

13 *See* 85 Fed. Reg. at 7459 (noting that "in evaluating whether a person meets the primary purpose exception, staff has focused on the relationship between the depositor *and the person acting as agent or nominee for that depositor*") (emphasis added). Although the FDIC states in a footnote in the Preamble that "[p]ersons that meet the deposit broker

definition could be interpreted to capture a broad range of third parties, resulting in a dramatic expansion of the deposit broker definition, contrary to the FDIC's stated expectation of the proposed rule's impact.[14]

a. BPI supports defining account control as an activity that constitutes facilitating the placement of deposits.

BPI supports adopting proposed section 337.6(a)(5)(ii)(B) in the final rule. That prong would provide that a person is engaged in the business of facilitating the placement of deposits if, while engaged in business, the person has legal authority, contractual or otherwise, to close the deposit account or move the third party's funds to another bank. We agree that having this authority indicates a sufficient level of ongoing influence and control over the deposit account even after it is open, as described in the Preamble. Indeed, this is indicative of the type of active and meaningful relationship that we recommend should be required to find that a third party is a deposit broker under either of the first two prongs of the deposit broker definition.[15] As a technical comment, we suggest inserting "deposit" before "account" and "in the account" after "third party's funds" for the sake of clarity.

b. The third party information sharing prong should be removed.

We are particularly concerned about proposed section 337.6(a)(5)(ii)(A) (the "information sharing prong"), which would include in the facilitation definition a person that, while engaged in business, "directly or indirectly shares any third party information with the insured depository institution".[16] This prong should be removed from the facilitation definition. Such a broad and vague standard would be inconsistent with the FDIC's intent to bring more clarity to the brokered deposits regulatory framework.[17] It would also contravene the FDIC's stated goal of encouraging innovation and bringing the brokered deposit regulations in line with developments in technology and business practices.[18]

Adopting the information sharing prong as proposed would, in fact, *broaden* the scope of the FDIC's existing interpretations to capture arrangements that the FDIC has previously determined do not result in brokered deposits,

definition because they are 'facilitating the placement' of deposits would also be eligible to submit an application under [the application] process", 85 Fed. Reg. at 7460 n. 16, the application process itself is available only for a "third party", defined as "an agent or nominee that is applying to be excluded from the definition of deposit broker pursuant to the primary purpose exception". Proposed section 303.243(b)(2)(i). The FDIC's discussion in the Preamble is consistent in referring to agents and nominees as eligible for the primary purpose exception. Thus, a person captured by the facilitation prong that is not an agent or nominee would appear not to be eligible to apply under the proposed primary purpose exception.

14 *See, e.g.*, 85 Fed. Reg. at 7463-4 (noting that the "proposed rule creates a new framework for analyzing certain provisions of the statutory definition of 'deposit broker'", the effect of which "likely would be some amount of deposits currently designated as brokered deposits [would] no longer be so designated").

15 See section III.A.2.c below for further discussion of the types of relationships that we recommend should be included in the deposit broker definition, specifically under the "facilitation" prong of the definition.

16 85 Fed. Reg. at 7472. In addition to our other concerns with the information sharing prong, the literal language of the proposed regulation does not specifically refer to third-party information about a potential depositor, or require that the information shared is even tangentially related to any deposit account.

17 *See, e.g.*, 85 Fed. Reg. at 7464 ("The proposed rule would benefit insured institutions and other interested parties by providing greater legal clarity regarding the treatment of brokered deposits".).

18 *See* 85 Fed. Reg. at 7453 ("Through [the proposed changes to the brokered deposit regulations], the FDIC intends to modernize its brokered deposit regulations to reflect recent technological changes and innovations that have occurred".).

such as listing services that transmit messages between potential depositors and banks but that are not compensated through volume-based fees,[19] as these types of arrangements necessarily involve the provision of some third-party information. The proposed information sharing prong would also prohibit other arrangements, including referral relationships in which a third party (including a bank's affiliate) may provide contact information to the bank for purposes of the bank's own marketing efforts to potential depositors, even if those arrangements result in a direct relationship between the bank and the depositor. We see nothing in the Preamble or Chairman McWilliams' public statements to suggest that the FDIC intended to expand coverage of the deposit broker definition in this manner.[20] In addition, doing so would disrupt longstanding relationships and business practices (and justified reliance on FDIC precedent and guidance) with no corresponding benefit to the safety and soundness of banks or the protection of the Deposit Insurance Fund.

The FDIC notes in the Preamble that the facilitation definition is "intended to capture activities that indicate the person takes an active role in the opening of an account or maintains a level of influence or control over the deposit account even after the account is opened".[21] We assume that a "level of influence or control" means something more than a modicum of influence or control, and the final rule itself should be consistent with this. Simply sharing information about a potential depositor with a bank does not indicate that the third party takes an active role in opening an account or that it maintains influence or control over the account after it is opened. In addition, such information sharing arrangements have become more commonplace with advancements in technology, particularly with the advent of application programming interfaces, or APIs, which are third-party software interfaces that involve the seamless sharing of content and data between parties for purposes unrelated to placing deposits. Banks routinely use such data sharing arrangements to deliver critical banking infrastructure, including fraud detection and other controls, and frequently leverage similar arrangements for marketing and other purposes. Such arrangements have been, and will continue to be, vital to delivering modern solutions to consumers that are responsive to their demands for convenience and transparency.

These types of arrangements do not, by their nature, provide a third party with a level of influence or control over a customer's deposit account that should result in the third party being a deposit broker. Under these

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19 *See* FAQs D2 (stating that a listing service is not a deposit broker if it (1) is compensated solely by means of subscription fees that are "not calculated on the basis of the number or dollar amount of deposits"; (2) performs only certain functions relating to the gathering and transmission of information and messages in exchange for its fees; and (3) is not involved in the physical placement of deposits).

20 The FDIC describes the change to its interpretation of facilitation as a "refinement" of current interpretations of the activities that result in a person being engaged in the business of facilitating the placement of a third party's deposits, which in no way suggests an expansion of the scope. 85 Fed. Reg. at 7457. In fact, quite to the contrary, the Preamble also states that "[t]he FDIC recognizes that, under this proposal, numerous categories of deposits that are currently considered brokered would instead be nonbrokered". 85 Fed. Reg. at 7463. The Preamble goes on to note, in the analysis of the expected effects of the proposal, "[c]hanges and innovations in deposit placement activity . . . could include the use of technology services that help enable payments and online marketing services that refer customers to certain banks. *To the extent that the proposed rule would treat such deposits as nonbrokered*, it could support ease of access to deposit placement services for U.S. consumers". 85 Fed. Reg. at 7464 (emphasis added). Similarly, Chairman McWilliams has indicated that one of the proposed rule's purposes is, in fact, to clarify that many relationships do not result in brokered deposits: "The first goal [of the proposed rule] is to develop a framework that encourages innovation . . . and allows banks to serve customers the way customers want to be served. . . . The proposal [clarifies] that various types of existing partnerships in which a consumer maintains a relationship directly with a bank generally would not result in a brokered deposit". Remarks by Chairman Jelena McWilliams, *supra* note 9, at 4.

21 85 Fed. Reg. at 7457. The FDIC should clarify that its formulation of "a level of influence or control" should be read to mean something more than a minimal level of influence or control. As articulated in the Preamble, the standard is very unclear and potentially problematic, as it is subject to expansive interpretation that could potentially result in classifying as a deposit broker a third party with *any* connection to a deposit account.

arrangements, the depositor selects its bank, opens and funds its account directly with the bank and, at all times, retains control over the funds in the account. The FDIC also notes that where the needs of the depositor are the primary drivers of the selection of the bank, it would not view a third-party relationship as facilitating the placement of deposits.[22] We agree with this view, and do not believe that simply "shar[ing] any information" is sufficient to demonstrate that the needs of the depositor are not the primary driver of the deposit relationship. The final rule therefore should not include the information sharing prong.

c. The FDIC should revise the third prong of the definition of "engaged in the business of facilitating the placement of deposits".

Under the proposed rule, a person that, while engaged in business, "provides assistance or is involved in setting rates, fees, terms, or conditions for the deposit account" would be "engaged in the business of facilitating the placement of deposits of third parties with insured depository institutions".[23] BPI agrees that setting the rates, etc. of a deposit account is an appropriate activity to include as a type of "facilitation" because those activities would involve "tak[ing] an active role"[24] in opening an account. The inclusion of the words of "providing assistance" is both unnecessary and confusing because of its ambiguity and, therefore, the final rule should delete "provides assistance" from the third prong of the facilitation definition.[25]

The term "provides assistance" is not necessary because the proposed rule would cover anyone "involved in" setting rates, etc.[26] The term is also ambiguous because it could be read broadly to encompass the provision of virtually any assistance to the depositor relating to the deposit account, instead of, more logically, being limited to providing assistance in setting rates, fees, terms or conditions of a deposit account.[27] The rule should not be construed to capture those that may provide assistance more generally, such as financial planning apps that allow customers to view deposit account balances and other account information at banks with which the customer has a direct relationship. The deletion of this phrase would be more consistent with the FDIC's stated purpose to apply the deposit broker definition to a person that takes an active role in the opening of a deposit account or maintains influence or control over the account. For these reasons, the final rule should clarify that a person is not engaged in the business of facilitating the placement of deposits merely because the person provides some assistance to depositors (or the bank), by deleting the phrase "provides assistance".

The final rule also should clarify the scope of "involved in", as it relates to setting the rates, fees, terms or conditions of a deposit account, so that the phrase is appropriately limited to activities that demonstrate an active role in opening the deposit account or maintaining a meaningful level of influence or control over the deposit account after

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22 85 Fed Reg. at 7457.

23 85 Fed. Reg. at 7472. In contrast to the application process regulation (which provides a definition of "third party"), the term "third party" is used in the definition of deposit broker in section 337.6 to refer in various places to both the ultimate depositor and to a third party that is placing deposits on behalf of a depositor. See proposed section 337.6(a)(5). The FDIC should clarify that the definition of third party for purposes of section 303.248 is exclusive to that section.

24 85 Fed. Reg. at 7457.

25 Proposed section 337.6(a)(5)(ii)(C), 85 Fed. Reg. at 7472.

26 This would still be the case if the FDIC adopts our proposal to change "involved in" to "actively engaged in", as described immediately below.

27 The Preamble provides, as an example of covered facilitation, that "if a person assists in setting rates, fees or terms, that person would be a deposit broker", 85 Fed. Reg. 7457, indicating that "assistance" should be read as limited to setting these features, but the language of the proposed regulation is ambiguous and this example is not exclusive.

the account is opened. BPI therefore suggests changing "involved in" to "actively engaged in" to clarify that the person's role with respect to the account must involve some action and should not be interpreted to include, for example, facilitating the sharing of information about an account's terms, such as passively exchanging such information between a bank and a depositor.

d. The text of the final rule should provide that a third party must have a business relationship with a customer and facilitate the placement of the customer's deposits as part of that relationship in order to be deemed to facilitate the placement of deposits.

As discussed in section III.A.1 above, the FDIC discusses in the Preamble its view that a person is "engaged in the business of placing deposits" if the person "has a business relationship with its customers, and as part of that relationship, places deposits on behalf of the customer".[28] The final rule should provide that this same concept applies to the facilitation definition: a person is *engaged in the business* of facilitating the placement of deposits only if the person has a business relationship with the customer and, as part of that relationship, facilitates the placement of that customer's deposits.

e. The FDIC should confirm that certain relationships do not result in a person being engaged in the business of facilitating the placement of deposits under the regulation.

Based on both the FDIC's historical positions and its stated purposes in proposing the revised brokered deposit regulations, we assume that that the FDIC would not view certain relationships as falling within the proposed "facilitating" definition. In particular, the FDIC should confirm that the following relationships do not result in a person being engaged in the business of facilitating the placement of deposits:

- Listing services: Under FAQ D2, listing services are not engaged in the business of facilitating the placement of deposits if (1) the listing service is "compensated solely by means of subscription fees . . . and/or listing fees"; (2) "the fees paid by depository institutions are flat fees, not calculated on the basis of the number or dollar amount of deposits accepted by the depository institution as a result of the listing or posting of the depository institution's rates"; (3) "the listing service performs no services except: ([a]) the gathering and transmission of information concerning the availability of deposits; and/or ([b]) the transmission of messages between depositors and depository institutions including purchase orders and trade confirmations"; and (4) "the listing service is not involved in the physical placement of deposits". The FDIC should confirm that listing services that meet these criteria are not within the "facilitating" definition.

- Marketing/advertising arrangements: Chairman McWilliams has stated that "[t]he proposal [clarifies] that various types of existing partnerships in which a consumer maintains a relationship directly with a bank generally would not result in a brokered deposit".[29] Marketing and advertising arrangements may take many forms, but banks base these arrangements on consumer demands and expectations in an increasingly automated and technology-driven environment. Examples include the APIs noted above, which may allow customers to transition seamlessly between a third-party site or application and the bank's website and, in some cases, pre-populate account applications with information entered on the third-party site; advertising on third-party websites and applications; and third-party programs where multiple banks advertise the details of their deposit products. Each of these and other marketing and advertising relationships are arrangements that generally result in direct customer relationships between the bank and a depositor. The FDIC

[28] 85 Fed. Reg. at 7457.

[29] Remarks by Chairman Jelena McWilliams, *supra* note 9, at 4.

should confirm that marketing arrangements are not within the “facilitating” definition, as long as the arrangement results in a direct relationship between a depositor and a bank (*i.e.*, the advertiser does not receive funds from a customer for deposit with a bank), and the advertiser does not have an ongoing contractual or other right to move the depositor’s funds to another bank.

- Affinity groups: Under the FDIC’s Advisory Opinions 93-30 and 93-71 and FAQ B4, affinity groups that entered into marketing programs with banks were not deposit brokers, based on a number of factors, including (1) the affinity groups were non-financial institutions; (2) the affinity groups did not directly market deposit products for the banks; (3) affinity group members placed deposits directly with the banks; (4) the affinity groups had exclusive relationships with the respective banks and did not endorse deposit products of other institutions; (5) the affinity groups did not receive volume-based fees in exchange for endorsing the banks’ deposit products (although they received royalties that represented “a fraction of the market rate” paid to traditional deposit brokers); (6) the banks treated the deposits obtained from the affinity group relationships as core deposits and did not use the deposits to replace core deposit run-off; (7) the affinity groups did not know which members made deposits with the bank, nor did they keep any records of the amounts, rates or maturities of the deposit; and (8) any advertising space the banks purchased in the affinity groups’ publication was sold to the banks at market rates. The FDIC should confirm that affinity group relationships that meet these criteria are not within the “facilitating” definition.

- Power of attorney: The final rule should confirm that general powers of attorney granted to lawyers and other advisers as part of the attorney’s or adviser’s broader relationship to provide a client with legal and/or advisory services are not within the “facilitating” definition. The proposed rule would provide that a person is engaged in the business of facilitating the placement of deposits if, while engaged in business, the person has legal authority, contractual or otherwise, to close the deposit account or move the third party’s funds to another bank. BPI supports this standard, but is concerned that it could be read to include an attorney or other adviser who has been provided a general power of attorney over a client’s assets and affairs that gives the attorney or adviser the legal authority to move a client’s funds from one bank to another. This activity would be done as part of the attorney’s or adviser’s role as the client’s agent and not as part of a business relationship to place deposits, and should not result in brokered deposit treatment.

- Fund administrators: Certain hedge funds and other similar funds engage fund administrators to perform the fund’s administrative duties. As part of these duties, the fund administrator may recommend to the fund potential banks at which the fund may establish a transactional account, and may assist the fund in opening the account by providing the bank with documentation and due diligence information during the account opening process. The fund, however, enters into the account agreement directly with the bank and the fund retains control at all times over whether deposits will be withdrawn from the account for investment or other purposes. The bank may pay market interest rates or an “earnings credit rate”, which is frequently below the market interest rate, on the same terms offered to corporate clients generally. These rates are offered as a convenience to the fund to cover the costs of the bank’s transaction fees and are not offered as a method to attract deposits. The bank does not pay a finder’s fee or any other remuneration to the fund administrator. The FDIC should confirm that fund administrators are not engaged in the business of facilitating the placement of deposits with respect to accounts that are placed at a bank selected by the fund and over which the fund retains control.

3. The final rule should clarify that dual and dual-hatted employees are not typically considered to be engaged in the business of placing or facilitating the placement of deposits because they are not “engaged in business” for purposes of the deposit broker definition.

Since the promulgation of Section 29 and much of the FDIC's related guidance, banks have expanded their affiliations with non-bank financial companies, largely as a result of customer preference and convenience. Concomitantly, banks have increasingly shifted to the use of dual employees (individuals employed jointly by the bank and an affiliate of the bank)[30] and dual-hatted employees (individuals employed exclusively by the bank but who perform services for an affiliate of the bank),[31] and frequently share office space with their affiliates. These arrangements allow banks and their affiliates to provide customers with a complete financial services experience and enable those services to be provided in a more personally tailored and cost-efficient manner. For example, a bank employee who is also licensed with an affiliate broker-dealer may sell securities to clients and recommend deposit products.

Neither of these employee arrangements is covered by the basic definition of "deposit broker" in Section 29. Under the plain meaning of Section 29, the definition of "deposit broker" does not encompass deposits that result from customer assistance provided by dual or dual-hatted employees in connection with those employees' providing access to a full complement of banking and affiliate products, because such employees are not "engaged in the business" of either (1) placing or (2) facilitating the placement of deposits.

BPI assumes that the FDIC did not intend to include dual and dual-hatted employees in the definition of "deposit broker" under the proposed rule. Dual and dual-hatted employees engage directly with depositors on behalf of the bank in which the depositor is opening or has an account. These employees do not place a third party's deposits, but rather act on behalf of the bank in receiving the third party's deposits and, therefore, are not engaged in the business of placing deposits. In addition, these employees do not have a contractual or other right to close an account or move the depositor's funds to another institution and are not involved in setting rates, fees, terms or conditions for the deposit account (other than in their capacity as employees of the bank) and, therefore, are not engaged in the business of facilitating the placement of deposits.

Because of the FDIC's historically broad interpretation of Section 29, particularly with respect to the "facilitating" prong of the deposit broker definition, there has been substantial confusion as to whether the FDIC might consider deposits generated through dual and dual-hatted employment arrangements to be brokered. This confusion has been exacerbated by an exception for employees in Section 29 and the FDIC's regulations that would not encompass most of these employment arrangements.[32] For these reasons, the final rule should clarify that dual and dual-hatted employees are not engaged in the business of (1) placing deposits or (2) facilitating the placement of deposits, *i.e.*, that such employees are not deposit brokers, with respect to deposits placed with an employer or affiliated bank.

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30 *See* FAQs question E3.

31 *See* FAQs question E4.

32 Section 29 contains an exception from the definition of deposit brokers for employees, but contains a narrow definition of employee, which, because employees of the IDI may not be employed exclusively by the IDI or may frequently share office space with the IDI's affiliates, may often render the employee exception inapplicable to the employee relationships described above. Under Section 29 and the FDIC's regulations, employees of IDIs are not deposit brokers with respect to deposits placed at the employing IDI, if the employee:

- is employed exclusively by the IDI;
- receives compensation that is primarily in the form of a salary;
- does not share his or her compensation with a deposit broker; and
- has a specific place of business that is used exclusively for the benefit of the IDI.

B. The "Primary Purpose Exception".

BPI strongly supports the FDIC's review of the primary purpose exception. Section 29 was intended to apply to only the most "flagrant abusers",[33] and the primary purpose exception plays an important role in limiting the statute's application to agents or nominees that may be captured by the definition of deposit broker but that have a primary purpose other than placing deposits of the type that concerned Congress in enacting Section 29. The existing brokered deposits framework, however, has been inconsistently applied, with overly restrictive views regarding the exception. The FDIC's review and amendment of the brokered deposit regulations is welcome, but we suggest several modifications to the proposed rule. Specifically, the FDIC should eliminate the mandatory application, and include in the rule bright-line criteria that banks may independently apply to specific arrangements that would qualify for the primary purpose exception. We also suggest changes to the particular criteria proposed and discuss additional exceptions that the FDIC should include in the final rule.

1. The FDIC should eliminate the mandatory application process and instead should provide bright-line criteria for the primary purpose exception and a supplementary voluntary application process to qualify under the exception for other activities.

The FDIC should eliminate the application requirement for the primary purpose arrangements described in the proposed rule and instead adopt bright-line criteria for the primary purpose exception.[34] The efficient and effective administration of the primary purpose exception would best be served by a framework that consists of (1) bright-line criteria that banks may independently apply and (2) a supplementary voluntary application process for relationships that do not meet the bright-line criteria.

BPI agrees that bright-line criteria are generally appropriate standards by which the primary purpose exception should be evaluated; however, each depository institution should be able to evaluate its individual circumstances and should not be required to obtain the FDIC's approval or concurrence with the bank's analysis and determination. The banks would, of course, be required to make good-faith determinations, and those determinations would be subject to review in the examination process. This approach is consistent with other regulatory frameworks under which banks and their parent companies operate, such as determinations of whether certain activities are part of the "business of banking" for purposes of the National Bank Act or whether a company "controls" another company for purposes of the Bank Holding Company Act.

Banks routinely are permitted and expected to make judgments—which are subject to review during the examination process—about the permissibility of their activities and their compliance with laws and regulations. This regulation should be no different. Requiring the FDIC to approve every relationship that relies on these criteria is not necessary to protect the Deposit Insurance Fund or preserve safety and soundness. We also note that, unlike some other statutes, Congress has not seen the need to require prior approval of the FDIC in Section 29 for reliance on the primary purpose exception,[35] or provided any basis for treating the primary purpose exception differently from the

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[33] Insured Brokered Deposits and Federal Depository Institutions, Hearings before the Subcommittee on General Oversight and Government Investigations of the House Committee on Banking, Housing, and Urban Affairs at 8, Cmte. Print 101-28, 101st Cong., 1st Sess. (May 17, 1989) (remarks of Sen. Murkowski) (noting that Section 29 was intended to be a "narrowly drawn provision that specifically targets the most flagrant abusers").

[34] Specifically, proposed 12 C.F.R. § 303.243(b) should be deleted. The proposed primary purpose exception at 12 C.F.R. § 337.6(a)(ii)(I) should also be revised to delete "if and to the extent, the FDIC determines that the agent or nominee meets this exception under the application process in 12 CFR 303.243(b)", and instead include subsections that set forth the specific criteria for the non-exclusive list of relationships that qualify for the primary purpose exception, including the specific criteria listed in the application process in proposed 12 C.F.R. § 303.243(b)(4) (modified as we propose in section III.B.4), as well as the voluntary application process we propose below.

[35] *Compare* 12 U.S.C. § 1842 (requiring prior approval of the Federal Reserve to become a bank holding company or for a bank holding company to acquire more than five percent of a bank's voting shares); 12 U.S.C. § 1828b (requiring

other exceptions from the definition of deposit broker, each of which may be relied on by banks *without* a formal application to the FDIC.

Because no list of criteria can be complete or sufficiently farsighted, particularly as the overall environment in which banks operate changes, BPI suggests a supplementary application process through which banks can voluntarily seek the FDIC's confirmation that certain relationships that do not meet the criteria set forth in the final regulation qualify for the primary purpose exception. In those cases, a voluntary application process, through which application decisions are made public, could provide substantial clarity for affected parties and the FDIC. This supplemental process would also result in additional consistency in the application of the primary purpose exception by providing banks with consistent public guidance.

In addition to being consistent with the statute and other bank regulatory frameworks, BPI's proposed approach also comports with practical realities. Adopting the requirement to obtain specific FDIC approval to rely on the primary purpose exception would require the FDIC to reconsider *thousands* of reasoned decisions on the primary purpose exception that banks and third parties have reached based on a careful analysis of Section 29 and the FDIC's existing regulations and interpretive guidance. This would also require agents or nominees to whom the FDIC has already affirmatively determined the primary purpose exception specifically applies to re-obtain the FDIC's approval to continue existing relationships. As examples of how broadly disruptive and burdensome the FDIC's proposed approach would be:

- Many banks rely on existing FDIC interpretive letters to apply the primary purpose exception to sweep deposits that a broker-dealer affiliate places with the bank.[36]

- Many banks rely on the primary purpose exception for deposits placed by broker-dealers pursuant to Rule 15c3-3 of the SEC's regulations,[37] as described in Advisory Opinion No. 94-39.[38]

- Using the rationale in Advisory Opinion No. 94-39, some banks apply the primary purpose exception to interest on lawyers trust accounts ("IOLTA") deposits, which attorneys must establish for the benefit of their clients under applicable professional rules.

Notwithstanding decades of reliance on the FDIC's guidance, under the proposed rule, each of these broker-dealers and attorneys would be required to apply for the primary purpose exception, potentially for multiple "business lines".[39] As a result, adoption of the proposed rule would require third parties and banks to inundate the FDIC with applications, many of which should not be necessary.

Beyond the need to review these numerous prior decisions, the FDIC may have substantially underestimated the volume of applications that would be required for banks seeking approval for new relationships that are eligible under one of the new bright-line application processes. For example, some banks have thousands of

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prior written approval of the appropriate federal regulator for an insured depository institution to merge or consolidate with another bank); 12 U.S.C. § 36 (requiring prior approval of the Office of the Comptroller of the Currency for a national bank to open a new branch); 12 U.S.C. § 1831a (requiring the FDIC's prior approval for a state bank to engage in activities that are not permissible for a national bank).

36 *See* FDIC, Advisory Opinion No. 05-02 (Feb. 3, 2005).

37 17 C.F.R. § 240.15c3-3.

38 As discussed in section III.B.5, the FDIC should adopt specific exceptions from the deposit broker definition, as part of the primary purpose exception, for these arrangements and for IOLTA deposits.

39 Please see section III.B.4.a for a discussion of certain issues relating to "business lines".

prepaid card customers, such as employers that offer prepaid payroll disbursements. Each of these customers would potentially be required to submit an application for the primary purpose exception *even though the arrangement meets the conditions to qualify for the primary purpose exception under the "enabling transactions" application process in the proposed rule*.[40] Rather than go through a burdensome and uncertain process, the parties simply may determine that the effort is not worthwhile, either foregoing providing the service altogether or treating the deposits as brokered, with the attendant negative consequences.

If the FDIC nevertheless determines to adopt the mandatory application process, relationships previously entered into on the basis of an existing FDIC interpretive letter on the primary purpose exception should be grandfathered. In particular, banks that have received the FDIC's approval to exclude certain affiliated sweep deposits from brokered treatment, as outlined in the FDIC's Advisory Opinion 05-02, should be able to continue to rely on those interpretive letters without a requirement to re-apply for approval under the proposed application process. Consistent with the proposed rule, the 10 percent ratio described in those approvals should be increased to 25 percent without any further action from the banks or the FDIC.[41] If the existing relationships based on the primary purpose exception are not grandfathered under the final rule, there would be a disruption of numerous existing relationships that the FDIC has already determined qualify for the primary purpose exception or to which the parties have concluded, in good faith, that the primary purpose exception is available. This result would impose substantial burden on banks and those with whom they have business relationships without providing any meaningful improvement to the brokered deposits framework or to safety and soundness.[42] Given that the FDIC expects the proposed rule to *expand* the availability of the primary purpose exception,[43] existing relationships that are not currently treated as brokered should not cause concern.

Finally, if the final rule includes any application process (whether mandatory or voluntary), the final rule should clarify the timing for approval. Although the NPR provides that the FDIC will provide a written determination within 120 days of receiving a "complete" application, there is no clarity on when an application will be deemed complete. In fact, each of the three application processes outlined in the proposed rule require the applicant to submit "*any* other information that the FDIC requires to initiate its review and *render the application complete*".[44] As a result, the timing of the review and for rendering a decision is entirely at the discretion of the FDIC. The final rule should therefore provide additional clarity by outlining the FDIC's process for reviewing whether an application is complete. We propose that the final rule provide that the FDIC would (1) review an application for completeness within 30 days, (2) submit a request for additional information within one week thereafter, (3) review additional

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40 *See* proposed 12 C.F.R. § 303.243(b)(4)(ii).

41 Although the requirement in Advisory Opinion 05-02 refers to the amount of assets in a single investment account, as opposed to the "assets under management" for a particular business line, increasing the ratio of assets that can be swept to IDIs to 25 percent would be consistent with the proposed rule. In the NPR, the FDIC proposes that "business line" would refer to accounts that provide a sweep feature. *See* 85 Fed. Reg. at 7461. Under the proposed rule, a broker-dealer could place at an IDI 25 percent of the assets in an investment account that provides a sweep feature, because placing 25 percent of the assets in each such account at an IDI would result in placing 25 percent of the total assets in all such accounts (i.e., in the "business line", as the FDIC proposed to define that term with respect to the "25% of AUM" exception). As a result, codifying the guidance in Advisory Opinion 05-02, but increasing the permissible ratio to 25 percent, would both be consistent with the proposed rule, and would permit banks to continue relationships that the FDIC has already reviewed and approved without being required to go through a separate, and unnecessary, application process.

42 For similar reasons, the final rule should also include an implementation period during which banks would have sufficient time to prepare and submit applications and make any necessary adjustments to their businesses.

43 85 Fed. Reg. at 7459 ("[The] proposed amendment to the primary purpose exception would expand the number of entities that meet the exception".).

44 85 Fed. Reg. at 7471 (emphasis added).

information for completeness within 15 days of receipt, and (4) reach a decision, absent serious deficiencies in the information provided, within 120 days.

2. The final rule should eliminate ongoing reporting or monitoring requirements for arrangements that qualify for the primary purpose exception.

Under the proposed rule, an agent or nominee that receives FDIC approval under the primary purpose exception application process, or a bank that applies on behalf of the agent or nominee, would be required to provide reports to the FDIC, the contents and frequency of which would be decided by the FDIC as part of the application process for the primary purpose exception. This requirement should be eliminated. The proposal to require banks to provide reports on or monitor third parties' continued eligibility or compliance is inappropriate and unworkable as a practical matter. In many cases, banks rely on representations from, and agreements with, third parties that the third party meets and will continue to meet the criteria required to qualify for the primary purpose exception. Banks could continue to rely on such representations and agreements, but, in most cases, would not have access to the information needed to prepare reports on behalf of third parties, and third parties would be at best reluctant to share needed information with a bank.

If, notwithstanding the significant difficulties inherent in such a requirement, the FDIC determines to include in the final rule a reporting and/or monitoring requirement for parties applying to the FDIC under any application process, it should, at most, require the original applicant to submit a periodic affirmation that the arrangement continues to meet the applicable criteria for the primary purpose exception. In cases where a bank has applied on behalf of a third party and is responsible for providing the affirmation, a bank should be permitted to rely on certifications from the third party that the third party's activities meet the relevant criteria and would continue to qualify for the primary purpose exception as originally analyzed or approved, and the bank should have no liability for the third party's representations (assuming the bank is acting in good faith in relying on the representations). This approach would allow the FDIC to monitor ongoing compliance without creating undue burden.

If the final rule includes reporting requirements, it should, at the very least, eliminate the proposed *ad hoc* system. As proposed, the FDIC would "describe any reporting requirements as part of its written approval for the primary purpose exception".[45] This would create an *ad hoc* system of reporting that would be contrary to the FDIC's goal of bringing clarity and transparency to its brokered deposit framework. This type of process would also impose burdensome and unnecessary costs on banks because the nature of the process would prevent banks from developing automated or standardized systems to monitor relationships and prepare reports. If, contrary to BPI's recommendations, the final rule retains a reporting requirement, the FDIC should develop a reporting form so that the frequency and contents of reports are uniform and capable of efficient monitoring and administration.[46] This would provide additional clarity and enable banks to develop systems to collect and report required information.

3. The final rule should provide that the FDIC will modify or withdraw an approval for the primary purpose exception only if there has been a material change in circumstances.

Under the proposed rule, the FDIC can modify or withdraw any approval it grants through the application process for the primary purpose exception "with notice and adequate justification". In order to preserve parties' expectations in establishing business arrangements and consistent with principles of due process, the final rule should provide that the FDIC would modify or withdraw an approval only if there is a material change in the facts or circumstances relied on by the FDIC in granting its initial approval.

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[45] Proposed section 303.243(b)(9), 85 Fed. Reg. at 7471.

[46] Any reporting form that the FDIC develops should be consistent with the requirements of the Paperwork Reduction Act, including notice and a meaningful opportunity for comment.

4. The final rule should clarify certain aspects of the 25 percent of customer "assets under management" primary purpose exception.

As discussed in section III.B.1, the FDIC should eliminate the mandatory application process in proposed section 303.248(b) and instead adopt the criteria described in subsection 303.248(b)(4)(i) as an exception from the definition of deposit broker within the primary purpose exception itself, *i.e.*, as part of section 337.6(a)(5)(iii)(I). Whether the FDIC retains the application requirement for the primary purpose exception or adopts BPI's suggested approach, the criteria should be revised as follows.

a. The final rule should provide that a "business line" is determined by reference to a person's reasonable determination of its own business lines in the ordinary course of business.

Assuming adoption of the proposed criteria for the "25% of AUM" exception that the FDIC would view as qualifying for the primary purpose exception, the final rule should provide that a business line may be defined in a way that is consistent with the person's ordinary course of business, such as the person's risk management and reporting structures. The FDIC's stated intent with respect to the term "business line" is to refer to "the business relationships an agent or nominee has with a group of customers for whom the business places or facilitates the placement of deposits".[47] The FDIC also notes in the Preamble that the determination of a particular business line "depends on the facts and circumstances of a particular case", and that the FDIC "retains discretion to determine the appropriate business line to which the primary purpose exception would apply".[48]

Although the regulation itself does not limit or define the term "business line", we are concerned that the Preamble's example of a business line—*i.e.*, in the context of broker-dealers, treating accounts that offer a sweep feature as a separate business line from one that does not[49]—does not comport with any usual understanding of a business line. Defining "business line" by reference to a single feature of a particular product is not consistent with how financial services companies evaluate, manage or market their businesses. The primary purpose exception should be defined in a way that permits banks to make reasonable determinations about whether the exception applies to a particular relationship, without seeking the FDIC's concurrence in every case.

For these reasons, the final rule should define "business line" as a business line determined by the person in the ordinary course of business for risk management purposes, reporting purposes or other identifiable criteria relevant to the person's business. With respect to a broker-dealer relying on the "25% of AUM" exception, for example, "business line" may refer to all aspects of a brokerage business through which a broker-dealer manages client assets, including, for example, sweep programs and investment management programs (including management provided by both individual and robo-advisers).

b. The final rule should use a term other than "assets under management".

Under the proposed "25% of AUM exception", applicants can seek the primary purpose exception "based on the placement of less than 25 percent of the amount of customer assets under management by the third party, for a particular business line, at depository institutions".[50] The NPR notes that "[i]n determining the amount of customer

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47 85 Fed. Reg. at 7461.

48 85 Fed. Reg. at 7461.

49 *See* 85 Fed. Reg. at 7461 ("[A] company that offered brokerage accounts to various types of customers that allowed customers to buy and sell assets, with a traditional cash sweep option, would be considered a business line. Brokerage accounts that did not offer a cash sweep option would not be considered part of the business line . . .".).

50 Proposed section 303.248(b)(4)(i), 85 Fed. Reg. at 7471.

assets under management by an agent or nominee, for a particular business line, the FDIC would measure the total market value of all financial assets (including cash balances) that the agent or nominee manages on behalf of its customers that participate in a particular business line".[51] This definition should be revised because it could be read as limiting the scope of the exception in ways that are inconsistent with the FDIC's historical application of the primary purpose exception to broker-dealers. Specifically, the FDIC has permitted broker-dealers to rely on the primary purpose exception, subject to several conditions.[52] This advisory opinion did not limit application of the primary purpose exception to deposits swept from accounts for which the broker-dealer exercised investment discretion.

The phrase "assets under management" in the proposal could be interpreted to refer only to assets that are held in managed accounts. BPI recommends that the final rule refer to "assets under management or administration", to include customer assets held in both managed accounts and accounts for which an asset manager or broker-dealer does not exercise investment discretion, which is a more accurate measure of an asset manager or broker-dealer's business.

5. The final rule should include additional arrangements that would qualify for the primary purpose exception.

In the Preamble, the FDIC solicits comment on additional arrangements where the primary purpose of the third party is not the placement of funds with depository institutions for which the FDIC should provide additional clarity.[53] The final rule should clarify the treatment of a number of arrangements by including as part of the primary purpose exception additional exceptions for those arrangements, as described below. Banks should be able to apply each of these exceptions without submitting an application or obtaining the FDIC's prior approval.[54]

a. Health savings accounts (HSAs).

HSAs are tax-advantaged trust or custodial accounts that must be used in conjunction with high-deductible health plans, as defined under tax law, and that must be held by a trustee or custodian that is approved by the United States Department of the Treasury.[55] Deposits in an HSA typically are placed by a third-party administrator that provides employers with HSA administrative services. Because HSAs are limited by statute to being used to pay for or reimburse qualified medical expenses, they are, by definition, designed for a primary purpose other than the placement of deposits—the payment of medical expenses.[56]

The Preamble notes that several commenters on the ANPR requested that the FDIC clarify that HSA deposits qualify for the primary purpose exception, but the proposed rule does not address this important type of deposit. The FDIC should adopt a specific provision under the primary purpose exception for HSAs. As noted above, deposits are placed by third-party administrators in HSAs on behalf of participants for the purpose of allowing the participants to pay or be reimbursed for their medical expenses. The primary purpose of the administrator is not

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51 85 Fed. Reg. at 7459.

52 *See* FDIC, Advisory Opinion No. 05-02 (Feb. 3, 2005) (determining that brokerage accounts with a sweep feature qualify for the primary purpose exception, subject to limitations on the percentage of total assets in the account that could be swept into deposit accounts at affiliated IDIs).

53 85 Fed. Reg. at 7461.

54 See section III.B.1 above for a detailed discussion of why the final rule should not include an application requirement.

55 26 U.S.C. § 223.

56 *See* 26 U.S.C. § 213.

to place deposits, but rather to comply with applicable tax law and provide a means for depositors that have high-deductible health plans to pay or be reimbursed for medical expenses in a tax-advantaged manner. HSAs cannot be used for general savings purposes because contributions to these accounts are limited by tax law, and funds from these accounts may only be used to pay for or reimburse qualifying health-related expenses. Therefore, deposits placed into HSA accounts should qualify for the primary purpose exception as long as they are based on, and come within the limits of, applicable Internal Revenue Code provisions, and the FDIC should include in the final rule a self-executing exception for these deposits as part of the primary purpose exception.

b. Broker-Dealer "Special Reserve Bank Accounts for the Exclusive Benefit of Customers".

"Special Reserve Bank Accounts for the Exclusive Benefit of Customers" are accounts established by broker-dealers pursuant to Rule 15c3-3 of the SEC's regulations.[57] Rule 15c3-3 is intended to safeguard customer funds and securities held by brokers and dealers by requiring every broker-dealer to maintain with an IDI a segregated account in which cash and/or qualified securities in amounts required by Rule 15c3-3 are held for the benefit of the broker-dealer's customers. As the FDIC staff recognized in Advisory Opinion No. 94-39, the primary purpose of the broker-dealer in depositing funds into "Special Reserve" accounts is to satisfy the regulatory requirements applicable to the broker-dealer, and not to provide a deposit placement service to its customers.[58] The final rule should codify this guidance by providing a primary purpose exception from the definition of deposit broker for broker-dealers with respect to deposits placed into "Special Reserve Bank Accounts for the Exclusive Benefit of Customers" pursuant to Rule 15c3-3.

c. IOLTA Deposits.

IOLTAs are accounts maintained by attorneys pursuant to applicable laws and professional rules in the state where the attorney practices.[59] Attorneys are required to hold client funds in a segregated account, and, in some cases, are required to pool client funds into a segregated, interest-bearing account (an IOLTA). Similar to the "Special Reserve" accounts maintained by broker-dealers, the primary purpose of an attorney in establishing an IOLTA is to comply with applicable requirements, and not to provide a deposit placement service to an attorney's clients, and many banks rely on the primary purpose exception in treating deposits placed in IOLTAs as non-brokered. The final rule should codify this treatment by providing a primary purpose exception from the definition of deposit broker for attorneys with respect to deposits placed into IOLTAs pursuant to applicable laws and professional rules.

d. Deposits placed by "middle market" companies.

Under the FDIC's Advisory Opinion No. 17-02, deposits placed in connection with a bank's relationships with a number of "middle market" companies satisfy the primary purpose exception, as long as the company does not maintain a contractual or other "programmatic" arrangement with the bank to place deposits with the bank, and the company is not compensated directly or indirectly by the bank. The final rule should codify this guidance by providing a primary purpose exception from the definition of deposit broker for the following relationships. The final rule should also clarify that "programmatic" arrangement means a written agreement or similar formal arrangement whereby the third party steers depositors to a particular bank in exchange for volume-based fees from the bank.

- <u>Property management firms</u>: Banks receive deposits from property management firms that assist property owners with the maintenance, upkeep, collection of rent and other tasks related to the

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57 17 C.F.R. § 240.15c3-3.

58 FDIC, Advisory Opinion No. 94-39 (Aug. 17, 1994).

59 *See, e.g.*, New York Judiciary Law § 497.

management of property. These firms place deposits at banks to assist their clients in the managing of their properties.

- Mortgage servicers: Mortgage servicers collect funds from borrowers to fulfill certain lender requirements, and frequently deposit borrower funds with banks only for the purpose of servicing mortgages.

- Residential/commercial escrow services: Title insurance companies offer various services to facilitate real estate transactions, including the provision of escrow services. Deposits are placed in escrow accounts at banks in connection with, and for the purpose of, providing these services.[60]

- CFTC customer segregated funds: CFTC-registered futures commission merchants place deposits to comply with applicable CFTC requirements that mandate customer funds be placed into segregated accounts.[61]

- Qualified intermediaries: Some deposits are placed by "qualified intermediaries" to allow third parties to satisfy applicable tax requirements.[62]

C. Proposed Revisions to the "IDI Exception".

BPI strongly supports the FDIC's proposal to include operating subsidiaries of an IDI in the "IDI exception". In particular, we agree with the FDIC's view that "there is little practical difference between deposits placed at an IDI by a division of the IDI versus deposits placed by a wholly owned subsidiary of the IDI",[63] and believe that operating subsidiaries should be treated as if they are the parent institution for purposes of the brokered deposit regulations.[64] Below, we suggest changes that would substantially improve the clarity of the application of the exception.

1. The final rule should permit a subsidiary of an insured depository institution to qualify for the IDI exception with respect to deposits placed with its parent regardless of whether the subsidiary also places deposits with other banks.

Under the proposed rule, a subsidiary of an IDI would qualify for the IDI exception if, among other criteria, the subsidiary "places deposits of retail customers exclusively with its parent insured depository institution".[65] We

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60 More generally, the final rule should provide a primary purpose exception from the deposit broker definition for third parties with respect to deposits placed into all forms of escrow accounts, as funds are placed into those accounts for the purpose of securing the funds in connection with some other transaction and are not placed for the purpose of providing a deposit placement service.

61 *See* 17 C.F.R. § 1.20 (requiring futures commission merchants to deposit customer funds into a segregated account with a bank or trust company, a derivatives clearing organization or another futures commission merchant).

62 Qualified intermediaries facilitate the exchange of "like kind" properties on behalf of clients. 26 C.F.R. § 1.1031(k)-1(g)(4).

63 85 Fed. Reg. at 7458.

64 This treatment is also consistent with other regulations, *e.g.*, operating subsidiaries generally are not treated as affiliates of their parent bank for purposes of Regulation W. *See* 12 C.F.R. § 223.3(k) (defining "depository institution" to include the institution's operating subsidiaries).

65 Proposed section 337.6(a)(5)(iii)(A), 85 Fed. Reg. at 7472. In addition to the criterion noted above, to qualify for the IDI exception, the subsidiary must also meet the following criteria: "the parent insured deposit institution owns 100 percent

assume that the FDIC intends "exclusively with its parent insured depository institution" criterion to mean that the subsidiary qualifies for the new exception from the definition of deposit broker with respect to those funds it places with its parent institution, but would not qualify with respect to funds placed into another depository institution, including a "sister bank" of its parent. The FDIC should clarify this in the final rule.

This clarification would be consistent with Section 29 and the FDIC's existing regulations, which exclude an IDI from the definition of deposit broker with respect to funds placed with that IDI.[66] There is no requirement that the IDI cannot place funds at another IDI. In other words, an IDI can be excluded from the deposit broker definition with respect to placing its own deposits while, at the same time, be captured by the definition of deposit broker with respect to funds placed at other institutions.

2. The final rule should clarify that the requirement to place deposits of retail customers exclusively with the parent bank does not prohibit the subsidiary from placing non-retail deposits with its parent bank or another bank.

As noted above, to qualify for the IDI exception, a bank subsidiary must, among other criteria, place deposits of "retail customers" exclusively with its parent IDI.[67] As drafted, it is not clear if this is intended to require a subsidiary to place all retail deposits with its parent in order to qualify (*i.e.*, the subsidiary can place non-retail deposits with other institutions and still qualify for the IDI exception), or if the subsidiary is permitted to place with its parent bank only retail deposits (and not wholesale deposits) in order to qualify. The Preamble does not shed any further light on the FDIC's intention in referring to "retail deposits".

The final rule should clarify that an operating subsidiary may place wholesale deposits with its parent institution (or another institution) and qualify for the IDI exception with respect to both the wholesale and retail deposits it places with its parent institution. The statutory IDI exception does not distinguish between wholesale and retail deposits, nor does the NPR provide any reason to disallow application of the exception to an operating subsidiary that places wholesale deposits.

In addition, there is no basis for treating an operating subsidiary differently from its parent institution. An insured depository institution is not a deposit broker with respect to placement of either retail or wholesale deposits at that institution, and, likewise, the IDI exception should apply to an operating subsidiary with respect to deposits placed at its parent bank, regardless of whether they are retail or wholesale deposits.

3. The final rule should not require the operating subsidiary to be wholly owned.

Under the proposed rule, only wholly owned subsidiaries of an IDI would qualify for the IDI exception.[68] BPI submits that there is little practical difference between a wholly owned operating subsidiary of an IDI and an operating subsidiary that is not wholly owned.

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of the subsidiary's outstanding stock" and the subsidiary "engages only in activities permissible for the parent insured depository institution".

66 12 U.S.C. 1831f(g)(2)(A) ("The term 'deposit broker' does not include an insured depository institution, with respect to funds placed with that depository institution".). 12 C.F.R. 337.6(a)(5)(ii)(A) (repeating the statutory exception with no changes).

67 Proposed section 337.6(a)(5)(iii)(A), 85 Fed. Reg. at 7472.

68 Proposed section 337.6(a)(5)(iii)(A)(*1*)(*i*) ("A wholly owned operating subsidiary is considered part of the parent insured depository institution . . . if it meets the following criteria: The parent insured depository institution owns 100 percent of the subsidiary's outstanding stock; . . . ".).

Under current regulatory frameworks, banks frequently establish operating subsidiaries that are not wholly owned. For example, national banks are permitted to invest in operating subsidiaries as long as the bank (i) has the ability to control the management and operations of the subsidiary (and no other person or entity exercises operating control over the subsidiary or has the ability to influence the subsidiary's operations to the same or greater extent as the bank); (ii) owns and controls more than 50 percent of the voting interest of the subsidiary (or otherwise controls the subsidiary and no other party controls a percentage of the subsidiary's voting interest greater than the bank's); and (iii) the operating subsidiary is consolidated with the bank under GAAP.[69]

Because banks control the operations of operating subsidiaries (and an operating subsidiary may engage only in activities permissible for the parent bank), an operating subsidiary is the functional equivalent of the parent bank, even if it is not wholly owned. Treating wholly owned operating subsidiaries differently from other operating subsidiaries in effect penalizes banks for their choice of ownership arrangements, which is determined for a variety of reasons, without any benefit to safety and soundness. The final rule should therefore remove the requirement for the parent bank to own 100 percent of the subsidiary's outstanding stock for the subsidiary to qualify for the IDI exception, so long as the subsidiary qualifies as an operating subsidiary of the bank under applicable law.

IV. Additional Recommendations.

A. The final rule should exclude affiliate-generated deposits from the definition of "deposit broker".

The final rule should exclude from the definition of brokered deposits any deposits sourced from a bank's affiliate, including an affiliated bank or trust company, where the bank and the affiliate are both wholly owned by the same holding company. Banks and their affiliates frequently offer a full suite of financial services, including broker-dealer, investment advisory and trust services, to meet customer demand for a modern, "one-stop-shop" experience. In these cases, a bank's affiliates are not engaged in the business of placing deposits or facilitating the placement of deposits, as the FDIC has proposed to interpret those terms, but rather are engaged in the business of providing a comprehensive and integrated financial services solution to its customers.

Affiliate-generated deposits lack the characteristics associated with brokered deposits, and generally result from a bank's desire to establish a relationship, or to deepen an existing relationship, with the depositor. Customer relationships with bank affiliates tend to be deep and long lasting, and, as a result, such customers view themselves as customers of the entire firm and are inherently less likely to demonstrate the volatility associated with brokered deposits. For example, as the FDIC noted in its 2011 Study on Core Deposits and Brokered Deposits, "[affiliate] referrals are *ancillary* to the affiliates' legitimate businesses", and "because depositors have a relationship with an affiliate of the bank, these deposits may behave more like deposits where the bank itself has a relationship with the depositor, and thus may be more stable and less likely to leave for higher rates or when the bank is under stress".[70]

Because affiliates that generate deposits for an affiliate bank are engaged in the business of providing an integrated financial services solution that results in a direct relationship between the affiliated bank and the depositor, the final rule should clarify that wholly owned subsidiaries of a bank's parent holding company are not engaged in the business of placing or facilitating the placement of deposits with respect to deposits they or their customers place with affiliate banks, and that these deposits, therefore, are not brokered deposits. If, however, the FDIC views these deposits as brokered under the basic definition of deposit broker, affiliates should be categorically excluded from the definition of deposit broker under the primary purpose exception. As discussed above, affiliates place deposits with their affiliated banks to serve customers' holistic banking needs and to provide customers and potential customers with access to a wide suite of banking and other financial services products, providing customers with information

69 12 C.F.R. § 5.34(e)(2).

70 FDIC, 2011 Study on Core Deposits and Brokered Deposits (July 8, 2011), at 56-57 (emphasis added).

and solutions concerning a wide variety of financial products that may include an affiliate bank's deposit offerings. As a result, their primary purpose is not the placement or facilitating the placement of deposits.

B. The FDIC should codify or rescind advisory opinions only after notice of the specific guidance to be codified and an opportunity to comment.

The NPR notes that as part of the rulemaking process,

> [T]he FDIC intends to evaluate existing staff opinions to identify those that are no longer relevant or applicable based on any revisions made to the brokered deposit regulations. The FDIC plans as part of any final rule to codify staff opinions of general applicability that continue to be relevant and applicable, and to rescind any staff opinions that are superseded or obsolete or are no longer relevant or applicable.

The FDIC does not describe what opinions or other guidance it considers "relevant or applicable", or how any such guidance will be implemented in the final rule. By not providing any indication of the guidance that will be codified or repealed, or how codified guidance will impact the text of the proposed rule, the FDIC has not provided the public the ability to comment meaningfully on a significant aspect of the proposed rule. For example, there are a number of advisory opinions in which the FDIC has determined that certain relationships qualify for the primary purpose exception.[71] The proposed rule does not indicate which, if any, of these opinions would be codified in the final rule, whether an application process would be required (or what information would be required for an application), or if any of the criteria in the opinions would be modified. This is inconsistent with the spirit of the Administrative Procedure Act, which is intended to provide for public participation in the in the rulemaking process.[72] For these reasons, the specific details of all changes to the proposed rule that would result from codification of the FDIC's existing guidance, and the repeal of any existing guidance, should be published for notice and comment.

C. BPI would support the codification of certain advisory opinions and other guidance after appropriate opportunity for notice and comment.

The FDIC has provided helpful guidance through its FAQs and advisory opinions with respect to a number of deposit relationships. BPI would support the codification of certain FAQs and advisory opinions, after a notice and comment period that provides a meaningful opportunity for the public to comment.

1. Listing services.

As discussed in Section III.A.2.e above, FAQs D2 should be codified to exclude listing services that meet the criteria in the FAQs from the definition of "deposit broker". Banks also rely on FAQs D1 and D3 in determining whether a third party is a listing service and for additional guidance on when the FDIC would treat a listing service as a deposit broker. The FDIC should codify this guidance so that banks have clear criteria for treating deposits placed through a listing service as non-brokered.

2. Distribution of prepaid cards.

Under FAQ E13, companies that distribute prepaid cards as part of a corporate rebate program are not deposit brokers. The FDIC should codify this guidance so that banks have clear examples of programs that would not result in a third party being deemed to be a deposit broker.

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71 *See, e.g.*, FDIC, Advisory Opinion Nos. 94-39, 05-02 and 17-02.

72 *See, e.g.*, Attorney General's Manual on the Administrative Procedure Act (1947), at 9.

3. Treatment of funds disbursed to beneficiaries of government programs.

Under FAQ E14, federal, state and local agencies qualify for the primary purpose exception with respect to certain deposits that are placed at IDIs and disbursed to beneficiaries of government programs through debit or prepaid cards. Although these agencies could continue to qualify for the primary purpose exception by placing deposits into transaction accounts, the proposed rule would require the agencies to apply for the exception. For the reasons discussed in section III.B.1 above, the final rule should not include an application requirement for the primary purpose exception. If, however, the final rule does include such a requirement, the FDIC should codify FAQ E14 and continue to permit agencies meeting the criteria set forth in the FAQ to qualify for the primary purpose exception without the need for an application.

4. Reclassification of certificates of deposit as non-brokered.

Under FAQ F2, a bank can reclassify a brokered certificate of deposit as non-brokered, if no third party "is involved with the account" at the time the certificate of deposit is renewed or rolled over. Many banks rely on this guidance, and the FDIC should codify FAQ F2, so that banks have clear criteria for reclassifying brokered certificates of deposit as non-brokered.

5. Reclassification of non-maturity deposits as non-brokered.

Under FAQ F3, a brokered non-maturity deposit (*e.g.*, a deposit placed into a demand deposit account) can be reclassified to non-brokered after 12 months have passed, if, during that 12-month period, no third party is "involved with the account". Guidance in FAQ F3 should be codified, so that banks continue to have clear criteria for reclassifying brokered non-maturity deposits as non-brokered.

D. BPI would support the rescission of certain advisory opinions and other guidance after appropriate opportunity for notice and comment

1. Guidance relating to "active" versus "passive and indirect" marketing should be repealed, after appropriate notice and comment.

Because of the revised definition of "engaged in the business of facilitating the placement of deposits", the NPR appears to supersede the FDIC's prior guidance relating to marketing relationships. In particular, it appears that the distinction between "active" and "passive and indirect" marketing is no longer applicable. For the sake of clarity, FAQs B4 and B8 and Advisory Opinion 93-71 (with respect to its discussion of "passive and indirect marketing"), should be rescinded.

2. Guidance relating to the definition of "deposit broker".

The FDIC should rescind FAQs A5 and B2 and Advisory Opinions 92-79 and 94-15 because the factors the FDIC set forth in that guidance for determining whether a third party is engaged in the business of placing or facilitating the placement of deposits are inconsistent with the definitions provided in the NPR and are no longer applicable.

3. Guidance relating to the primary purpose exception.

The FDIC should rescind FAQs E9 through E12 because (1) the FDIC has indicated that it will now examine the primary purpose exception on the basis of the business relationship between the agent or nominee and its customers, as opposed to the intent of the third party in placing deposits,[73] and (2) the NPR's exception for deposits placed into transaction accounts supersedes the FAQs' guidance that distributors of general purpose prepaid cards and multi-purpose debit cards generally do not qualify for the primary purpose exception.

E. The FDIC and other regulators should revise the liquidity coverage ratio ("LCR"), the proposed net stable funding ratio ("NSFR") and the G-SIB surcharge to align the treatment of deposits with the FDIC's brokered deposit regulations.

Under the LCR requirement and the proposed NSFR, brokered sweep deposits are treated as volatile sources of funding even if they are not brokered deposits under Section 29 (*e.g.*, because of the primary purpose exception). Similarly, brokered sweep deposits are not excluded from the short-term wholesale funding calculation for purposes of the G-SIB surcharge or the banking agencies' tailoring rules[74] even if they are not brokered deposits under Section 29. This treatment of sweep deposits results from a broader philosophy of treating all brokered deposits as risky and volatile sources of funding notwithstanding that many of these deposits are in fact stable and do not implicate the concerns raised by Congress in enacting Section 29. For these reasons, the FDIC and other regulators should, as applicable, revisit the treatment of brokered sweep deposits under the LCR, the proposed NSFR, the G-SIB surcharge and the tailoring rules. Please refer to BPI's prior comment letters on the LCR, NSFR, G-SIB surcharge and tailoring rules for additional details.[75]

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73 *See* 85 Fed. Reg. at 7459 ("The FDIC is proposing to set forth regulatory changes to the primary purpose exception. Specifically, the FDIC is proposing that the application of the primary purpose exception be based on the business relationship between the agent or nominee and its customers.").

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

75 *See* Letter to OCC, FRB and FDIC, from The Clearing House Association L.L.C., the American Bankers Association, the Securities Industry and Financial Markets Association, the Institute of International Bankers, the International Association of Credit Portfolio Managers, the Structured Finance Industry Group and the Financial Services Roundtable re: Liquidity Coverage Rate: Liquidity Risk Management, Standards, and Monitoring (Jan. 31, 2014), at 43-47; Letter to OCC, FRB and FDIC, from The Clearing House Association L.L.C., the Securities Industry and Financial Markets Association, the Financial Services Roundtable, the American Bankers Association, the CRE Finance Council and the Institute of International Bankers re: Net Stable Funding Ratio: Liquidity Risk Measurement Standards and Disclosure Requirements (Aug. 5, 2016), at 27-31; Letter to the FRB, from The Clearing House Association L.L.C., the Securities Industry and Financial Markets Association and the Financial Services Roundtable (Apr. 2, 2015), at 39-40; Letter to OCC, FRB and FDIC, from BPI and the American Bankers Association re: Proposed Changes to Applicability Thresholds for Regulatory Capital Requirements for Certain U.S. Subsidiaries of Foreign Banking Organizations and Application of Liquidity Requirements to Foreign Banking Organizations, Certain U.S. Depository Institution Holding Companies, and Certain Depository Institution Subsidiaries (June 21, 2019) at 19.

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The Bank Policy Institute appreciates the opportunity to provide its comments, and would welcome the opportunity to discuss them further with you. If you have any questions, please contact the undersigned by phone at (202) 589-2424 or by email at *dafina.stewart@bpi.com*.

Respectfully submitted,

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