6714-01-P

FEDERAL DEPOSIT INSURANCE CORPORATION
12 CFR Part 337
RIN 3064-AE94

Unsafe and Unsound Banking Practices: Brokered Deposits Restrictions

AGENCY: Federal Deposit Insurance Corporation (FDIC).

ACTION: Notice of proposed rulemaking and request for comment.

SUMMARY: The FDIC is inviting comment on proposed revisions to its regulations relating to the brokered deposits restrictions that apply to less than well capitalized insured depository institutions. The proposed rule would create a new framework for analyzing certain provisions of the "deposit broker" definition, including "facilitating" and "primary purpose." The proposed rule would also establish an application and reporting process with respect to the primary purpose exception. The application process would be available to insured depository institutions and third parties that wish to utilize the exception.

DATES: Comments must be received by the FDIC no later than **[Insert date 60 days after publication in the Federal Register]**.

ADDRESSES: You may submit comments on the notice of proposed rulemaking using any of the following methods:

- *Agency Web Site:* http://www.fdic.gov/regulations/laws/federal/. Follow the instructions for submitting comments on the agency website.

- *E-mail: comments@fdic.gov.* Include RIN 3064-AE94 on the subject line of the message.

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

- *Hand Delivery:* Comments may be hand delivered to the guard station at the rear of the 550 17th Street NW Building (located on F Street) on business days between 7 a.m. and 5 p.m.

- Public Inspection: All comments received, including any personal information provided, will be posted generally without change to *http://www.fdic.gov/regulations/laws/federal*

FOR FURTHER INFORMATION CONTACT: Division of Risk Management Supervision: Rae-Ann Miller, Associate Director, (202) 898–3898, rmiller@fdic.gov. Legal Division: Vivek V. Khare, Counsel, (202) 898–6847, vkhare@fdic.gov.

SUPPLEMENTARY INFORMATION:

I. Policy Objectives

On December 18, 2018, the FDIC Board adopted an advance notice of proposed rulemaking (ANPR) to obtain input from the public on its brokered deposit and interest rate regulations in light of significant changes in technology, business models, the economic environment, and products since the regulations were adopted.[1] After reviewing comments received, the FDIC is proposing changes to its regulations relating to brokered deposits.[2]

[1] The ANPR was published for comment in the Federal Register on February 6, 2019. *See* 84 FR 2366 (February 6, 2019).

[2] On August 20, 2019, the FDIC proposed revisions to its regulations relating to the interest rate restrictions. *See* 84 FR 46470 (September 4, 2019).

Through these proposed changes, the FDIC intends to modernize its brokered deposit regulations to reflect recent technological changes and innovations that have occurred. The FDIC recognizes that the definition of "deposit broker," and its corresponding staff interpretations, may not be as relevant compared to the deposit placement arrangements that exist in the market today. Notably, in recent times, banks collaborate with third parties, including financial technology companies, for a variety of business purposes including access to deposits. Moreover, banks are increasingly relying on new technologies to engage and interact with their customers, and it appears that this trend will continue given rapid technological evolution. Through these proposed changes, the FDIC's brokered deposit regulations will continue to promote safe and sound practices while ensuring that the classification of a deposit as brokered appropriately reflects changes in the banking landscape since 1989, when the law on brokered deposits was first enacted.

II. Background

Section 29 of the Federal Deposit Insurance Act (FDI Act) restricts the acceptance of deposits by insured depository institutions from a "deposit broker."[3] Well capitalized insured depository institutions are not restricted from accepting deposits from a deposit broker. An "adequately capitalized" insured depository institution may accept deposits from a deposit broker only if it has received a waiver from the FDIC.[4] A waiver may be granted by the FDIC "upon a finding that the acceptance of such deposits does not constitute an unsafe or unsound practice"

[3] The statute also restricts a less than well capitalized institution generally from offering interest rates that significantly exceed the market rates offered in an institutions normal market area.
[4] *See* 12 U.S.C. 1831f.

with respect to that institution.[5] An "undercapitalized" depository institution is prohibited from accepting deposits from a deposit broker.[6]

A. Current Law and Regulations

Section 29 of the Federal Deposit Insurance Act (FDI Act), titled "Brokered Deposits," was originally added to the FDI Act by the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 (FIRREA). The law originally restricted troubled institutions (i.e., those that did not meet the minimum capital requirements) from (1) accepting deposits from a deposit broker without a waiver and (2) soliciting deposits by offering rates of interest on deposits that were significantly higher than the prevailing rates of interest on deposits offered by other insured depository institutions ("IDIs") having the same type of charter in such depository institution's normal market area.[7]

Two years later, Congress enacted the Federal Deposit Insurance Corporation Improvement Act of 1991 (FDICIA), which added the Prompt Corrective Action (PCA) capital regime to the FDI Act and also amended the threshold for the brokered deposit and interest rate restrictions from a troubled institution to a bank falling below the "well capitalized" PCA level. At the same time, the FDIC was authorized to waive the brokered deposit restrictions for a bank that is adequately capitalized upon a finding that the acceptance of such deposits does not constitute an unsafe or unsound practice with respect to the institution.[8] FDICIA did not authorize the FDIC to waive the brokered deposit restrictions for less than adequately capitalized institutions. Most recently, earlier this year, Section 29 of the FDI Act was amended as part of

[5] *See id.*
[6] *See id.*
[7] *See* Pub. L. 101–73, August 9, 1989, 103 Stat. 183.
[8] *See* Pub. L. 102–242, December 19, 1991, 105 Stat 2236.

the Economic Growth, Regulatory Relief, and Consumer Protection Act, to except a capped amount of certain reciprocal deposits from treatment as brokered deposits.

Section 337.6 of the FDIC's Rules and Regulations implements and closely tracks the statutory text of Section 29, particularly with respect to the definition of "deposit broker" and its exceptions.[9] Section 29 of the FDI Act does not directly define a "brokered deposit," rather, it defines a "deposit broker" for purposes of the restrictions.[10] Thus, the meaning of the term "brokered deposit" turns upon the definition of "deposit broker."

Section 29 and the FDIC's implementing regulation define the term "deposit broker" to include:

1. any person engaged in the business of placing deposits, or facilitating the placement of deposits, of third parties with insured depository institutions or the business of placing deposits with insured depository institutions for the purpose of selling interests in those deposits to third parties; and
2. an agent or trustee who establishes a deposit account to facilitate a business arrangement with an insured depository institution to use the proceeds of the account to fund a prearranged loan.

This definition is subject to the following nine statutory exceptions:

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

[9] *See* 12 CFR 337.6. The FDIC issued two rulemakings related to the interest rate restrictions under this section. A discussion of those rulemakings, and the interest rate restrictions, is provided in Section (II)(B) of this Notice.
[10] *See* 12 U.S.C. 1831f.

2. an employee of an insured depository institution, with respect to funds placed with the employing depository institution;[11]
3. a trust department of an insured depository institution, if the trust in question has not been established for the primary purpose of placing funds with insured depository institutions;
4. the trustee of a pension or other employee benefit plan, with respect to funds of the plan;
5. a person acting as a plan administrator or an investment adviser in connection with a pension plan or other employee benefit plan provided that that person is performing managerial functions with respect to the plan;
6. the trustee of a testamentary account;
7. the trustee of an irrevocable trust (other than one described in paragraph (1)(B)), as long as the trust in question has not been established for the primary purpose of placing funds with insured depository institutions;
8. a trustee or custodian of a pension or profit sharing plan qualified under section 401(d) or 430(a) of the Internal Revenue Code of 1986; or
9. an agent or nominee whose primary purpose is not the placement of funds with depository institutions.

The statute and regulation also define an "employee" to mean any employee: (1) who is employed exclusively by the insured depository institution; (2) whose compensation is primarily in the form of a salary; (3) who does not share such employee's compensation with a deposit broker; and (4) whose office space or place of business is used exclusively for the benefit of the insured depository institution which employs such individual.

[11] The term "employee" is defined as "any employee (A) who is employed exclusively by the insured depository institution; (B) whose compensation is primarily in the form of salary; (C) who does not share such employee's compensation with a deposit broker; and (D) whose office space or place of business is used exclusively for the benefit of the insured depository institution which employs such individual."

As listed above, the statute includes nine exceptions to the definition of "deposit broker." In 1992, the FDIC amended its regulations to include the following tenth exception: "An insured depository institution acting as an intermediary or agent of a U.S. government department or agency for a government sponsored minority or women-owned depository institution program." The FDIC indicated in the preamble for the 1992 final rule that implemented the FDICIA revisions to Section 29 that those revisions were not intended to apply to deposits placed by insured depository institutions assisting government departments and agencies in administration of minority or women-owned deposit programs.[12]

B. Issues Raised by Commenters

In response to the ANPR on brokered deposits and the interest rate restrictions applicable to less than well capitalized banks, the FDIC received over 130 comments from individuals, banking organizations, non-profits, as well as industry and trade groups, representing banks, insurance companies, and the broader financial services industry. Of the total comments, over 100 comments related to brokered deposits.

Generally, a common theme amongst the commenters was a desire for the FDIC to clarify its historical interpretation of the "deposit broker" definition and its corresponding statutory and regulatory exceptions.

Stable Funding. Seven commenters advanced their general point to be that brokered deposits are not inherently risky and that many types of deposits currently considered to be brokered are just as stable as core deposits and should be treated as such for supervisory purposes and assessments. A number of other commenters specifically noted that certain types of deposits (e.g., health savings accounts (HSAs), deposits underlying prepaid cards, and

[12] *See* 57 FR 23933, 23040 (1992).

"relationship" deposits) are stable sources of funding (these comments are discussed in more detail under separate headings). Several commenters suggested that the more relevant issue with respect to potential bank failures is not the source of funding but rather the oversight of asset growth, specifically the increase in risky loans. Similarly, one consulting firm suggested that the FDIC focus its supervisory concerns on bank asset growth rates, especially rapid growth in risky loan categories, and that the FDIC should view brokered deposits as an important, stable funding source that complements retail deposit-gathering. One bank commenter stated that in the bank's experience, brokered deposits have been a stable, relatively low-cost, convenient, non-volatile source of funds for the past ten years. Another bank noted that brokered deposits have been a safe, stable and useful funding source for the bank and that any additional restrictions on the use of brokered deposits would cause significant additional costs and risks to the bank.

Two commenters specifically discussed the use of brokered deposits by rural community banks. One urged the FDIC to revisit its views on brokered deposits because many rural institutions rely upon third-party funding to help provide loans to local agriculture and manufacturing businesses (that are capital-intensive) to support their operations. According to commenters, brokered deposits are more important now that many rural communities are seeing a decrease in the amount of deposits being placed by its local community. The other commenter stated that brokered deposits are a good source of supplemental funding for banks in rural areas or markets which lack ample local deposits to meet the legitimate credit needs of the community.

Definition and Scope of "Brokered Deposit." While many commenters focused on specific types of products that they believe should not meet the regulatory definition of "brokered deposit," 11 commenters generally stated that the definition of brokered deposit should be revised. These commenters indicated that the definition is unclear and has been

interpreted too broadly, capturing many products or transactions that were not intended to be covered. One bank stated that the current regulations lack definitional clarity and that FDIC staff interpretations unnecessarily capture any third party that is involved in the administering or marketing of an account.

Several of these commenters noted that technology has brought significant changes to the marketplace, including online advertising and deposit marketing through third parties. In particular, one banker stated that more institutions are being forced to rely upon funding channels that involve third parties due to the evolution of online banking activities and that this often triggers the definition of brokered deposit. Another commenter suggested that the definition be limited to those deposits that inherently pose risks to banks.

One commenter stated that the FDIC's current interpretation of what constitutes a "deposit broker" seemingly hinges on the involvement of any third party (including affiliates or subsidiaries of the bank) in sourcing the customer relationship or servicing the customer. By taking such a view, the commenter argued, the FDIC has significantly expanded the types of entities considered to be deposit brokers beyond what was originally contemplated when Section 29 was enacted. This commenter stated that as a result, entities such as retailers, employers, technology platforms, advertising and marketing partners, and Fintech partners may currently be classified as deposit brokers, even though their activities may only be incidentally linked to a deposit account. The commenter requested that the FDIC limit its determination of what constitutes a "deposit broker" to what they believe was a narrow scope contemplated by Section 29.

While the majority of the comments sought to constrict the definition of "brokered deposits," one organization argued against any such a reduction in scope. The commenter stated

that brokered deposits contributed to the savings and loan crisis of the 1980's that cost taxpayers hundreds of millions of dollars. The commenter also noted that brokered deposits have already received permissive regulatory treatment and that more than 99% of banks are considered "well-capitalized" and therefore can accept brokered deposits without any statutory or regulatory restriction.

Primary Purpose Exception. A number of commenters discussed the "primary purpose exception" to the deposit broker definition in various contexts. Many of those commenters focused on specific deposit placement arrangements relating to health savings accounts (HSAs), prepaid cards, and affiliated broker-dealers. These comments are discussed more specifically under those headings. In addition to these specific deposit placement arrangements, a number of comments focused more generally on how the primary purpose exception should be interpreted. One bank commented that third parties that are involved in placing deposits but do so to achieve some other purpose outside of providing a deposit account, where the deposits do not have the risks associated with traditional brokered deposits, should meet the primary purpose exception. Another commenter proposed amending the primary purpose exception and making it available to entities that place deposits but also offer consumers an array of financial services. The commenter argued that the correct way to determine such person's "primary purpose" is to review the entire range of services offered by the person to its customers and to exclude deposits that are facilitated or placed by persons for whom deposit brokerage revenue and income is less than 50 percent of their total consolidated revenue and income.

Alternatively, one commenter argued that one key test for whether a person meets the primary purpose exception should be if the person facilitating placement of a deposit is paid a fee by the bank, which the commenter stated is a prominent feature of a "classic" deposit broker.

The commenter also stated that in contrast, a securities broker or mutual fund administrator is paid a fee by the owner of the funds. According to the commenter, that is the key distinction that should be used to define a brokered deposit is whether the broker drives the selection of bank or whether the depositor drives the selection.

A consulting firm asked the FDIC to take a "principles-based" approach toward the brokered deposit regulation and primary purpose exception that places the burden on the banks and their ability to explain, document and defend their operating and contingency management policies and practices.

Health Savings Accounts (HSAs). Nine separate commenters mentioned HSAs, in general arguing that third party administrators (or HSA custodians) that assist in placing HSA deposits at insured depository institutions meet one of two statutory exceptions to the deposit broker definitions. Specifically, commenters believe that the third party administrators fit within the statutory exception for plan administrators for employee benefit plans, or that these third party administrators should meet the "primary purpose exemption."

Commenters who argued that third party administrators fit within the primary purpose exception noted that HSAs are opened primarily for the purpose of facilitating savings in an effort to assist employees to meet deductibles and pay qualified medical expenses. One commenter noted that the primary purpose exception applies to HSAs because the funds are placed with banks incidental to providing a tax advantaged program for healthcare expenditures. Similarly, one commenter stated simply that placing HSA funds in banks is only incidental to the primary purpose of the non-bank administrators.

Others pointed out that HSAs placed at insured depository institutions by third parties do not represent "hot money" but rather are a stable source of funding. Third party administrators

also do not have the same authority to control the HSAs in a manner comparable to the control of traditional deposit brokers. One trade association made a public policy argument in favor of HSAs not being considered brokered deposits, stating that HSAs are a desirable option for both employers and employees to offset high employee healthcare costs. Another commenter also articulated a public policy reason for HSAs not being brokered deposits, noting that HSAs benefit consumers through increased competition, innovation and reduced costs.

Prepaid Cards. Eight commenters discussed prepaid cards, generally stating that prepaid card companies are not deposit brokers because they are not engaged in the business of placing deposits, but rather are involved in a much larger economic activity of offering prepaid payments on products to replace inefficient and costlier, traditional payments. One commenter noted that program managers of prepaid card products meet the primary purpose exception because prepaid card managers place deposits to enable cardholders to make purchases throughout the interbank payment system and that prepaid cards are a source of stable funding. One trade association argued that funds underlying prepaid cards are not "hot money" because they are typically held in pooled custodial accounts and the IDI is generally required to receive written approval of its primary federal regulator before assuming a large transfer of pooled funds. A few commenters noted that funds underlying prepaid cards should not be considered brokered deposits because they are low balance, stable, and relatively low-cost compared to other deposits. A large payments company similarly argued that funds underlying prepaid cards are not "hot money" and often have stable rates. The commenter further stated that prepaid card program managers provide consumers with a payment mechanism that substitutes for cash or a money order. Additionally, a commenter suggested that prepaid program structures that get paid based upon

administrative services should qualify for the primary purpose exception, similar to the exception provided for government benefit programs.

Broker-Dealer Sweeps. Currently, certain affiliated broker dealer sweeps are not considered to be brokered deposits. Two commenters stated that unaffiliated broker-dealer sweeps should also not be considered brokered, with one commenter suggesting that unaffiliated broker dealers meet the primary purpose exception.

Several commenters suggested that the regulations should explicitly provide that affiliated broker dealers meet the primary purpose exception. Moreover, some commenters suggested that the FDIC reconsider the criteria that it has considered as part of its existing interpretation in Advisory Opinion 05-02.[13] A consulting company suggested that the FDIC incorporate that staff opinion into the regulatory exceptions, and that the FDIC also codify, through rulemaking, that a separately incorporated trust company affiliate of a bank that acts as a bona fide trust custodian in placing deposits at an IDI, meets the primary purpose exception.

Affiliate Transactions. Sixteen commenters suggested that deposit referrals made by affiliated entities should not be considered brokered deposits, and that affiliates making such referrals should not be considered deposit brokers. One bank argued that affiliate referrals serve to strengthen and deepen the customer relationship. The bank also urged the FDIC to clarify, by regulation, that an affiliate of a depository institution does not constitute a deposit broker. A trade association representing the banking industry suggested that employees of bank affiliates and subsidiaries should not be considered deposit brokers. One bank similarly argued that deposits sourced from affiliates generally are similar to traditional core deposits because they are funds of customers with long-term relationships with the firm. One commenter suggested that

[13] FDIC Staff Advisory Opinion 05-02 (February 3, 2005).

affiliates that refer customers to a bank should not be treated as deposit brokers as long as the customer establishes a direct account relationship with the bank, the affiliate institution does not have the legal authority to move customers' funds to another depository institution, and the bank retains complete control over setting rates, fees, terms, and conditions for the account as well as full discretion over the opening or closing of the account.

A trade association representing community banks stated that dual and affiliated employees who provide a suite of nonbanking and deposit products and services to customers, and are not paid commissions or fees based upon the volume of deposits placed, should not meet the deposit broker definition. Another banking trade association suggested that information sharing with affiliates should not be determinative factor for the FDIC in considering whether a deposit is brokered. A state banker's association stated that they found little evidence that so-called "relationship deposits" gathered through the normal course of providing banking services through affiliates or marketing partnerships pose an enhanced risk to safety and soundness or the deposit insurance fund. Two congressional commenters stated that there are characteristics of an affiliated broker-dealer's relationship with an insured depository institution that should result in deposits opened by them as being viewed as nonbrokered.

Two commenters argued that deposits placed into a parent bank by its wholly-owned operating subsidiary should not be brokered deposits. According to the commenter, this is because wholly-owned operating subsidiaries are treated as part of the bank under certain federal banking laws.

Insurance Agents. A bank suggested that the FDIC change its position regarding deposits marketed through non-employee, exclusive agents of, an insurance company engaged primarily

in the sale of insurance if the bank is an affiliate of the insurance company and the agents market exclusively to such insurer's bank affiliate.

Government Accounts. One commenter stated that large government investment pools that place deposits on behalf of municipalities and other governmental entities should not be classified as "deposit brokers" because they invest their portfolio assets as principal fiduciary and not as agent. Therefore, such pools do not act for the "primary purpose" of investing fund assets in deposit accounts.

Listing Services. One commenter stated that brokered deposits expressly exclude deposits derived from listing services and that the "deposit broker" definition excludes listing services. The commenter suggested that the use of deposit listing services benefits the Deposit Insurance Fund by allowing bank customers to source multiple depository relationships, thereby minimizing losses to either the DIF or to the customer if deposits were placed at a single institution. Another commenter urged the FDIC to preserve its longstanding position regarding online listing services and stated that the position should remain even if a fee is paid for preferential placement on the listing service website.

Custodial Deposits. A management company stated that FDIC's regulations should clarify that so-called "custodial deposits" are nonbrokered deposits because custodial deposits level the playing field between community banks and larger money center banks by allowing a custodian bank to break down large corporate, municipal, and not-for-profit institutional deposits and distribute them to smaller banks.

Deposit Insurance Assessments. Three commenters suggested that the FDIC revise its deposit insurance assessment regulations with respect to valuation of brokered deposits. While

this matter is outside the scope of this rulemaking process, the FDIC acknowledges the comments and will consider them, as appropriate, in any future assessment rulemaking.

III. Discussion of Proposed Rule

A. Deposit Broker Definition

A person meets the "deposit broker" definition under Section 29 of the FDI Act if it is engaged in the business of placing deposits, or facilitating the placement of deposits, of third parties with insured depository institutions or the business of placing deposits with insured depository institutions for the purpose of selling interests in those deposits to third parties. An agent or trustee meets the "deposit broker" definition when establishing a deposit account to facilitate a business arrangement with an insured depository institution to use the proceeds of the account to fund a prearranged loan. As discussed below, the FDIC is proposing to define certain prongs of the deposit broker definition.

1. Engaged in the business of placing deposits

The statute provides that a person meets the definition of "deposit broker" if it is "engaged in the business of placing deposits" on behalf of a third party (i.e., a depositor) at insured depository institutions. The FDIC would view a person to be *engaged in the business of placing deposits* if that 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).

As such, any person that places deposits at insured depository institutions on behalf of a depositor, as part of its business relationship with that depositor, fits within the meaning of the "deposit broker" definition.

Question 1: Is the FDIC's proposed definition of "engaged in the business of placing deposits" appropriate?

2. Engaged in the business of facilitating the placement of deposits

A. Background and Comments Received

Section 29 of the FDI Act also provides that a person is a deposit broker when it is "facilitating" the placement of deposits of third parties with insured depository institutions. 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. Historically, the term "facilitating the placement of deposits" has been interpreted by staff at the FDIC to include actions taken by third parties to connect insured depository institutions with potential depositors.

Commenters argue that, under the current FDIC staff interpretations, the term "facilitating" has been broadly interpreted to include *any* actions taken by third parties to connect insured depository institutions with potential depositors. Commenters also contend that determining whether a third party is "facilitating the placement of deposits" is not always clear because the FDIC's staff interpretative letters do not always apply perfectly to new arrangements relating – for example – to whether deposits placed in new ways stemming from technological or marketplace changes would be considered brokered deposits.

Since enactment of Section 29, there have been significant technological advances in the way banks seek and source deposits, well beyond what was contemplated at that time and by staff at the FDIC in the following years. As a result, some of the historical factors that have been considered may not be relevant as compared to current deposit placement arrangements in the market.

Today, banks are increasingly relying on new technologies to engage and interact with their customers and, it appears that this trend will continue given rapid technological evolution. Specifically, the proliferation of various online marketing and advertising channels have provided new opportunities for insured depository institutions to attract depositors from different parts of the country. In an effort to ensure that the term brokered deposit appropriately reflects the banking landscape, and to ensure that the FDIC's regulations promote safe and sound practices, the FDIC is proposing to refine the activities that result in a person being "engaged in the business of facilitating the placement" of third party deposits at an insured depository institution.

B. Proposed Definition of Engaged in the Business of Facilitating the Placement of Deposits.

Under the proposal, the FDIC proposes that a person would meet the "facilitation" prong of the "deposit broker" definition by, while engaged in business, engaging in any one, or more than one, of the following activities:

- The person directly or indirectly shares any third party information with the insured depository institution;
- The person has legal authority, contractual or otherwise, to close the account or move the third party's funds to another insured depository institution;
- The person provides assistance or is involved in setting rates, fees, terms, or conditions for the deposit account; or,
- The person is acting, directly or indirectly, with respect to the placement of deposits, as an intermediary between a third party that is placing deposits on behalf of a depositor and an insured depository institution, other than in a purely administrative capacity.

By engaging in one or more than one of the above listed activities, while engaged in business, the person would be engaged in the business of facilitating the placement of customer deposits at an insured depository and therefore meet the "deposit broker" definition. For example, if a person assists in setting rates, fees, or terms, then that person would be considered a deposit broker despite the fact that the person may not share third party information with the insured depository institution.

The proposed "facilitation" definition is intended to capture activities that indicate that the person takes an active role in the opening of an account or maintains a level of influence or control over the deposit account even after the account is open. It is the FDIC's view that a level of control or influence indicates that the deposit relationship is between the depositor and the person rather than the depositor and the insured depository institution. Having a level of control or influence over the depositor allows the person to influence the movement of funds between institutions and makes the deposits less stable than deposits brought to the insured depository institution through a single point of contact where that contact does not have influence over the movement of deposits between insured depository institutions. Ultimately, the FDIC believes that if the person is not engaged in any of the activities above, then the needs of the depositor are the primary drivers of the selection of a bank, and therefore the person is not facilitating the placement of deposits.

The proposal would also define any person that acts as an intermediary between another person that is placing deposits on behalf of a depositor and an insured depository institution, other than in a purely administrative capacity, as facilitating the placement of deposits. In other words, any assistance provided by such intermediaries, outside of providing purely administrative functions, would result in the intermediary meeting the "deposit broker" definition

and any deposits placed through the assistance of such intermediaries would be brokered deposits. For example, if an agent or nominee that meets the primary purpose exception uses an intermediary (in a manner that is not purely administrative) in placing, or facilitating the placement of, deposits, then the intermediary would be a deposit broker, and the resulting deposits would be brokered. Administrative functions would include, for example, any reporting or bookkeeping assistance provided to the person placing its customers' deposits with insured depository institutions. Administrative functions would not include, for example, assisting in decision-making or steering persons (including the underlying depositors) to particular insured depository institutions. The FDIC believes such an interpretation is warranted, in part, because deposits placed through the assistance of such intermediaries are more likely to raise concerns traditionally associated with brokered deposits. For example, it is possible that such entities are able to directly or indirectly control or influence the movement of funds between insured depository institutions without any involvement or input from the underlying depositor.

This proposal would provide industry participants with clarity over whether the actions of a person, in assisting with the placement of deposits, meet the "facilitation" part of the "deposit broker" definition.

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

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

Question 4: Has the FDIC provided sufficient clarity surrounding whether a third party intermediary would meet the "facilitation" prong of the "deposit broker" definition?

Question 5: Should the FDIC provide more clarity regarding whether any specific types of deposit placement arrangements would or would not meet the "facilitation" prong of the "deposit broker" definition? If so, please describe any such deposit placement arrangements.

3. Selling Interests in Deposits to Third Parties

The third prong of the "deposit broker" definition includes a person "engaged in the business of placing deposits with insured depository institutions for the purpose of selling interest in those deposits to third parties." This part of the definition specifically captures the brokered certificates of deposit (CD) market (referred to herein as "brokered CDs"). These are typically deposit placement arrangements where brokered CDs are issued in wholesale amounts by a bank seeking to place funds under certain terms and sold through a registered broker-dealer to investors, typically in fully-insured amounts. The brokers subdivide the bank-issued "master CD" and alter the terms of the original CD before selling the new CDs to its brokerage customers. These brokered CDs are (in most cases) held in book-entry form at the Depository Trust Corporation ("DTC") and use the CUSIP system for identification and trading in a primary and secondary market.

Deposits placed through this market have always been marketed and classified as brokered deposits and are specifically captured under the placement of deposits "for the purpose of selling interests in those deposits to third parties" prong of the deposit broker definition. Through this rulemaking, the FDIC is not proposing any changes to the brokered classification of such deposits. In other words, under this proposal, without exception, and as further explained below in the section discussing the primary purpose exception, brokered CDs would continue to be classified as brokered.

In addition, the FDIC notes that the brokered CD market has evolved since Section 29 was first enacted, and will likely continue to evolve. As such, it is the FDIC's intention that third parties that assist in the placement of brokered CDs, or any similar deposit placement arrangement with a similar purpose, continue to meet the deposit broker definition.

B. Exceptions to the Deposit Broker Definition

Section 29 provides nine statutory exceptions to the definition of deposit broker and, as noted earlier, the FDIC added one regulatory exception to the definition. Through this rulemaking, the FDIC proposes amending two exceptions – (1) the exception for insured depository institutions, with respect to funds placed with that depository institution (the "IDI exception") and (2) the exception for an agent or nominee whose primary purpose is not the placement of funds with depository institutions (the "primary purpose exception").

1. Bank Operating Subsidiaries and the IDI Exception

Section 29 of the FDI Act expressly excludes from the definition of "deposit broker" an insured depository institution, with respect to funds placed with that depository institution, also known as the "IDI Exception."[14] Under the IDI Exception, an IDI is not considered to be a deposit broker when it (or its employees) places funds at the bank.

In response to the ANPR, commenters suggest that funds deposited at an IDI through the IDI's relationship with a wholly-owned subsidiary should not be considered brokered deposits. The commenters state that operating subsidiaries of an IDI are under the exclusive control of the parent IDI, engage only in activities permissible for an IDI and are treated as a division of the IDI for a variety of regulatory purposes.

[14] 12 U.S.C. 1831f((g)(2)(A).

The FDIC recognizes that the exception currently is limited to IDIs only, and not their subsidiaries. The IDI Exception currently applies, for example, in the case of a division of an IDI that places deposits exclusively with the parent IDI, but does not apply if a separately incorporated subsidiary of the IDI places deposits exclusively with the parent. The FDIC also recognizes that a wholly-owned operating subsidiary that meets certain criteria can be considered similar to a division of an IDI for certain purposes. In fact, wholly-owned subsidiaries are treated differently under various legal and regulatory frameworks. For example, the Bank Merger Act and Receivership law treat wholly-owned subsidiaries as separate from its parent IDI, whereas Section 23A and Section 23B of the Federal Reserve Act and Call Reports treat wholly-owned subsidiaries as part of the parent IDI.

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. Therefore, the FDIC proposes that the IDI exception be available to wholly-owned operating subsidiaries provided that such a subsidiary meets the criteria discussed below. The FDIC believes that setting forth specific criteria is appropriate to limit the exception to wholly-owned subsidiaries that are functioning essentially as divisions of parent IDIs.

For the reasons described above, the FDIC is proposing that a subsidiary be eligible for the IDI exception, provided all of the following criteria are met:

- The subsidiary is a wholly owned operating subsidiary of the IDI, meaning that the IDI owns 100% of the subsidiary's outstanding stock;
- The subsidiary places deposits of retail customers exclusively with the parent IDI; and
- The subsidiary engages only in activities permissible for the parent IDI.

Under the proposal, wholly-owned subsidiaries, based on the above listed conditions, would be eligible for the IDI exception to the definition of deposit broker with respect to funds placed at the IDI. However, the FDIC notes that such deposits would be considered brokered if a third party is involved that is itself a deposit broker.

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

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

2. Primary Purpose Exception

a. Background

The statute provides that the primary purpose exception applies to "an agent or nominee whose primary purpose is not the placement of funds with depository institutions." Generally, if a person is engaged in the business of either placing deposits for its customers, or facilitating the placement of deposits for its customers, at insured depository institutions, then it meets the "deposit broker" definition. However, if the person meets the primary purpose exception, then the person is excepted from the definition of "deposit broker" and any deposits that it places with insured depository institutions are not brokered deposits.

As noted in the ANPR, 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.[15] In particular, staff has generally analyzed whether the agent's placement of deposits is for a substantial purpose other than (1) to provide deposit

[15] 84 FR 2366, 2372 (February 6, 2019).

insurance, or (2) for a deposit-placement service. In analyzing this principle, staff has considered whether the deposit-placement activity is incidental to some other purpose.

b. General Overview of Proposal

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. As such, the proposal would amend the primary purpose exception in the regulation to apply when the primary purpose of the agent's or nominee's business relationship with its customers is not the placement of funds with depository institutions.

The FDIC recognizes that, since Section 29 was first enacted, there have been a number of different agents and nominees that have sought views on the applicability of the primary purpose exception, and this proposed amendment to the primary purpose exception would expand the number of entities that meet the exception. The FDIC also recognizes that every deposit broker can claim a primary purpose other than the placement of funds at a depository institution, and Congress did not intend for every potential deposit broker to become exempt through the primary purpose exception. In order for the FDIC to properly scrutinize whether a primary purpose exception is warranted, the FDIC is proposing to establish an application and reporting process to ensure that the FDIC's role in protecting the Deposit Insurance Fund and ensuring safety and soundness is preserved.

c. Business Relationships Deemed to Meet the Primary Purpose Exception Subject to the Application Process

1. Deposit Placements of Less Than 25 Percent of Customer Assets Under Management by the Third Party

Through this rulemaking, the FDIC proposes that the primary purpose of an agent's or nominee's business relationship with its customers will not be considered to be the placement of funds, subject to an application process, if less than 25 percent of the total assets that the agent or nominee has under management for its customers, in a particular business line, is placed at depository institutions. It is the FDIC's view that the primary purpose of a third party's business relationship with its customers is not the placement of funds with depository institutions if the third party places less than 25 percent of customer assets under management for its customers, for a particular business line, at insured depository institutions. The FDIC believes that if 75 percent or more of the customer assets under management of the third party is not being placed at depository institutions, for a particular business line, the third party has demonstrated that the primary purpose of that business line is not the placement of funds at depository institutions. The FDIC also believes that establishing a transparent, bright line test is beneficial for all parties.

To give an example, a broker dealer that sweeps uninvested cash balances into deposit accounts at depository institutions would meet the primary purpose exception if the amount of customer funds it places at deposit accounts represents less than a quarter of the total amount of customer assets it manages for its broker dealer business. However, if 25 percent or more of the customer assets the broker dealer manages is placed at depository institutions, the FDIC would, barring information to the contrary, likely conclude that the primary purpose of the broker dealer's business is placing funds at depository institutions, rather than the placing of funds at depository institutions being ancillary to its primary purpose.

An agent or nominee that seeks to avail itself of the primary purpose exception based on this standard would be required to submit an application, as discussed below.

Customer assets under management. In determining the amount of customer assets under management by an agent or nominee, for a particular business line, the FDIC would measure the total market value of all the financial assets (including cash balances) that the agent or nominee manages on behalf of its customers that participate in a particular business line.

Question 8: Is it appropriate to interpret the primary purpose of a third party's business relationship with its customers as not placement of funds if the third party places less than 25 percent of customer assets under management for its customers, for a particular business line, at depository institutions? Is a bright line test appropriate? If so, is 25 percent an appropriate threshold?

Question 9: Should the FDIC specifically provide more clarity regarding what is meant by customer assets under "management" by a broker dealer or third party?

2. Deposit Placements that Enable Transactions

The FDIC proposes, subject to an application process, that the primary purpose of an agent's or nominee's business relationship with its customers will not be considered to be the placement of funds if the agent or nominee places depositors' funds into transactional accounts for the purpose of enabling payments. The FDIC does not intend for this exception to capture all third parties that place deposits into accounts that have transaction features and does not intend to create an incentive for deposit brokers to move customers from time deposits to transaction accounts in order to evade brokered deposits restrictions. Rather, the exception would be construed to apply only to third parties whose business purpose is to place funds in transactional accounts to enable transactions or make payments.

Under the proposal, if an agent or nominee places 100 percent of its customer funds into transaction accounts at depository institutions and no fees, interest, or other remuneration is provided to the depositor, then it would meet the primary purpose exception of enabling payments, subject to providing information as part of an application process. In such a case, the FDIC would conclude that the primary purpose of the agent's or nominee's business is to enable payments.

If the agent or nominee, or the depository institution, pays any sort of interest, fee, or provides any remuneration, (e.g., nominal interest paid to the deposit account), then the FDIC would more closely scrutinize the agent's or nominee's business to determine whether the primary purpose is truly to enable payments. In such a case, the FDIC would consider a number of factors, including the volume of transactions in customer accounts, and the interest, fees, or other remuneration provided, in determining the applicability of the primary purpose exception.

An agent or nominee that seeks to avail itself of the primary purpose exception based on this standard would be required to submit an application.

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

d. Other Deposit Placements That May Meet the Primary Purpose Exception

Agents or nominees that do not fit within the business arrangements detailed above would also be eligible to apply for the primary purpose exception, subject to the application process.[16] In such a case, in order to qualify for the primary purpose exception, the FDIC would expect the agent or nominee to demonstrate through its application that the primary purpose of

[16] Persons that meet the deposit broker definition because they are "facilitating the placement" of deposits would also be eligible to submit an application under this process.

the agent or nominee is something other than the placement of funds at depository institutions. In such applications, the FDIC would consider a number of factors in determining whether the agent or nominee meets the primary purpose exception.

The FDIC notes that agents or nominees seeking a primary purpose exception under this category may be placing more than 25 percent of its customer assets under management, for a particular business line, into deposit accounts at depository institutions. As such, the applicant would be required to provide information sufficient to establish that its primary purpose is something other than the placement of funds, despite the fact that it places more than 25 percent of its customer assets under management, for a particular business line, in deposit accounts.

One factor the FDIC would review is the revenue structure for the agent or nominee. If the agent or nominee receives a majority of its revenue from its deposit placement activity, rather than for some other service it offers, then it would likely not meet the primary purpose exception. A second factor would be whether the agent's or nominee's marketing activities to prospective depositors is aimed at opening a deposit account or to provide some other service, and if there is some other service, whether the opening of the deposit account is incidental to that other service. As part of reviewing this factor, the FDIC would also consider whether it is necessary for the customer to open a deposit account first before receiving the other services provided by the agent or nominee. A third factor would be the fees, and type of fees, received by an agent or nominee for any deposit placement service it offers.

Ultimately, the FDIC's review of whether an agent or nominee meets the primary purpose exception would be a case-by-case review and depend upon a consideration of factors detailed in the application section below, as well as the information presented by the applicant as to why it should meet the primary purpose exception.

e. Business Relationships That Do Not Meet the Primary Purpose Exception

1. Deposit Placements of Brokered CDs

Through this proposal, the FDIC would continue to consider a person's placement of brokered CDs (as described in the third prong to the deposit broker definition and as discussed above) as deposit brokering. For purposes of establishing the person's primary purpose, the person's placement of brokered CDs would be considered a discrete and independent business line from other deposit placement businesses, and so the primary purpose for that particular business line will always be the placement of deposits at depository institutions. Accordingly, such deposits would continue to be considered brokered notwithstanding that the person may not be considered a deposit broker for other deposits that it places (or for which it facilitates the placement), which would be evaluated as a separate business line.

Brokered CD products are marketed to customers as a way to increase FDIC deposit insurance coverage and increase yield. One historical form of brokered CDs is CD participations, where a broker dealer purchases a CD issued by a bank and sells the interests in the CD to its customers. CD participations, at the time that Section 29 was being contemplated, were a core form of deposit brokering. This activity enables any insured depository institution to attract large volumes of funds irrespective of the institutions' managerial and financial characteristics. While such deposits can provide a helpful source of liquidity to institutions, their availability and pricing make it possible for poorly-managed institutions to continue operating beyond the time at which natural market forces would have otherwise resulted in failure.

Moreover, and as provided in the ANPR, brokered CDs have caused significant losses to the deposit insurance fund.[17]

Accordingly, for purposes of effectuating the intent and policy of Section 29 (and Part 337 of the FDIC's regulations), brokered CDs, as has been the case since 1989, will be considered brokered, without exception. As discussed below, deposits related to brokered CDs would not be included for purposes of determining whether a person's other business line meets the primary purpose exception.

2. Deposit Placements for Purposes of Encouraging Savings

The FDIC would not grant a primary purpose exception if the third party's primary purpose for its business relationship with its customers is to place (or assist in the placement of) funds into deposit accounts to "encourage savings," "maximize yield," "provide deposit insurance", or any similar purpose. The FDIC is concerned that these types of purposes evade the purposes of Section 29. It is the FDIC's view that there is no meaningful distinction between these objectives and the objectives for placing funds into a deposit account. As such, third parties that either place or assist in the placement of deposits to provide these core deposit-placement services for its customers would not meet the primary purpose exception.

f. Applicability of Prior FDIC Staff Advisory Opinions

The FDIC recognizes that some insured depository institutions may have met the primary propose exception based on a previous FDIC staff advisory opinion. As part of this rulemaking process, the 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

[17] 84 FR 2366, 2370 (February 6, 2019).

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.

Question 11: Are there particular FDIC staff opinions of general applicability that should or should not be codified as part of the final rule? If so, which ones, and why?

g. Evaluation of Business Lines

In evaluating whether the primary purpose would apply, the FDIC believes it is necessary to analyze specific business lines. Otherwise, any agent or nominee engaged in the brokering of deposits could evade the statutory restrictions by adding or combining its brokering business with another business such that the deposit broker business is no longer its primary purpose. In this proposal, the term business line would 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. For example, 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 (because those customers are not part of the group of customers for whom the person is placing deposits), and any accounts in which customers are only able to place money in accounts at depository institutions (and not invest in other types of assets) would also be considered a separate business line. Ultimately, the determination of what constitutes a business line will depend on the facts and circumstances of a particular case, and the FDIC retains discretion to determine the appropriate business line to which the primary purpose exception would apply.

Question 12: Has the FDIC provided sufficient clarity regarding what will be considered a "business line"? How can the FDIC provide more clarity? Are there other factors that should be considered in determining an agent's or nominee's business line(s)?

h. Application Process for the Primary Purpose Exception

1. General Overview of the Application Process

For purposes of the application process, the term applicant includes an insured depository institution or a nonbank third party[18] that meets the "deposit broker" definition by either placing (or facilitating the placement of) customer deposits at insured depository institutions and seeks to be excluded from that definition by application of the primary purpose exception. Under the proposal, the FDIC would establish an application process under which any agent or nominee that seeks to avail itself of the primary purpose exception, or an insured depository institution acting on behalf of an agent or nominee, could request that the FDIC consider certain deposits as nonbrokered as a result of the primary purpose exception. If an application from the agent or nominee is approved, deposits placed or facilitated by that party would be considered nonbrokered for a particular business line.

As mentioned, an applicant may be an insured depository institution that applies to the FDIC on behalf of a third party seeking a determination that the third party meets the primary purpose exception. In this case, if appropriate, the FDIC would evaluate the third party's relationships with all IDIs in which the third party places, or facilitates the placement of, deposits. An approval that a third party meets the primary purpose exception (based on an application by an IDI on behalf of the third party) could be applicable to all deposit placements

[18] The FDIC will look to each separately incorporated legal entity as its own "third party" for purposes of this application process.

by that third party at other IDI(s) to the extent that the deposit placement arrangements with the other IDI(s) are the same as the arrangement between the applicant and the third party. The FDIC anticipates that an agent or nominee who places, or facilitates the placement of, deposits at multiple IDIs and seeks a primary purpose exception is likely to apply on its own behalf, given that the information required to complete an application will be in possession of the agent or nominee.

Question 13: Are there scenarios where a nonbank third party, as part of the same business line, has different deposit placement arrangements with IDIs?

Applicants would receive a written determination from the FDIC within 120 days of a complete application. For applications seeking the primary purpose exception as described above in paragraphs C(1) and C(2) (with the exception of applicants seeking a primary purpose exception based on enabling payments where interest, fees, or remuneration, is provided to depositors), if the application is simple and straightforward and meets the relevant standards, the FDIC intends to provide an expedited processing of the application. The FDIC expects such applications to generally be simple and straightforward, but recognizes there may be some cases, such as when defining the scope of the "business line" is complicated, in which the FDIC may need more time to process the application.

Question 14: Is the application process proposed for the primary purpose exception appropriate? Are there ways the application process could be modified to make it more effective or efficient?

Question 15: Is the application process for IDIs that apply on behalf of a third party workable? Are there ways to improve the process for IDIs that apply on behalf of third parties?

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

Question 17: Should some or all FDIC decisions on applications for the primary purpose exception be publicly available? If so, in what format?

Question 18: Are there commonly known deposit placement arrangements not mentioned above that are sufficiently simple and straightforward that applications for such arrangements should receive expedited application processing, as described above?

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

2. Application Contents

An applicant would need to submit certain information, depending on the basis on which the primary purpose exception is being sought. Below are the application contents that would be required for each of the three types of previously discussed business arrangements.

Application Contents for Third Parties that Seek Primary Purpose Based on Placing Less Than 25 Percent of Customer Assets Under Management at IDIs. The applicant would be required to provide (1) a description of the business line for which the applicant is filing an application; (2) the total amount of customer assets under management by the third party for that particular business line and (3) the total amount of deposits placed by the third party on behalf of its customers, for that particular business line, at all depository institutions. The total amount of deposits placed by the third party should be exclusive of the amount of brokered CDs being placed by the third party, which is treated as a separate business line. An application

would also need to include a description of the deposit placement arrangement(s) with the IDI or IDIs and the services provided by any other third parties involved. The FDIC would be permitted to request additional information at any time during the review of the application to render the application complete and initiate its review.

The FDIC will approve primary purpose applications if the total amount of customer funds placed at insured depository institutions by the third party is less than 25 percent of total customer assets under management by the third party for a particular business line.

Question 20: Are the criteria for considering and approving primary purpose applications for third parties that seek a primary purpose exception based on placing less than 25 percent of customer assets under management at depository institutions appropriate?

Application Contents for Third Parties that Seek Primary Purpose Based on Enabling Transactions. The applicant would need to submit information, including contracts with customers and with the depository institutions in which the third party is placing deposits, showing that all of its customer deposits are in transaction accounts. An application would also need to include a description of the deposit placement arrangement(s) with the IDI or IDIs and the services provided by any other third parties involved. The applicant would also need to submit information on the amount of interest, fees, or remuneration being provided or paid for the transaction accounts. For third parties that pay interest, fees, or provide other remuneration, the applicant would need to provide information regarding the volume of transactions in customer accounts. In addition, for third parties that pay interest, fees, or provide other remuneration, applicants would need to provide an explanation of how its customers utilize its services *for the purpose* of making payments and not for the receipt of a deposit placement

service or deposit insurance. The FDIC would be permitted to request additional information at any time during the review of the application to render the application complete and initiate its review.

The FDIC would approve primary purpose applications if an agent or nominee places funds into transactional accounts for the purpose of enabling payments, and no fees, interest, or other remuneration is being provided to the depositor.

Question 21: Are the criteria for considering and approving primary purpose applications based on enabling transactions appropriate?

Application Contents for Other Business Relationships That May Meet the Primary Purpose Exception. Applicants seeking the primary purpose exception not based on business relationships described above (in paragraphs C(1) and C(2)) would request that the FDIC view a particular business relationship between a third party and an IDI as meeting the primary purpose exception. This process would be available, for example, to third parties that place more than 25 percent of the total assets under management for its customers, for a particular business line, into deposit accounts at insured depository institutions.

Application Contents. In order for an application to be considered, the following information, at a minimum, would be required, to the extent applicable:

(1) A description of the deposit placement arrangements with all entities involved;

(2) A description of the business line for which the applicant is filing an application;

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

(4) The total amount of assets under management by the third party;

(5) The total amount of deposits placed by the third party at all insured depository institutions, including the amounts placed with the applicant, if the applicant is an insured depository institution. This includes the total amount of term deposits and transactional deposits placed by the third party, but should be exclusive of the amount of brokered CDs being placed by that third party;

(6) Revenue generated from the third party's activities related to the placement, or the facilitating of the placement, of deposits;

(7) Revenue generated from the third party's activities not related to the placement, or the facilitating of the placement, of deposits;

(8) A description of the marketing activities provided by the third party to prospective depositors;

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

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

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

Supporting documentation and contracts related to the items above would also be required. The FDIC would be permitted to request additional information at any time during its review to render the application complete and initiate its review. The FDIC's review of whether a third party meets the primary purpose exception would be based on the application and all supporting information provided. After receipt of a complete application, the FDIC will notify the applicant, in writing, of its response within 120 days.

Under the proposal, the FDIC would approve applications submitted under this process if the application demonstrates, with respect to the particular business line under which the third party places or facilitates the placement of deposits, that the primary purpose of the third party, for that business line, is a purpose other than the placement or facilitation of placement of deposits.

Question 22: Are proposed requirements for the application process for business relationships, other than those described in paragraphs (C)(1) and (C)(2), appropriate?

3. Ongoing Reporting

An agent or nominee that meets the primary purpose exception, or an IDI that applies on behalf of the agent or nominee, would need to provide reports to the FDIC and, if applicable, in the case of insured depository institutions, its primary federal regulator. The FDIC will describe the reporting requirements, including the frequency and any calculation methodology, as part of its written approval for a primary purpose exception. The FDIC anticipates that the reporting would be required on a quarterly basis. As an example, if a primary purpose approval is granted based, in part, on the representation that a nonbank third party places less than 25 percent of its customer assets under management into deposit accounts, then the FDIC would likely require as a condition of the approval that the nonbank third party provide reporting of the amount of deposits, based upon the average daily balances, placed by the nonbank third party at all depository institutions and the total amount of assets, based upon the average daily balances, under the third party's management. The FDIC believes it is more efficient for the nonbank third party to report directly to the FDIC, rather than for the nonbank third party to send the same information to each IDI in which it places deposits, each of which would then in turn report this identical information to the FDIC.

Question 23: Is it appropriate to require reporting from nonbank entities that have received approval for a primary purpose exception? Should the FDIC require IDIs to report on behalf of such nonbank entities instead? Are there other ways the FDIC should consider to ensure that applicants that receive the primary purpose exception remain within the relevant standards?

Question 24: How frequently should the FDIC require reporting?

IDIs would be responsible for monitoring a nonbank third parties' eligibility for the primary purpose exception. For example, if a certain percentage of a nonbank third party's revenue is from some activity other than deposit placement, and the FDIC approves a primary purpose exception in reliance of this factor, among other factors, then the FDIC would require that an insured depository institution that receives such deposits provide a notice to the FDIC and the primary federal regulator if there are any material change to the nonbank third party's revenue structure. When establishing a contractual relationship with a nonbank third party for the placement of deposits that may be classified as nonbrokered due to the primary purpose exception, an IDI may wish to consider the reporting and monitoring requirements described here.

Question 25: Is it appropriate for the FDIC to require IDIs to monitor third parties for eligibility for the primary purpose exception? Are there additional or better ways to ensure that third parties continue to remain eligible for the exception?

4. Modification and Withdrawals

At any time after approval, the FDIC proposes that it may, with notice and as appropriate, require additional information to ensure that the approval is still appropriate, or to verify the accuracy of the information that was provided by a third party to an IDI or submitted to the

FDIC. In addition, in certain circumstances, such as if an entity previously approved for a primary purpose exception has undergone material changes to its business, the FDIC would be able to require that the applicant reapply for approval, impose additional conditions on the approval, or withdraw a previously granted approval, if warranted and with sufficient notice.

C. Brokered Deposits and Assessments

Under the proposal, some deposits that are currently considered brokered will no longer be considered brokered. In a future rulemaking, the FDIC plans to consider modifications to the assessment regulations in light of any changes made to the brokered deposits regulation.

D. Reporting of Certain Deposits on Call Reports

Also, after a final rule is adopted, the FDIC will consider requiring reporting of deposits that are excluded from being reported as brokered deposits because of the application of the primary purpose exception. The FDIC will monitor this information to assess the risk factors associated with the deposits and determine assessment implications, if any. Any changes to reporting requirements applicable to the Consolidated Reports of Condition and Income ("Call Reports"), and its instructions, would be effectuated in coordination with the Federal Financial Institutions Examination Council in a separate Paperwork Reduction Act notice.

E. Treatment of Non-Maturity Deposits for Purposes of the Brokered Deposits Restrictions

As discussed in the FDIC's notice of proposed rulemaking for interest rate restrictions, the FDIC is looking at the question of when non-maturity deposits in an existing account are considered "accepted." The FDIC is in the process of considering comments received in response to that notice of proposed rulemaking.

The FDIC is considering a similar approach for brokered deposits as it did for interest rate restrictions. For brokered nonmaturity deposits, through this proposal, the FDIC is

considering an interpretation under which non-maturity brokered deposits are viewed as "accepted" for the brokered deposits restrictions at the time any new non-maturity deposits are placed at an institution by or through a deposit broker.

Under this proposed interpretation, brokered balances in a money market demand account or other savings account, as well as transaction accounts, at the time an institution falls below well capitalized, would not be subject to the brokered deposits restrictions. However, if brokered funds were deposited into such an account after the institution became less than well capitalized, the entire balance of the account would be subject to the brokered deposits restrictions. If, however, the same customer deposited brokered funds into a new account and the balance in that account was subject to the brokered deposits restrictions, the balance in the initial account would continue to not be subject to the brokered deposits restrictions so long as no additional funds were accepted. Brokered deposits restrictions also generally apply to any new non-maturity brokered deposit accounts opened after the institution falls to below well capitalized.

The term "accept" is also used in PCA-triggered restrictions related to employee benefit plan deposits.[19] The FDIC plans to address in a future rulemaking when deposits are "accepted" for purposes of these PCA-related restrictions, both for non-maturity deposits, such as transaction accounts and MMDAs, as well as for certificates of deposits and other time deposits.
Question 26: Is the FDIC's proposed definition of "accept" appropriate? Would there be substantial operational difficulties for institutions to monitor additions into these existing accounts? Is there another interpretation that would be more appropriate and consistent with the statute?

[19] *See* 12 U.S.C. 1821(a)(1)(D).

F. Additional Supervisory Matters

The FDIC recognizes that, under this proposal, numerous categories of deposits that are currently considered brokered would instead be nonbrokered. The FDIC will continue to take such supervisory efforts as may be necessary to ensure that banks are operating in a safe and sound manner. Nothing in this proposal is intended to limit the FDIC's ability to review or take supervisory action with respect to funding-related matters, including funding concentrations, that may affect the safety and soundness of individual banks or the industry generally.

VI. Alternatives

The FDIC is proposing these comprehensive changes to the brokered deposit regulations after considering comments received pursuant to the ANPR and evaluating alternative options for modernizing the regulations. The FDIC considered a number of alternative approaches, including taking more incremental approaches through which more limited changes would be made. Additionally, the FDIC considered more narrowly revisiting certain existing staff interpretations to identify those that should be updated. However, the FDIC ultimately determined that the best course of action was to take a fresh, holistic look at the regulations and interpretations, and propose a new framework that reflects technological and other changes in the banking industry over the past three decades and is consistent with the FDI Act.

VII. Expected Effects

As described previously, the proposed rule would amend the FDIC's regulations that implement provisions of the Federal Deposit Insurance Act regarding brokered deposits. The proposed rule creates a new framework for analyzing certain provisions of the statutory definition of "deposit broker." Further, the proposed rule amends two of the ten current

regulatory exceptions to the definition of "deposit broker." The aggregate effect likely would be some amount of deposits currently designated as brokered deposits to no longer be so designated.

As of June 30th, 2019, there were 5,303 insured depository institutions holding approximately $18 trillion in assets and $13 trillion in domestic deposits. Of those domestic deposits, $1.1 trillion (8.5 percent) are currently classified as brokered deposits. Approximately 41 percent (2,154) of FDIC-insured institutions reported some positive amount of brokered deposits. These insured institutions accounted for the vast majority of banking industry holdings – almost $17 trillion (92 percent) of assets and almost $12 trillion (91 percent) of domestic deposits.

Traditional brokered CDs would still be defined by the rule as brokered and subject to the associated statutory and regulatory restrictions. Certain types of deposits, notably deposits placed by agents or nominees that satisfy criteria set forth in the proposed revisions to the primary purpose exception, would not be considered brokered deposits subject to an application process. The amount of deposits currently reported as brokered that may be re-designated as non-brokered as a result of the rule may be material. However, a reliable estimate of this change in designation is not possible with the information currently available to the FDIC.

There are potentially four broad categories of effects of the proposed rule: effects on consumers and economic activity; effects applicable to potentially any insured institution; effects applicable to less than well-capitalized institutions; and effects applicable to nonbank entities that may or may not be deemed deposit brokers.

A. Consumers and the Economy

The proposed rule would amend the FDIC's brokered deposit regulations to better reflect recent technological changes and innovations. There are benefits to banks and consumers if innovative deposit placement arrangements that do not present undue funding risk are not classified as brokered deposits. Changes and innovations in deposit placement activity are likely to continue, suggesting that demand for, and utilization of, certain types of deposit accounts currently classified as brokered are likely to grow in the years to come. These could include the use of technology services that help enable payments and online marketing channels 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. Unbanked or underbanked customers, for example, may benefit from increased ease of access to deposit placement services because banks would be more willing to accept deposits that would be no longer considered brokered under the proposal. Additionally, to the extent that the proposed rule supports greater utilization of deposits currently classified as brokered deposits, but classified as non-brokered under the proposed rule, it could increase the funds available to insured depository institutions for lending to U.S. consumers. If the proposed rule does result in an increase in bank lending, some associated increase in measured U.S. economic output would be expected, in part because the imputed value of the credit services banks provide is a component of measured GDP.

B. All Insured Institutions

The proposed rule could immediately affect the 2,154 FDIC-insured institutions currently reporting brokered deposits. Going forward, the rule could affect all 5,303 FDIC-insured institutions whose decisions regarding the types of deposits to accept could be affected.

The proposed rule would benefit insured institutions and other interested parties by providing greater legal clarity regarding the treatment of brokered deposits. As result of this increased clarity, the proposed rule would reduce the extent of reliance by banks and third parties on FDIC Staff Advisory opinions and informal written and telephonic inquiries with FDIC staff. This would have two important benefits. First, the likelihood of inconsistent outcomes, where some institutions may report certain types of deposits as brokered and others do not, would be reduced. Second, to the extent the classification of deposits as brokered or non-brokered can be clearly addressed in regulation, the need for potentially time-consuming staff analyses can be minimized.

The FDIC has heard from a number of insured institutions that they perceive a stigma associated with accepting brokered deposits. Historical experience has been that higher use of deposits currently reported to the FDIC as brokered has been associated with higher probability of bank failure and higher deposit insurance fund loss rates.[20] The funding characteristics of brokered deposits, however, are non-uniform. For example, brokered CDs are often used by bank customers searching for relatively high yields on their insured deposits, and as such these deposits may be less stable and more subject to deposit interest rate competition. The behavior of other types of deposit placement arrangements, such as deposits placed through sweeps or that underlie prepaid card programs, may be more based on a business relationship than on interest rate competition. Given limitations on available data, however, historical studies have not been able to differentiate the experience of banks based on the different types of deposits accepted.

[20] *See* FDIC's *2011 Study on Core and Brokered Deposits*, July 8, 2011.

To the extent the proposed rule reduces bankers' perception of a stigma associated with certain types of deposits, more institutions may be incentivized to accept such deposits.

The proposed rule could incentivize the development of banking relationships between banks and other firms. The new opportunities could spur growth in the third party deposit placement industry, particularly for third parties that receive the primary purpose exception, potentially resulting in greater access to, or use of, bank deposits by a greater variety of customers. It is difficult to accurately estimate such potential effects with the information currently available to the FDIC, because such effects depend, in part, on the future commercial development of such activities.

FDIC deposit insurance assessments would be affected by the proposed changes, potentially affecting any insured institution that currently accepts brokered deposits or might do so in the future. Since 2009, insured institutions with a significant concentration of brokered deposits may pay higher quarterly assessments, depending on other factors. To the extent that deposits currently defined as brokered would no longer be considered brokered deposits under this NPR, a bank's assessment may decrease, all else equal. However, as noted above, in a future rulemaking the FDIC plans to consider modifications to its assessment regulations in light of the proposed rule. Certain calculations required under the Liquidity Coverage Ratio rule applicable to some large banks could also be affected by the proposed rule. Available data do not allow for a reliable estimate of the amount of deposits currently designated as brokered that would no longer be designated as such under the proposed rule, and consequently do not allow for an estimate of effects on assessments or the reported Liquidity Coverage Ratio.

Insured institutions could benefit from the rule by having greater certainty and greater access to funding sources that would no longer be designated as brokered deposits, thereby easing their liquidity planning and reducing the likelihood that a liquidity failure of an otherwise viable institution might be precipitated by the brokered deposit regulations. Another benefit of the rule could result if greater access to funding sources supported insured institutions' ability to provide credit. However, these effects are difficult to estimate because the decision to receive third party deposits depends on the specific financial conditions of each bank, fluctuating market conditions for third party deposits, and future management decisions.

C. Less than Well-Capitalized Institutions

As discussed previously, the acceptance of brokered deposits is subject to statutory and regulatory restrictions for banks that are not well capitalized. Adequately capitalized banks may not accept brokered deposits without a waiver from the FDIC, and banks that are less than adequately capitalized may not accept them at all. As a result, adequately capitalized and undercapitalized banks generally hold less brokered deposits – as of June 30, 2019, brokered deposits make up approximately 3 percent of domestic deposits held by not well capitalized banks, well below the 9 percent held by all IDIs. By generally reducing the scope of deposits that are considered brokered, the proposed rule would allow not well capitalized banks to increase their holdings of deposits that are currently reported as brokered but would not be reported as brokered under the proposal. As of June 30, 2019, there are only 16 adequately capitalized and undercapitalized banks.[21] These banks hold approximately $2.2 billion in assets,

[21] Information based on June 30, 2019 Consolidated Reports of Condition and Income. The 16 institutions do not include any quantitatively well capitalized institutions that may have been administratively classified as less than well capitalized. *See generally,* FDIC—12 CFR 324.403(b)(1)(v); Board of Governors of the Federal Reserve System—12 CFR 208.43(b)(1)(v); Office of the Comptroller of the Currency—12 CFR 6.4(c)(1)(v).

$2.0 billion in domestic deposits, and $61 million in brokered deposits. These banks could be directly affected by the proposed rule in that they could potentially accept more or different types of deposits currently designated as brokered.

More broadly speaking with respect to future developments, another aspect of brokered deposit restrictions is that, consistent with their statutory purpose, they act as a constraint on growth and risk-taking by troubled institutions. Conversely, as noted previously, access to funding can prevent needless liquidity failures of viable institutions.

D. Entities that may or may not be deposit brokers

The proposed revisions to the brokered deposit regulations would likely give rise to some activity by non-bank third parties seeking to determine whether they are, or are not, deposit brokers under the rule. This may include the filing of applications by some parties that seek to avail themselves of the primary purpose exception. Ongoing activity by these entities to ensure compliance with the revised rule would also be expected.

The FDIC is interested in commenters' views on the effects, costs, and benefits of the proposed rule.

VIII. Administrative Law Matters

A. Paperwork Reduction Act

Certain provisions of the proposed rule contain "collection of information" requirements within the meaning of the Paperwork Reduction Act (PRA) of 1995 (44 U.S.C. 3501–3521). In accordance with the requirements of the PRA, the FDIC may not conduct or sponsor, and a respondent is not required to respond to, an information collection unless it displays a currently valid Office of Management and Budget (OMB) control number. The information collection

requirements contained in this proposed rule are being submitted to the Office of Management and Budget (OMB) for review and approval under section 3507(d) of the PRA (44 U.S.C. 3507(d)) and section 1320.11 of the OMB's implementing regulations (5 CFR 1320). FDIC is revising its existing information collection entitled "Application for Waiver of Prohibition on Acceptance of Brokered Deposits" (OMB Control Number 3064-0099) and will rename the information collection "Reporting and Recordkeeping Requirements for Brokered Deposits."

Current Actions

Under the proposed rulemaking:

- Respondents may file an application with the FDIC for a "Primary Purpose Exception" based on the placement of less than 25% of customer assets under management (reporting requirement to obtain or retain a benefit);
- Respondents may file an application with the FDIC for a "Primary Purpose Exception" based on "Enabling Transactions" (reporting requirement to obtain or retain a benefit); and
- Respondents may file an application with the FDIC for a "Primary Purpose Exception" based on factors other than "Enabling Transactions" or the placement of less than 25% of customer assets under management (reporting requirement to obtain or retain a benefit).

The proposed rule would establish recordkeeping and reporting requirements for third parties that apply for and maintain a primary purpose exception under § 303.243.[22] The FDIC

[22] IDIs can apply for an exception on behalf of a third party, and third parties can apply directly for an exception. *See* § 303.243(b)(3)(i) and (ii).

estimated the annual burden associated with the proposal based on the following assumptions and according to the methodology described below:

- First, the FDIC lacks the data necessary to determine the number of third parties which will take advantage of the applications relating to exceptions from the definition of "deposit broker," and invites comments on how its estimates could be improved. The first type of exception, that based on placing less than 25 percent of customer assets under management, is expected to be sought largely by broker-dealers. With few exceptions, broker-dealers must register with the Securities and Exchange Commission and be members of FINRA.[23] There were 3,607 FINRA registered broker-dealer firms in 2018.[24] Some of the 3,607 broker-dealers may not engage in activity which meets the definition of "deposit broker," while some firms which do engage in such activity may not be among the 3,607 FINRA registered broker-dealers. However, in the absence of a more refined figure, the FDIC estimated that 1,203 firms will apply for an exception based on placing less than 25 percent of customer assets under management on average each year over three years.
- Second, the FDIC expects that the exceptions based on enabling transactions and on other business arrangements will be sought by firms engaged in deposit brokering. However, the FDIC is unable to determine the number of firms which engage in deposit brokering. According to Census data, there are 1,105 establishments within the industry in which deposit brokers are classified.[25] Not all 1,105 establishments engage in deposit brokering,

[23] FINRA, https://www.finra.org/investors/learn-to-invest/choosing-investment-professional/brokers
[24] *2019 FINRA Industry Snapshot*, pg. 13, https://www.finra.org/sites/default/files/2019%20Industry%20Snapshot.pdf
[25] Deposit brokers are classified according to the 2017 North American Industry Classification System as belonging to the "Miscellaneous Financial Investment Activities" industry (NAICS code 523999). *See* U.S. Census Bureau,

and some firms which engage in deposit brokering may be classified in another industry. In the absence of better data, the FDIC estimated that, over the three-year period covered by this information collection request, an average of 369 firms will apply for an exception based on enabling transactions and other business arrangements.

- Third, the FDIC lacks the data necessary to determine the number of business lines for which firms may submit applications, and in the absence of a more refined estimate, assumed that all respondents submit one application.
- Fourth, the FDIC estimated the amount of time required to complete each application type. The most straightforward application type is that for which a primary purpose exception to the definition of deposit broker is sought based on placing less than 25 percent of customer assets under management, by business line, with IDIs. For this type of application, three items are required: (1) A description of the business line for which the applicant is filing an application, (2) the total amount of customer assets under control by the third party for that particular business line, and (3) the total amount of deposits placed by the third party on behalf of its customers, for that particular business line, at all IDIs, exclusive of the amount of brokered CDs being placed by that third party. Given the "bright line" nature of this application type, and the limited number of line items required, the FDIC estimated it would take each respondent three hours on average to gather the material and submit the request required for this application type.

  The second application type is that for which a primary purpose exception to the definition of deposit broker is sought based on placing funds to enable transactions. Under this application type, the applicant would need to submit information, including a

2017 County Business Patterns Data, available at https://www.census.gov/data/datasets/2017/econ/cbp/2017-cbp.html

copy of the form of contracts used with customers and with the IDIs in which the third party is placing deposits, showing that all of its customer deposits are in transaction accounts, and that no interest, fees, or other remuneration is being provided to or paid for the transaction accounts. In addition, applicants would need to submit a description of the deposit placement arrangement between the entities involved. For third parties that pay interest, fees, or provide other remuneration, the applicant would need to provide information regarding the volume of transactions in customer accounts. In addition, for applications where the third party pays interest, fees, or provides other remuneration, applicants would also need to provide an explanation of how its customers utilize its services *for the purpose* of making payments and not for the receipt of a deposit placement service or deposit insurance. Because the second application type should require more time to prepare than the first, the FDIC estimated it would take each respondent five hours on average the gather the required material and submit the application.

The third application type is for a primary purpose exception where the business arrangement is not covered by the other two types described above. This third type requires the items enumerated in this proposal, and due to the number of items requested, the FDIC estimates it would take each respondent 10 hours on average to gather the material required for this application type and submit the application.

- Fifth, each application type would have associated quarterly (ongoing) reporting requirements, which are to be spelled out by the FDIC in its written approval of the application. For the first two application types, the FDIC estimates it would take each respondent an average of 30 minutes per quarter to gather the information and submit the

report for an annual average of 2 burden hours. In FDIC assumes that initial quarterly report may take longer to prepare, but once reporting and recordkeeping systems are in place, the FDIC believes an average of 30 minutes per quarter is a reasonable estimate for this. The third application type, due to its greater number of required items, is estimated to take each respondent an average of one hour per quarter to gather the information and submit the report for an annual average of 4 burden hours.

- In addition, the FDIC revised its estimates for the information collection "Application for Waiver of Prohibition on Acceptance of Brokered Deposits." Based on consultations with subject matter experts, the FDIC estimates nine IDIs will file this application each year, on average. Each IDI applicant will spend six hours, on average, to file. Thus, the FDIC estimates the average annual burden at 54 hours.

- Based on the above assumptions and methodology, the FDIC estimates the proposed rule imposes new annual reporting burden of 22,988 hours, or approximately 15 hours per deposit broker and broker-dealer.

- Finally, to estimate the annual dollar cost of the total estimated annual hourly burdens, the FDIC used the occupational breakdown associated with the Application for Waiver of Prohibition on Acceptance of Brokered Deposits for the new information collection requirements contained in the proposed rule. FDIC assumes that all of the 23,042 estimated burden hours are broken down into hours worked by managers and executives (5 percent), lawyers (5 percent), compliance officers (10 percent), IT specialists (30 percent), financial analysts (40 percent), and clerical staff (10 percent), so that 100 percent of the hours are allocated to an occupation.

The FDIC then used the 75th percentile wage estimates for each occupation, based on the industry of the expected applicant, from the Bureau of Labor Statistics, and adjusted them for inflation and to account for the value of non-wage benefits, to produce an annual labor cost associated with the hours estimated above.[26] This resulted in an estimated weighted average hourly wage of $106.11 for applications relating to exceptions from the definition of "deposit broker," and $83.88 for the Application for Waiver of Prohibition on Acceptance of Brokered Deposits. Based on the inflation adjusted wages, and accounting for non-wage benefits, the FDIC estimates that the average annual average reporting cost associated with the proposal is approximately $2.4 million, or approximately $1,545.70 per respondent.

[26] Specifically, for the applications relating to exceptions from the definition of "deposit broker," the FDIC used the wage estimates from the Bureau of Labor Statistics (BLS) "National Industry-Specific Occupational Employment and Wage Estimates: Securities, Commodity Contracts, and Other Financial Investments and Related Activities Sector" (May 2018), while for the Application for Waiver of Prohibition on Acceptance of Brokered Deposits, the FDIC used the wage estimates from the BLS "National Industry-Specific Occupational Employment and Wage Estimates: Depository Credit Intermediation Sector" (May 2018). Other BLS data used were the Employer Cost of Employee Compensation data (June 2019), and the Consumer Price Index (June 2019). Hourly wage estimates at the 75th percentile wage were used, except when the estimate was greater than $100, in which case $100 per hour was used, as the BLS does not report hourly wages in excess of $100. The 75th percentile wage information reported by the BLS in the Specific Occupational Employment and Wage Estimates does not include health benefits and other non-monetary benefits. According to the June 2019 Employer Cost of Employee Compensation data, compensation rates for health and other benefits are 33.8 percent of total compensation. Additionally, the wage has been adjusted for inflation according to BLS data on the Consumer Price Index for Urban Consumers (CPI-U), so that it is contemporaneous with the non-wage compensation statistic. The inflation rate was 1.86 percent between May 2018 and June 2019.

Burden Estimate:

Summary of Annual Burden

Information Collection (IC) Description	Type of Burden	Obligation to Respond	Estimated Number of Respondents	Estimated Number of Responses	Estimated Time per Response (Hours)	Frequency of Response	Total Estimated Annual Burden (Hours)
Initial Implementation							
Application for Primary Purpose Exception Based on the Placement of Less Than 25 Percent of Customer Assets Under Management	Reporting	Obtain or Retain a Benefit	1,203	1	3	On Occasion	3,609
Application for Primary Purpose Exception Based on Enabling Transactions	Reporting	Obtain or Retain a Benefit	369	1	5	On Occasion	1,845
Application for Primary Purpose Exception Not Based on Enabling Transactions or Placement of Less Than 25 Percent of Customer Assets Under Management	Reporting	Obtain or Retain a Benefit	369	1	10	On Occasion	3,690
Ongoing							
Reporting for Primary Purpose Exception Based on the Placement of Less Than 25 Percent of Customer Assets Under Management	Reporting	Obtain or Retain a Benefit	3,607	4	0.5	Quarterly	7,214
Reporting for Primary Purpose Exception Based on Enabling Transactions	Reporting	Obtain or Retain a Benefit	1,105	4	0.5	Quarterly	2,210
Reporting for Primary Purpose Exception Not Based on Enabling Transactions or Placement of Less Than 25 Percent of Customer Assets Under Management	Reporting	Obtain or Retain a Benefit	1,105	4	1	Quarterly	4,420
Application for Waiver of Prohibition on Acceptance of Brokered Deposits	Reporting	Obtain or Retain a Benefit	9	1	6	On Occasion	54
Total Estimated Annual Burden Hours							**23,042**

Note: The estimated number of respondents in the *Initial Implementation* section is an annual average calculated over three years.

Comments are invited on:

a. Whether the collections of information are necessary for the proper performance of the agencies' functions, including whether the information has practical utility;

b. The accuracy or the estimate of the burden of the information collections, including the validity of the methodology and assumptions used;

c. Ways to enhance the quality, utility, and clarity of the information to be collected;

d. Ways to minimize the burden of the information collections on respondents, including through the use of automated collection techniques or other forms of information technology; and

e. Estimates of capital or startup costs and costs of operation, maintenance, and purchase of services to provide information.

All comments will become a matter of public record. Comments on aspects of this notice that may affect reporting, recordkeeping, or disclosure requirements and burden estimates should be sent to the addresses listed in the ADDRESSES section of this document. A copy of the comments may also be submitted to the OMB desk officer by mail to U.S. Office of Management and Budget, 725 17th Street NW, #10235, Washington, DC 20503; facsimile to (202) 395-6974; or e-mail to oira_submission@omb.eop.gov, Attention, Federal Banking Agency Desk Officer.

B. Solicitation of Comments on Use of Plain Language

Section 722 of the Gramm-Leach Bliley Act,[27] requires the Federal banking agencies to use plain language in all proposed and final rules published after January 1, 2000. The FDIC invites your comments on how to make this revised proposal easier to understand. For example:

[27] Pub. L. 106–102, 113 Stat. 1338, 1471 (Nov. 12, 1999).

- Has the FDIC organized the material to suit your needs? If not, how could the material be better organized?
- Are the requirements in the proposed regulation clearly stated? If not, how could the regulation be stated more clearly?
- Does the proposed regulation contain language or jargon that is unclear? If so, which language requires clarification?
- Would a different format (grouping and order of sections, use of headings, paragraphing) make the regulation easier to understand?

C. Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA) generally requires that, in connection with a proposed rule, an agency prepare and make available for public comment an initial regulatory flexibility analysis describing the impact of the proposal on small entities.[28] A regulatory flexibility analysis is not required, however, if the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities. The Small Business Administration (SBA) has defined "small entities" to include banking organizations with total assets less than or equal to $600 million.[29] Generally, the FDIC considers a significant effect to be a quantified effect in excess of 5 percent of total annual salaries and benefits per institution, or 2.5 percent of total non-interest expenses. The FDIC believes that effects in excess of these

[28] 5 U.S.C. 601 *et seq.*

[29] The SBA defines a small banking organization as having $600 million or less in assets, where an organization's "assets are determined by averaging the assets reported on its four quarterly financial statements for the preceding year." *See* 13 CFR 121.201 (as amended by 84 FR 34261, effective August 19, 2019). In its determination, the "SBA counts the receipts, employees, or other measure of size of the concern whose size is at issue and all of its domestic and foreign affiliates." *See* 13 CFR 121.103. Following these regulations, the FDIC uses a covered entity's affiliated and acquired assets, averaged over the preceding four quarters, to determine whether the covered entity is "small" for the purposes of RFA.

thresholds typically represent significant effects for FDIC-insured institutions. The FDIC does not believe that the proposed rule, if adopted, will have a significant economic effect on a substantial number of small entities. However, some expected effects of the proposed rule are difficult to assess or accurately quantify given current information, therefore the FDIC has included an Initial Regulatory Flexibility Act Analysis in this section.

Reasons why this Action is Being Considered

As previously discussed in Section II. Background, the agencies issued an ANPR in 2018 to obtain input from the public on its brokered deposit and interest rate regulations in light of significant changes in technology, business models, the economic environment, and products since the agency's regulations relating to brokered deposits were adopted. Generally speaking, commenters offered information and expressed options that suggested the FDIC needed to clarify and update its historical interpretation of the "deposit broker" definition to better align with current market practices and risks associated with brokered deposits.

Policy Objectives

As previously discussed in Section I. Policy Objectives, the FDIC is proposing amendments to its regulations relating to brokered deposits in order to modernize those regulations to reflect recent technological changes and innovations that have occurred. Additionally, the FDIC seeks to continue to promote safe and sound practices by FDIC-insured depository institutions.

Legal Basis

The FDIC is proposing this rule under authorities granted by Section 29 of the Federal Deposit Insurance Act (FDI Act). The law restricts troubled institutions (i.e. those that are not well capitalized) from (1) accepting deposits by or through a deposit broker without a waiver and

(2) soliciting deposits by offering rates of interest on deposits that were significantly higher than the prevailing rates of interest on deposits offered by other insured depository institutions in such depository institution's normal market area. For a more detailed discussion of the proposed rule's legal basis please refer to Section A. Current Law and Regulation, within Section II. Background.

Description of the Rule

A person meets the "deposit broker" definition under Section 29 of the FDI Act if it is engaged in the business of placing deposits, or facilitating the placement of deposits, of third parties with insured depository institutions or the business of placing deposits with insured depository institutions for the purpose of selling interests in those deposits to third parties. An agent or trustee meets the "deposit broker" definition when establishing a deposit account to facilitate a business arrangement with an insured depository institution to use the proceeds of the account to fund a prearranged loan. Additionally, Section 29 provides nine statutory exceptions to the definition of deposit broker and, as noted earlier, the FDIC added one regulatory exception to the definition. The FDIC is proposing a new framework for analyzing certain provisions of the statutory definition. Among other things, through this rulemaking, the FDIC proposes amending the IDI exception and the primary purpose exception. For a more detailed description of the proposed rule please refer to Section III. Discussion of the Proposed Rule.

Small Entities Affected

The FDIC insures 5,303 depository institutions, of which 3,947 are defined as small institutions by the terms of the RFA.[30] Additionally, of those 3,947 small, FDIC-insured

[30] Call Report, June 30, 2019. Nine insured domestic branches of foreign banks are excluded from the count of FDIC-insured depository institutions. These branches of foreign banks are not "small entities" for purposes of the RFA.

institutions, 1,297 currently report holding some volume of brokered deposits. Further, of those 3,947 small, FDIC-insured institutions, 3,931 are currently classified as well capitalized, while 16 are less than well capitalized based on capital ratios reported in their Call Reports.[31]

Expected Effects

There are potentially three broad categories of effects of the proposed rule on small, FDIC-insured institutions: effects applicable to potentially any small, insured institution; effects applicable to small, less than well-capitalized institutions; and effects applicable to nonbank subsidiaries of small, FDIC-insured institutions that may or may not be deemed deposit brokers.

All Small, FDIC-insured Institutions

The proposed rule could immediately affect the 1,297 small, FDIC-insured institutions currently reporting brokered deposits. Going forward, the rule could affect all 3,947 small, FDIC-insured institutions whose decisions regarding the types of deposits to accept could be affected.

The proposed rule would benefit insured institutions and other interested parties by providing greater legal clarity regarding the treatment of brokered deposits. The FDIC believes that as result of this increased clarity, the proposed rule would reduce the extent of reliance by banks and third parties on FDIC Staff Advisory Opinions and informal written and telephonic inquiries with FDIC staff. This would have two important benefits. First, the likelihood of inconsistent outcomes, where some institutions may report certain types of deposits as brokered and others do not, would be reduced. Second, to the extent the classification of deposits as

[31] Information based on June 30, 2019 Consolidated Reports of Condition and Income. The 16 institutions do not include any quantitatively well capitalized institutions that may have been administratively classified as less than well capitalized. *See generally,* FDIC—12 CFR 324.403(b)(1)(v); Board of Governors of the Federal Reserve System—12 CFR 208.43(b)(1)(v); Office of the Comptroller of the Currency—12 CFR 6.4(c)(1)(v).

brokered or non-brokered can be clearly addressed in regulation, the need for potentially time-consuming analyses can be minimized.

The FDIC has heard from a number of insured institutions that they perceive a stigma associated with accepting brokered deposits. Historical experience has been that higher use of deposits currently reported to the FDIC as brokered has been associated with higher probability of bank failure and higher deposit insurance fund loss rates.[32] The funding characteristics of brokered deposits, however, are non-uniform. For example, brokered CDs are often used by bank customers searching for relatively high yields on their insured deposits, and as such these deposits may be less stable and more subject to deposit interest rate competition. The behavior of deposits placed through sweeps or that underlie prepaid card programs may be more based on a business relationship than on interest rate competition. Given limitations on available data, however, historical studies have not been able to differentiate the experience of banks based on the different types of deposits accepted. To the extent the proposed rule reduces bankers' perception of a stigma associated with certain types of deposits, more institutions may be incentivized to accept such deposits.

The proposed rule could incentivize the development of banking relationships between small, FDIC-insured institutions and other firms. The new opportunities could spur growth in the third party deposit placement industry, potentially resulting in greater access to, or use of, bank deposits by a greater variety of customers. Further, such growth could be of benefit to small, FDIC-insured institutions allowing them to compete against large financial institutions that are utilizing internet based deposit gathering methods across the country. It is difficult to

[32] *See* FDIC's *2011 Study on Core and Brokered Deposits*, July 8, 2011.

accurately estimate such potential effects with the information currently available to the FDIC, because such effects depend, in part, on the future commercial development of such activities.

FDIC deposit insurance assessments would be affected by the proposed changes to the definition of deposit broker, potentially affecting any insured institution that currently accepts brokered deposits or might do so in the future. Since 2009, significant concentrations of brokered deposits can increase an institution's quarterly assessments, depending on other factors. To the extent that certain deposits would no longer be considered brokered deposits under this NPR, a bank's assessment may decrease, all else equal. However, as noted above, in a future rulemaking the FDIC plans to consider modifications to its assessment regulations in light of this rule.

Small, FDIC-insured institutions could benefit from the rule by having greater certainty and greater access to funding sources that would no longer be designated as brokered deposits, thereby easing their liquidity planning and reducing the likelihood that a liquidity failure of an otherwise viable institution might be precipitated by the brokered deposit regulations. Another benefit of the rule could result if greater access to funding sources supported small FDIC-insured institutions' ability to provide credit. However, these effects are difficult to estimate because the decision to receive third party deposits depends on the specific financial conditions of each bank, fluctuating market conditions for third party deposits, and future management decisions.

The proposed rule would establish recordkeeping and reporting requirements for IDIs and other nonbank third parties that apply for and maintain a primary purpose exception under § 303.243.[33] As noted previously, however, the FDIC anticipates that nonbank third parties are

[33] IDIs can apply for an exception on behalf of a third party, and third parties can apply directly for an exception. *See* § 303.243(b)(3)(i) and (ii).

likely to apply on their own behalf, given that the information required to complete an application will be in possession of the nonbank third party (rather than the bank). The FDIC views the potential burden on small FDIC-insured institutions under the proposed rule as minimal.

Less than Well-Capitalized Institutions

As discussed previously, the acceptance of brokered deposits is subject to statutory and regulatory restrictions for those banks that are less than well capitalized. Adequately capitalized banks may not accept brokered deposits without a waiver from the FDIC, and banks that are less than adequately capitalized may not accept them at all. As a result, adequately capitalized and undercapitalized banks generally hold less brokered deposits – as of June 30, 2019, brokered deposits make up approximately 3 percent of domestic deposits held by less than well capitalized banks, well below the 9 percent held by all IDIs. By generally reducing the scope of deposits that are considered brokered, the proposed rule would allow less than well capitalized banks to increase their holdings of deposits that are currently reported as brokered but would not be reported as brokered under the proposal. As of June 30, 2019, there are only 16 less than well capitalized small, FDIC-insured institutions based on Call report information. These banks hold approximately $2.2 billion in assets, $2.0 billion in domestic deposits, and $61 million in brokered deposits. These banks could be directly affected by the proposed rule in that they could potentially accept more or different types of deposits currently designated as brokered.

More broadly speaking with respect to future developments, another aspect of brokered deposit restrictions is that, consistent with their statutory purpose, they act as a constraint on

growth and risk-taking by troubled institutions. Conversely, as noted previously, access to funding can prevent needless liquidity failures of viable institutions.

Nonbank Subsidiaries of Small, FDIC-insured Institutions That May or May Not be Deposit Brokers

The proposed revisions to the brokered deposit regulations could have effects on some nonbank subsidiaries of small, FDIC-insured institutions. For example, wholly owned subsidiaries of small, FDIC-insured institutions that may currently meet the deposit broker definition would no longer be a deposit broker under the proposed rule if they meet the parameters of the rule. Additionally, some nonbank subsidiaries of small, FDIC-insured institutions could seek to determine whether they meet the primary purpose exception, as defined under the IDI exception (as proposed). This may include the filing of applications by some parties that seek to avail themselves of the primary purpose exception. Ongoing activity by these entities to ensure that they continue to meet the relevant exceptions would also be expected.

Other Statutes and Federal Rules

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

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

D. Riegle Community Development and Regulatory Improvement Act

Section 302 of the Riegle Community Development and Regulatory Improvement Act of 1994 (RCDRIA), 12 U.S.C. 4701, requires that each Federal banking agency, in determining the effective date and administrative compliance requirements for new regulations that impose

additional reporting, disclosure, or other requirements on insured depository institutions, consider, consistent with principles of safety and soundness and the public interest, any administrative burdens that such regulations would place on depository institutions, including small depository institutions, and customers of depository institutions, as well as the benefits of such regulations.[34] In addition, new regulations that impose additional reporting, disclosures, or other new requirements on insured depository institutions generally must take effect on the first day of a calendar quarter that begins on or after the date on which the regulations are published in final form.

The FDIC invites comments that further will inform the FDIC's consideration of RCDRIA.

IX. Request for Comments

The FDIC invites comment from all members of the public regarding all aspects of the proposal. This request for comment is limited to this proposal. The FDIC will carefully consider all comments that relate to the proposal.

List of Subjects in 12 CFR 303

Administrative practice and procedure, Banks, Banking, Savings associations.

Federal Deposit Insurance Corporation

12 CFR Chapter III

[34] 12 U.S.C. 4802.

Authority and Issuance

For the reasons stated in the preamble, the FDIC proposes to amends parts 303 and 337 of chapter III of Title 12, Code of Federal Regulations as follows:

PART 303—FILING PROCEDURES

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

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

2. Revise Subpart M to read as follows

Subpart M—Other Filings

303.240 General.

303.241 Reduce or retire capital stock or capital debt instruments.

303.242 Exercise of trust powers.

303.243 Brokered deposits.

303.244 Golden parachute and severance plan payments.

303.245 Waiver of liability for commonly controlled depository institutions.

303.246 Conversion with diminution of capital.

303.247 Continue or resume status as an insured institution following termination under section 8 of the FDI Act.

303.248 Truth in Lending Act - Relief from reimbursement.

303.249 Management official interlocks.

303.250 Modification of conditions.

303.251 Extension of time.

303.252-303.259 [Reserved]

§ 303.243 Brokered Deposits [Amended]

4. Section 303.243 is amended as follows:

A. The title is amended by removing "Brokered deposit waiver" and adding in its place "Brokered Deposits."

B. Paragraph (a) is redesignated as "Brokered Deposit Waivers.

C. A new paragraph (b) is added to read as follows:

(b) Application for primary purpose exception

(1) *Scope.* Section 29 of the FDI Act (12 U.S.C. 1831f) provides that an agent or nominee is excluded from the definition of deposit broker if its primary purpose is not the placement of funds with depository institutions. This section sets forth the application procedures for insured depository institutions and agents or nominees that seek the FDIC's determination that it, or a nonbank agent or nominee on whose behalf an insured depository institution is submitting an application, is excluded from the definition of deposit broker pursuant to the primary purpose exception.

(2) *Definitions.* For purposes of this section:
(i) *Third party* means an agent or nominee that is applying to be excluded from the definition of deposit broker pursuant to the primary purpose exception.
(ii) *Applicant* means a third party as defined in (i), or an insured depository institution that is applying on behalf of a third party for that third party to be excluded from the definition of deposit broker pursuant to the primary purpose exception.
(iii) *Appropriate FDIC office* means the office designated by the appropriate regional director or designee.

(iv) *Appropriate Regional Director* means the Director of the FDIC Region in which the applicant is located.

(v) *Brokered CD* means a deposit placement arrangement in which certificates of deposit are issued in wholesale amounts by a depository institution, subdivided by a non-bank entity or a depository institution, and then sold by a nonbank entity or depository institution to investors, or a similar deposit placement arrangement that the FDIC determines is arranged for a similar purpose.

(3) *Filing Procedures.*

(i) A third party may submit a written application to the appropriate FDIC office seeking a primary purpose exception.

(ii) An insured depository institution may submit a written application, on behalf of a nonbank third party, to the appropriate FDIC office of the insured depository institution, seeking a determination that the primary purpose exception applies to the nonbank third party.

(4) *Content for filing.*

(i) Applications that seek the primary purpose exception for third parties based on the placement of less than 25 percent of the total amount of customer assets under management by the third party, for a particular business line, at depository institutions shall contain the following information:

(a) A description of the particular business line;

(b) Total amount of customer assets under management by the third party for that particular business line;

(b) Total amount of deposits placed by the third party on behalf of its customers, for that particular business line, at all depository institutions, but exclusive of the amount of brokered CDs being placed by that third party;

(c) A description of the deposit placement arrangements with all entities involved;

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

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

(ii) Applications that seek the primary purpose exception for third parties based on the placement of customer funds, with respect to a particular business line, at insured depository institutions to enable its customers to make transactions shall contain the following information:

(a) Contracts with customers evidencing the amount of interest, fees, or other remuneration, accrued for all customer accounts, and that all customer deposits are in transaction accounts;

(b) For third parties that pay interest, fees, or provide other remuneration, (1) the average volume of transactions for all customer accounts, and (2) an explanation of how its customers utilize its services for the purpose of making payments and not for the receipt of a deposit placement service or deposit insurance;

(c) A description of the deposit placement arrangements with all entities involved;
(d) Any other information the applicant deems relevant; and
(e) Any other information that the FDIC requires to initiate its review and render the application complete.

(iii) Applications that seek the primary purpose exception for third parties, other than applications under (i) and (ii), with respect to a particular business line, must include, to the extent applicable:
(a) A description of the deposit placement arrangements with all entities involved;
(b) A description of the particular business line;
(c) A description of the primary purpose of the particular business line;
(d) The total amount of customer assets under management by the third party;
(e) The total amount of deposits placed by the third party at all insured depository institutions, including the amounts placed with the applicant, if the applicant is an insured depository institution. This includes the total amount of term deposits and transactional deposits placed by the third party, but should be exclusive of the amount of brokered CDs being placed by that third party;
(f) Revenue generated from the third party's activities related to the placement, or facilitating the placement, of deposits;
(g) Revenue generated from the third party's activities not related to the placement, or facilitating the placement, of deposits;
(h) A description of the marketing activities provided by the third party;
(i) The reasons the third party meets the primary purpose exception;
(j) Any other information the applicant deems relevant; and
(k) Any other information that the FDIC requires to initiate its review and render the application complete.

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

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

(7) *Timing.*

(i) An applicant that submits a complete application seeking the primary purpose exception will receive a written determination by the FDIC within 120 days of receipt of a complete application.

(ii) The FDIC may extend the 120-day timeframe, if necessary, to complete its review of a complete application, with proper notice to the applicant.

(8) *Approvals.* The FDIC will approve an application –

(i) Submitted under (4)(i), if the total amount of customer funds placed at insured depository institutions by the third party is less than 25 percent of total customer assets under management by the third party, for purposes of a particular business line.

(ii) Submitted under (4)(ii), if no interest, fees, or other remuneration, is being provided or paid on any customer accounts by the third party.

(iii) Submitted under (4)(ii) in which interest, fees, or other remuneration is being provided or paid on any customer accounts by the third party, if the applicant demonstrates that the primary purpose of the particular business line under which customer accounts are offered is to enable its customers to make transactions.

(iv) Submitted under (4)(iii), if the applicant demonstrates that, with respect to the particular business line under which the third party places or facilitates the placement of deposits, the primary purpose of the third party, for the particular business line, is a purpose other than the placement or facilitation of placement of deposits.

(9) *Ongoing reporting.* (i) *General.* The FDIC will describe any reporting requirements as part of its written approval for a primary purpose exception.

(ii) *Reporting.* Third parties, or insured depository institutions that apply on behalf of the third party, that receive a written approval for the primary purpose exception, shall provide reporting to the appropriate FDIC office and, in the case of an insured depository institution, to its primary federal regulator.

(10) *Modification and withdrawal of a previously granted approval.* At any time after approval of an application for the primary purpose exception, the FDIC may, with notice and adequate justification:

(i) require additional information from an applicant for which the FDIC has approved the primary purpose exception to ensure that the approval is still appropriate, or for purposes of verifying the accuracy and correctness of the information provided to an insured depository institution or submitted to the FDIC as part of the application under this section;

(ii) require the applicant for which the FDIC has approved the primary purpose exception to reapply for approval;

(iii) impose additional conditions on an approval; or

(iv) withdraw an approval.

Any such action will be communicated to the applicant in writing by the FDIC.

PART 337—UNSAFE AND UNSOUND BANKING PRACTICES

1. The authority for 12 CFR part 337 continues to read:

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

§337.6 Brokered deposits.

1. Revise paragraph (a)(5)(i) to read as follows:

(i) The term deposit broker means:

(A) Any person engaged in the business of placing deposits of third parties with insured depository institutions;
(B) Any person engaged in the business of facilitating the placement of deposits of third parties with insured depository institutions;
(C) Any person engaged in the business of placing deposits with insured depository institutions for the purpose of selling interests in those deposits to third parties; and
(D) An agent or trustee who establishes a deposit account to facilitate a business arrangement with an insured depository institution to use the proceeds of the account to fund a prearranged loan.

2. Redesignate (a)(5)(ii) and (iii) as paragraphs (iii) and (iv), respectively.

3. Add paragraph (a)(5)(ii) to read as follows:

(ii) *Engaged in the Business of Facilitating the Placement of Deposits.* A person is engaged in the business of facilitating the placement of deposits of third parties with insured depository institutions, by, while engaged in business, engaging in one or more of the following activities:
(A) The person directly or indirectly shares any third party information with the insured depository institution;
(B) The person has legal authority, contractual or otherwise, to close the account or move the third party's funds to another insured depository institution;
(C) The person provides assistance or is involved in setting rates, fees, terms, or conditions for the deposit account; or
(D) the person is acting, directly or indirectly, with respect to the placement of deposits, as an intermediary between a third party that is placing deposits on behalf of a depositor and an insured depository institution, other than in a purely administrative capacity.

4. Revise paragraph 5(a)(iii)(A) as redesignated is revised to read as follows:

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

institution;

a. A wholly owned operating subsidiary is considered a part of its parent insured depository institution, for purposes of this section, if it meets the following criteria:
    i. The parent insured depository institution owns 100 percent of the subsidiary's outstanding stock;
    ii. The wholly owned subsidiary places deposits of retail customers exclusively with its parent insured depository institution; and
    iii. The wholly owned subsidiary engages only in activities permissible for the parent insured depository institution.

5. Revise paragraph (a)(5)(iii)(I) as redesignated to read as follows:

(I) An agent or nominee whose primary purpose is not the placement of funds with depository institutions 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); or

Federal Deposit Insurance Corporation.

By order of the Board of Directors.

Dated at Washington, DC, on August 20, 2019.

Robert E. Feldman,

Executive Secretary.