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May 7, 2019

Submitted Electronically

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

Re: Brokered Deposits and Interest Rate Restrictions
RIN 3064-AE94

Dear Mr. Feldman:

U.S. Bank appreciates the opportunity to comment on the Federal Deposit Insurance Corporation's (FDIC) advance notice of proposed rulemaking (ANPR) in connection with the FDIC's comprehensive review of its regulatory approach to brokered deposits. We believe that reflecting our recommendations in a revised approach to brokered deposits would allow the FDIC to achieve its goals of updating this framework with sufficient flexibility for future developments in products, services, and delivery methods. A revised framework would encourage banks to establish and deepen their relationship with customers, especially those who have not had full access to the banking system, in new and innovative ways.

U.S. Bancorp, with 74,000 employees and $476 billion in assets as of March 31, 2019, is the parent company of U.S. Bank, the fifth-largest commercial bank in the United States. We strive to create products and services that are beneficial to our customers and that serve all members of our community. As consumer tastes and preferences change, our Minneapolis-based bank blends our relationship teams, branches and ATM network with mobile and online tools that allow customers to bank how, when, and where they prefer.

Because of these ongoing commitments to our customers, U.S. Bank believes that the FDIC is correct to modernize its regulatory approach towards this stable and low volatility funding source to allow banks to better serve their customers and pursue innovative ways of meeting customer demands for access to the banking system. This is true not only because our customers expect innovation, but a dynamic approach would allow insured depository institutions (IDIs) of all sizes to remain competitive in today's technology-driven financial services landscape that has changed business models, products, and delivery channels.

In such an environment, the "inherent challenge" of distinguishing between third parties who work with an IDI to connect customers and potential customers with innovative banking services and other third parties that are truly "engaged in the business of" placing or facilitating the placement of deposits is becoming increasingly important. In some instances, the FDIC's broad and complex approach to brokered deposit interpretations limits the ability of banks to innovate and compete with others in offering products and services that can be accessed by customers using modern technology, "... in light of significant changes in technology, business models, the economic environment, and products since the regulations were adopted."[1] Moreover, the FDIC's expansive interpretation of what constitutes a brokered deposit captures many types of deposits that do not possess the risky or "hot money" features

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1 FDIC, *Unsafe and Unsound Banking Practices: Brokered Deposits and Interest Rate Restrictions*, 84 Fed. Reg. 2366, 2366 (Feb. 6, 2019) (hereafter, the ANPR).

that Congress intended to limit when it enacted Section 29 of the Federal Deposit Insurance Act (Section 29 or the statute),[2] but rather are stable, relationship-based deposits.

We encourage the FDIC to revisit its interpretations of what constitutes a deposit broker (and thus a brokered deposit) and to more widely permit banks to accept stable and low volatility deposits outside their geographic footprint or with the involvement of third parties without running afoul of brokered deposit restrictions.

Specifically, we believe that the FDIC should modernize its brokered deposits framework as follows:

- **Define "deposit broker," including any exceptions, to distinguish clearly between third parties who assist in connecting potential customers to available financial services and those acting as a "deposit broker."** The FDIC should limit the classification of an entity as a "deposit broker" to one which is unaffiliated with an IDI and contracts to place deposits of third parties at that institution or contracts with an IDI for the purpose of selling interests in that institution's deposits to third parties. Properly applied, this narrow definition would:
    - Not limit the ability of banks to connect potential customers to banking products and services through appropriate partnerships.
    - Allow banks to meet consumer demand for prepaid products as an alternative or complement to traditional deposit products by specifically excluding prepaid products from consideration as brokered deposits.
    - Not restrict banks' engagement in ordinary course marketing and advertising strategies available to businesses outside of the banking sector.
    - Support banks' efforts to deepen customer relationships through products such as affiliate sweep deposits from client investment accounts, by specifically excluding affiliates from consideration as deposit brokers under certain circumstances.

- **Revise applicable guidance.** Congress intended Section 29 to restrict troubled banks from holding significant amounts of high cost, risky deposits that were bundled by intermediaries. The current body of guidance on brokered deposits does not always clearly reflect the purpose of the statute. The FDIC should revise (or replace) its guidance to, among other updates, clarify that Section 29 does not discourage bank partnerships with third parties for the purposes of marketing deposits products and services or limit the ability of banks in engage in the types of internet marketing, mobile, and internet-based partnerships that are part of contemporary business practices.

Our goal in this comment letter is to further the FDIC's understanding of the scope of banking products and services, as well as the ways in which banks connect potential customers with those products and services, that may be captured by an overbroad view of what it means to be a "deposit broker." In each case, we offer suggestions for how the FDIC can revise its regulatory approach to capture as brokered only those deposits Congress intended to capture.[3]

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[2] 12 U.S.C. § 1831f.

[3] We generally support the arguments in other comment letters from the Consumer Bankers Association, Innovative Payments Association, American Bankers Association, and Bank Policy Institute regarding a potential FDIC approach to brokered deposits, especially with regards to prepaid products and marketing relationships and partnerships. We agree that it is difficult, if not impossible, to apply extant FDIC interpretations to modern marketing practices in a logical and consistent manner, and that they should not be expanded (including, for example, to internet marketing, mobile and internet-based partnerships, etc.) unless necessary to effectuate Congressional purpose.

I. The FDIC should reevaluate its treatment of deposits associated with prepaid products.

A. Innovation is necessary to expand customer access to alternative banking products.

Prepaid cards use the existing payment card infrastructure to offer payment functionality like that of debit cards for consumers who either do not have debit cards or who prefer not to use them for some of their transactions.[4] Employers also increasingly use prepaid products because of the expense of issuing paper checks and because employees demand alternatives to check-based payments. Prepaid cards (and other prepaid products) provide an alternative that bridges the gap for consumers without traditional deposit accounts who wish to access the banking system to receive payments and purchase goods and services, including through digital channels. Customers - including, for example, the employers who offer payroll cards and the employees who wish to use them - demand this alternative. These programs can serve as one avenue through which the banking system can be made "accessible to ... the young immigrant who cannot afford a smartphone."[5] Indeed, prepaid transactions are growing substantially faster than transactions on debit and credit cards as more consumers use alternative financial products.[6] The designation of the associated deposits as brokered—and the resultant impact on the cost of funds—inhibits innovation by financial institutions in the prepaid products space.

Financial institutions are unable to answer fully the customer-driven demand for innovation in part due to the current regulatory approach to brokered deposits. Consumers are pushing the industry to move to digital wallet-based products, which essentially involves issuing prepaid cards without the card by using digital account numbers. Currently, to offer such digital products in this space in response to consumer demands, banks' pricing models must account for potential brokered deposit classification for these innovative products. This is another area that is ripe for consideration as the FDIC seeks to "... revisit elements of [its] regulatory framework that have made banks reluctant to innovate and develop products that could attract more unbanked and underbanked consumers into the banking fold."[7]

In the paragraphs below, we briefly explain the FDIC's currently overbroad interpretations concerning prepaid products, discuss how certain prepaid programs under which the bank promotes access to banking products and services for potential customers may be captured by those interpretations, and suggest that the FDIC revisit its extant interpretations to focus on the letter and spirit of Section 29.

B. Third parties offering prepaid products tied to deposit accounts at a financial institution should not be classified as "deposit brokers."

Third parties can assist banking organizations in identifying groups of consumers who need or demand alternative access to the banking system, including, for example, employees and recipients of government benefits. None of these third parties is "engaged in the business of" placing deposits as a deposit broker, and prepaid products do not yield high denomination, "hot money" deposits from these

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4 Wilshusen, Stephanie M., et. al., Federal Reserve Bank of Philadelphia, and Schneider, Rachel, Center for Financial Services Innovation, *Discussion Paper: Payment Cards Center: Consumers' Use of Prepaid Cards: A Transaction-Based Analysis* (August 2012), at 3 (hereafter, FRB Philadelphia Study).

5 McWilliams, Jelena, FDIC Chairman, Remarks at the National Diversity Coalition Washington D.C. Town Hall Meeting, Washington, D.C. (Mar. 14, 2019).

6 FRB Philadelphia Study, at 3. See also, Mercator Advisory Group, 15th Annual U.S. Open-Loop Prepaid Cards Market Forecasts, 2017-2021 (September 2018), at 4 (noting that "[l]oads in the Money/Financial Services segment saw an uptick as more people chose to use alternative financial products for their everyday needs") (hereafter, the Mercator Study).

7 *See supra*, FN 5.

program relationships. Programs established through third parties simply provide consumers access to an alternative, convenient product in an efficient way.

In the paragraphs below, we discuss the characteristics of several of our prepaid card programs to illustrate that the third parties who partner with the bank to offer such programs are not the sort of third parties Congress intended to capture under Section 29.

1. Employer Payroll Programs

Employers offer prepaid cards as an alternative to issuing paper checks to employees who may not have access to traditional banking services via a deposit account. This segment of the prepaid products market is the second largest in the United States and is forecasted to continue to grow in the coming years.[8] These prepaid cards can, in many ways, replicate the features of a demand deposit account, such as the ability to set up automatic bill payments and pay for goods and services - including those purchased through digital channels - thereby providing the employee with access to the banking system via an additional, alternative to a traditional deposit account. Employers using prepaid cards for payroll purposes for unbanked or underbanked employees should not be classified as "deposit brokers." These employers are offering employees an alternative way to access banking services and taking advantage of the significant benefits of issuing payroll cards over paper checks.[9] To that end, these employers are incentivized by their own cost-benefit analysis to assist banking organizations in identifying groups of employees that desire alternative access to banking services. Accordingly, these employers not "engaged in the business of" placing or facilitating the placement of deposits.

2. Government Benefits Programs

Prepaid cards used in connection with government benefits programs are contracted with government agencies, often through state required bidding processes. These relationships between the government and the bank are designed to last multiple years given the operational costs and policy goals of the government agencies to ensure programs' funds are efficiently distributed to benefit recipients. Banks participate in a transparent bidding/request for proposal process to gain new contracts. The government contracts do not involve revenue-sharing of fees but may require banks to invest in technology used by the government agencies, which serves to improve the efficiency of benefits distribution. State and local governments using these prepaid card programs are simply providing convenient funds access and are not "engaged in the business of" placing or facilitating the placement of deposits.

3. Corporate Rebate Programs

Corporate rebate prepaid card programs are typically conducted through an incentive or rebate fulfillment company, and cards are distributed as incentives or rewards in connection with the purchase of goods or services as part of a customer acquisition or retention program of a given business. For example, an internet service provider could offer a prepaid card of a certain dollar value as an incentive for new customers to sign up for their services - the card is not marketed to consumers on a standalone basis, but as an inducement in connection with a business offering other goods or services. Third parties offering or facilitating rebate programs are simply looking for a convenient and efficient way to

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8 Mercator Study, at 24.
9 Mercator Study, at 25.

deliver incentives to consumers for purchase of their products and services and are not "engaged in the business of" placing or facilitating the placement of deposits.

4. Retail General Purpose Programs

Retail general purpose prepaid cards are sold by retailers alongside prepaid cards offered by other financial institutions. Partnerships with retailers are non-exclusive and prepaid cards are offered to customers of those retailers as general purpose cards available to meet the customers' need or desire for an alternative to traditional banking products. Retailers offering these prepaid cards are not sourcing high denomination deposits to banks with the highest interest rates—they are simply offering a product that provides the convenience their customers demand.

The deposits associated with each of these prepaid programs are not the sort of deposits Congress intended to limit under Section 29, and the third parties involved in offering them to consumers are not engaged in the activities of the classic "deposit brokers" placing "hot money" deposits that Congress intended to limit under the statute. Furthermore, an overly broad view of brokered deposits tends to inhibit innovation by banks in these areas and limit bank participation in such programs. Such views hinder customer access to these programs and serve no legislative policy goals.

C. The FDIC's extant guidance concerning prepaid products and programs should be rescinded.

While recognizing the FDIC has attempted to update its guidance with regards to the treatment of prepaid cards, the 2016 FAQs present a view that virtually all deposits placed in connection with prepaid card programs are brokered. That guidance is based on three examples described in the 2011 Core Deposits Study of situations involving prepaid products. The guidance in these 2016 FAQs do not appear to be grounded directly in Section 29, the FDIC's brokered deposits regulations, or in an FDIC Advisory Opinion.[10] The 2016 FAQs do not discuss the implicit conclusion that third parties involved in distributing prepaid cards satisfy the statutory or regulatory definition of deposit broker (i.e., engaged in the business of placing or facilitating the placement of deposits) other than by noting that they would not, in the FDIC's view as stated in the FAQ, be covered by the primary purpose exception.

This guidance has complicated banks' analyses as to whether to offer or continue programs customers want and has limited the ability of banks to meet customer demands for alternative access to banking products and services. Customers increasingly access banking services by using prepaid products as substitutes for checking accounts. Consumer adoption of these alternative products is expanding, including among the traditional unbanked and underbanked households, particularly as new features make these products more competitive with traditional checking accounts.[11] Furthermore, consumers increasingly demand the convenience and innovative features of prepaid products either as a complement or alternative to traditional deposit products. If banks are to continue to offer customers these services, the potential regulatory and funding costs associated with any "brokered" classification of prepaid programs need to be carefully reconsidered by the FDIC. We recommend that the FDIC rescind its guidance concerning prepaid cards in the 2016 FAQ and explicitly exclude third parties

10 As support for its statement in the 2016 FAQ that "the primary purpose exception generally does not apply to" companies that distribute prepaid cards that provide access to funds at an insured depository institution, the FDIC cites only the 2011 Core Deposits Study, which in turn states that "no published advisory opinion addresses [the issue of whether the deposits underlying stored value cards are brokered deposits]."

11 Mercator Study, at 9.

involved in offering prepaid product programs from the definition of "deposit broker" by adding to the enumerated exclusions in its brokered deposits regulation at 12 C.F.R. § 337.

II. The FDIC should reevaluate its approach to marketing relationships and partnerships.

A. Innovation is necessary to connect potential customers with access to banking products and services.

As noted earlier this year by Chairman McWilliams, "millions of households are unbanked or underbanked" and "[b]ringing these households into the banking system ... requires that we revisit elements of our regulatory framework that have made banks reluctant to innovate and develop products that could attract more unbanked and underbanked consumers into the banking fold."[12] The FDIC's brokered deposit interpretations, in some instances, have arguably "made banks reluctant to innovate," which impacts the ability of banks to effectively reach potential customers with products and services. As Chairman McWilliams further explained, "[b]oth the FDIC and the banking industry need to respond to changes in consumer behavior [by] being accessible to both the millennial who has never stepped foot inside a bank branch and also the young immigrant who cannot afford a smartphone."[13] This statement highlights the current need for the FDIC to revisit its approach to analyzing marketing relationships and partnerships in the deposit broker context to allow banks to reach potential customers where they are and in ways appropriate to their needs without categorizing certain customer access channels as "deposit brokers."

In the paragraphs below, we discuss how certain programs under which the bank promotes access to banking products and services for potential customers may be captured by the FDIC's current interpretations concerning marketing relationships and partnerships. We believe that an updated framework that focuses more closely on the letter and spirit of the statute will encourage banks to engage in the development of innovative products, services, and delivery channels while enhancing customer relationships that are at the core of a stable deposit funding strategy.

B. The FDIC's regulatory framework with regards to brokered deposits should not limit the ability of banks to connect potential customers with access to banking products and services.

The FDIC's 2016 Frequently Asked Questions (FAQ),[14] based on Advisory Opinions issued by FDIC staff in the 1990s, require that marketing relationships be limited to the "general endorsement" of a bank that must appear in promotional materials produced and distributed solely by the bank, made in in exchange for a flat fee, if any, to avoid a deposit broker classification of the endorsing party. The statute does not mandate such an overly broad approach to marketing relationships, and this approach does not reflect the "significant changes in technology, business models, the economic environment, and products since the regulations were adopted."[15]

A third-party partner is not automatically "engaged in the business of" placing or facilitating the placement of deposits for purposes of being considered a deposit broker merely because a bank engaged it to assist the bank in connecting with potential customers, including those who are not currently utilizing the banking system. Third parties should not be classified as "engaged in the

12 *See supra*, FN 5.
13 *See supra*, FN 5.
14 FDIC, FIL-42-2016, *Frequently Asked Questions on Identifying, Accepting and Reporting Brokered Deposits* (June 30, 2016), FAQ B8.
15 ANPR, at 2366.

business" of a deposit broker simply because that third-party partner co-produces or assists in the distribution of materials describing banking services available to potential customers and how they can access those services, or partners with banks to deliver those services to customers. These actions are not focused on short-term deposit gathering and do not yield high-denomination, "hot money" deposits of the type Congress intended to address under Section 29. Rather, their focus is engaging with new customers in new ways to create a long-term and broad relationship that meets the needs and expectations of our customers.

One example of a current bank program that could be implicated by this approach (i.e., by classifying any resultant deposits as brokered) - with resultant limitations in customer access - is our campus programs. Campus programs, where banks partner with colleges and universities to offer student deposit accounts, depending on their structure, may be captured by the FDIC's longstanding approach to evaluating marketing relationships and partnerships under its overbroad interpretation of what constitutes a "deposit broker." These programs are not focused on deposit gathering (and certainly do not represent a source of high-denomination, "hot money" deposits), but rather are mainly focused on connecting with new customers. These accounts are often the students' first entry into the banking system and can lead to deeper banking relationships as they graduate and enter the workforce. Student deposit accounts represent one effort by the banks that offer them to be more "accessible to ... the millennial who has never stepped foot inside a bank branch ..."[16]

Colleges and universities that partner with a bank to connect their students with banking services available to them are certainly not, on that basis, "engaged in the business of" placing or facilitating the placement of deposits. Given the characteristics of campus banking programs, and the resulting low balance accounts and longstanding relationships formed with students entering the banking system for the first time, an overbroad view of marketing relationships and partnerships that would capture colleges or universities as "deposit brokers" is inappropriate and was never intended by Congress under Section 29.

In the ordinary course of the business of banking, banks may also work with other third parties that are well-placed to help banks identify and reach unbanked or underbanked consumers to introduce them to deposit products. Banks engaging in various forms of customer outreach through marketing and referral arrangements to establish relationships with new customers should not need to evaluate every third party with even a tenuous connection to those efforts as a potential deposit broker—Congress did not intend to impede ordinary course customer outreach programs under Section 29.

C. The FDIC's approach to marketing relationships should be revised to permit banks to partner with third parties to connect customers with access to traditional and innovative banking services without the risk of any resulting deposits being classified as "brokered."

The FDIC's historic view of how banks use marketing relationships with third parties potentially limits the ability of consumers to obtain information about banking services and products by classifying deposits indirectly resulting from third-party marketing efforts as brokered. Nothing in the statute dictates this approach to (or even suggests a Congressional intent to curtail) banking partnerships with third parties and potentially limits the ability of banks in engage in the types internet marketing, mobile, and internet-based partnerships which are part of contemporary business practices. These bank partnerships with third parties to reach potential customers do not result in "brokered and high-rate

16 *See supra*, FN 5.

deposits [that are] volatile because deposit brokers (on behalf of customers), or the customers themselves, were [] drawn to high rates and were prone to leave the bank when they found a better rate ..."[17] Rather, these relationships reflect a strategy to amplify engagement in core and new markets with an enhanced portfolio of digital products and existing services and to build and deepen customer relationships. The FDIC's advisory opinions and the FAQs based on those opinions should be reviewed in this light and replaced by a revised regulatory framework centered around the narrow Congressional intent behind Section 29. This review should consider the modern business of banking, contemporary and future customer demands, as well as the safe and sound yet innovative banking practices that have evolved in response to those demands.

III. Affiliate deposits, including affiliate sweep deposits from client investment accounts, should not be considered brokered because affiliate employees, in fulfilling their broad client service role, should not be considered deposit brokers.

Affiliate employees often refer customers to an IDI as part of an established banking relationship to provide a broader suite of products and services to the customer. For example, when an employee of our affiliate broker-dealer, U.S. Bancorp Investments Inc., refers a customer to U.S. Bank because of an identified need for banking services, the U.S. Bank employee becomes the relationship manager with regards to that customer's banking products and services. This arrangement generally leads to long-term customer relationships like those in which the customer's first contact is with the bank itself. Indeed, as the FDIC noted in its 2011 Core Deposits Study, "[affiliate] referrals are ancillary to the affiliates' legitimate businesses and are usually based upon a relationship between the customer and the affiliate," and "because depositors have a relationship with an affiliate of the bank, these deposits may behave more like deposits where the bank itself has a relationship with the depositor, and thus may be more stable and less likely to leave for higher rates or when the bank is under stress."[18] The statutory definition of "deposit broker" does not encompass deposits that result from affiliate employee referrals in connection with providing access to banking services to meet customer needs. Therefore, the FDIC should not treat such affiliate employees as deposit brokers.

Furthermore, the statutory exclusions from the "deposit broker" definition in Section 29[19] were included based on the conduct of the business of banking at the time the statute was enacted. To reflect contemporary banking practices and to appropriately ground future affiliate interpretations within the language of and Congressional intent behind Section 29, FDIC should exclude certain affiliate employees from the definition of "deposit broker." This exclusion would be similar to the current exclusion for trust departments, where the trust is not "established for the primary purpose of placing funds with an insured depository institution."

As the FDIC notes in 2016 FAQ E8, "[t]he brokered deposit restrictions *were not intended to curtail the normal activities of* trust departments, but since a blanket exemption for all trust department activities might have led to circumvention of the statute through various trust-type mechanisms, the statute imposed a 'primary purpose' test. *The primary purpose test serves to distinguish the normal activities of trust departments from arrangements that have the purpose and effect of circumventing the statute.*"[20] The FDIC has the authority to add a similar exclusion for affiliate employees to the

17 ANPR, at 2366.
18 2011 Core Deposits Study, at 56-57.
19 12 U.S.C. 1831f(g)(2).
20 FDIC, Identifying, Accepting and Reporting Brokered Deposits: Frequently Asked Questions (June 30, 2016), at 9 (emphasis added).

regulatory exclusions included in its brokered deposit regulation at 12 C.F.R. § 337.6, consistent with the Congressional intent embodied in Section 29.[21] Using the same approach taken above with respect to the statutory exception for trust departments, the FDIC should add a parallel exclusion in 12 C.F.R. § 337.6(a)(5)(ii)(K) for "affiliates of an insured depository institution, where the primary purpose of the affiliate employee is not placing funds with an insured depository institution." This would allow the FDIC to distinguish "the normal activities of" affiliate employees, such as broker-dealer affiliates, from "arrangements that have the purpose and effect of circumventing the statute" by driving "hot money" deposits to an insured depository institution.

Conclusion

We continue to support the FDIC's efforts to modernize its deposit insurance framework, including those efforts to align its treatment of brokered deposits more closely with Congressional intent. The FDIC could achieve its goals of updating this framework and providing it with sufficient flexibility for future developments in products, services, and delivery methods by providing the public with a clear and focused definition of "deposit broker" and a limited number of additional, specific exceptions to that definition. These efforts would thereby encourage banks to establish and deepen their relationship with customers, especially those who have not had full access to the banking system, in new and innovative ways.

We appreciate the opportunity to provide these comments in response to the ANPR and thank the FDIC for its consideration of the suggestions contained in this letter. Should you have any questions or would like to discuss further, please do not hesitate to contact Jason Fincke in our Legal Regulatory Group at 202.442.2704 or jason.fincke@usbank.com.

Sincerely,

[redacted]

Peter Klukken

General Manager, Prepaid Division

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21 The statue would not limit the addition of certain affiliate employees to the list of regulatory exceptions in 12 CFR § 337.6; the FDIC has already added an additional exception to the statutory list in 12 CFR 337.6(a)(5)(ii)(J).