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

Re: Unsafe and Unsound Banking Practices: Brokered Deposits Restrictions
RIN 3064–AE94

Dear Mr. Feldman,

The American Bankers Association[1] (ABA) appreciates the opportunity to comment on the Federal Deposit Insurance Corporation's (FDIC) notice of proposed rulemaking (NPR or proposal)[2] on the brokered deposit restrictions that apply to less than well-capitalized insured depository institutions (IDIs). The NPR would create a new framework for analyzing certain provisions of the definition of "deposit broker," including the meaning of the term "engaged in the business of facilitating the placement of deposits." The NPR would also establish an application and reporting process for IDIs and third parties that seek to utilize the "primary purpose" exception.

The NPR follows an Advance Notice of Proposed Rulemaking (ANPR)[3] to which ABA responded on May 7, 2019.[4] In that submission, we expressed our support for the FDIC's review of the brokered deposit regulations that implement Section 29 of the Federal Deposit Insurance Act (FDI Act). We continue to support this review and appreciate the thoughtful approach the FDIC has taken in modifying its interpretation of the statue to accommodate modern banking, while ensuring that banks are operating in a safe and sound manner. In particular, ABA supports and encourages the increased transparency and objective framework the FDIC is proposing to implement. However, we do not believe that the NPR goes far enough towards solving the current regulations' fundamental problems.

[1] *The American Bankers Association is the voice of the nation's $18.6 trillion banking industry, which is composed of small, midsize, regional, and large banks that together employ more than 2 million people, safeguard nearly $14.5 trillion in deposits, and extend more than $10.5 trillion in loans.*
[2] 85 Fed. Reg. 7453 (Feb. 10, 2020).
[3] 84 Fed. Reg. 2366 (Feb. 6, 2019).
[4] https://www.fdic.gov/regulations/laws/federal/2019/2019-unsafe-and-unsound-banking-practices-3064-ae94-c-068.pdf

Section 29 of the FDI Act was enacted in 1989 as part of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 (FIRREA). The statute imposes restrictions on the acceptance of brokered deposits by insured depository institutions (IDIs) with weakened capital positions. Section 29 was adopted in response to concerns that the use of brokered deposits by troubled savings and loan associations fueled rapid growth, and exacerbated the crisis in that industry.[5] Section 29 addressed this concern by preventing *troubled* IDIs from holding funds placed by third-parties whose primary business is "placing deposits or facilitating the placement of deposits of third parties" with IDIs. Since the enactment of Section 29, there have been significant statutory changes, such as the Riegle-Neal Interstate Banking and Branching Efficiency Act of 1994[6] and the Gramm-Leach-Bliley Act[7], which expanded bank footprints and affiliations. These changes, together with significant technological advances, reconfigured markets, spurred new business opportunities and allowing new banking models and mechanisms for deposit gathering. However, there has been no corresponding statutory or regulatory update to Section 29 to accommodate these changes. [8]

The result of an outdated and broadly interpreted framework is a significant gap has developed between the brokered deposits Congress intended to restrict and those that are currently designated as such. Many of the deposits now classified as "brokered" under the FDIC's regulations, or that IDIs treat as "brokered deposits" due to the lack of clarity in those regulations and existing FDIC guidance, go far beyond what was intended by Congress. Further, there is no empirical evidence that a deposit that is classified as "brokered" possess enhanced risk to the safety and soundness of IDIs or, by extension, to the Deposit Insurance Fund. Rather, the label is largely a result of an outdated legal construct. The result is a statutory and regulatory framework that discourages *well capitalized* institutions from holding a diverse, stable funding base or innovating to stay competitive and meet the needs and demands of their customers.

ABA acknowledges that the FDIC recognizes many of these problems and appreciates the effort the FDIC has put into modernizing and clarifying its brokered deposit regulations. Today, depositors arrive at their IDI's through a variety of partnerships, technology platforms, and general business strategies that are unique to individual IDIs. On an aggregate industry level the combinations of these factors is almost endless. We appreciate, then, that it is extremely difficult for the FDIC to sort the universe of deposit products and relationships into statutorily mandated buckets developed years before the internet or smartphones, and before IDIs were allowed to branch across state lines or permitted to form affiliations with securities and other firms under the umbrella of a financial holding company. However, we do not believe that the NPR sufficiently narrows the definition of "deposit broker." Thus it fails to resolve the fundamental problem of an overly broad regulatory framework that imposes unnecessary costs on stable funding sources gathered through modern means.

ABA has four major concerns with the framework proposed in the NPR:

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[5] See, e.g. Hearings before House Comm. On Banking, Finance and Urban Affairs, "Insured Brokered Deposits and Federal Depository Institutions (May 17, 1989)(Testimony of FDIC Chairman Seidman).

[6] P.L. 103-328, 108 STAT. 2338.

[7] P.L. 106-102, 113 STAT. 1338.

[8] Additionally, we remind the FDIC that regulations put in place after the enactment of Section 29 provide the FDIC and other supervisory agencies with a broader set of tools for identifying and mitigating the perceived risks of brokered deposits. These include prompt corrective action and capital and liquidity standards.

- The proposed definition of "facilitation" is overly broad, complex, creates significant grey areas, and will inadvertently increase the scope of deposits classified as brokered;

- The proposed application process combined with significant ambiguity will cause the primary purpose exception to become the rule;

- The NPR does not resolve the question of how current interpretations of the brokered deposit regulations fit under its proposed framework; and

- The NPR does not eliminate the stigma of "classic" brokered deposits.

To address these concerns, ABA recommends that the FDIC:

- **Make the definition of "deposit broker" more precise.** This may be achieved by modifying the proposed definition of "facilitation" to make discretion over an account the primary factor for determining facilitation;

- **Explicitly exempt parties that the FDIC does not deem to be deposit brokers.** This would add significant clarity and may be achieved by specifically identifying parties and transactions that fall within statutory exceptions to the definition or that the FDIC does not view as a deposit broker;

- **Provide that certain activities that fall within the primary purpose exemption do not require an application.** This would reduce some of the uncertainty associated with the proposed application and determination process, as well as operational burdens on the FDIC;

- **Require annual re-certification of primary purpose exemptions and publish a list of third parties that have been re-certified.** To enhance compliance and transparency, the FDIC should require third parties to annually re-certify that they meet the requirements of the exception and the FDIC should make public a list of the third parties that have been certified;

- **Establish a transition period for compliance.** It is unknown how current opinions and interpretations will fit into the FDIC's final framework. We recommend that the FDIC review its prior interpretations and publicly indicate which interpretations will be effective under the final framework. Additionally, we recommend allowing IDIs up to three years following the effective date of a final rule to conform their practices; and

- **Mitigate the stigma of "classic" brokered deposits.** We encourage the FDIC to take steps, including examiner education, to mitigate the stigma of these deposits.

Collectively, these recommendations would permit the FDIC to meet its statutory requirements and would eliminate much of the ambiguity associated with current regulations and the NPR. In the balance of this letter, we address our concerns with the NPR in more detail, and expand on our recommendations to address those concerns. We also refer to the letter submitted by ABA's HSA Council, for technical discussion about those products and how they intersect with the brokered deposit framework.

I. The definitions of "deposit broker" and "facilitation" should be more precise to avoid inadvertently increasing the scope of deposits classified as brokered.

In the NPR, the FDIC proposes revising the definition of deposit broker to be: (1) Any person engaged in the business of placing deposits of third parties; (2) Any person engaged in the business of facilitating the placement of deposits of third parties with IDI's; (3) Any person engaged in the business of placing deposits with [IDIs] for the purpose of selling interests in those deposits to third parties; and (4) An agent or trustee who establishes a deposit account to facilitate a business arrangement with an IDI to use the proceeds of the account to fund a prearranged loan.

We appreciate and support the movement away from the position that all third parties are deposit brokers. As a general matter, however, ABA believes that the FDIC's threshold for designation of an entity as a "deposit broker" is still too low. Moreover, there are many definitional areas in need of clarification. To enhance the clarity and transparency of the proposal, we recommend that the FDIC provide an explicit list of entities and circumstances that it does not consider create a "deposit broker." A list that illustrates some of the types of entities that should be explicitly exempted is provided below in Section II of this letter.

A. Persons engaged in the business of placing deposits

In the preamble to the NPR, the FDIC states that, for purposes of the first prong of this definition of deposit broker, it would view a person to be "engaged in the business of placing deposits," if the person has a *business relationship* with its customers, and as part of the relationship, placed deposits on behalf of the customer."[9] ABA supports the view that brokered deposits, by definition, have to have an underlying contractual business relationship. To the extent that the FDIC intends to clarify the meaning of the phrase "engaged in the business of placing deposits," we recommend that the FDIC add a definition of "engaged in the business of placing deposits" to the defined terms in 12 C.F.R. § 337.6(a) that requires such a business relationship.

B. Persons engaged in the business of facilitating the placement of deposits

For purposes of the second prong of the definition of deposit broker, the FDIC is proposing a four-factor definition of what constitutes "engaged in the business of facilitating the placement of deposits." The preamble to the NPR states that this four-factor definition is "intended to capture activities that indicate that the person takes an active role in the opening of an account or maintaining a level of influence or control over the deposit account even after the account is opened."[10] Yet, as discussed further below, we find this proposed definition to be overly broad, complex, and ambiguous, encompassing a much broader swath of deposits than the

[9] 85 Fed. Reg. 7457 (Feb. 10, 2020).
[10] Id., at 7457.

FDIC seemed to intend. Moreover, besides being vague, three of the factors are not necessarily exclusive to one person and could have the curious result of multiple parties being deemed "deposit brokers" with respect to the same deposit, which conflicts with the principle above that a deposit broker is a person with a level of control or influence over the movement of deposit.

In order to simplify the proposed definition and increase its transparency, we urge the FDIC to remove the proposed information factor and instead look to the party that has control over the account. Using control over the account as the basis by which "facilitation" is defined and interpreted would serve as an appropriate threshold from which to identify the types of products and relationships Congress meant to isolate, while excluding many of the stable deposits gathered through normal course partnerships and modern technology.

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:

> (1) The person directly or indirectly shares any third party information with the insured depository institution;
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> (2) The person has legal authority, contractual or otherwise, to close the account or move the third party's funds to another insured depository institution;
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> (3) The person provides assistance or is involved in setting rates, fees, terms, or conditions for the deposit account; or,
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> (4) 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.

1. The information sharing factor is an inappropriate proxy for defining "facilitation" and should be removed.

ABA believes that the first factor, related to information sharing, would significantly broaden the scope of deposits classified as "brokered" and unnecessarily complicate the analysis of whether a deposit should be labeled as such. We understand that the FDIC seeks to encourage innovation by accommodating modern partnerships, such as those in which banks partner with fintech companies and engage in online marketing. However, as proposed, the information sharing factor would capture a much broader universe of deposits than is captured under current interpretations, including many of the relationships the FDIC does not intend to be subject to the regulation. Moreover, the factor does not specify the type of third party information whose sharing would be deemed "facilitation;" rather, the sharing of <u>any</u> third party information would be problematic.

ABA does not believe that the sharing of information is an appropriate proxy for whether or not a business partner is a "deposit broker." Merely providing information to an IDI should not result in the provider of that information being viewed as facilitating the placement of deposits. Today, information is shared between IDIs and affiliated and unaffiliated third parties under a variety of circumstances in the normal course of business, including data processing, web servicing, consulting, advertising, and marketing. Many forms of online advertising and marketing, therefore, could result in third party information being shared with the IDI. Moreover, in some circumstances information sharing is required by law, such as to comply with the Bank Secrecy Act. The proposal could even cause multiple persons to be deemed "deposit brokers" with respect to the same deposit, yet none of them have a level of "influence or control" over a deposit account. Additionally, in the case of affiliate relationships, in order to offer the customer a seamless and complete experience, an IDI and its affiliate work closely together, resulting in the entities sharing information or having access to information, as a matter of normal course of business. The restriction on information sharing also would create the nonsensical result of requiring an IDI and its affiliates to store customer information on separate systems, thereby eliminating any connectivity between them, and creating inefficiencies for IDIs, and their customers. We, therefore, recommend that the FDIC delete proposed §337.6(a)(5)(ii)(A) in its entirety.

2. Control over the account should be the primary factor by which "facilitation" is defined.

As we noted above, the proposed definition of "facilitation" is intended to capture relationships in which a third party has a greater degree of control or influence over the deposit relationship than the account holder. Having a level of control or influence over the deposit relationship allows the third party to influence the movement of funds between IDIs and can make the deposits less stable. ABA agrees that a third party with *exclusive* and ongoing control over the deposit account is likely a deposit broker, rather than a party that is simply acting at the direction of the account holder. Accordingly, ABA recommends that the FDIC simplify the definition of "facilitation," by establishing control over the account as the filter through which a third party will be deemed to be facilitating the placement of deposits.

More specifically, we recommend that proposed §337.6(a)(5)(ii)(B) be revised to read as follows:

> The person, other than the account holder and those granted power of an attorney or other such power, has a contractual business relationship with the IDI and has exclusive legal authority, contractual or otherwise, to: (i) open an account; (ii) close an account or move the account to another insured depository institution for reasons other than risk of loss to the depositor; (iii) execute transactions within an account; or (iv) set rates, fees, or other terms of the account;

3. Offering market-rate interest on transaction accounts should not trigger a deposit broker designation.

The third factor in the definition of "facilitation" reaches a person that *provides assistance*, or is involved in setting rates, fees, terms, or conditions for the deposit account. We agree that actually setting rates, fees, terms or conditions demonstrates a sufficient level of influence or control over the account to cause the person to be classified as a deposit broker.

Thus, we have included this proposed factor in our recommended revision of the second factor, as discussed above.

If the FDIC retains this as a stand-alone factor, we recommend that the phrase *provides assistance* be removed from proposed §337.6(a)(5)(ii)(C) or modified to reflect the direct involvement of a person in the account, such as, "the person sets or negotiates rates, fees, terms, or conditions for the deposit account on behalf of the depositor." As currently drafted, the factor is too vague, creates uncertainty, and is not needed. For example, if a business refers its customers to a bank and the bank offers higher rates to referred customers, the business could be deemed to be "providing assistance" in setting rates and therefore be classified a "deposit broker." This could be the case even if the business simply gives its customers a list of several banks that offer preferred rates and no compensation is paid to the business, or if an employee of a third party simply passes on basic, publicly available information about the bank's rates and products, with no other involvement or compensation. Further, more than one person could be involved in "providing assistance" to a depositor, such as if an affinity network and a member business both provide information to customers about a bank. We do not believe such an expansive definition of "deposit broker" was intended.

4. Who is acting as an "intermediary" and what is an "administrative capacity" should be clarified

The final factor in the definition of "facilitation" would cover any person 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. The term "indirectly" is vague and should be more clearly defined, as any number of persons could be acting "indirectly," causing multiple parties being deemed "deposit brokers" with respect to the same deposit. It is hard to see how an unlimited number of people could have control or influence over one deposit.

Additionally, we ask that the FDIC provide clarification with respect to what *administrative* functions are meant to classify a party as a deposit broker. Furthermore, we recommend that the FDIC provide examples of the types of accounts covered by this factor and exactly what is meant by acting as an *intermediary*. More specifically, we believe that a business, organization, communications firm, or marketing firm that has partnered with an IDI, but is not otherwise involved in the opening/servicing of the account, should not be deemed to be an intermediary. Such a person would not have any significant control or influence over the depositor and designating such person a "deposit broker" serves no policy or supervisory purpose.

II. The FDIC should identify and exempt parties that it does not deem to be deposit brokers.

<u>A. The IDI exception should include all bank customers</u>

We appreciate and support the proposal to allow the IDI exception to be available to wholly-owned operating subsidiaries if they meet certain criteria. This exception is consistent with the intent of the statute and developments in the marketplace. However, as currently drafted, the exclusion could be interpreted as (1) only including retail customers, or (2) only being applicable to retail customers. If it is the former, the FDIC should clarify that institutional customer deposits are also included. Furthermore, the exclusion should apply to employees of the subsidiary as well as the subsidiary.

B. Affiliates of IDIs should be expressly excluded from the definition of deposit broker.

As we have argued in the past, modern technology and business practices result in banks and their affiliates operating as a single firm in many respects in order to offer a full range of financial products and services to their clients. Customers of an affiliate view themselves as having a relationship with the entire firm, as do customers of the IDI who look to the affiliate for services outside of lending and deposit products and services. Due to the broad array of services banking organizations can offer, their customer relationships tend to be deep and long lasting. The deposits that originate from customers of an IDI's affiliates, are demonstrably sticky and enhance the franchise value of the entire company. Therefore, we recommend that the FDIC exclude affiliates of IDIs from the definition of "deposit broker".[11]

We encourage the FDIC to codify this determination by adding an eleventh exception to the definition of "deposit broker" in 12 C.F.R. § 337.6(a)(5)(ii), which could read as follows:

> (K) Any bank, trust company, broker-dealer or other affiliate the insured depository institution, with respect to customer funds placed with that depository institution, when the depository institution or affiliate also is providing other products or services to the customer.

In the alternative, the FDIC should determine, through an amendment to its brokered deposits regulations, that wholly owned affiliates have a "primary purpose" that is not the placement of funds with depository institutions, without requiring the submission of an application for the FDIC to make this determination. To ensure that this exclusion does not inadvertently create risks for an IDI, the exclusion could apply only to deposits placed with the IDI. As noted above, customers of an affiliate tend to view themselves as having a relationship with the entire organization, including the IDI.

C. Other parties should be excluded.

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[11] Many of the FDIC's advisory opinions have excluded certain entities from being treated as deposit brokers when acting in certain capacities, typically on the basis that such entities are either (1) not "engaged in the business of placing deposits" and not "facilitating the placement of deposits," or (2) have a "primary purpose" that is not the placement of funds with depository institutions. The FDIC has ample legal authority to exclude affiliates from treatment as deposit brokers via regulation or advisory opinion, so long as it reasonably determines that such entities are not "engaged in the business of placing deposits or facilitating the placement of deposits" or have a "primary purpose" that is not the placement of funds with depository institutions. Such a determination would be reasonable for the reasons described below.

In addition to operating subsidiaries and affiliates of IDIs, we recommend that the FDIC determine that certain parties, and employees thereof, be excluded from the definition of "deposit broker." In most cases, the basis for these determinations would be the primary purpose exception. The other parties that we believe should be expressly excluded are as follows:

- Trustees and custodians of health savings accounts;
- Mortgage and loan servicers in connection with servicing activities;
- Real estate brokerages in connection with real estate transactions;
- Title & escrow companies in connection with real estate transactions;
- Property managers in connection with their performance of management services; and,
- Third party service providers, such as call center operators, where the interaction such entities have with customers is entirely a function of the customers' relationship with the IDI and;
- Third parties that provide administrative or technology services.

We further recommend that the following types of deposits not be classified as "brokered:"

- Deposits underlying prepaid cards;
- Deposits made by any person or entity that has another deposit, other than a brokered deposit, or other relationship with the IDI;
- Deposits resulting from affinity or marketing relationships where the entity has no control over the decision to open an account or has no influence over the movement of funds, including account closure;
- Security deposits or other deposits of tenant funds by or on behalf of a landlord;
- Deposits made for the purpose of complying with reserve requirements under SEC Rule 15c3-3, CFTC rules or other similar regulations;
- Interest on Lawyers Trust Accounts (IOLTAs); and,
- Health savings accounts;
- Other custodial deposits where the service offered by the agent or nominee to its clients or customers – and the clients' or customers' interest in deposited funds – does not substantially resemble a demand, savings or time deposit with respect to features and functionality, including with respect to client/customer access to funds; and
- Other relationships in which the overall business purpose is served by the placement of deposits.

III. The primary purpose exception should not "swallow" the rule.

The "primary purpose exception" is one of nine exceptions to the definition of a "deposit broker" Section 29 grants to "an agent or nominee whose primary purpose is not the placement of funds with depository institutions."[12] Under the statute, a person in the business of placing or facilitating the placement of deposits will not be treated as a deposit broker if the "primary purpose" of the person is not the placement of funds with an IDI. Under the proposal, the primary purpose exclusion would be based upon the business relationship between an agent or

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

nominee and its customers, and the agent or nominee could qualify for the exception under one of three prongs:

- Deposit placements of less than 25 percent of customer assets under management by the third party;
- Placement of funds to enable the customer to make transactions; and
- Other placements that may meet the primary purpose exception.

Additionally, under the NPR, agents or nominees that seek to qualify for an exception under one of these prongs would be subject to an application process.

As a general matter, we support clarification of the primary purpose exclusion. However, it is likely that, if the NPR is implemented as proposed, the primary purpose exception process will become the principal means through which the FDIC interprets and applies Section 29 now and going forward. In order to prevent that outcome, and provide more legal certainty to banks and their business partners, we urge the FDIC to put forth a more precise definition of "deposit broker," such as the approach suggested in Sections I and II of this letter.

Also, we have some practical concerns about the proposed application process. Given the new definitions proposed in the NPR, and the uncertainty inherent in any new regulatory framework, we anticipate a large volume of initial applications. Therefore, as discussed below, we suggest streamlining the procedures.

A. FDIC should provide for presumptive approvals.

We recommend that the FDIC identify entities that presumptively qualify for the primary purpose exception, and do not need to submit an application. Additionally, we encourage the FDIC to establish bright line tests, so that if a firm meets the parameters of the prong they do not need to file an application. More specifically, we recommend that any of the entities listed in Section II of this letter should not be required to file an application to be excluded.

B. FDIC should provide for blanket approvals.

The NPR provides that applications for the primary purpose exception may be filed by either an IDI or a third party. We recommend that these provisions be modified to enable an IDI to obtain a "blanket" approval under the primary purpose exception.

Many IDIs work with more than one third party in circumstances that qualify for the primary purpose exception. For example, under the NPR, a broker-dealer that places deposits in amounts that are less than 25% of the broker-dealer's total assets under management for a particular business line will qualify for the primary purpose exception. An IDI may have relationships with many broker-dealers that qualify for this exception. As proposed in the NPR, however, each broker-dealer would have to submit an application, or an IDI would have to submit a separate application for each broker-dealer. This process will place unnecessary burdens both on the IDI and on the FDIC, which will need to review and act on multiple repetitive applications.

To address this problem, we recommend that the FDIC permit an IDI to submit a single application on behalf of all third parties with which the IDI transacts at the time of the application, or may work with in the future, that have the same relationship with the IDI (*i.e.*, the same fact pattern). Thus, if an IDI's application on behalf of a broker-dealer is approved because the broker-dealer places deposits in amounts less than 25% of its total assets under management for a particular business line, the IDI should be permitted to rely on that approval for any future broker-dealers that also place deposits that are less than 25% of their assets under management. Neither the IDI nor the new broker-dealer should be required to submit a new application.

Specifically, we request that the FDIC consider adding a new subsection (11) to the proposed new provision in 12 C.F.R. §303(b), to read as follows:

> (11) *No additional application required*. If the FDIC has approved an application submitted by an insured depository institution on behalf of a nonbank third party under paragraph (b)(3)(ii), such approval shall apply to all nonbank third parties that transact with such insured depository institution and that meet the same factual criteria described in such application, provided that as part of its ongoing reporting obligations the insured depository institution shall identify all nonbank third parties with respect to which it is relying on such approval and provide all required information regarding each such nonbank third party.

C. Deposit Placements of Less than 25% of Customer Assets Under Management

The FDIC is proposing that an application will be approved under the primary purpose exception if the total amount of funds placed at a depository institution by a third party is less than 25% of the total customer assets under management by the third party, for a particular business line. As discussed above, we recommend these arrangements not be subject to the application process, and be presumptively approved.

Additionally, we recommend that the FDIC modify the funds and relationships captured by this prong, ensuring that both non-managed and managed accounts and retail brokerage accounts are considered. To this end, we recommend that the FDIC look to the definition of Assets Under Administration within the Federal Reserve's FR –Y15 *Banking Organization Systemic Risk Report.*[13]

Moreover, it is unclear what constitutes a "particular business line." The NPR does not define the term "business line." However, in the preamble, the FDIC states that the term business line refers to the business relationships an agent or nominee has with a group of customers form whom the business places or facilitates the placement of deposits."[14] The preamble notes, for example, that a broker-dealer offering investment accounts *with a sweep option* would be a business line, while broker-dealer accounts *without a sweep option* would be a different business line. Because some firms have different internal classifications with respect to activities or

[13] https://www.federalreserve.gov/apps/reportforms/reportdetail.aspx?sOoYJ+5BzDaRHakir9P9vg==
[14] 85 Fed. Reg. 7461 (Feb. 10, 2020).

products that fall under an individual firm's business line definition, this prong could become extremely complex. To prevent this outcome, we recommend that the FDIC defer to each IDI's determination of what constitutes a particular business line, which could include all activities of a particular legal entity. To prevent abuse of this discretion, the FDIC could either: (1) have automatically approved parties notify the FDIC that they had qualified for the automatic approval, and include in that notification a description of its business line(s); or (2) have those parties provide a description of their business lines in whatever periodic reporting the FDIC requires.

Lastly, we note that the proposal is unclear on what happens if an IDI temporarily breaches the percentage threshold due to anomalous circumstances, such as significant inflows due to financial market stress. Therefore, we encourage the FDIC to introduce flexibility into this exception by allowing monthly breaches, or allowing the percentage to be averaged over time, e.g., over a month or a quarter. We appreciate the FDIC's recognition that unusual circumstances related to the coronavirus caused the deposit ratio to rise significantly.[15] We encourage the FDIC to codify this flexibility, and its parameters, in any final rule.

D. Deposit placements that enable transactions

The FDIC is proposing that an application will be approved under the primary purpose exception if an agent or nominee is placing deposits into transaction accounts for the purpose of enabling payments. We generally support this exclusion, but request additional clarification of the two conditions associated with this prong.

First, the preamble to the proposed rule states that 100 percent of the customer's funds must be placed in transaction accounts. In light of the changes made to Regulation D, which effectively remove any distinction between savings and transactions accounts, we recommend that savings accounts also qualify for the exception. This would allow "for the purpose of enabling payments" to serve as a threshold and sufficiently narrow the exception to those accounts that are in fact 'transactional' in nature, while ensuring that the FDIC is not preserving an outdated construct.

Second, the proposed rule requires that no fees, interest, or other remuneration may be provided or paid on any customer accounts *by the third party*.[16] Yet, in the preamble the FDIC states that an application would be subject to close scrutiny 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)".[17] It is normal practice for an IDI to pay interest on accounts. Thus, we urge the FDIC to resolve this discrepancy between the rule text and the preamble by affirming that the rule text is controlling, and that IDIs may pay market rates of interest on such accounts. Moreover, given how central the payment of interest is to the business of banking, it should not disqualify an entity from the exemption.

IV. The process for applications and determinations should be efficient and transparent.

[15] https://www.fdic.gov/regulations/laws/rules/4000-10420.html#fdic400020-01

[16] Proposed §303.243(8)(ii).

[17] Id., at 7459.

ABA is concerned about the efficiency and transparency of the proposed application process. Below we suggest some steps the FDIC could take to make the process more robust.

With respect to the proposed timeline, the FDIC should limit the time it takes to respond to applications for exemptions. In addition, for any FDIC determinations that a deposit is not eligible for the primary purpose exception, the IDI should be given a transition period of at least one year to adjust the relationship with the third party accordingly, before having to report the subject deposits as brokered.

Additionally, we believe the FDIC should create a formal process for rescission of an interpretation that predates any final rule that follows the NPR. Any exemptions that the FDIC has previously granted should remain in effect unless and until the FDIC formally revokes such exemptions or they are superseded by a new exemption, and any revoked exemptions should have a transition period, as further described in Section V of this letter

To increase both transparency and clarity, we urge the FDIC to make all opinions, decisions and determinations for the exception public, on a redacted basis. For example, if a third-party or IDI receives a determination that a relationship is eligible for the primary purpose exception, all IDIs with comparable relationships should be able to determine that the primary purpose exception applies equally to them (subject to any conditions imposed by FDIC in its determination). This procedure could be based upon the FDIC's existing rules governing relief from recordkeeping requirements related to deposit insurance coverage. Those rules permit an IDI with substantially similar facts and circumstances as an IDI that received an exemption to provide notice to the FDIC, and the exemption is deemed granted after 120 days.[18]

With respect to reporting, the FDIC should require the applicant to annually re-certify that it meets the requirements of the exception and make such re-certification public. For example, in order to maintain anonymity, the FDIC could publicly provide an annual list of determinations where the third party applicant has been re-certified.

IV. The FDIC should establish a transition period for current interpretations.

In the preamble of the proposed rule, the FDIC states that, as part of this rulemaking, it 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.[19] Further, the FDIC states that the final rule will codify staff opinions of general applicability that continue to be relevant and applicable, and rescind any staff opinions that are superseded or obsolete or are no longer relevant or applicable. We note that it is difficult to comment on proposed changes to a significant regulatory framework without a complete understanding of how the proposed framework will affect specific customer relationships, partnerships and business models. Additionally, this presents a compliance challenge for the banking industry as there are

[18] 12 C.F.R. 370.8.
[19] Id. at 7460.

numerous pre-existing staff opinions, some of which are private. It is not clear which of those opinions the FDIC views as superseded, obsolete, or irrelevant.[20]

In order to avoid confusion, we urge the FDIC to review prior interpretations that excepted activities and practices from being considered brokered and publicly indicate which will be continued under the final framework. The final rule should expressly provide that IDIs may continue to rely on existing FDIC written determinations, subject to the same restrictions therein, unless specifically rescinded by the FDIC. ABA encourages the FDIC to implement a transition period for any interpretations, opinions or exemptions that currently provide that a person or activity is excepted from being a "deposit broker." The transition period would have two phases, the first of which would insure there is no gap in "coverage" during the time between the comment period ending until the final rule is released. The second phase, which would begin upon finalization of the rule, would allow a transition period of up to three years, for interpretations, including those under the primary purpose exception, on which banks have relied on prior guidance or waivers from FDIC.

In addition, the changes proposed by the NPR, and the additional changes that we urge the FDIC to consider, will result in deposits that currently are considered brokered deposits to be recharacterized as "unbrokered." We request that the FDIC provide clear guidance on the applicability of any changes to the brokered deposit regulations to existing deposits so that depository institutions will understand whether and how existing brokered deposits would become "unbrokered" as a result of these changes.

V. Other Items

A. *Take steps to mitigate the stigma of "classic" brokered deposits*

There is little evidence that the more "classic" types of brokered deposits pose the same risks they did in the 1980s.[21] In fact, longer term CDs provide a key source of funding and interest rate risk management for community banks and others. We encourage the FDIC to take steps, including examiner education, to mitigate the stigma of these deposits and allow well-capitalized institutions to hold these deposits thereby maintaining a diverse and cost effective funding base, among other benefits.

B. *Do not implement the proposed definition of "accept" as it is operationally unworkable.*

The FDIC is considering an approach similar to what it proposed under the National Rate Cap NPR where funds deposited into a money market deposit account (MMDA), other savings or transaction account *after* an institution becomes less than well capitalized would subject the entire balance to the brokered deposit restrictions. If the same customer opens a new account, however, the initial balance would not be subject to the restrictions.

[20] For example, based on ABA's understanding of the proposed rule, several FAQs issued by the FDIC in 2016, along with related Advisory Opinions, contradict the proposed rule's definition of "facilitating the placement of deposits": A5, B2, B4, B8, E12, Advisory Opinion No. 92-79 (November 10, 1992), Advisory Opinion No. 93-71 (October 1, 1993) and Advisory Opinion No. 93-30 (June 15, 1993).
[21] Id.

ABA reiterates our concern with the proposed definition of "accept,"[22] which is operationally unworkable for non-maturity deposits. The FDIC proposes an interpretation of when non-maturity deposits are considered "accepted" or "solicited." Under the proposed interpretation, balances already on deposit in (MMDA) or other accounts would not be subject to the deposit restrictions at the time an institution becomes less than well capitalized, but if additional funds are deposited into the account after the institution becomes less than well capitalized, the entire balance would be subjected to rate restrictions. This creates significant and unnecessary burden as it would require banks to maintain parallel products and systems in order to be able to track accounts and multiple rates in the event the bank becomes less than well capitalized. We also note that forcing a customer's rate down, should he or she deposit an additional amount in the account hurts consumers and will likely cause liquidity stress as customers move their balances elsewhere.

For these reasons, we urge the FDIC not to finalize this component of the Proposal as it would be operationally infeasible and therefore not a practical solution. Instead, we recommend that once an institution falls below less than well capitalized, the FDIC exempt, or grandfather, all existing deposit accounts from the rate restrictions, restricting only new deposits to new accounts opened with the bank. We also suggest allowing a 5-7 day transition to approve and market new deposit products, and process the new accounts.

B. Align the LCR, NSFR, and G-SIB surcharge treatment of sweeps with the final rule

We urge the FDIC to work with the other agencies to ensure that the liquidity coverage ratio (LCR), proposed net stable funding ratio (NSFR) and the global systemically important bank (G-SIB) surcharge are consistent with the final brokered deposit regulations. The treatment of sweep programs under the final rule should align with their treatment under these capital and liquidity rules.

Under the LCR, brokered deposits are defined broadly as deposits that are obtained, directly or indirectly, from or through the mediation or assistance of a deposit broker as that term is defined in section 29 of the Federal Deposit Insurance Act[23], and **includes a reciprocal brokered deposit and a brokered sweep deposit**."[24]

A "brokered sweep deposit" is defined in the LCR as follows:

> "Brokered sweep deposit means a deposit held at the Board-regulated institution by a customer or counterparty through a contractual feature that automatically transfers to the Board-regulated institution from another regulated financial company at the close of each

[22] ABA Comment letter in response to the FDIC proposed rulemaking on interest rate restrictions on institutions that are less than well capitalizedhttps://www.fdic.gov/regulations/laws/federal/2019/2019-interest-rate-restrictions-3064-af02-c-043.pdf
[23] 12 U.S.C. 1831f(g)
[24] 12 CFR 249.3 (emphasis added)

business day amounts identified under the agreement governing the account from which the amount is being transferred." [25]

Based on this definition, even if a deposit is not a brokered deposit under the FDIC's rules, *e.g.*, because it qualifies under the primary purpose exception it would be a brokered deposit under the LCR if it were a "reciprocal brokered deposit" or a "brokered sweep deposit." This result was acknowledged by the FDIC and other federal banking agencies in the final LCR rule.[26]

We ask the FDIC to work with the other federal banking agencies to remove the discrepancies between the FDIC's brokered deposit definitions and the LCR, NSFR and GSIB surcharge definitions of ""brokered sweep deposits" and "reciprocal brokered deposits," so that any deposit that is not a "brokered deposit" under Section 29, whether by regulation or through a primary purpose exception, will no longer be treated as a brokered deposit under the LCR, NSFR, and GSIB surcharge rules.

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We appreciate the FDIC's initiative on brokered deposit modernization and its efforts to conform its brokered deposit policies more closely with the purposes of the statute and the realities of banking and customer relationships today. We stand ready to assist in this important effort for the benefit of our customers and to reinforce the strength of the banking system. If you have any questions about these comments, please contact the undersigned at (202) 663-5147 or email: atouhey@aba.com.

Sincerely,

[redacted]

Alison Touhey

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[25] 12 CFR 249.3.

[26] See 79 Fed. Reg. 61440, 61492 (Oct. 10, 2014) ("The definition of 'brokered sweep deposit' under the proposed rule would have covered all deposits under such arrangements, regardless of whether the deposit qualified as a brokered deposit under the FDI Act.").