

June 7, 2020

Robert E. Feldman, Executive Secretary
Attention: Comments
Federal Deposit Insurance Corporation
550 17th Street NW
Washington, DC 20429

Re: Unsafe and Unsound Banking Practices – Brokered Deposit Restrictions (RIN 3064-AE94)

To Whom It May Concern:

The Massachusetts Bankers Association (MBA), which represents more than 130 commercial, savings and cooperative banks and federal savings institutions with 72,000 employees located throughout the Massachusetts and New England, appreciates the opportunity to comment on the Federal Deposit Insurance Corporation's (FDIC) Notice of Proposed Rulemaking on Unsafe and Unsound Banking Practices: Brokered Deposits Restrictions (NPR or proposal). The proposal provides a new framework to determine what defines a "deposit broker" and also establishes an application and reporting process for service providers and less than well-capitalized insured depository institutions (IDIs) that seek to utilize the "primary purpose" exception.

The NPR builds on the Advanced Notice of Proposed Rulemaking (ANPR) from February 2019 that MBA commented on in May 2019. We expressed our support for the FDIC's review of the brokered deposit regulations at that time and continue to support the agency's effort to modify, reinterpret and modernize these regulations to adapt to modern, 21st century banking practices while ensuring banks continue to operate in a safe and sound manner. The proposal recognizes the substantial evolution of the banking industry since enactment of Section 29 of the Federal Deposit Insurance Act (FDI Act) and we believe some of the proposed changes will alleviate the restrictions on well-capitalized institutions from holding diverse and stable funding or innovating to stay competitive to meet the needs and demands of customers within their community. Nevertheless, MBA believes the proposal does not go far enough to rectify the uncertainty and lack of clarity that contributes to banks and financial institutions treating broad types of deposits as "brokered" out of an abundance of caution and to avoid regulatory criticism.

MBA recognizes that it is difficult to sort all the different types of deposit products and banking relationships that existed prior to the prevalence of the internet and smart phones. Still, the proposal does not sufficiently narrow the definition of what constitutes a "deposit broker" and the framework established for application and reporting as "primary purpose" exception parties will become the de facto norm – creating an onerous burden at a time when the FDIC has pledged to push for greater transparency and efficiency in banking regulation. MBA has serious concerns relative to the modified definitions of "brokered deposits" as well as the term "facilitation", the primary purpose exception and its application process as well as the inherent ambiguity in how present interpretations of the brokered deposit regulations fit under the proposed framework.

Definitions for "Brokered Deposit" and "Facilitation" – Concerns and Recommendations

The proposal revises the definition of deposit broker to be: (1) Any person engaged in the business of placing deposits of third parties with IDIs; (2) Any person engaged in the business of facilitating the placement of deposits of third parties with IDIs; (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.

The definition no longer takes the position that all third parties are deposit brokers, which is important. However, the proposal also introduces a new “facilitation” definition relative to a person(s) engaged in the business of facilitating the placement of deposits. This definition is based on four separate factors which we believe are too broad and complex while also remaining ambiguous for a large cross section of deposits. For example, one of the components relative to “facilitation” would appear to restrict community banks from receiving external information from third parties about current customers and / or potential new customers. If community banks are impeded from using advisory and consulting services to assist them in the development and improvement of their product offerings, they will not be able to compete with their largest competitors across the Commonwealth and New England.

In our view, the primary flaw within the proposed “facilitation” definition is that it focuses on the “activities of the third party” leading up to the placement of the deposit, rather than on the “direct relationship established between an individual depositor and their selected bank” when that deposit is gathered. We believe a more effective approach would be to focus on the strength and characteristics of the direct relationship that is established between the individual depositor and his or her IDI (and the stable nature of that depositor’s associated funds) rather than on an IDI’s use of a third party or third-party service, provided that the third party has no contractual relationship with the individual depositor to place, manage or control the individual depositor’s deposits, banking decisions or financial activities. If the bank owns and manages the depositor relationship, the institution should not be penalized when outsourcing activities and services that would otherwise be permissible if conducted directly by the institution.

We recommend that the information sharing component to these definitions be removed as it is not an appropriate proxy for whether a business partner is a “deposit broker”. In today’s economy and throughout the normal course of business, information is shared by IDIs and both affiliated and unaffiliated third parties by means such as consulting, web servicing and data processing.

The “Primary Purpose” Exception – Concerns and Recommendations

Under the statute, a person(s) 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. This exception is one of nine exceptions to the definition of a “deposit broker” that Section 29 grants to agents and nominees whose primary purpose is not the placement of funds with depository institutions. However, according to the NPR, the primary purpose exclusion would be based on business relationships between agents and their customers with certain criteria needing to be met to qualify for the “primary purpose” exception.

Given the complexity of these relationships, we believe it is very likely that this exception will become the principal means through which the FDIC interprets and applies Section 29 now and in the future. Parties that do not meet the application standards or testing criteria would not receive the exception – likely frustrating relationship building between IDIs and these third parties. The “primary purpose” exception will likely see a large volume of initial applications which would, in turn, force the agency’s hand and make the granting of such an exception the de facto measure that determines whether agents and businesses are “brokered depositors”.

Such an outcome would create additional legal uncertainty for banks and their business partners. We strongly urge the FDIC to provide a more precise definition of “deposit broker” as discussed earlier. By providing a more objectively clarified definition, the FDIC could likely eliminate the need for a “primary purpose” exception in the first place. Specifically, the definitions should be clarified relative to parties that are expressly excluded (such as mortgage and loan servicers in connection with servicing activities)

as well as the types of deposits not classified as “brokered” (such as deposits resulting from marketing relationships or certain kinds of custodial deposits).

Industry Reliance on Advisory Opinions and the Stable Nature of Specific Types of Deposits

The NPR makes clear that the banking industry is operating under existing Staff Advisory Opinions. The proposal also states that the FDIC intends to review the existing opinions and determine their relevancy based on the revisions made to brokered deposit regulations once finalized. Most community banks rely on advisory opinions prior to engaging with third parties, particularly as related to brokered deposits. The industry as a whole and community banks, in particular, have made significant investments in products, platforms, and services in reliance upon these Advisory Opinions. It is not clear what the impact would be if certain Opinions are rescinded, as the review process is not clearly defined.

Additionally, the NPR does not readily address the lack of evidence that *classic* types of brokered deposits pose the same risks they once did. Over time, deposits that demonstrate an ongoing and direct relationship has been established between the individual depositor and their bank are key sources of funding and interest rate risk management for community banks. For example, longer-term CDs have long been stigmatized. In recent years, arrangements between community banks and fintech companies have grown and led to challenges for community banks regarding classification of new, emerging deposits as “brokered”. We request that the final definition of “brokered deposits” have express exclusions for stable deposits (savings, MMAs and CDs) as well as transaction accounts with direct deposits that are individually gathered.

Conclusion

MBA supports the efforts undertaken by the FDIC to modernize the regulations governing brokered deposits given the strategic planning landscape across the country and evolving funding strategies. Nevertheless, we have serious concerns about some of the proposed changes and their potential impact on the community and regional banks operating throughout Massachusetts.

Thank you for the consideration of our comments and concerns. If you have any questions or need additional information, please contact me at (617) 523-7597 or via [email](#).

Sincerely,

A large black rectangular redaction box covering the signature area.

Bén Craigie
Director of Compliance and Training
Massachusetts Bankers Association