FEDERAL DEPOSIT INSURANCE CORPORATION

12 CFR Parts 303 and 337

RIN 3064–AE94; 3064–AF02

Unsafe and Unsound Banking Practices: Brokered Deposits and Interest Rate Restrictions

AGENCY: Federal Deposit Insurance Corporation (FDIC).

ACTION: Final rule.

SUMMARY: The FDIC is finalizing revisions to its regulations relating to the brokered deposits and interest rate restrictions that apply to less than well capitalized insured depository institutions. For brokered deposits, the final rule establishes a new framework for analyzing certain provisions of the "deposit broker" definition, including "facilitating" and "primary purpose." For the interest rate restrictions, the FDIC is amending its methodology for calculating the national rate, the national rate cap, and the local market rate cap. Further, the FDIC is explaining when nonmaturity deposits are accepted and when nonmaturity deposits are solicited for purposes of applying the brokered deposits and interest rate restrictions.

DATES: *Effective Date*: April 1, 2021; with an extended compliance date of January 1, 2022, as provided in section I(C)(4).

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:* James Sheesley, Assistant 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, Senior Deputy Director, (202) 898–3898, rmiller@fdic.gov. Legal Division: Vivek V. Khare, Counsel, (202) 898–6847, vkhare@fdic.gov.

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I. Brokered Deposits

A. Policy Objectives

Significant technological changes have affected many aspects of the banking industry, including the manner in which banks source deposits. For many banks, brokered deposits are an important source of funds, and the marketplace for brokered deposits has evolved in response to technological developments and new business relationships. The FDIC recognizes that its regulations governing brokered deposits are outdated and do not reflect current industry practices and the marketplace. As such, the FDIC initiated an extensive rulemaking process to seek input from stakeholders and to develop new regulations that take into consideration current industry practices and that allow for continued innovation. Banks often 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. Through this rulemaking process, the FDIC attempted to ensure that the brokered deposit regulations would continue to promote safe and sound practices while ensuring that the classification of a deposit as brokered appropriately reflects changes in the banking landscape.

B. Background

1. Historical Statutory Framework

Section 29 of the Federal Deposit Insurance Act (FDI Act)[1] restricts the acceptance of deposits by certain insured depository institutions ("IDIs")from a "deposit broker." Section 29, entitled "Brokered Deposits," was 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 having the same type of charter in such depository institution's normal market area.[2]

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.[3] Thus, under current law, a "well capitalized" insured depository institution is 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

[1] 12 USC 1831f (also referred to herein as "Section 29").
[2] *See* Pub. L. 101–73, August 9, 1989, 103 Stat. 183.
[3] *See* Pub. L. 102–242, Dec. 19, 1991, 105 Stat 2236.
[4] *See* 12 U.S.C. 1831f.

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

In 2018, Section 29 of the FDI Act was amended as part of the Economic Growth, Regulatory Relief, and Consumer Protection Act, to except a capped amount of certain "reciprocal deposits" from treatment as brokered deposits.[7]

2. Current Regulations

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.[8] Section 29 of the FDI Act does not directly define a "brokered deposit," rather, it defines a "deposit broker" for purposes of the restrictions.[9] 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:

- 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
- 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.

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[5] *See id.*
[6] *See id.*
[7] 1831f(I)(2)(E).
[8] *See* 12 CFR 337.6. The FDIC issued two rulemakings related to the interest rate restrictions under this section. The FDIC is also adopting a final rule for the interest rate restrictions as discussed in Part II of this Notice.
[9] *See* 12 U.S.C. 1831f.

This definition is subject to the following nine statutory exceptions:

1. an insured depository institution, with respect to funds placed with that depository institution (the "IDI exception");

2. an employee of an insured depository institution, with respect to funds placed with the employing depository institution;

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 403(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 "primary purpose exception").

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.[10]

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."[11]

3. Advance Notice of Proposed Rulemaking

On December 18, 2018, the FDIC Board approved an Advanced Notice of Proposed Rulemaking (ANPR), inviting comment on all aspects of the FDIC's brokered deposit and interest rate regulations 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.

The ANPR discussed issues with sweep deposits, deposit listing services, statutory exceptions (particularly the primary purpose exception), software products, prepaid cards, and interest rate restrictions applicable to less than well-capitalized institutions (particularly the definition and calculation of the national rate). The ANPR also included historical and statistical analysis, in addition to other information, including the FDIC's experience with brokered deposit questions. The ANPR was published in the Federal Register on February 6, 2019.[12] The FDIC

[10] 12 U.S.C. 1831f(g)(4).
[11] *See* 57 FR 23933, 23040 (1992). 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] 84 FR 2366 (Feb. 6, 2019).

received over 130 comments to the ANPR 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, 59 related to the FDIC's rules on the interest rate restrictions. The majority of these commenters expressed concerns about the national rate calculation. Concerns included the effect of calculating an average rate by including branches (minimizing the significance of online-focused banks, which have few or no branches) and data issues with banks' published rates. Commenters suggested that to make rates appropriate for different economic environments and maximum transparency, the FDIC should set national rates at the higher of the current rates and the previous (1992) rates based on US Treasury yields. Other comments addressed the local rate, stressing the necessity to compete for particular products within local market areas.

Comments to the ANPR referring to brokered deposit issues other than interest rate caps focused on the need for clarity, specifically requesting the FDIC to clarify its historical interpretation of the ''deposit broker'' definition and its corresponding statutory and regulatory exceptions. Many commenters stated that the FDIC had interpreted the definition of deposit broker too broadly and had significantly expanded the types of entities considered to be deposit brokers beyond what was originally contemplated when Section 29 was enacted.

Commenters also requested clarity in the deposit broker definition, specifically with the primary purpose exception. Many commenters preferred a bright-line test and noted certain types of deposits are designed for a purpose other than establishing a depository account, provide stable sources of funding, do not have the risks associated with traditional brokered deposits, and, therefore, should meet the primary purpose exception.

Because of the strong interest in in both interest rate cap issues and other brokered deposit issues and to better address commenters' concerns, the FDIC decided to issue separate proposed rulemakings, one relating to interest rate caps and the second, relating to proposed changes in the regulations other than those relating to interest rate caps.

4. Overview of Notice of Proposed Rulemaking and Comments Received

In its notice of proposed rulemaking ("Brokered Deposits NPR," or, in this Part, "proposal" or "proposed rule"),[13] and in response to comments submitted in response to the advance notice of proposed rulemaking ("ANPR"),[14] the FDIC proposed a number of significant changes to its brokered deposit regulation to modernize the regulation in light of technological and other innovations in the way banks source deposits. The FDIC proposed clarifications to the circumstances under which a person[15] meets the deposit broker definition by interpreting when a person is considered to be engaged in the business of "placing" or "facilitating the placement" of deposits on behalf of its customers. These proposed changes were intended to provide clarity for industry participants as to what types of deposit arrangements would be considered "brokered" and which would not. In addition, the FDIC proposed an expansion of the IDI exception to permit wholly owned subsidiaries that meet certain criteria to be eligible for the exception.

The FDIC also proposed an interpretation for the "primary purpose" exception to the "deposit broker" definition and sought to provide a mechanism through which IDIs or third parties could apply to the FDIC to receive approval for meeting the primary purpose exception. The FDIC proposed that brokered CDs would continue to be considered to be brokered. Finally,

[13] 85 FR 7453 (Feb. 10, 2020).
[14] 84 FR 2366 (Feb. 6, 2019).
[15] This Notice also uses the term "third party" in reference to the subject of the "deposit broker" definition. Consistent with section 29, this Notice also refers to the potential deposit broker with respect to the primary purpose exception as the "agent or nominee."

the FDIC proposed that existing staff FDIC advisory opinions would either be rescinded if they were no longer applicable under the final rule or codified as part of the final rule if relevant under the new regulation.

The Brokered Deposits NPR solicited comment on all aspects of the proposed rule. The comment period ended on June 9, 2020.[16] In response to the proposal, the FDIC received more than 160 comments from individuals, banking organizations, non-profits, as well as industry and trade groups representing banks, insurance companies, and the broader financial services industry. A number of commenters supported the FDIC's efforts to modernize the rule and provide clarifications to key definitions.

Generally, a common theme amongst the commenters was a desire for the FDIC to provide additional clarification to its proposed changes to the "deposit broker" definition and its corresponding statutory and regulatory exceptions. Some commenters suggested that a legislative change to Section 29 was needed, including replacing the brokered deposit restrictions with a restriction on asset growth for less than well capitalized institutions. Commenters also suggested that the FDIC revise certain aspects of the proposal to permit certain types of arrangements that, under the proposal, would continue to be considered to be brokered to instead either fall within an exception or otherwise to be determined to be non-brokered. A small number of commenters opposed the proposed changes, with one commenter stating that the changes would create new loopholes in the statutory restrictions on brokered deposits, threatening safety and soundness of banks and the Deposit Insurance Fund (DIF), without evidence that the changes are necessary and without knowing the impact of the changes. Another commenter criticized the proposal for failing to focus on the underlying risks

[16] The comment period was extended for another 60 days to provide commenters with additional time to address the matters raised in the NPR. 85 FR 19706 (April 8, 2020).

of brokered deposits and weakening the FDIC's ability to understand deposit volatility and balance sheet risks of supervised IDIs. A summary of comments received on specific aspects of the proposed rule is provided below in section.

C. Final Rule and Discussion of Comments

1. Deposit Broker Definition

Section 29 of the FDI Act provides that a person is a "deposit broker" 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.[17] An agent or trustee also 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.[18]

The statute does not further define the categories that make up the definition of "deposit broker," and the FDIC has authority under the FDI Act to issue regulations to further clarify the types of activities that cause a person to be considered to be a deposit broker.[19] Historically, the FDIC has considered several factors in evaluating whether or not an entity is a "deposit broker," including, for example, whether or not the entity receives fees from IDIs based upon the volume of deposits placed and whether the entity provides marketing or referral services on behalf of the IDIs.

[17] 12 U.S.C. 1831f(g)(1)(A).
[18] 12 U.S.C. 1831f(g)(1)(B).
[19] 12 U.S.C. 12 U.S.C. 1819(a)(Tenth).

In the Brokered Deposits NPR, the FDIC proposed a new framework for analyzing the deposit broker definition in an effort to provide clarity around when a third party meets the definition. In this context, the FDIC described the circumstances under which a third party would be:

- *engaged in the business of placing deposits*;
- *engaged in the business of facilitating the placement of deposits*; and
- *engaged in the business of placing deposits with insured depository institutions for the purpose of selling interests in those deposits to third parties*.

In general, commenters raised concerns that the proposed deposit broker definition was overly broad and would create barriers to innovation. Commenters also argued that the listed activities in the proposal, specifically in the proposed "facilitation" definition, would capture many third party service providers and would prevent community banks from using those providers for any purpose without having the deposits be classified as brokered. Commenters also requested that the definition be further narrowed and that the FDIC identify specific activities in which a person could engage without being a deposit broker. The specific issues raised by commenters are summarized below.

a. Exclusive deposit placement arrangements

Section 29 provides that *a person* meets the "deposit broker" definition (as described above) when 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" (emphasis added). The FDIC recognizes that a number of entities, including some

financial technology companies, partner with one insured depository institution to establish exclusive deposit placement arrangements. Under these arrangements, the third party has developed an exclusive business relationship with the IDI and, as a result, is less likely to move its customer funds to other IDIs in a way that makes the deposits less stable.

As such, in an effort to clarify the types of persons that meet the "deposit broker" definition, and consistent with the statute, under this final rule, any person that has an exclusive deposit placement arrangement with one IDI, and is not placing or facilitating the placement of deposits at any other IDI, will not be "engaged in the business" of placing, or facilitating the placement of, deposits and therefore will not meet the "deposit broker" definition.

This change is also intended to address comments, further described below, that the FDIC would be inundated with applications from banks and third parties seeking the primary purpose exception under the proposed application process.

The FDIC notes, however, that a person that creates or utilizes multiple entities that each place deposits at different IDIs to evade this rule, while still maintaining a relationship with one or more of such entities, will collectively still be viewed as one "person" and thus qualify as a deposit broker.

b. Engaged in the business of placing deposits

The statute provides that a person meets the definition of "deposit broker" if the person is "engaged in the business of placing deposits" on behalf of a third party (i.e., a depositor) at insured depository institutions. As provided in the proposed rule, the FDIC considers 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 with IDIs on behalf of the customer (e.g., acting as custodian or agent for the underlying depositor).

Commenters suggested that the FDIC provide additional clarity to this part of the "deposit broker" definition with one commenter suggesting that the FDIC include the description provided above in the final rule text, which the FDIC agrees would provide clarity. As such, the FDIC is amending the "deposit broker" definition in the final rule by (1) including that the person must have a business relationship with its customers to be "engaged in business" and (2) providing that the person must receive customer funds before placing deposits to satisfy the "engaged in the business of placing deposits" part of the definition.

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

In contrast to the first part of the deposit broker definition, the "facilitation" part of the definition refers to activities where the person does not directly place deposits on behalf of its customers with insured depository institutions. 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.

Under the proposed rule, 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.

i. Comments in Response to the Proposed "Facilitation" Definition

The FDIC sought to provide clarity and consistency with respect to what it means to facilitate the placement of deposits. The proposed "facilitation" definition was the issue that received the most comments; of the 166 comment letters received (47 of which were form letters), 118 commented on the proposed definition.

In general, commenters raised concerns that some of the listed activities in the proposal were overly broad and, as proposed, would result in all deposits sourced through some use of third party service providers to be classified as brokered. Some commenters suggested that all "relationship accounts" and transaction accounts "owned by a bank" with no direct relationship between the third party and the depositor should be exempt from the definition of "facilitating." Below is a summary of the comments received on each of the four prongs of the proposed "facilitation" definition.

First Prong. Numerous commenters raised concerns about this first prong of the definition of "facilitating," related to information sharing. Major trade associations representing the banking industry suggested that the FDIC delete the information sharing prong entirely and focus instead on the extent to which a third party exercises control over the account. A law firm commented that the first prong would capture the core activities of essentially every financial

technology company or technology platform solutions provider performed for or on behalf of depository institutions, since many financial technology companies receive and store consumers' credentials and share verified consumer information with a depository institution. The commenter expressed that an essential factor underlying the "facilitation" activities is whether the person in question is acting on behalf of the bank or on behalf of the depositor. The commenter stated that where a person is acting on behalf of and at the direction of the depositor, that person's activities should not be viewed as "facilitation" activities because no services are being provided to a particular depository institution. One company suggested that the proposed definition of "facilitating the placement of deposits" should be revised to exclude third-parties who provide services to banks for the purpose of enabling the bank to establish deposit accounts directly with individual depositors.

A number of commenters, including bankers, a law firm, a trade association, and private companies, raised a specific concern that the "information sharing" prong of the definition could be interpreted to include listing services, which historically have been viewed by FDIC staff as excluded from being considered deposit brokers under certain circumstances. Several other bankers expressed similar views, arguing that entities that simply provide information, such as listing services, should not be considered deposit brokers and that the definition as proposed could lead to such a result.

Second Prong. A number of commenters expressed support for the second prong to the proposed "facilitation" definition, which included activities where the person has legal authority, contractual or otherwise, to close the account or move the third party's funds to another insured depository institution. Specifically, commenters stated that this activity is indicative of the type of active and meaningful relationship that should be required to find that a third party is

facilitating the placement of deposits under the deposit broker definition. One commenter asked that the FDIC limit the second prong to include exclusive legal authority over the movement of funds.

Third Prong. Commenters expressed concerns with the proposed third prong of the facilitation definition, believing that the definition was overly broad, contained unnecessary terms, and would capture services the FDIC did not intend to capture. Some community bankers believed that the proposed third prong would result in classifying service providers that provide assistance (but not the final determination) in setting rates, fees, terms or conditions for various deposit account programs, as deposit brokers. Other commenters mentioned that the phrase "providing assistance" was unnecessary and ambiguous and should be deleted from the final rule. The commenters explained that because the proposed rule would cover anyone "involved in" setting rates, fees, terms or conditions, the term "providing assistance" would only create ambiguity and could be read more broadly.

Some commenters believed that the overly broad definition could include listing services. However, one commenter believed that listing services should be included in the third prong and cited legislative history to support its position. Lastly, commenters mentioned that the definition could be used to capture a bank's use of consulting or advisory services that assist them with developing, delivering and improving their deposit offerings.

Fourth Prong. A number of commenters expressed concerns that the proposed fourth prong of the definition of "facilitation," which excluded persons involved in a purely administrative capacity, was also ambiguous and should be clarified by providing a list of activities that would be considered to be purely administrative. A law firm commented that the FDIC should clarify its intent with respect to the exclusion for "purely administrative" conduct,

and argued that a third party conducting only administrative functions should be permissible without the third party being considered a deposit broker. A trade association suggested that the FDIC provide that an intermediary between an IDI and a third party placing deposits is not "facilitating" if the third party is itself not a deposit broker and if the third party would not be a deposit broker if performing the intermediary's activities itself regardless of whether those activities were "purely administrative."

2. Final Rule Discussion for "Facilitation" Definition

The FDIC is adopting the general approach taken in the proposed rule with respect to the "facilitation" part of the deposit broker definition, but is making certain revisions to the definition. Under the final rule, a person is engaged in the business of facilitating the placement of deposits if that person is engaged in certain activities with respect to deposits placed at more than one IDI. The activities that result in a person being "engaged in the business of facilitating the placement of deposits," as discussed in the proposed rule, is intended to capture activities that indicate that the third party 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. Having a certain level of influence over account opening, or retaining a level of control over the movement of customer funds after the account is open, indicates that the deposit relationship is between the depositor and the person rather than the depositor and the insured depository institution. Moreover, when a third party can influence a depositor to either open the account with a particular insured depository institution or move funds between insured depository institutions, the deposits tend to be less stable than if the deposits were 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.

Consistent with this approach to defining the "facilitating" part of the deposit broker definition, and in response to issues raised by commenters, the final rule provides that if a person engages in any one of the following activities, while engaged in business, the person will be a deposit broker and any deposits placed by the person will be brokered:

- 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 is involved in negotiating or setting rates, fees, terms, or conditions for the deposit account; or
- The person engages in matchmaking, as defined in the rule.

Proposed Information Sharing Prong

The FDIC is not retaining the first proposed prong of the "facilitation" definition. The FDIC agrees with commenters that the "direct or indirect sharing of customer information" is overly broad and could have the unintended effect of capturing persons that do not have influence or control over the placement of deposits. The proposed first prong was generally intended to capture activities where the person shares information in an effort to match prospective depositors with particular banks, and that specific activity, as part of the final rule, will now be included in the matchmaking prong of the facilitation definition discussed below.

Legal Control

The FDIC is finalizing the proposed prong relating to legal control over the account as part of the "facilitation" definition. Although one commenter suggested that having legal control of moving customer funds was too broad, many commenters supported this criterion's inclusion

in the "facilitation" definition. The FDIC believes that the activity clearly demonstrates that a third party has meaningful, substantial influence or control over an account and, therefore, is acting as a deposit broker.

Setting Rates, Terms, Conditions

With respect to the proposed third prong, commenters viewed that *providing assistance* with setting rates, terms, or conditions would be over-inclusive and capture consulting or advisory services that assist banks in improving their deposit offerings. As provided in a staff memorandum to the Brokered Deposits NPR comment file,[20] certain activities such as market research, general consulting or advisory services, and advertising by including a link on a website, were not intended to be included in the third prong of the proposed facilitation definition. As such, the FDIC is revising this prong to clarify that it only includes activities where a third party is negotiating or setting rates, terms, or conditions for a particular deposit product (on behalf of a particular depositor or particular banks).[21] By striking the "providing assistance" factor, this revised prong will appropriately capture third parties that influence or control the placement of deposits by negotiating deposit terms between depositors and insured depository institutions.

Providing Matchmaking Services

[20] *See* FDIC Federal Register Citations, Unsafe and Unsound Banking Practices: Brokered Deposits Restrictions – Comments and Staff Disclosures, *available at:* https://www.fdic.gov/regulations/laws/federal/2020/2020-unsafe-unsound-banking-practices-brokered-deposits-3064-ae94.html.
[21] In the final rule, this activity will be included in the second prong of the facilitation definition.

Finally, the FDIC is incorporating concepts from the proposed first prong ("information sharing") and the proposed fourth prong with the new third prong to provide a clear description of the types of activities that were intended to be captured under the facilitation definition.

This prong in the final rule will capture persons that engage in matchmaking. The final rule will define matchmaking as follows:

- A person is engaged in matchmaking if the person proposes deposit allocations at, or between, more than one bank based upon both (a) the particular deposit objectives of a specific depositor or depositor's agent, and (b) the particular deposit objectives of specific banks, except in the case of deposits placed by a depositor's agent with a bank affiliated with the depositor's agent. A proposed deposit allocation is based on the particular objectives of:
  - a depositor or depositor's agent when the person has access to specific financial information of the depositor or depositor's agent and the proposed deposit allocation is based upon such information; and
  - a bank when the person has access to specific information of the deposit-balance objectives of the bank and the proposed deposit allocation is based upon such information.

Specifically, this prong captures certain entities that utilize their relationships with prospective depositors or depositor's agents and banks to propose deposit allocations at particular banks. These activities indicate that the person has influence over the movement of deposits between insured depository institutions. These activities also indicate that the person is not only satisfying the deposit objectives of the depositor or its agent but also of the insured

depository institution. Such a relationship could allow less than well capitalized institutions to utilize a third party to bid for considerable volumes of funding, quickly, which could present heightened risks to the Deposit Insurance Fund. Additionally, such a relationship could increase the likelihood of a third party withdrawing funds from a less than well capitalized institution (or under other circumstances, such as in the event an institution is the subject of an enforcement action), which could present sudden liquidity concerns.

This prong would not include persons that engage in activities that would otherwise satisfy the matchmaking prong if, and to the extent that, these activities are conducted between a bank and an affiliated third party.[22] With respect to this specific function, the FDIC views such services by an intermediary as administrative in nature due to the direct relationship between the person placing the deposits and the bank.[23] However, deposits placed at banks, with the assistance of persons engaging in matchmaking activities, by an affiliated third party that meets the deposit broker definition would be brokered.

This prong will include third parties that engage in matchmaking as part of an unaffiliated deposit sweep program between a depositor, its broker dealer, and various unaffiliated banks. These third parties propose deposit allocations by matching the deposit obligations of either the depositor(s) or the broker dealers with the target deposit balances of various unaffiliated banks. It may be the case that a third party with a primary purpose exception sweeps deposits to an affiliated IDI, and those sweep deposits would not be brokered, while the same third party uses

[22] For ease of reference, the "depositor's agent" in the "matchmaking" definition in 12 CFR 337.6(a)(5)(iii)(C) is referred to here as the "third party".

[23] This view aligns with the FDIC's intent not to disrupt business arrangements that have existed for a number of years in reliance on prior staff guidance related to affiliate sweep arrangements, when the resulting adjustments to business operations would be solely for the purpose of complying with regulatory changes.

an intermediary that would qualify as a deposit broker under this prong in the placement of deposits at unaffiliated IDIs, in which case those deposits would be brokered.[24]

The third prong will not include third parties that provide administrative services as part of a deposit sweep program between a depositor, its broker dealer, and unaffiliated banks. In these cases, the third party may assist in the placement of sweep deposits with unaffiliated banks but does not propose deposit allocations, as described above.

The third prong is defined to capture specific forms of matchmaking that are active in nature; more passive forms of matching depositors and banks, such as those in which traditional listing services often engage, would not be captured.[25]

Unlike the fourth prong of the proposed rule, the final rule will not distinguish between the activities of a person that interfaces directly with a depositor and the activities of a person that interfaces with an intermediary or a depositor's agent. Rather, the facilitation definition, and its three criteria, will apply, generally, to any third party that plays a role in the flow of funds between a prospective depositor and the opening of a deposit account at an insured depository institution.

Anti-Evasion. It may be possible for an entity that meets the matchmaking prong to modify its business arrangements in such a way that evades the terms of the regulation while maintaining effectively the same business relationships. The FDIC has included in the regulation an anti-evasion provision that would allow the FDIC to determine that such attempts to evade the matchmaking prong still meet the matchmaking prong. The purpose of the anti-evasion authority

[24] See section I(C)(2)(b)(ii)(F) for further discussion of the treatment of additional third parties who may qualify as a deposit broker.
[25] See section I(C)(5) for further discussion of listing services.

is not to capture an entity that restructures it business in such a manner that it is no longer engaged in the type of matchmaking captured by the rule, but rather to avoid creating an unintended incentive for entities to modify or restructure businesses solely to evade the regulation. In this regard, the FDIC expects to use this authority sparingly.

To provide an example, in the event that a third party that would otherwise satisfy the criteria of the matchmaking prong sells or licenses software that provides deposit placement or allocation services between depositors or banks in a manner that is intended to evade this prong, and continues to play an ongoing role in providing the matchmaking function, the deposits placed through the assistance of the software may be considered brokered. Conversely, in the event that a third party sells or licenses software that provides deposit placement or allocation services between depositors or banks and does not subsequently play an ongoing role in providing any function related to matchmaking, then the deposits placed would not be considered brokered. As such, whether a third party meets the matchmaking prong will, under the anti-evasion provision, depend in part on whether the third party continues to play an ongoing role in providing functions related to matchmaking.

d. Engaged in the business of placing deposits with insured depository institutions for the purpose of selling interests in those deposits to third parties

i. Overview and Proposal

The third part of the "deposit broker" definition includes a person "engaged in the business of placing deposits with insured depository institutions for the purpose of selling interests in those deposits to third parties." As provided in the proposed rule, 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.

ii. Final Rule Discussion of Brokered CDs

In response to the proposal, a commenter clarified that the current brokered certificate of deposit market operates in a manner different than as described in the notice of proposed rulemaking. Rather than being arrangements in which institutions issue a brokered certificate of deposit in a wholesale amount in the name of a broker dealer, who then sells participations in the wholesale CD, in current financial markets, an insured depository institution issues a master certificate of deposit in the name of the third party that has organized the funding of the certificate of deposit, or in the name of a custodian or a sub-custodian of the third party. The certificate is funded by individual depositors through the third party, with each individual depositor receiving an ownership interest in the certificate that is reflected on the books and records of the third party in a manner to permit pass-through treatment for purposes of deposit insurance for the individual depositors. The FDIC acknowledges that the brokered CD market has evolved, in part, to ensure that its underlying depositors receive pass-through deposit insurance and to allow the beneficial owners of the deposits to trade their accounts in a secondary market maintained by the broker.

Nevertheless, under the final rule, without exception, and as further explained below in the section discussing the primary purpose exception, brokered CDs continue to be classified as brokered. Brokered CDs, which were offered well before Section 29 of the FDI Act was enacted, were specifically intended to be included as part of the statute. Moreover, and as

provided in the ANPR, brokered CDs have caused significant losses to the Deposit Insurance Fund.[26] Regardless of any future innovations and re-structuring in the brokered CD market, the FDIC intends that third parties that assist in the placement of brokered CDs, or any similar deposit placement arrangement with a similar purpose, will continue to be considered deposit brokers under this part of the deposit broker definition.

This final rule revises the proposed definition of a brokered CD in Part 303 to more accurately reflect the current marketplace.

2. Exceptions to the "Deposit Broker" Definition

Section 29 provides nine statutory exceptions to the definition of deposit broker and, as described earlier, the FDIC established one regulatory exception to the definition. In the proposal, the FDIC proposed amending two exceptions – (1) the exception for an insured depository institution, 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"). In response to comments, as described below, the final rule makes revisions to both exceptions.

a. Bank Operating Subsidiaries and the IDI Exception

Under the IDI Exception, an IDI is not considered to be a deposit broker when it places (or its employees place) funds at the bank.[27] As provided in the proposed rule, the IDI Exception 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

[26] 84 FR 2366, 2370 (February 6, 2019).
[27] 12 U.S.C. 1831f((g)(2)(A)-(B).

IDI places deposits exclusively with the parent. However, the FDIC proposed changes to expand the IDI Exception to permit wholly owned subsidiaries that meet certain criteria to be eligible for the exception. In doing this, the FDIC recognized that a wholly owned operating subsidiary that meets certain criteria can be considered similar to a division of an IDI for certain purposes.

i. Comments received in response to the IDI exception

Of those who commented on this aspect of the proposed rule, a majority were in favor of the expansion of the exception to include wholly owned subsidiaries. Many also argued that the exception should be further broadened, so as to allow affiliates, in addition to wholly owned subsidiaries, to also fit within the exception (although one commenter expressly stated that it should not be further expanded in this way). Those who argued for further expansion suggested that there is little practical difference between a wholly owned subsidiary and an affiliate and that deposits placed through an affiliate were not "hot" money that should be considered to be a brokered deposit. Some commenters also asked the FDIC to clarify how "dual-hatted" or "dual-employees" would be treated as part of the new regulation.

ii. Final rule discussion for the IDI exception

The final rule is not adopting the proposed changes to the IDI exception. Under this final rule, the deposit broker definition does not include third parties that have an exclusive deposit placement arrangement with one insured depository institution. As a result, the proposed expansion of the IDI exception to wholly owned subsidiaries is no longer necessary. This is because, under the proposal, in order to meet the IDI exception, a wholly owned subsidiary would have to place deposits *exclusively* with the parent IDI among other conditions. As such, wholly owned subsidiaries that would have met the proposed IDI exception will not meet the

"deposit broker" definition under this final rule because they have an exclusive deposit placement arrangement with one bank, their parent bank.

In response to comments regarding the status of "dual-hatted" or "dual" employees under the final rule, the FDIC notes that the statutory "employee" exception applies solely to an "employee" who satisfies the definition of an employee provided by the statute. The statute defines an "employee" as any employee: "(i) who is employed exclusively by the insured depository institution; (ii) whose compensation is primarily in the form of a salary; (iii) who does not share such employee's compensation with a deposit broker; and (iv) whose office space or place of business is used exclusively for the benefit of the insured depository institution, which employs such individual."[28] This exception does not apply to a contractor or dual employee because they are not employed exclusively by insured depository institutions. The exception would, however, apply to "dual-hatted" employees that are employed exclusively by the bank so long as the employees meet each of the other statutory elements of the "employee" definition.

b. Primary Purpose Exception

i. Overview of Proposal and Comments

Section 29 provides that the primary purpose exception applies to "an agent or nominee whose primary purpose is not the placement of funds with depository institutions." In the Brokered Deposits NPR, the FDIC proposed a new interpretation for the primary purpose exception based on the relationship between the agent or nominee and its customers. Specifically, the primary purpose exception would apply when the primary purpose of the

[28] 12 U.S.C. 1831(g)(4).

agent's or nominee's business relationship with its customers is not the placement of funds with depository institutions.

Along with the new interpretation, the FDIC proposed a new framework for evaluating business relationships that may meet the primary purpose exception and identified two types of relationships that would be deemed to qualify for the exception. Under the proposal, the FDIC would evaluate whether a particular business relationship meets the primary purpose exception through an application process, available to both IDIs and third parties. The proposed application process was intended to allow the FDIC to ensure that the applicant met the relevant criteria for the exception and to promote transparency and consistency for applicants. The proposal also established an ongoing reporting process for approved applicants.

General Comments. In response to the proposed framework, many commenters suggested that the FDIC (1) establish more bright-line tests, or business arrangements, that qualify for the primary purpose exception, and (2) eliminate the application process, or revise it to create a more streamlined process. Commenters generally argued that if the FDIC identified more bright-line tests, or business relationships, with respect to the primary purpose exception then there would be little, if any, need for an application process. Two commenters were critical of the proposed changes to the definition of the primary purpose exception. In particular, one commenter stated the proposed changes would invite evasion and create opportunities for nonbanks instead of protecting the DIF. The commenter believed that the primary purpose exception should be based on the primary purpose of deposits, not the purpose of the agent and its customer. Another commenter stated that the proposal reflected rulemaking centered on non-bank third parties, whereas the FDIC's mandate and responsibilities direct the agency to focus on IDIs that it insures and supervises.

One commenter representing large financial institutions suggested that bright-line criteria will be more efficient because banks can evaluate their individual circumstances for a primary purpose exception and not have to wait for the FDIC's approval. The commenter stated that the banks would make good faith determinations that would be subject to review in the examination process. The commenter, and several others, raised concerns that, unless the FDIC eliminates or revises the proposed application process, the FDIC would be inundated with applications from banks and third parties seeking the primary purpose exception.

Primary purpose exception based on 25 percent test. In addition to the general comments about the overall framework for evaluating primary purpose exceptions, the FDIC also received numerous comments on the proposed primary purpose exception for entities placing less than 25 percent of customer assets under management with insured depository institutions (the "25 percent" test or business relationship). Most of those comments sought additional clarity as to the definitions of "business line" and "customer assets under management." One commenter noted that the phrase "customer assets under management" is a term of art in securities law and limited in use for broker dealers or investment advisors, which the commenter suggested could lead to confusion and limit the scope of the exception. At least one commenter suggested that the threshold be raised to 50 percent, while another suggested that the 25 percent threshold was too high and would allow significant amounts of deposits to flow to IDIs without restricting business models that create risk.

Primary purpose exception based on enabling transactions. In the Brokered Deposits NPR, the FDIC proposed a second business relationship that would meet the proposed primary purpose exception for parties that place funds at depository institutions for the purpose of enabling transactions (the "the enabling transactions" test or business relationship). The FDIC

received comments suggesting that the FDIC provide clarity regarding the terms "enabling transactions" and "transaction account" to further clarify the types of deposit arrangements that would meet the exception. Other commenters indicated that the existence of some fees, remuneration, or interest paid, should not prevent an entity from being eligible for the primary purpose exception. One commenter noted that receiving a fee for wire transfer processing or other related transaction services does not necessarily transform a third party's primary intent from processing ordinary business transactions into deposit placement activity.[29]

Application process. For both the 25 percent and the enabling transactions business relationships, the FDIC proposed an application process through which applicants would demonstrate that they meet the criteria for the particular exception and the FDIC, on an expedited basis, would review and approve the application. Commenters who addressed this process were critical, suggesting that, at least for the two business relationships that meet the criteria set forth in the proposal, at most a notice requirement should exist. Commenters raised concerns about FDIC's ability to evaluate so many applications in a timely manner and suggested that the FDIC could evaluate the business relationships as part of an examination rather than requiring approval in advance.

Other business relationships. As noted above, the FDIC also proposed that parties that did not qualify under either the "25 percent" business relationship or the "enabling transactions" business relationship could apply for a primary purpose exception. A number of commenters raised concerns about the application process, in some cases arguing it should be eliminated and in most cases stating that it would be too cumbersome and time consuming both for the applicants and for the FDIC to evaluate the applications in a timely manner. Commenters

[29] Under the proposal, the FDIC only would have considered fees, interest, or other remuneration paid to the underlying *depositor*.

suggested that the FDIC instead should establish additional "bright-line" categories of business arrangements that are eligible for the primary purpose exception, which would largely obviate the need for an application process aside from entities that did not fit within one of the predetermined business relationships. Specifically, commenters noted that some business arrangements have been provided the primary purpose exception in the past via staff advisory opinions, and that such arrangements should also be included in the list of arrangements that are deemed to meet the primary purpose exception.

ii. Primary Purpose Exception in the Final Rule

As described below, and in response to the comments, the final rule retains the proposal's interpretation of the primary purpose exception and revises the proposed framework for the primary purpose exception in several ways. Like in the proposal, the primary purpose exception, in the final rule, will apply when, with respect to a particular business line, the primary purpose of the agent's or nominee's business relationship with its customers is not the placement of funds with depository institutions. Whether an agent or nominee qualifies for the primary purpose exception will be based on an analysis of the agent's or nominee's relationship with those customers. However, the FDIC agrees with commenters that the proposed application process for business relationships that the FDIC designates as meeting the primary purpose exception is not necessary.

In the final rule, the FDIC (1) identifies several, specific business relationships as meeting the primary purpose exception, described as "designated exceptions," and (2) allows agents or nominees that do not meet one of these designated exceptions to apply for a primary purpose exception. Business relationships that qualify for a designated exception will not be required to go through the application process. For two of the designated exceptions, the FDIC

will require a notice, while for the other designated exceptions, no notice, application, or reporting will be required. Under the final rule, entities that do not meet one of the designated exception may apply for a primary purpose exception. The final rule will also authorize the FDIC to identify additional relationships as designated exceptions to the primary purpose exception (and therefore will not require an application).

The FDIC also notes that certain agents or nominees may only place deposits at one IDI, in which case the agent or nominee would not be a deposit broker, regardless of whether the agent or nominee satisfies the primary purpose exception. However, the FDIC notes that if an agent or nominee places deposits at one IDI as part of one business line,[30] such as part of a sweep program, and places deposits at one or more other IDIs as part of one or more other business lines, such as issuing brokered CDs, that agent or nominee would still qualify as a deposit broker unless it satisfied the primary purpose exception, with respect to a particular business line, or one of the other nine exceptions to the definition of "deposit broker."

A. Designated Exceptions

In the final rule, the FDIC recognizes a number of business relationships, known as "designated exceptions," described below, as meeting the primary purpose exception. Two of these relationships are the relationships described in the proposal as business relationships deemed to meet the primary purpose exception – the "25 percent" business relationship and the "enabling transactions" business relationship. Unlike in the proposal, these two relationships will not be required to go through the application process, and instead will only require a notice. The final rule also adds a number of designated exceptions that will neither require a notice nor

[30] Additional discussion regarding the concept of a "business line" is provided in section I(C)(2)(b)(ii)(E).

an application. The additional designated exceptions include business relationships that have previously been viewed by staff at the FDIC as meeting the primary purpose exception, and were evaluated as part of this rulemaking process to meet the primary purpose exception under the interpretation of the exception adopted in this final rule, as well as certain business arrangements identified by commenters as meeting the primary purpose exception. The following business relationships are identified as designated exceptions under the final rule: business relationships in which, with respect to a particular business line:[31]

(1) less than 25 percent of the total assets that the agent or nominee has under administration for its customers is placed at depository institutions;

(2) 100 percent of depositors' funds that the agent or nominee places, or assists in placing, at depository institutions are placed into transactional accounts that do not pay any fees, interest, or other remuneration to the depositor;

(3) a property management firm places, or assists in placing, customer funds into deposit accounts for the primary purpose of providing property management services;

(4) the agent or nominee places, or assists in placing, customer funds into deposit accounts for the primary purpose of providing cross-border clearing services to its customers;

(5) the agent or nominee places, or assists in placing, customer funds into deposit accounts for the primary purpose of providing mortgage servicing;

[31] The FDIC recognizes that some of these arrangements may be between an agent or nominee and one insured depository institution. Under this final rule, if the agent or nominee has an exclusive deposit placement arrangement with one IDI, and does not place or facilitate the placement of deposits at any other IDI, then it will not meet the "deposit broker" definition.

(6) a title company places, or assists in placing, customer funds into deposit accounts for the primary purpose of facilitating real estate transactions;

(7) a qualified intermediary places, or assists in placing, customer funds into deposit accounts for the primary purpose of facilitating exchanges of properties under section 1031 of the Internal Revenue Code;

(8) a broker dealer or futures commission merchant places, or assists in placing, customer funds into deposit accounts in compliance with 17 CFR 240.15c3-3(e) or 17 CFR 1.20(a);

(9) the agent or nominee places, or assists in placing, customer funds into deposit accounts for the primary purpose of posting collateral for customers to secure credit-card loans;

(10) the agent or nominee places, or assists in placing, customer funds into deposit accounts for the primary purpose of paying for or reimbursing qualified medical expenses under section 223 of the Internal Revenue Code;

(11) the agent or nominee places, or assists in placing, customer funds into deposit accounts for the primary purpose of investing in qualified tuition programs under section 529 of the Internal Revenue Code;

(12) the agent or nominee places, or assists in placing, customer funds into deposit accounts to enable participation in the following tax-advantaged programs: individual retirement accounts under section 408(a) of the Internal Revenue Code, Simple individual retirement accounts under section 408(p) of the Internal Revenue Code, and Roth individual retirement accounts under section 408A of the Internal Revenue Code;

(13) a Federal, State, or local agency places, or assists in placing, customer funds into deposit accounts to deliver funds to the beneficiaries of government programs; and

(14) the agent or nominee places, or assists in placing, customer funds into deposit accounts pursuant to such other relationships as the FDIC specifically identifies as a designated business relationship that meets the primary purpose exception.

1. Deposit Placements of Less than 25 Percent of Customer Assets under Management by the Third Party

Under the proposal, the FDIC provided 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 at a depository institution, 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.

The FDIC is finalizing the proposed "25 percent" test generally as proposed but, in response to comments, is revising the phrase "assets under management" to "assets under administration." The FDIC is also providing additional clarity regarding the concept of a "business line" in section I(C)(2)(b)(ii)(E).

The FDIC is also reiterating for clarification that if more than 25 percent of the total customer assets that an agent or nominee has under administration is placed at depository institutions, the agent or nominee may still apply for a primary purpose exception through the application process described in section I(C)(3)(c).

Customer assets under management. In response to comments indicating that the phrase "customer assets under management" is generally limited to certain broker dealer and investment

advisor business, the FDIC is revising the term to "customer assets under administration." The revised phrase more accurately reflects the FDIC's intention that this test cover both customer assets managed by the agent or nominee and those customer assets for which the agent or nominee provides certain other services but may not exercise deposit placement or investment discretion.

As part of the final rule, in determining the amount of customer assets under administration by an agent or nominee, for a particular business line, the agent or nominee must measure the total market value of all the financial assets (including cash balances) that the agent or nominee administers on behalf of its customers that participate in a particular business line.

As a result, under the final rule, an agent or nominee will meet the designated exception if less than 25 percent of the total assets that the agent or nominee has under administration for its customers, in a particular business line, is placed at depository institutions.

2. Enabling Transactions

Proposal. As part of the Brokered Deposits NPR, the FDIC also proposed that the primary purpose of an agent's or nominee's business relationship with its customers would 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 transactions.

Under the proposed rule, if 100 percent of an agent's or nominee's customer funds that are placed at depository institutions are placed into transaction accounts, and no fees, interest, or other remuneration is provided to the depositor, then the agent or nominee would meet the primary purpose exception of enabling transactions.

However, the FDIC also proposed that 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), the agent or nominee would still be eligible for the primary purpose exception, but the FDIC would more closely scrutinize the agent's or nominee's business to determine whether the primary purpose is truly to enable payments. The FDIC identified factors to be considered in evaluating such a scenario, including the number of transactions in customer accounts, and the interest, fees, or other remuneration provided, in determining the applicability of the primary purpose exception.

Under the final rule, if an agent or nominee places 100 percent of its customer funds that have been placed at depository institutions, with respect to a particular business line, into transaction accounts, and no fees, interest, or other remuneration is provided to the depositor, the agent or nominee will meet the designated exception of enabling transactions. Entities that wish to avail themselves of the designated exception for "enabling transactions" would not be subject to the application process, as under the proposal, and would instead be required to file a notice, as detailed in section I(C)(3).

Under the final rule, agents or nominees that place customer deposits at depository institutions in transactional accounts in which the customer earns some amount of interest, fees, or other remuneration, will continue to be subject to an application process. However, in response to comments that asked for more clarity on how these arrangements can meet the primary purpose exception, the following criteria will be considered as part of the application process:

- The amount of interest, fees, or other remuneration;
- The amount of transactions that customers make, on average, on a month-to-month basis;
- The marketing materials provided by the agent or nominee indicate that funds placed into insured depository institutions are to enable transactions for depositors; and

- If any customer funds are placed in deposit accounts that are not transaction accounts, the percentage of customer funds placed in deposit accounts that are not transaction accounts.

To the extent an agent or nominee that places all customer deposits at depository institutions in transactional accounts can establish via the application process that it markets and offers its deposit placement service for the primary purpose of enabling transactions and that its customers (1) earn a nominal amount of interest, fees, or other remuneration on its deposits, based on the interest rate environment at the time, or (2) on average, make more than six transactions a month, then the FDIC will determine that the agent or nominee meets the primary purpose exception. The FDIC is providing this guidance in the preamble to provide clarity to potential applicants and to streamline the approval of applications from agents or nominees with a primary purpose of enabling transactions. The FDIC is not establishing a designated exception for such arrangements due to the lack of bright line standards for evaluating marketing materials and for defining "nominal" interest, fees, or other remuneration in different interest rate environments.[32] The FDIC is less likely to approve an application in which customers receive more than a nominal amount of interest, fees, or other remuneration on their deposits and, on average, make fewer than six transactions per month.

If an agent or nominee that applies for a primary purpose exception places a small percentage of deposits in accounts that are not transaction accounts, the FDIC may still consider approving the application, depending on the facts and circumstances, including an analysis of the criteria discussed above, but will more closely scrutinize whether the primary purpose is enabling transactions.

[32] Under the final rule, the FDIC retains authority to determine whether a rate of interest paid is nominal.

As noted in the Brokered Deposits NPR, and in response to commenters asking the FDIC to expand the proposed exception, the proposed exception was not intended to apply to all third parties that place deposits into accounts that have transactional features and is not intended 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 proposed exception was intended to and will, as part of this final rule, apply only to third parties whose business purpose is to place funds at depository institutions to enable transactions or make payments.

B. Additional Designated Exceptions

As provided in the proposal, the FDIC indicated that it would review existing advisory opinions to determine those that should be codified in the final rule and those that were outdated and should be rescinded.[33] A number of the staff advisory opinions related to the primary purpose exception, and some of these opinions interpreted the primary purpose exception as applying to certain third parties engaged in certain business arrangements. While these opinions were based upon an interpretation of the primary purpose exception that is different than the interpretation provided in this final rule, the outcome of whether the arrangements meet the primary purpose exception under the final rule interpretation would not necessarily change if evaluated under the revised interpretation. In an effort to streamline the process for determining whether an agent or nominee meets the primary purpose exception, the FDIC agrees with commenters that it is more efficient to include some of these arrangements as part of the bright-line test for the exception. In this way, entities that have relied upon previous staff opinions for the primary purpose exception will be able to continue to rely upon the exception.

[33] A full discussion of that review, and the comments received on previous advisory opinions, is provided below in section I(C)(5).

Moreover, and in response to comments, the FDIC is also identifying other business relationships that the FDIC believes meet the primary purpose exception as designated exceptions. Agents or nominees that qualify for a designated exception listed below do not have to file an application or notice.

Property Management Services

Certain property management firms assist clients, such as homeowner's associations ("HOAs"), in managing their properties. These property management firms might place deposits at insured depository institutions because they need to deposit rent checks or security deposits on behalf of their client and may use some of those funds to pay for maintenance or repairs needed on the client's property. Under the final rule, a property management firm that places deposits at insured depository institutions to provide property management services will be deemed to meet the primary purpose and qualify for a designated exception. The primary purpose of the relationship between a property management service and its customer is to manage a property, rather than to place funds in deposits accounts at IDIs.[34]

The FDIC also notes that companies that assist property management firms or their clients in placing funds at insured depository institutions to maximize yield or deposit insurance may still qualify as deposit brokers. These companies that either place or assist in placing funds would not be eligible for the primary purpose exception under this particular business relationship because the primary purpose of their deposit placement activity, on behalf of their client (the property management firm), is not to provide property management functions.

Cross-border Clearing Services

[34] FDIC Staff Advisory Opinion 17-02 (June 19, 2017).

Certain insured depository institutions provide cross-border clearing services for customers to facilitate fund or payment transfers where the payee and the transaction recipient are located in separate countries. Specifically, in these arrangements, a nonbank entity or a bank that does not have cross-border clearing capabilities places, or assists in placing, its customer funds into bank accounts at an IDI (the "clearing IDI") that acts as an intermediary to clear and settle the transfer of the customer's funds into the transaction recipient's bank account. In providing cross-border clearing functions, the customer's funds are placed in deposit accounts at the clearing IDI for a very limited period of time and are typically disbursed to the recipient immediately (or almost immediately).

Under these circumstances, the third party's primary purpose in placing, or facilitating the placement of, deposits at the clearing IDI is to facilitate the clearing of payments and will be deemed to meet the primary purpose exception and qualify for a designated exception. This outcome is consistent with previous staff advisory opinions related to clearing services provided by insured depository institutions.[35]

The FDIC recognizes that IDIs provide a variety of clearing services that may be outside of the scope of the specific cross-border clearing services designated exception described above. At this point, the FDIC will evaluate whether these other clearing services provided to customers will meet the primary purpose exception as part of the application process. As described in section I(C)(3)(h), if the FDIC determines that other clearing services meet the primary purpose exception, then it will also consider whether additional particular clearing services should be identified as designated exceptions.

Real Estate Related Transactions

[35] *See* FDIC Staff Advisory Opinion 16-01 (May 19, 2016).

Mortgage servicing. Mortgage servicing rights are often sold to mortgage servicers that are responsible for the day-to-day management of a loan account, including collecting a borrower's monthly payments of principal and interest and disbursing these funds to stakeholders pursuant to the terms of servicing agreements. Mortgage service providers also collect from borrower's prepayments of each borrower's respective property tax and property insurance premiums and hold such funds in escrow accounts until such payments are due, at which time they use the escrowed funds to make payments. As part of managing these services, mortgage servicers place funds into omnibus deposit accounts at insured depository institutions. The primary purpose of the mortgage servicer's relationship with its customers is providing the services listed above related to the loan account, and not the placement of deposits at IDIs. Accordingly, under this final rule, mortgage servicers that place deposits at insured depository institutions to fulfill their obligations under servicing agreements meet the primary purpose exception and qualify for a designated exception. This outcome is consistent with previous staff advisory opinions related to mortgage servicers.[36]

Residential/Commercial Escrow Services. Prior to closing a real estate transaction, the parties involved (e.g., the seller and buyer) often times have the funds necessary to complete the pending real estate transaction held by a title insurance company in a deposit account at an insured depository institution. The purpose of having a third party title company hold funds in an escrow account is to protect the interests of all parties involved by ensuring that no funds or property will be transferred until every escrow term and condition has been met. The primary purpose of the third party title company's relationship with its customers in such an arrangement is typically providing title services or facilitating the closure of the real estate transaction, and in

[36] *See generally*, FDIC Staff Advisory Opinion 92-78 (November 10, 1992); *see also*, FDIC Staff Advisory Opinion 17-02 (June 19, 2017).

any case not the placement of deposits at IDIs. Accordingly, under the final rule, title companies that place deposits at insured depository institutions to facilitate a real estate transaction are deemed to meet the primary purpose exception and qualify for a designated exception. This outcome is consistent with previous staff advisory opinions related to title companies.[37]

1031 Like-Kind Exchanges. Some deposits are placed at banks by financial intermediaries known as "qualified intermediaries" or "QIs." Under section 1031 of the Internal Revenue Code (26 U.S.C. § 1031), the role of a QI is to facilitate the exchange of "like kind" properties on behalf of clients known as "exchangers." Pursuant to a written agreement, the QI acquires property from the exchanger and then arranges for its resale. With the proceeds, the QI acquires another property and then transfers it to the exchanger. If the transaction is handled properly, the exchanger receives favorable tax treatment.

Before the QI uses the proceeds of the first property to purchase the second property, the funds are held by the QI in a deposit account at a bank. In this case, the primary purpose of the QI's relationship with its clients is to facilitate the exchange of property, not to place deposits at IDIs. Accordingly, under the final rule, QIs that place deposits into depository institutions to facilitate the exchange of two properties under section 1031 of the Internal Revenue Code are deemed to meet the primary purpose exception and qualify for a designated exception. This outcome is consistent with previous staff advisory opinions related to certain QIs.[38]

Deposits Related to Satisfaction of Certain Regulations

Broker Dealer Funds in a Special Reserve Account for the Benefit of Customers. A broker dealer registered with the United States Securities and Exchange Commission (SEC) is

[37] *See* FDIC Staff Advisory Opinion 17-02 (June 19, 2017).
[38] *See id.*

required to establish an account at a bank titled "Special Reserve Account for the Benefit of Customers" and to keep in the account cash or qualified securities (Special Reserve Account).[39]

The Special Reserve Account protects a broker dealer's customers in the event the broker dealer is liquidated, in which case the funds and qualified securities in the Special Reserve Account, in addition to funds collected by the liquidating agent from customers of the firm that have debits, are used to satisfy customer claims on a pro rata basis before being available for the firm's general creditors. While the broker dealer is operating as a going concern, it is prohibited from using the funds or qualified securities in the Special Reserve Account as security for a loan to the broker dealer by the bank.[40]

The primary purpose of the broker dealer's business relationship with its customers is to facilitate the buying and selling of securities on behalf of customers. As part of that relationship a broker dealer is required to establish a Special Reserve Account is to provide customer protection in the event of a broker dealer liquidation. Thus, to the extent that the balance in a Special Reserve Account is owned by customers at the time funds are deposited into it, such arrangement meets the primary purpose exception and qualifies for a designated exception.[41]

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[39] 17 CFR 240.15c3-3(e), 240.15c3-3a. The amount required to be held in the Special Reserve Account is determined pursuant to an SEC formula where, for each customer, the broker dealer adds up free credit balances and other credits in the account, and then reduces that number by certain debits. The broker dealer then aggregates the calculation for all customers and this aggregate represents the amount that a broker dealer must keep, in cash or qualified securities, in the Special Reserve Account at a bank. *Id.*

"Free credit balances" are defined as liabilities of a broker or dealer to customers which are subject to immediate cash payment to customers on demand, whether resulting from sales of securities, dividends, interest, deposits or otherwise, and can include funds carried in a certain securities account, including variation margin or initial margin, marks to market, and proceeds resulting from margin paid or released in connection with closing out, settling or exercising futures contracts and options thereon. 17 CFR 240.15c3-3(a)(8).

[40] 17 CFR 240.15c3-3(e).

[41] *See*, FDIC Staff Advisory Opinion 94-39 (August 17, 1994). To the extent that the balance of a Special Reserve Account is owned by the broker dealer and only becomes owned by its customers when a liquidating agent of a failed broker dealer is appointed and distributes the funds to all customers on a pro rata basis, then the broker dealer would not be a third party placing or facilitating the placement of funds of others, and would be outside the scope of the deposit broker definition. The FDIC is not addressing the ownership of Special Reserve Accounts in this final rule.

Futures Commission Merchant's Funds in a Segregated Customer Account. Regulations of the Commodity Futures Trading Commission (CFTC) provide protections for futures customer funds under a regulatory system similar to the SEC's requirements related to the Special Reserve Account. Under the CFTC's regulations, a futures commission merchant must maintain in a separate account at a bank or trust company money or permitted investments in an amount at least sufficient in the aggregate to cover its total obligations to all futures customers as computed under a formula established by the CFTC (Segregated Customer Account).[42]

The Segregated Customer Account protects a futures commission merchant's customers in the event the futures commission merchant is liquidated, in which case the Account balance and permitted investments in the Segregated Customer Account, in addition to funds collected by the liquidating agent from customers of the firm that have debits, are used to satisfy customer claims on a pro rata basis before being available for the firm's general creditors.

The primary purpose of a futures commission merchant's business relationship with its customers is to facilitate the buying and selling of futures and other investment products on behalf of customers. As part of that relationship, the futures commission merchant is required to establish a Segregated Customer Account to provide customer protection in the event of a futures commission merchant's liquidation. Thus, to the extent that the balance of a Segregated Customer Account is owned by the firm's customers at the time funds are deposited into it, such arrangement meets the primary purpose exception and qualify for a designated exception.[43]

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[42] 17 CFR 1.20(a). The formula set in CFTC regulations calls for the amount to be maintained in the segregated customer account the market value of futures customer funds subject to certain adjustments. 17 CFR 1.20(i). "Futures customer funds" include all money, securities, and property received by a futures commission merchant from, for, or on behalf of, futures customers to margin, guarantee, or secure contracts for future delivery on or subject to the rules of a contract market or derivatives clearing organization, as the case may be, and all money accruing to such futures customers as the result of such contracts." 17 CFR 1.3.

[43] *See*, FDIC Staff Advisory Opinion 17-02 (June 19, 2017).

The FDIC is aware of other deposit arrangements in which entities place deposits as required under federal or state law. While the FDIC does not have sufficient knowledge of such arrangements to grant designated exceptions for such arrangements in this final rule, the FDIC expects it would approve an application for a PPE under such circumstances when the primary purpose is not the placement of deposits. The FDIC will consider identifying specific such arrangements as designated exceptions in the future if warranted.

Deposits Placed as Required Collateral for Credit-Card Loans

Some deposits are placed at insured depository institutions by third parties that offer secured credit-card loans to their customers. The loans are secured by deposits belonging to the customers and held at insured depository institutions as required collateral that is typically capped to the amount of the credit line granted to the customer by the third party. Under this final rule, the primary purpose of the third party's relationship with its customers is to provide consumers access to credit card loans and not to place deposits with IDIs. Accordingly, under this final rule, third parties that place customer funds into depository institutions as collateral for their customers to secure credit card loans will meet the primary purpose exception and qualify for a designated exception. This outcome is consistent with previous staff advisory opinions.[44]

Deposits Placed to Pay for or to Reimburse Qualified Medical Expenses under Section 223 of the Internal Revenue Code.

Some deposits are placed with IDIs on behalf of customers participating in health savings accounts (HSAs). Individuals that participate in an HSA can use those funds to pay for or reimburse qualified medical expenses with certain tax benefits.[45] Individuals may place funds directly with IDIs into HSAs, or, their funds may be placed into HSAs through employers that

[44] *See* FDIC Staff Advisory Opinion 94-13 (March 11, 1994).
[45] 26 USC 223.

utilize third party administrators that manage HSA programs. As part of those management services, the third party administrator places, or facilitates the placement of, deposits at IDIs directly from employer payroll accounts. Funds in a designated HSA are intended to be used by the depositor for payment of qualified medical expenses. The primary purpose of the third party administrator's relationship with its customers is to assist in placing customer funds into HSAs to facilitate the payment for or reimbursement of qualified medical expenses. Accordingly, under this final rule, entities that place, or facilitate the placement of, customer funds into HSAs pursuant to section 223 of the Internal Revenue code meet the primary purpose exception and qualify for a designated exception.

The FDIC is aware that not all individuals with funds in an HSA use those funds only for qualified medical expenses. Nonetheless, the FDIC is persuaded that the primary purpose of HSA fund administrators is to enable the payment of qualified medical expenses. However, the FDIC will continue to monitor the evolution and use of HSA accounts over time. If at some point in the future, the primary purpose of HSA administrators has evolved to something other than enabling transactions related to qualified medical expenses, the FDIC may reevaluate whether this designated exception is still warranted. Any changes would be made through notice and comment rulemaking.

Deposits Placed for Qualified Tuition Programs Under Section 529 of the Internal Revenue Code.

Some deposits are placed at IDIs by states, state agencies, or educational institutions as part of qualified tuition plans (or "529 plans"). A 529 plan is a tax-advantaged savings plan designed to encourage saving for future education costs.[46] The individual contributions for a 529 plan may be invested in a variety of financial products, including deposit products. The primary

[46] 26 USC 529.

purpose of the state, state agency, or educational institution's relationship with its investors is to provide a tax-advantaged savings plan designed to encourage saving for future education costs and not the placement of deposits. Accordingly, under this final rule, states, state agencies, or educational institutions that place investor funds into depository institutions pursuant to section 529 of the Internal Revenue Code will meet the primary purpose exception and qualify for a designated exception.

Deposits Placed in a Retirement Account Not Part of an Employee Benefit Plan

Section 29 contains an express exception from the deposit broker definition for trustees of a pension plan or other employee benefits plan and for plan administrators and investment advisors of such plans.[47] Section 29 also provides an express exception for a trustee or custodian of a pension or profitsharing plan qualified under section 401(d) or 403(a) of the Internal Revenue Code.[48] A commenter requested that the primary purpose exception apply with respect to individual retirement accounts.

Congress has provided similar tax incentivized treatment for other retirement account arrangements that do not meet the definition of Employee Benefit Plan or the pension and profitsharing plans referenced in section 29. Such arrangements include a traditional IRA, Simple IRA, and Roth IRAs. The primary purpose of an entity who places deposits in association with such plans is to enable participation in the retirement program and not place deposits at IDIs. Accordingly, the FDIC is establishing a designated exception for such plans.[49]

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[47] 12 U.S.C. 1831f(g)(2)(D) and (E). Because the exceptions for trustees, plan administrators, and investment advisers for pension plans and other employee benefit plans are provided in separate statutory exception and are not related to the primary placement exception, no notice or application requirement would apply.

[48] 12 U.S.C. 1831f(g)(2)(H).

[49] This treatment for IRAs and other retirement plans that are not part of an employee benefit plan is consistent with how the FDIC viewed such accounts in a 1984 final rule, along with the Federal Home Loan Bank Board, when it adopted the definition of "deposit broker" upon which the current statutory definition is based.

Deposits Placed by Agencies to Disburse Government Benefits

Federal, state or local agencies ("Agencies") sometimes use debit or prepaid cards to deliver funds to the beneficiaries of government programs. In some cases, such programs are structured so that each beneficiary will own a separate deposit account at particular insured depository institutions (with the account being accessible by the beneficiary through the use of a debit card). Other programs may be structured so that multiple beneficiaries will own a commingled deposit account with "per beneficiary" or "pass-through" deposit insurance coverage. In these scenarios, the Agency is involved in choosing IDIs or opening deposit accounts to assist in the disbursement of funds to beneficiaries, as mandated by law. These accounts are also limited to the placement of funds for a designated government benefit program and may not be commingled with the beneficiary's other funds outside of the government benefit program. The primary purpose of the Agency's relationship with beneficiaries is to discharge its legal obligation by disbursing funds as part of a government program. Accordingly, under this final rule, Agencies that place funds for beneficiaries of government programs will meet the primary purpose exception and qualify for a designated exception.

C. Other Business Relationships

Under the final rule, agents or nominees that meet the "deposit broker" definition, but do not qualify for a designated exception, may submit an application to the FDIC. The FDIC will review whether the applicant sufficiently demonstrates that the primary purpose of the agent or nominee is something other than the placement, or facilitating the placement, of funds at insured depository institutions. As noted above, in conducting this review, the FDIC will specifically

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The insurance coverage currently available to deposits held in connection with pension funds and other employee benefit plans will not be affected by the rule unless such deposits are placed by or through a deposit broker. ***In addition, trustees and custodians of IRA and Keogh accounts will not be deemed to be deposit brokers***. 49 FR 13003 at 13009 (April 4, 1984). (emphasis added)

look at the primary purpose of the business relationship between the agent or nominee and its customers, with respect to a particular business line. For example, offering loans or a range of lending products, could be described in the application as the primary purpose of a business relationship, if lending is a more significant portion of a particular business line than placing, or facilitating the placement of, deposits is. As part of its review, the FDIC will, as proposed, consider the following factors: (1) the revenue structure for the agent or nominee; (2) 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; and (3) the fees, and type of fees, received by an agent or nominee for any deposit placement service it offers. A detailed discussion of the specific content requirements and timing for the application process is provided in section I(C)(3)(d) of this notice.

The FDIC expects to make publicly available on the FDIC's website (1) redacted summaries of certain approved applications, as soon as practicable, and (2) a list of additional designated exceptions, to the extent applicable, that will describe additional business arrangements not described in this rulemaking that the FDIC in the future determines meet the primary purpose exception without requiring an application. Redacted summaries available on the FDIC's website will typically describe business relationships not discussed in this final rule that the FDIC has determined to meet the primary purpose exception and may be cited as support in applications for the primary purpose exception in certain circumstances. Designated exceptions identified following this rulemaking may be relied upon, without an application, by any agent or nominee that meets the published criteria. The FDIC would also note on the

website whether a notice and/or any ongoing reporting will be required with respect to a new designated exception.

The FDIC intends for the application process to promote transparency and consistency for entities seeking to use the primary purpose exception for business relationships that do not qualify for a designated exception. In addition to transparency and consistency for the public, the application process is intended to enhance FDIC's ability to protect the Deposit Insurance Fund and promote safety and soundness, particularly with respect to new or novel business arrangements.

D. Business Relationships Ineligible for the Primary Purpose Exception

1. Deposit Placements of Brokered CDs

In the Brokered Deposits NPR, the FDIC stated that it 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. Under the proposal, 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. Thus, the primary purpose for that particular business line would always be the placement of deposits at depository institutions, even if 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.

The FDIC is finalizing this aspect of the proposed rule as proposed. Accordingly, consistent with the intent of Section 29 (and Part 337 of the FDIC's regulations), brokered CDs, as has been the case since 1989, will be considered brokered. Deposits related to brokered CDs

will not be included for purposes of determining whether a person's other business lines meet the primary purpose exception.

2. Deposit Placements for Purposes of Encouraging Savings

In the Brokered Deposits NPR, the FDIC proposed that 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 expressed concern that these types of services could evade the purposes of Section 29.

The FDIC is finalizing this aspect of the proposed rule as proposed. It is the FDIC's view that there is no meaningful distinction between a primary purpose of "encouraging savings," "maximizing yield," "providing deposit insurance," or any similar purpose and a primary purpose of placing funds into a deposit account. Furthermore, granting a primary purpose exception based on such rationales could result in *all* deposit arrangements satisfying the primary purpose exception, which would not be consistent with Section 29. As such, third parties that either place or assist in the placement of deposits to provide these core deposit-placement services for its customers will not qualify for the primary purpose exception.

The FDIC notes that one of the designated exceptions is for 529 plans in which the primary purpose is to encourage savings for future education costs as part of a tax-advantaged savings plan. While a primary purpose of encouraging or enabling savings does not generally qualify for the primary purpose exception for the reasons described above, encouraging savings as part of a specific tax-incentivized government program, similar to 529 plans, may qualify.

E. Evaluation of Business Lines

As noted in the Brokered Deposits NPR, the analysis and assessment of discrete business lines is an important aspect of whether certain agents or nominees meet the primary purpose exception. In evaluating whether an applicant meets the requirements of the primary purpose exception, the FDIC would analyze specific business lines in which the applicant has a specific type of relationship with its customers. This was intended to prevent an agent or nominee engaged in the brokering of deposits from evading 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. Under the proposed rule, 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.

Commenters who addressed the proposed definition of "business line" raised concerns that the proposed definition does not reflect how businesses view their business lines. Specifically, commenters suggested that the FDIC permit the third party to identify one or more business lines for purposes of the application process, so that the business line would reflect risk management and reporting policies and procedures utilized by the third party. These commenters expressed the view that the third party, rather than the FDIC, should have discretion to determine specific business lines, as business lines will vary significantly across different entities. One commenter noted that business line information is generally proprietary and confidential and thus third parties may not be willing to provide such information.

The FDIC expects that entities that submit a notice or application for the primary purpose exception should, in good faith, determine their appropriate, specific business lines. The FDIC, in reviewing a particular business arrangement for the primary purpose exception, will generally defer to the descriptions of business lines provided by the applicant or notice-filer. Nonetheless,

the determination of what constitutes a business line will depend on the facts and circumstances of a particular deposit placement arrangement, and the FDIC ultimately retains discretion to determine the appropriate business line to which the primary purpose exception would apply. The FDIC is more likely to scrutinize the identification of a business line if the business relationships to which it refers are materially broader than the business relationships with the specific group of customers for whom the business places, or facilitates the placement of, deposits.

The FDIC expects that in many cases, particularly in the case of agents or nominees who are nonfinancial companies, the identification of a business line will be simple and straightforward, and in some cases may encompass an entire business.

F. Involvement of Other Third Party Intermediaries

If an agent or nominee qualifies for a statutory exception from the deposit broker definition, it is possible that one or more additional third parties that are engaged in the business of placing, or facilitating the placement of, customer deposits may qualify as a deposit broker. The FDIC understands that, in certain deposit placement arrangements, agents or nominees may use third party intermediaries (and in some cases a number of them) to provide administrative functions. To the extent that these third party intermediaries do not meet the deposit broker definition, then deposits placed at IDIs via an agent or nominee that meet an exception to the definition of deposit broker (for example, the primary purpose exception), will be nonbrokered. If, however, the third party intermediary is, for example, providing matchmaking functions for the agent or nominee and insured depository institutions, as defined in this final rule, then it would meet the "facilitation" part of the deposit broker definition, and the deposits placed by or

through the intermediary would be brokered deposits, regardless of the status of the agent or nominee.

In the case of the primary purpose exception, IDIs that receive deposits from agents or nominees that meet the primary purpose exception should be aware of any other third parties involved in the placement of deposits and whether those other third parties meet the deposit broker definition in order to properly complete their Consolidated Reports of Condition and Income ("Call Reports"), which require reporting of brokered deposits held by IDIs. If such other third parties meet the definition of deposit broker, deposits placed by or through that third party are considered brokered.

See section I(C)(3)(h) for further discussion of this topic in the context of designated exceptions subject to the notice requirement and the application process.

3. Notice and Application Process for the Primary Purpose Exception

Under the proposal, entities that place deposits at insured depository institutions under the business relationships that were deemed to meet the primary purpose exception would have been subject to expedited processing under the application process. The FDIC is revising this part of the proposed application process and, under the final rule, will no longer require applications for those two business relationships or for the additional designated business relationships described in this final rule. The purpose of this change from the proposal is to streamline the process for entities (or business arrangements) that meet a bright-line primary purpose exception. In other words, the FDIC has already evaluated these business relationships as part of this rulemaking process and has determined that they meet the primary purpose exception. As such, entities will not need to go through an application process if they are

placing, or facilitating the placement of, deposits as part of a business relationship that is a designated exception under this final rule.

a. Notice Requirement

For two of the designated exceptions – the "25 percent" and the "enabling transactions" business relationships – the FDIC is requiring that third parties submit a written notice to the FDIC indicating that the third party will rely upon the applicable designated exception.[50] The notice may also be submitted by an insured depository institution that is receiving deposits from the third party.

Upon the FDIC's receipt of the notice, the third party that is the subject of the notice may rely upon the applicable designated exception for a particular business line. The FDIC will establish an electronic process for the receipt of notices. This process will include providing the notice filer with an immediate acknowledgement of receipt. The FDIC may, however, at its discretion, and at any time, including during the supervision and examination of an insured depository institution, require the notice filer to provide additional information. Such requests generally will be limited to verifying that the third party meets the criteria for the applicable designated exception, and the FDIC generally expects to only make such requests if there is reason to believe that the third party does not meet, or no longer meets, the criteria for the applicable designated exception. The FDIC also may occasionally request other information, such as descriptions of the services provided by any additional third parties involved in the

[50] Entities that qualify for other designated exceptions detailed above are not subject to a notice, application, or reporting process. The applicable specific contents for the two types of notice submissions are provided in section I(C)(3)(b).

deposit placement arrangement that may meet the deposit broker definition.[51] The FDIC will only request information specifically relevant to whether or not the deposits being placed are brokered. If the FDIC learns that the entity no longer meets the criteria of the designated exception or that information provided in a notice or subsequent reporting was inaccurate, or the entity fails to submit required reports, the FDIC may, with notice, revoke the entity's primary purpose exception.[52]

The FDIC is requiring a notice for the "25 percent" and "enabling transactions" designated exceptions, and not for the other designated exceptions identified in this final rule, because eligibility for those two designated exceptions would be difficult for the FDIC or an IDI to verify or monitor without access to the contents of the notice (which are described below). The other designated exceptions generally relate to more specific deposit placement arrangements and describe criteria that are less difficult to verify or monitor. The FDIC may, or may not, also decide to require a notice for any additional designated exceptions that are identified after the issuance of this final rule, and the FDIC expects such decisions to be based on similar analysis to that described in this paragraph.

The final rule also requires that third parties that notified the FDIC of reliance on a designated exception submit a subsequent notice to the FDIC if the third party no longer meets the primary purpose exception.

b. Notice Contents and Reporting Requirement

[51] See Section I(C)(3)(h) for further discussion on requests for additional information related to additional third parties.

[52] If a primary purpose exception is revoked due to an inaccurate notice or report, or due to a failure to submit a required report, but the entity continues to satisfy the criteria of the designated exception, the entity may refile a notice with accurate information.

The written notice that an entity submits will need to include (1) the designated exception upon which the entity is relying; (2) a brief description of the business line; (3) the applicable specific contents for the designated exception; (4) a statement that there is no involvement of any additional third party who qualifies as a deposit broker, or a brief description of any additional third party that may qualify as a deposit broker; and (5) if the notice is provided by a nonbank entity, a list of the IDIs that are receiving deposits by or through the particular business line at the time that the notice is filed. For third parties that meet the primary purpose exception based on the "25 percent" designated exception the applicable specific contents are:

- the total amount of customer assets under administration by the third party for that particular business line; and
- the total amount of deposits placed by the third party on behalf of its customers, for that particular business line, at all depository institutions.[53]

For third parties that meet the primary purpose exception based on the "enabling transactions" designated exception the applicable specific contents are:

- contractual evidence that there is no interest, fees, or other remuneration being paid to any customer accounts, and
- a certification that all customer deposits are in transaction accounts.

Third parties, or insured depository institutions, that submit a notice under the "25 percent" test will be required to provide reporting on a quarterly basis to the FDIC. The report

[53] 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.

will need to include updates to the figures that were provided as part of the original notice submission.

For those that submit a notice under the "enabling transactions" test, the filing entity will need to provide an annual certification that the third party continues to place all customer funds at depository institutions into transaction accounts and that customers do not receive or accrue any interest, fees, or other remuneration.

c. Overview of the Application Process

The FDIC is finalizing the proposed application process for entities that seek to qualify for the primary purpose exception but that do not meet a designated exception. As part of this process, an entity can submit an application to the FDIC. For purposes of the application process, the term "applicant" includes an insured depository institution or a nonbank third party[54] that meets the "deposit broker" definition by either placing (or facilitating the placement of) customer deposits at insured depository institutions and that seeks to be excluded from that definition through the primary purpose exception. If an application is approved, the agent or nominee will be considered to meet the primary purpose exception 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 will 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

[54] The FDIC will look to each separately incorporated legal entity as its own "third party" for purposes of this application process. IDIs may submit an application on behalf of a third party that is placing deposits with the IDI.

application by an IDI on behalf of the third party might be applicable to all deposit placements by that third party at any 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 is of the view that that an agent or nominee who 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.

Under the proposal, applicants would have received a written determination from the FDIC within 120 days of a complete application, unless extended by the FDIC with notice if necessary. A commenter requested more clarity around the proposed timeline, and suggested additional timelines for certain steps in the process. The FDIC is providing additional clarity, consistent with the intent of the proposal, that the FDIC will notify an applicant within 45 days of submission if an application is not complete, and that an extension, if necessary, beyond the initial 120 days may last for a maximum of 120 additional days.

The FDIC will approve applications submitted under this process if the application demonstrates to the FDIC's satisfaction, 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. Approved applicants may be subject to periodic reporting requirements to enable the FDIC to ensure that the applicant continues to meet the exception.

d. Application Contents

An application must include, to the extent applicable, at a minimum[55]:

(1) A description of the deposit placement arrangements between the third party and insured depository institutions for the particular business line, including the services provided by any relevant third parties;

(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 administration 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;

[55] A description of the application contents for agents or nominees seeking the primary purpose exception under the "enabling transactions" business relationship because they place all customer deposits at depository institutions into transactional accounts but the customer earns some amount of interest, fees or other remuneration are provided in section I(C)(2)(b)(ii)(A)(2).

(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 determines is necessary to complete its review.

The application also should include supporting documentation and relevant contracts related to the items above. The FDIC retains authority to request additional information at any time during its review. The FDIC's review of whether a third party meets the primary purpose exception will be based on the application and all supporting information provided.

e. Reporting for Approved Applicants

Approved applicants may be subject to periodic reporting requirements. These reporting requirements will allow the FDIC to monitor the applicability of the primary purpose exception and ensure that the FDIC is aware of any material changes to the criteria under which the FDIC approved the application. The FDIC will describe specific reporting requirements, including the frequency and any calculation methodology, as part of its written approval for a primary purpose exception. The FDIC does not expect to require ongoing reporting in all cases. The FDIC will decide whether to require reporting, and tailor such reporting if appropriate, on a case-by-case basis, depending on the type of information that the FDIC relies upon to determine that a particular agent or nominee meets the primary purpose exception. Reporting will not be required more frequently than quarterly.

f. Monitoring by IDIs

Under the proposed rule, an IDI that accepted deposits from a third party that relies upon the primary purpose exception would have been responsible for monitoring the nonbank third party's eligibility for the primary purpose exception. The proposal further noted that 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, the IDI may wish to consider the reporting and monitoring requirements described here. The FDIC received a number of comments that these expectations would be difficult to manage or unworkable. Given the potential volume of third parties that could qualify for the primary purpose exception, and the idiosyncratic business models that such third parties may have, the FDIC agrees that this expectation is not appropriate. Instead, under the final rule, an IDI that accepts deposits from a third party that relies on the primary purpose exception would be expected to be able to access records of the nonbank third party's eligibility for the primary purpose exception, including copies of the notices delivered to the FDIC and any accepted applications. The FDIC also expects that if an IDI has reason to believe that a third party that qualified for a primary purpose exception no longer qualifies for the primary purpose exception, for example due to a change in business model, the IDI would notify the FDIC and its primary financial regulator and report the deposits as brokered.

g. Requesting additional information, requiring re-application, imposing additional conditions, and withdrawing approvals

At any time after approval of an application, the FDIC may, at its discretion, and at any time, including during the supervision and examination of an insured depository institution, require an entity whose application has been approved to provide additional information. Such requests generally will be limited to verifying that the entity continues to satisfy the terms of the

approved application, and the FDIC generally expects to only make such requests if there is reason to believe that the entity does not meet, or no longer meets, the terms of the approved application. The FDIC also may occasionally request other information, such as the services provided as part of the deposit placement arrangement by any additional third parties that may meet the deposit broker definition. The FDIC will only request information specifically relevant to whether or not the deposits being placed are brokered. If the FDIC learns that the entity no longer meets the terms of the approved application, for example because the entity has undergone material changes to its business that renders the business no longer eligible for the primary purpose exception, or that information provided in an application or subsequent reporting was inaccurate, the FDIC may, with written notice and adequate justification, require the entity to submit a new application for approval, impose additional conditions on the previously granted approval, or withdraw a previously granted approval.

A commenter requested that the FDIC clarify that the FDIC would only modify or withdraw an approval if there is a material change in the facts or circumstances relied on by the FDIC in granting its initial approval. As noted above, the FDIC would modify or withdraw an application if the FDIC learns that the entity no longer meets the terms of the approved application or if information provided in an application or subsequent reporting was inaccurate. Additionally, the FDIC generally expects to give an entity with an approved application an opportunity to reapply or adjust its business relationships prior to withdrawing, or imposing additional conditions, on a previously granted approval.

h. Additional Third Parties

As noted above, the FDIC may request additional information following the filing of a notice or application about additional third parties involved in the arrangement. If the FDIC finds that a third party applicant or notice filer (or a third party on whose behalf an IDI has submitted a notice or application) meets the primary purpose exception, but another third party involved in the arrangement meets the deposit broker definition, the FDIC would notify the applicant and the other third party of this finding. The absence of such a finding does not mean that no additional third party meets the deposit broker definition. The FDIC expects to request such additional information and make such findings only in certain circumstances, and not on a regular or frequent basis, and entities should not rely on the FDIC to decide whether additional third parties are deposit brokers.

4. Effective Date and Extended Compliance

Except as specifically provided here, the final rule will take effect on April 1, 2021, and will be reflected in Call Report Data due June 30, 2021. Full compliance with the regulation is extended to January 1, 2022. The extended compliance date is intended to provide sufficient time for financial institutions to put in place systems to implement the new regulatory regime and to allow the FDIC to develop internal processes and systems to ensure a consistent and robust review process.

Notices. Starting April 1, 2021, an entity that wishes to rely upon a designated exception for the primary purpose exception described in this final rule that requires a notice submission must file a notice, and comply with any applicable reporting requirements. However, the full compliance date of January 1, 2022, will allow entities to continue to rely upon existing staff advisory opinions or other interpretations that predated this final rule in determining whether

deposits placed by or through an agent or nominee are brokered deposits. After January 1, 2022, entities may no longer rely on upon staff advisory opinions or other interpretations that predated this final rule, and to the extent that such entities instead opt to rely on a designated exception for which a notice is required, a notice must be filed. After January 1, 2022, the advisory opinions and other publicly available interpretations set forth in Appendix 1 to this notice will be moved to inactive status.

Applications. Similarly, starting April 1, 2021, entities that wish to apply for a primary purpose exception, as described in section I(C)(3)(c-g), may submit an application starting on that date. The FDIC will begin its application review as soon as possible, but no later than September 3, 2021. Written determinations for applications submitted on or before September 3, 2021, will be provided by January 1, 2022 (consistent with the 120-day review period), unless extended, with notice, if necessary. As stated above, however, the full compliance date provision will allow entities who rely on the primary purpose exception the option to continue to rely on existing staff advisory opinions or other interpretations that predated this final rule until January 1, 2022. After that date, such entities will no longer be permitted to rely on existing staff advisory opinions or other interpretations that predated this final rule and must have an application, if appropriate.

5. Prior FDIC Staff Advisory Opinions

In the Brokered Deposits NPR, the FDIC indicated that it would review existing advisory opinions to determine those that should be codified in the final rule and those that are outdated and should be rescinded. This section reviews and discusses the comments relating to prior FDIC staff advisory opinions. The FDIC notes, however, that this final rule will allow certain

entities that have relied upon previous staff opinions regarding the primary purpose exception to continue to rely upon the primary purpose exception under designated exemptions described.[56] Moreover, and as provided above in section I(C)(4), the FDIC will allow entities to continue to rely upon all previous staff advisory opinions related to brokered deposits until January 1, 2022.

a. Comments on Prior FDIC Staff Advisory Opinions

A significant number of commenters addressed this aspect of the Brokered Deposits NPR. Of those who commented, the majority urged the FDIC to grandfather all existing advisory opinions, particularly those opinions where the staff had previously interpreted the primary purpose exception as applying. A few commenters identified specific advisory opinions that they believed should be retained or codified, but the general view was that all advisory opinions should continue to be available and active.

One banker recommended that the FDIC retain existing advisory opinions that conclude that specific company activities do not make the company a deposit broker, while several other bankers urged the FDIC to grandfather all relationships based on current advisory opinions and suggested that such relationships be exempt from the definition of deposit broker. One banker stated that firmly-established business relationships should be protected by maintaining all existing FDIC advisory opinions, while a second banker stated that the FDIC should maintain all advisory opinions to avoid dismantling established partnerships with industry participants who rely on current advisory opinions to provide their services to banks. Still another banker suggested that the FDIC codify certain long-standing, frequently relied-upon advisory opinions and repeal or update outdated advisory opinions.

[56] A discussion of the primary purpose exception and the advisory opinions provided in section I(C)(2)(b)(ii)(B).

A few commenters also addressed the process of reviewing and rescinding, or codifying, any advisory opinions. A state bankers' association called on the FDIC to publicly indicate which advisory opinions would remain and allow a three-year transition to conform to the new rule. A national trade group representing the banking industry suggested that the FDIC implement a formal notice and comment process for rescission of advisory opinions, and stated that any exemptions from previously granted advisory opinions should remain in effect. The commenter further stated that any exemptions that are revoked should have a 3-year transition period. A second bank trade association wrote that the FDIC should only rescind the advisory opinions after a notice and comment period.

b. Final Rule Discussion of Prior Staff Advisory Opinions

As part of this rulemaking process, the FDIC evaluated all previous FDIC staff advisory opinions related to brokered deposits to identify those that are no longer relevant or applicable based upon the revisions made as part of this final rule. The FDIC also, as part of its review, evaluated whether previous FDIC staff advisory opinions may continue to be relied upon and may be applicable under the new framework of this final rule.

As a result of this review, the content of some of the opinions have been included in this final rule.[57] However, upon the full compliance date of the final rule (January 1, 2022), previous staff advisory opinions will be moved to inactive status on the FDIC's website.[58] The FDIC recognizes that given the significant changes in the regulation, it is likely that in most, if not all, cases, the analysis contained in the various advisory opinions will no longer accurately reflect the regulation, even though in many cases the result will be the same. Codifying all previous

[57] See discussion on "designated exceptions" in section I(C)(2)(b)(ii)(A)-(B).
[58] See list of publicly available FDIC staff advisory opinions and FILs related to section 29 in Appendix 1.

staff opinions would thus result in the existence of two parallel regulatory regimes for brokered deposits that would make it difficult for entities and banks to understand the interpretations that apply for their particular deposit placement arrangement. Instead, the FDIC has (1) provided additional clarity on the "facilitation" part of the deposit broker definition and (2) included in its list of designated exceptions a number of the business arrangements that have previously been viewed by staff at the FDIC to meet the primary purpose exception. In addition, and as noted earlier, the FDIC has established an extended compliance period for the final rule to ensure that entities who are impacted have ample time to adjust previous arrangements, if necessary.

Those entities such as listing services, marketing firms, or certain companies that design their own deposit products with special features, which have relied upon previous staff advisory opinions outside of the primary purpose exception context to develop their business in a way to avoid meeting the "deposit broker" definition, will need to review the new criteria developed under this final rule to determine whether their current arrangements meet the deposit broker definition. Below is a discussion of these entities and how they fit within this final rule.

Listing services. A "listing service" is a company that compiles information about the interest rates offered by banks on deposit products. Through the years, staff at the FDIC have developed criteria to help determine whether a "listing service" meets the "deposit broker" definition. Under this final rule, the FDIC anticipates that whether a listing service, or a similar service that posts information about bank rates, is a deposit broker will likely depend on whether the service meets the new criteria under the "facilitation" part of the deposit broker definition. Based upon the new "facilitation" definition, a listing service that is passively posting rate information and sending trade confirmations between the depositor and the bank is unlikely to be

a deposit broker. However, if a listing service provides services that meet one of the three prongs of the "facilitation" definition, then it would be considered a deposit broker.

Entities that Provide Marketing Services. Some insured depository institutions attempt to attract new depositors through advertising or referrals by third parties in exchange for fees based upon the volume of deposits placed. In these cases, and under the assumption that the deposits are being placed directly by the depositors, the third parties generally would not meet the "deposit broker" definition, unless they took actions that meet one of the three prongs of the "facilitation" definition. Under the definition of facilitation, it is unlikely that a third party that is, for example, providing general marketing or advertising services on behalf of a bank (e.g., providing a link on its website) in exchange for a volume-based fee, will meet the deposit broker definition.

Entities that Design Deposit Products. Some third parties design deposit products with special features, such as deposit accounts that produce interest or rewards based on account activity. If a company merely designs deposit products or deposit accounts for banks, and markets the banks that offer the deposit products, it would not likely meet the deposit broker definition unless it places deposits at more than one IDI or meets one of the three prongs of the "facilitation" definition.

D. Discussion of Certain Other Deposit Placement Arrangements Raised by Commenters

In response to the NPR, some commenters asked how deposits placed through certain third parties would be treated under the primary purpose exception. These arrangements are not being designated as meeting the primary purpose exception, however, the FDIC acknowledges that under certain circumstances, an agent or nominee acting under one of these business relationships could meet one of the designated exceptions.

Trust Companies. Trust companies that administer trusts sometimes place funds at IDIs while acting in a fiduciary capacity for a number of clients and accounts. The FDIC understands that these trust companies invest their customer assets under administration in a variety of different investment products, which may include deposit accounts. As such, the FDIC believes that some trust companies will be eligible to meet the primary purpose exception under the "25 percent test" because they place less than 25 percent of customer assets under administration at IDIs. Additionally, a trust company that places customer deposits, as described above, at only one IDI would not qualify as a deposit broker.

Moreover, section 29 provides targeted statutory exceptions to the "deposit broker" definition for specific trust activities and one for trust departments of IDIs.[59] Trust companies that place customer deposits with IDIs that do not qualify for any of the exceptions listed above will also be able to avail themselves of the primary purpose exception through the application process provided in this final rule, and the application would be approved if the trust company demonstrated that providing traditional trust services, rather than placing deposits, was the trust company's primary purpose.

Companies that Provide Certain Software Services. Some companies provide accounting, cash management, and other administrative support via software services to clients. These companies, on behalf of its clients, place deposits at either one or a group of preferred or partner banks that are sometimes integrated with its software services. Because these companies place deposits at IDIs, they meet the definition of "deposit broker." Commenters, in response to the NPR, argued that such software companies (e.g., bankruptcy management software companies) should meet the primary purpose exception because their primary relationship with

[59] *See* 12 USC 1831f(g)(2).

its customers is to provide accounting services and not the placement of deposits. The FDIC notes that software providers may place customer deposits into transactional accounts that pay no (or nominal amounts of) interest, fees, or other remuneration to the customer. As such, these software providers may be eligible to meet the enabling transactions test for the primary purpose exception. Additionally, a software provider that places customer deposits, as described above, at only one IDI would not qualify as a deposit broker. If such a software provider does not meet the enabling transactions test and applies for a primary purpose exception, the FDIC would approve the application if the software provider demonstrates that providing software services, rather than placing deposits, is the primary purpose of the business relationship.

E. Other Supervisory Matters Related to Brokered Deposits

1. Brokered Deposits and Assessments

In the proposed rule, the FDIC noted that it planned to consider modifications to its deposit insurance assessment regulations in light of the changes made to the brokered deposits regulation. This was one of several changes the FDIC was considering to make its large bank pricing model more risk-sensitive. Given the economic uncertainty surrounding the COVID-19 pandemic, the FDIC decided to postpone consideration of such changes to its deposit insurance assessment pricing. As noted below, institutions will be required to report to the FDIC or on the Call Report certain types of deposits that will not be considered brokered deposits under the final rule. The FDIC plans to monitor the data resulting from such reporting and will consider in the future whether modifications to deposit insurance assessment pricing related to certain types of funding concentrations are warranted, consistent with the statutory requirement that the assessments be risk-based.

2. Reporting of Certain Deposits on Call Reports

The proposed rule indicated that 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. As part of the final rule implementing a stable funding requirement for certain large banking organizations (also known as the net stable funding ratio or "NSFR") the FDIC, along with the Board of Governors of the Federal Reserve System and the Office of the Comptroller of the Currency, stated their intent to revise the Call Reports to obtain data that may help evaluate funding stability of sweep deposits over time to determine their appropriate treatment under the liquidity regulations. The FDIC further intends to monitor this information to assess the risk factors associated with sweep deposits and determine assessment implications, if any. Any changes to reporting requirements applicable to the Call Reports, and their instructions, would be effectuated in coordination with the Federal Financial Institutions Examination Council in a separate Paperwork Reduction Act notice.

3. Additional Supervisory Matters

The FDIC recognizes that, under the final rule, categories of deposits that are currently considered brokered will 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 the final rule 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. FDIC examiners will continue to review funding as part of safety and soundness examinations, regardless of whether or not the deposits used by the IDI are brokered. Among other things, examiners will review whether banks are reporting their deposits appropriately on Call Reports.[60]

[60] Examiners will not, however, require that an IDI treat a third party as a deposit broker if the third party has qualified for the primary purpose exception through a designated exception or an approved application.

The FDIC will work to ensure that any such decisions by examiners are made consistently. Additionally, this regulation addresses whether certain deposits are considered brokered, but nothing in this final rule changes the FDIC's or other federal regulators' authorities under Section 8 or Section 39 of the FDI Act.

F. Alternatives

The FDIC is adopting these comprehensive changes to the brokered deposit regulations after considering comments received pursuant to the ANPR and NPR 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 establish 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.

G. Expected Effects

As described previously, the final rule amends the FDIC's regulations that implement provisions of section 29 regarding brokered deposits. The final rule creates a new framework for analyzing certain provisions of the statutory definition of "deposit broker." Further, the final rule amends one of the ten regulatory exceptions to the definition of "deposit broker." The aggregate effect likely would be that some amount of deposits currently reported as brokered deposits will no longer be so reported.

As of June 30, 2020, there were 5,075 insured depository institutions holding approximately $21.2 trillion in assets and $15.6 trillion in domestic deposits. Of those domestic deposits, $1.2 trillion (7.7 percent) are currently classified as brokered deposits. Approximately 38 percent (1,932) of FDIC-insured institutions reported some positive amount of brokered deposits. These insured institutions accounted for the vast majority of banking industry assets and deposits—almost $19.5 trillion (92.0 percent) of assets and almost $14.1 trillion (90.4 percent) of domestic deposits.[61]

Traditional brokered CDs will continue to be defined by the rule as brokered deposits and subject to the associated statutory and regulatory restrictions. Certain types of deposits, notably deposits placed by agents or nominees that meet one of the identified "designated exceptions" or otherwise satisfy criteria set forth in the revisions made in this final rule to the primary purpose exception will not be considered brokered deposits. 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.[62] However, a reliable estimate of this change in designation is not possible with the information currently available to the FDIC.

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

1. Consumers and the Economy

[61] Call Report data, June 30, 2020.
[62] A number of the "designated exceptions" identified as meeting the primary purpose exception are based upon business relationships that staff at the FDIC previously viewed as meeting the primary purpose exception.

The final rule amends the FDIC's brokered deposit regulations to reflect recent technological changes and innovations. The rule generates benefits to banks and consumers if 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 rule results in such deposits as being non-brokered, 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 final rule. Additionally, to the extent that the rule supports greater utilization of deposits currently classified as brokered deposits, but classified as non-brokered under the rule, it could increase the funds available to insured depository institutions for lending to U.S. consumers. If the 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.

2. All Insured Institutions

The rule could immediately affect the 1,932 FDIC-insured institutions currently reporting brokered deposits. Going forward, the rule could affect all 5,075 FDIC-insured institutions whose decisions regarding the types of deposits to accept could be affected.

The final rule benefits insured institutions and other interested parties by providing greater legal clarity regarding the classification and treatment of brokered deposits. As result of

this increased clarity, the final rule reduces 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.[63] 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 and safety with deposit insurance, rather than as part of a relationship with a bank, 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 certain deposit sweep arrangements 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 rule reduces bankers' perception of a stigma associated with certain types of deposits, more institutions may be incentivized to accept such deposits.

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

The rule could incentivize the development of banking relationships between banks and other firms. The new opportunities could spur growth in the types of companies that provide deposit placement services, 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 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 rule, a bank's assessment may decrease, all else equal. Certain calculations required under the Liquidity Coverage Ratio and Net Stable Funding Ratio rules applicable to some large banks could also be affected by the 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 rule, and consequently do not allow for an estimate of effects on assessments or the reported Liquidity Coverage Ratio and Net Stable Funding 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 in the event they fall below well capitalized and become subject to the restrictions set forth in the law and regulations 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.

3. 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. By generally reducing the scope of deposits that are considered brokered, the rule allows not well capitalized banks to increase their holdings of deposits that are currently reported as brokered but will not be reported as brokered under the final rule. As of June 30, 2020, there are only 10 adequately capitalized and undercapitalized banks.[64] These banks hold approximately $2.5 billion in assets, $1.7 million in domestic deposits, and $21.7 million in brokered deposits.[65] These banks could be directly affected by the rule in that they could potentially accept more or different types of deposits currently designated as brokered.

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

[64] Information based on June 30, 2020 Consolidated Reports of Condition and Income. The 10 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).
[65] Call Report Data, June 30, 2020

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

4. Entities That May or May Not Be Deposit Brokers

The revisions to the brokered deposit regulations would likely give rise to some activity by nonbank third parties seeking to determine whether they are, or are not, deposit brokers under the rule. This may include submitting notices or filing applications by some third parties that seek to avail themselves of the primary purpose exception, or by banks submitting notices or filing applications on behalf of third parties. In certain circumstances, ongoing reporting or certification by these entities is also expected under the final rule.

5. Reporting Compliance Costs

As previously discussed, the final rule establishes some reporting obligations for certain insured depository institutions or nonbank third parties that meet the "deposit broker" definition by either placing (or facilitating the placement of) customer deposits at insured depository institutions but meet the "primary purpose" exception. Specifically, the rule provides that entities that wish to invoke two of the "designated exceptions" – the "25 percent" and "enabling transactions" business arrangements – will be required to submit a notice to the FDIC. These entities will also be subject to either a quarterly reporting or annual certification requirement.

The final rule also establishes 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, and does not meet one of the "designated exceptions," could request that the FDIC consider the agent or nominee as meeting the primary purpose exception. Entities that meet the primary purpose exception via an approved application may also be subject to periodic reporting requirements under the final rule.

These reporting requirements will allow the FDIC to monitor the applicability of the primary purpose exception.

Finally, the FDIC may, with notice, revoke a primary purpose exception of a third party that relies on a "designated exception," if the third party no longer meets the criteria for a designated exception, the notice or subsequent reporting is inaccurate, or the notice filer fails to submit the required reports. For approved applications, the FDIC may, under certain circumstances and with adequate justification, require the entity to refile a notice, submit an application, reapply for approval, impose additional conditions on the approval, or withdraw a previously granted approval, with notice to the entity.

There were 3,517 FINRA registered broker-dealer firms in 2019.[66] Some of the 3,517 broker-dealers may not engage in activity which would meet the definition of "deposit broker" but for meeting the primary purpose exception through the "25 percent test," while some firms that do engage in such activity may not be among the 3,517 FINRA registered broker-dealers. In the absence of data to estimate future respondents, consistent with the changes in the rule relative to the NPR, and with its Paperwork Reduction Act analysis of this rule, the FDIC assumes that 703 firms will submit notices for a "designated exception" under the primary purpose exception based on placing less than 25 percent of customer assets under administration, in the initial year of implementation. Further, the FDIC assumes that 176 firms will submit notices for a "designated exception" under the primary purpose exception based on placing less than 25 percent of customer assets under administration, on average each year, an ongoing basis.

[66] 2019 FINRA Industry Snapshot, pg. 13, https://www.finra.org/sites/default/files/2020%20Industry%20Snapshot.pdf.

According to Census data, there are 1,223 establishments within the industry in which deposit brokers are classified.[67] Not all 1,223 establishments engage in deposit brokering, and some firms which engage in deposit brokering may be classified in another industry. In the absence of data to estimate future respondents, consistent with the changes in the rule relative to the NPR, and with its Paperwork Reduction Act analysis of this rule, the FDIC assumes that 245 firms will submit notices in reliance on the enabling transactions designated exception in the initial year of implementation. Additionally, the FDIC assumes that 245 firms submit applications for a primary purpose exception in the initial year of implementation. Finally, in the absence of data to estimate future respondents, the FDIC assumes that 61 will file a notice in reliance upon the enabling transactions designated exception, or a designated exception identified in the future that requires a notice, and an additional 61 will submit an application, on average each year, on an ongoing basis.

In the initial year of implementation, the FDIC assumes that the notice for the "25 percent" business relationship will be three hours to complete on average, and 0.5 hours per quarter each year after that. In the initial year of implementation, the FDIC assumes that the notice for the "enabling transactions" will take 5 hours to complete on average, and 0.5 hours each year after that. In the initial year of implementation, the FDIC assumes that the application for entities that do not meet a "designated exception," will take 10 hours to complete on average, and 0.25 hour per quarter each year[68] after that. The FDIC also recognizes there will likely be outliers who spend more or less time on notices, applications, and reporting than the FDIC

[67] 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, 2017 County Business Patterns Data, available at https://www.census.gov/data/datasets/2017/econ/cbp/2017-cbp.html.

[68] This average number reflects that not all approved applications are expected to require ongoing reporting.

expects at this time, therefore FDIC believes that the compliance burden realized by affected entities will likely vary from labor hours presented. Therefore, based on the above assumptions and methodology, the FDIC estimates the final rule imposes an annual reporting burden of 5,784 hours for the first year and 497.5 hours each year after that for all affected entities. This equates to estimated compliance costs of $613,740 in the first year and $51,589 each year after that for all affected entities.[69]

Part II. Interest Rate Restrictions.

A. Policy Objectives

The policy objective of Part II of this final rule is to ensure that deposit interest rate caps appropriately reflect the prevailing deposit interest rate environment, while continuing to ensure that less than well capitalized institutions do not solicit or accept deposits by offering interest rates that significantly exceed prevailing rates on comparable deposit products.

B. Background

Under Section 29 of the Federal Deposit Insurance Act (FDI Act), well capitalized institutions are not subject to any interest rate restrictions. However, the statute imposes interest

[69] 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.

rate restrictions on insured depository institutions that are less than well capitalized, as defined in Section 38 of the FDI Act. The statutory restrictions are described in detail below.

Brokered deposits accepted pursuant to a waiver and certain reciprocal deposits. Institutions that are less than well capitalized may not pay a rate of interest on brokered deposits accepted pursuant to a waiver, or on reciprocal deposits excluded by Section 29 from being considered brokered deposits, that "significantly exceeds" the following: "(1) The rate paid on deposits of similar maturity in such institution's normal market area for deposits accepted in the institution's normal market area; or (2) the national rate paid on deposits of comparable maturity, as established by the [FDIC], for deposits accepted outside the institution's normal market area."[70]

Adequately capitalized institutions. Institutions that are adequately capitalized may not engage in the solicitation of deposits by offering rates that "are significantly higher than the prevailing rates of interest on deposits offered by other insured depository institutions in such depository institution's normal market area."[71] For institutions in this category, the statute restricts interest rates in an indirect manner. Rather than simply setting forth an interest rate restriction for adequately capitalized institutions to accept brokered deposits, the statute defines the term "deposit broker" to include "any insured depository institution that is not well capitalized . . . which engages, directly or indirectly, in the solicitation of deposits by offering rates of interest which are significantly higher than the prevailing rates of interest on deposits offered by other insured depository institutions in such depository institution's normal market area."[72] In other words, the depository institution itself is a "deposit broker" if it solicits deposits

[70] 12 U.S.C. 1831f(e).
[71] 12 U.S.C. 1831f(g)(3).
[72] *Id.*

by offering rates significantly higher than the prevailing rates in its own "normal market area." Without a waiver, the institution cannot accept deposits from a "deposit broker." Thus, the institution cannot accept these deposits from itself. In this indirect manner, the statute prohibits institutions in this category from soliciting deposits by offering rates significantly higher than the prevailing rates in the institution's "normal market area."

Undercapitalized institutions. In this category, institutions may not solicit deposits by offering rates "that are significantly higher than the prevailing rates of interest on insured deposits (1) in such institution's normal market area; or (2) in the market area in which such deposits would otherwise be accepted."[73]

C. Regulatory Approach

The FDIC has implemented the statutory interest rate restrictions through two rulemakings.[74] While the statutory provisions noted above set forth a basic framework based upon capital categories, they do not provide certain key details, such as definitions of the terms "significantly exceeds," "significantly higher," "market," and "national rate." As a result, the FDIC defined these key terms via rulemaking in 1992. Both the "national rate" calculation and the application of the interest rate restrictions were updated in a 2009 rulemaking.

"Significantly Exceeds" or "Significantly Higher."[75] Through both the 1992 and the 2009 rulemakings, the FDIC has interpreted that a rate of interest "significantly exceeds" another rate, or is "significantly higher" than another rate, if the first rate exceeds the second rate by

[73] 12 U.S.C. 1831f(h).
[74] 57 FR 23933 (1992); 74 FR 26516 (2009).
[75] The FDIC has not viewed the slight verbal variations in these provisions as reflecting a legislative intent that they have different meaning and so the agency has, through rulemaking, construed the same meaning for these two phrases.

more than 75 basis points.[76] In adopting this standard in 1992, and subsequently retaining it in 2009, the FDIC offered the following explanation: "Based upon the FDIC's experience with the brokered deposit prohibitions to date, it is believed that this number will allow insured depository institutions subject to the interest rate ceilings . . . to compete for funds within markets, and yet constrain their ability to attract funds by paying rates significantly higher than prevailing rates."[77]

"Market." In the FDIC's regulations, as implemented through both the 1992 and 2009 rulemaking, the term "market" is "any readily defined geographical area in which the rates offered by any one insured depository institution soliciting deposits in that area may affect the rates offered by other insured depository institutions in the same area."[78] The FDIC determines an institution's market area on a case-by-case basis.[79]

The "National Rate." As part of the 1992 rulemaking, the "national rate" was defined as follows: "(1) 120 percent of the current yield on similar maturity U.S. Treasury obligations; or (2) In the case of any deposit at least half of which is uninsured, 130 percent of such applicable yield." In defining the "national rate" in this manner, the FDIC understood that the spread between Treasury securities and depository institution deposits can fluctuate substantially over time but relied upon the fact that such a definition is "objective and simple to administer."[80] By using percentages (120 percent, or 130 percent for wholesale deposits, of the yield on U.S. Treasury obligations) instead of a fixed number of basis points, the FDIC hoped to "allow for greater flexibility should the spread to Treasury securities widen in a rising interest rate

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[76] 12 CFR 337.6(b)(2)(ii), (b)(3)(ii) and (b)(4). The FDIC first defined "significantly higher" as 50 basis points. 55 FR 39135 (1990). As part of the 1992 rulemaking, commenters suggested that the FDIC define "significantly higher" as 100 basis points. In response, the FDIC defined "significantly higher" as 75 basis points.
[77] 57 FR 23933, 23939 (1992); 74 FR 26516, 26520 (2009).
[78] 57 FR 23933 (1992) and 74 FR 26516 (2009).
[79] 12 CFR 337.6(f).
[80] 57 FR 23933, 23938 (June 5, 1992).

environment." Additionally, at the time of the 1992 rulemaking, the FDIC did not have readily available data on actual deposit rates paid and used Treasury rates as a proxy.

Prior to the 2009 rulemaking, yields on Treasury securities plummeted precipitously, driven by global economic uncertainties, which resulted in a "national rate" that was lower than deposit rates offered by many institutions. As part of the 2009 rulemaking, with access to data on offered rates available on a substantially real-time basis, the FDIC redefined the "national rate" as "a simple average of rates paid by all insured depository institutions and branches for which data are available."[81]

The "Prevailing Rate." The FDIC has recognized, as part of its regulation on interest rate restrictions, that competition for deposit pricing has become increasingly national in scope. Therefore, through the 2009 rulemaking, the FDIC presumes that the prevailing rate in an institution's market area is the FDIC-defined national rate."[82]

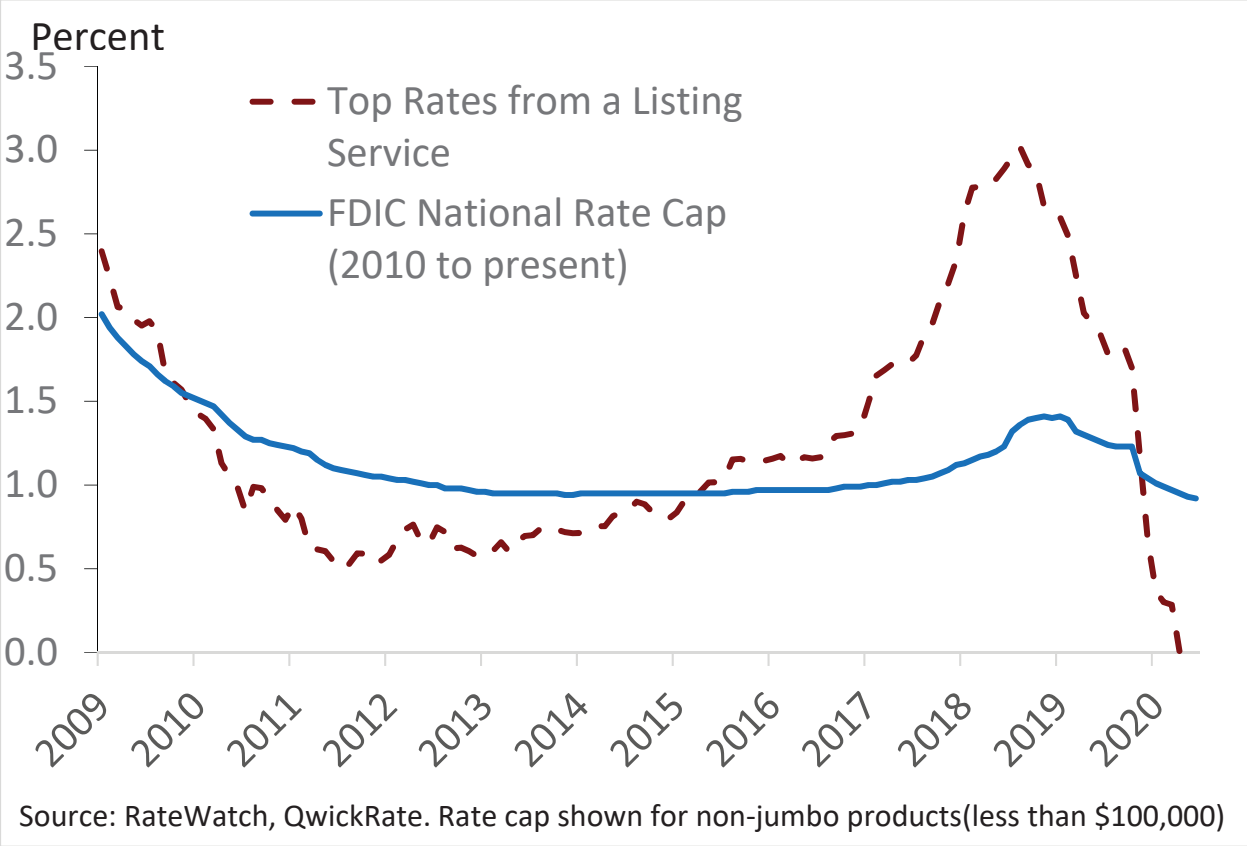
D. Need for Further Rulemaking

The current interest rate cap regulations became effective in 2010 and were adopted to modify the previous national rate cap (based on U.S. Treasury securities) that had become overly restrictive. Chart 1 below reflects the current national rate cap and the average of the top ten rates paid for a 12-month CD between 2010 and the present.[83] Chart 1 illustrates that between 2010 and approximately the second quarter of 2015, rates on deposits were quite low, even for the top rate payers. For this period, the current regulation's methodology for calculating the national rate, to which 75 basis points is added to arrive at the national rate cap, resulted in a

[81] 74 FR 26516 (2009). The 2009 rulemaking also recognized, based on the FDIC's experience, that some institutions still do compete for particular products within their local market areas, and provided a safe harbor for those institutions.
[82] 74 FR 26516 at 26519 (2009).
[83] The average of the top ten rates paid for 12 month CDs is meant to illustrate a competitive offering rate for wholesale insured deposits and show the general direction of the movement of the market for deposit rates.

national rate cap that allowed less than well capitalized institutions to easily compete with even the highest rates paid on the 12-month CD during this timeframe.

Chart 1—12-Month CD, Comparison of Listing Service Top Ten Average Payers and the FDIC National Rate Cap, 2010 to Present



However, from about July 2015 through February 2020, the current national rate methodology resulted in a national rate for the 12-month CD that, when 75 basis points were added, resulted in a national rate cap that remained relatively unchanged. During this period, the FDIC observed that the relatively unchanged national rate could restrict less than well-capitalized banks from competing for market-rate funding. Market conditions caused similar changes in the rates of other deposit products compared to the applicable rate cap, although the timing of when such changes occurred varied from product to product. Due to the COVID-19 emergency and the resulting effect on the economy beginning in March 2020, deposit rates in

general, including the national rate and the rates paid by the top rate payers dropped, so that less than well capitalized institutions may again easily compete with even the highest rates paid on the 12-month CD under the current national rate cap.

There are several reasons that the national rate cap remained fairly unchanged from mid-2015 to approximately February 2020. Primarily, interest rates were relatively low following the financial crisis that began in 2007. Towards the end of 2015, however, some banks began to increase rates paid on deposits as the Federal Reserve increased its federal funds rate targets. During this time, and up to the present day, the largest banks have been, on average, slower to raise their published interest rates on deposits. This has held down the simple average of rates offered across all insured banks and branches. Additionally, institutions, including the largest banks, had been offering more deposit products with special features, such as rewards checking, higher rates on odd-term maturities, negotiated rates, and cash bonuses, that are not included in the calculation of the published national rate.

Because of these developments, the majority of the institutions subject to the interest rate caps sought determinations from the FDIC to use the local rate for deposits obtained locally as the prevailing rate during the period when the national rate cap remained relatively unchanged. The national rate cap, however, remained applicable to deposits that these institutions obtained from outside their respective normal market area, including through the Internet.

Setting the national rate cap at too low of a level could prohibit less than well capitalized banks from competing for deposits and create an unintentional liquidity strain on those banks competing in national markets. For example, a national rate cap that is too low could destabilize a less than well capitalized bank that gathers deposits outside its local market area just as it is working on improving its financial condition. Preventing such institutions from being

competitive for deposits, when they are most in need of predictable liquidity, can create severe funding problems. Additionally, a rate cap that is too low may be inconsistent with the statutory requirement that an insured depository institution is only prohibited from offering a rate that "significantly exceeds" or is "significantly higher" than the prevailing rate. This could unnecessarily harm the institution, especially when liquidity planning is essential for safety and soundness.

E. ANPR and Notice of Proposed Rulemaking

On September 4, 2019, the FDIC published in the Federal Register a notice of proposed rulemaking ("Interest Rate NPR"),[84] that proposed to amend the national rate, the national rate cap, the local market area, and the local market rate cap, as described below.[85]

1. National Rate

To address concerns raised in response to the ANPR about the current calculation of the "national rate," from which the current national rate cap is derived, the FDIC proposed to replace the current "national rate" definition, which is based on the simple average of rates paid by all insured depository institutions and branches, with a definition based on a weighted average of rates paid by all insured depository institutions on a given deposit product, where the weights are institutions' respective market share of domestic deposits. This change to the calculation of the "national rate" was intended to address comments received in response to the ANPR that expressed concern that the current national rate definition resulted in a national rate cap that is too low because the largest banks with the most branches have a disproportional effect on the

[84] 85 FR 7453 (February 10, 2020).
[85] 84 FR 46470 (September 4, 2019).

national rate, and that the branch-based methodology minimized the significance of online-focused banks, which have few or no branches but tend to pay the highest rates.

2. National Rate Cap

In the Interest Rate NPR, the FDIC proposed to replace the current national rate cap, i.e., the national rate plus 75 basis points, with a proposed definition of "national rate cap" that is the higher of: (1) the rate offered at the 95th percentile of rates weighted by domestic deposit share; or (2) the national rate plus 75 basis points, with modifications to how the national rate is calculated, as described below.

The FDIC stated that it intended that the proposed two-prong national rate cap be effective across economic and interest rate cycles. During periods of low interest rates such as during the 2008 to 2015 period and the current, pandemic environment since March 2020, the second prong, i.e., the national rate plus 75 basis points, would likely be the governing prong of the proposed national rate cap. During more normal interest rate environments, such as between 1992 and 2008, and between 2015 and early 2020, the other prong, the 95th percentile of rates, would likely be the national rate cap. The proposal was intended to provide a more balanced and dynamic national rate cap that would ensure that less than well capitalized institutions have the flexibility to access market-rate funding, yet prevent them from offering a rate that significantly exceeds the prevailing rate for a particular product, in accordance with Section 29.[86]

3. Local Rate Cap

[86] In the proposal, the FDIC discussed other ways it had considered to set the national rate cap, including setting at: the higher of the current interest rate cap and the one that preceded it from 1992 to 2009, and the average of rates paid by the top payers. 84 FR at 46476-46477. The FDIC also solicited comment on whether there were better options for setting a proxy for what it means to "significantly exceed" a prevailing market rate when rates converge. 84 FR at 46492-46493.

Under the FDIC's the current regulation, there is a presumption that the prevailing rate or effective yield in the relevant market is the national rate unless the FDIC determines, in its sole discretion based on available evidence, that the effective yield in that market differs from the national rate. If a bank believes that the posted national rates are lower than the actual prevailing rates in the bank's normal market area(s), then the bank may request a high rate area determination from the FDIC. In determining whether the bank is in a high rate area, the FDIC could use segmented market rate information (for example, evidence by State, county or metropolitan statistical area).[87] If the FDIC agrees that the bank was in a high rate area,[88] the institution would be permitted to pay as much as 75 basis points above the local prevailing rate for deposits on those products solicited in its local market areas. For deposits received from outside its local market (including through the Internet), the institution would have to offer rates that did not exceed the national rate cap. Also, the FDIC could allow evidence as to the rates offered by credit unions but only if the insured depository institution competed directly with the credit unions in the particular market.

In the Interest Rate NPR, the FDIC proposed to establish a local market rate cap that is 90 percent of the highest offered rate in the institution's local market area for a specific deposit product. Specifically, the proposal would allow less than well capitalized institutions to provide evidence that any bank or credit union with a physical presence in its local market area offers a rate on a particular deposit product in excess of the national rate cap. If sufficient evidence is

[87] 12 CFR 337.6(f).

[88] The procedures for seeking such a determination are set forth in FIL-69-2009 (December 4, 2009). As explained in the FIL, an insured depository institution can request a high rate determination for its market area(s) by sending a letter to the applicable FDIC regional office. After receiving the request, the FDIC would make a determination as to whether the bank's market area is a high-rate area. If the FDIC agreed that the bank was operating in a high-rate area, the bank would need to calculate and retain evidence of the prevailing rates for specific deposits in its local market area. The question and answer attachment was revised in November 1, 2011.

provided, then the less than well capitalized institution would be allowed to offer an interest rate that is 90 percent of the highest offered rate in the local market area.

The Interest Rate NPR would eliminate the current two-step process where less than well capitalized institutions request a high rate determination from the FDIC and, if approved, calculate the prevailing rate within local markets. Instead, a less than well capitalized institution would need to notify its appropriate FDIC regional office that it intends to offer a rate that is above the national rate cap and provide evidence that an insured depository institution or credit union in the local market area is offering a rate in its local market area in excess of the national rate cap for a comparable deposit product. As described above, the institution would then be allowed to offer 90 percent of the rate offered by the insured depository institution or credit union in the institution's local market area. The institution would be expected to calculate the local rate cap periodically, and, upon the FDIC's request, provide the documentation to the appropriate FDIC regional office and to examination staff during subsequent examinations.

F. Discussion of Comments

In response to the Interest Rate NPR, the FDIC received a total of 43 comments. Three of the comments were from national associations representing stakeholders in the banking industry; three were from state-level associations representing stakeholders in the banking industry in those states; one comment was from another trade association; one was from a state banking department, one comment was from a law firm on behalf of a bank, and 30 comments were from bankers or banks, including 12 similar emails from bankers. The details of these comments are discussed below.

1. Discussion of Public Comment on the National Rate

Several commenters raised concerns about the proposed methodology for calculating the national rate. For example, a national trade association for the banking industry and several bankers raised concerns regarding the use of a weighted approach. Some commenters wrote that they believed that the proposed methodology continued to give undue weight to the largest institutions with a traditional branch based model. One commenter indicated that it remained concerned about the continued use of weighting, whether it be by branch, market share, or size because they believe that weighting tends to misrepresent actual market share. Several commenters urged the FDIC to include rates paid by credit unions and internet banks, stating that including those rates would make for a more accurate national rate calculation. The commenters suggested that such rates are often higher and thus not including them would cause the national rate (and, ultimately, the national rate cap) to be too low, making it harder for banks, particularly community banks, to compete for or attract deposits.

A trade association recommended that credit union rates be included as part of the national rate calculation because credit unions compete on both a national and local scale with insured depository institutions.

2. Discussion of Public Comment on the National Rate Cap

Most commenters agreed that the current interest rate cap methodology needed to be revised and no commenter recommended that the current methodology remain unchanged. Several commenters raised general concerns about data quality and transparency, in particular with respect to the 95th percentile. One commenter questioned the quality of the underlying data used to calculate the rate. One commenter wrote that the data that is currently being collected and used by the FDIC to calculate the rate cap is not always an accurate representation of actual

rates that many banks are willing to pay and are actively paying and that while the 95th percentile would be an improvement over the current methodology, it still does not produce a rate cap high enough to exceed prevailing rates in some economic cycles. Several argued that the national rate is not robust enough and should be based on publicly available, transparent data. One commenter stated that it is important to have a transparent and market-based national rate. Another argued that the 95th percentile would not be effective because it is not an accurate representation of actual rates that many banks are willing to pay and actively paying, and that if the FDIC used the 95th percentile it should add 75 basis points to that rate. One commenter stated that the 95th percentile still gives large banks too much influence over the calculation of the rate.

Several commenters recommended additional changes and requested that the proposed methodology be revised in the final rule. A trade association representing banks recommended that the FDIC adopt a rate cap that is the higher of the rate cap using the methodology in place between 1992 and 2009 (the Treasuries-based rate cap), and the rate cap using the methodology currently in place but modified so that it is 100 basis points above the average instead of 75 basis points and so that the average is calculated assigning each bank the same weight, with the additional change to include credit unions. Another trade association representing banks recommended that the FDIC set the national rate cap using a formula that it submitted, and implicit in that formula was the higher of the pre-2009 Treasuries-based rate and the current rate, with modifications.

A trade association recommended that the FDIC adopt a national rate cap of the higher of the current rate cap or the Treasuries-based rate cap in place from 1992 to 2009. A State banking commissioner recommended that the FDIC set the national rate cap at the higher of the following

4 measures: (1) the proposed national rate cap methodology; (2) the 1992-2009 methodology, i.e., 120 percent or 130 percent of the comparable U.S. Treasury plus 75 basis points; (3) the average of the top 25 rates offered in the nation; and (4) the highest rate offered by a local institution for a particular deposit product. For renewals of time deposits, the State banking commissioner recommended that a bank be permitted to pay the rate currently paid to the customer for the same or lesser amount and for the same or lesser term.

Commenters generally recommended that the national rate cap be more transparent by basing it on publicly available market data such as Treasury and federal funds rates.

A banker recommended that the FDIC make a list of the highest rates offered to consumers for comparable products, select a certain number of the highest rates, e.g. 25 and average those 25 highest rates. To accommodate the statutory language, the banker suggested that the average be the national rate and the FDIC allow 110 percent of that average as the level that does not significantly exceed the national rate.

For nonmaturity deposits, one commenter suggested that the national rate cap be based on the federal funds rate, 1-month Treasuries rate, FHLB overnight funds rate, or rates offered by listing services. Another banker suggested using the 3-month Treasuries rate or the federal funds rate, plus 75 basis points. Still another commenter suggested that nonmaturity products should use either the pre-2009 methodology or the rates on 1-year Treasuries.

3. Discussion of Public Comment on Local Rate Cap

The FDIC received several comments regarding the local rate cap proposal. One national trade association representing banks, as well as a state trade association, recommended that the FDIC use 125 percent, instead of the proposed 90 percent, of a competing interest rate as the

upper limit, which it claimed would allow a less than well capitalized bank to offer competitive rates on deposits while not going so far above normal market rates as to exacerbate potential safety and soundness issues. Another national association representing stakeholders in the banking industry recommended that a less than well capitalized institution be permitted to offer at least up to 95 percent of the competing institution's rate on a particular product in order to allow additional flexibility.

A state-level banking association recommended that internet rates and listing service rates be considered when deciding the local rates with which an institution competes. A banker stated that the proposal is better than the current method of calculating local rates, but suggested that the calculation include internet rates.

Commenters from more rural areas drew a distinction between funding operations in rural areas versus funding operations in more urban settings. One commenter wrote that banks in rural areas may not have access to sufficient local deposits and need to be able to attract deposits through other mechanisms, such as online. One commenter suggested that caps should relate to a bank's funding method, as there are often different rates offered at branches, on-line at the same branch, and at a branchless bank. A single rate may result in a cap that is too high for banks with many branches and too low for branchless banks.

4. Discussion of Other Comments

One national trade association commended the FDIC for revising its Risk Management Supervision Manual of Examination Policies to clarify that national rate caps apply only to institutions that are less than well capitalized. Despite this recent clarification to the Manual, several bankers urged the FDIC to make clear to its examiners that the national rate cap may not

be used to evaluate well capitalized banks and should not be used as a proxy to evaluate financial products of well capitalized banks.

One banker reiterated a comment he made in response to the ANPR that the interest rate restrictions should not apply to a bank that has capital ratios that satisfy the well capitalized category but is deemed adequately capitalized because it is subject to a consent agreement that includes a capital maintenance provision. The commenter indicated that applying the interest rate restrictions to such an institution serves as a strong disincentive to investors injecting additional new capital into an institution experiencing difficulties because there is no guarantee the FDIC will not impose onerous rate restrictions regardless of the amount of capital invested.

G. The Final Rule

As described in further detail below, the final rule amends the FDIC's methodology for calculating the national rate, the national rate cap, and the local rate cap. The final rule also provides a new simplified process for institutions that seek to offer a competitive rate when the prevailing rate in an institution's local market area rate exceeds the national rate cap.

1. National Rate

The FDIC is adopting the national rate methodology generally as proposed, but revised to include the rates offered by credit unions. After considering the comments that indicated that credit unions compete with banks on a national scale, the FDIC is finalizing the proposed national rate definition, replacing the interest rate average weighted by branches with an average where each institution's interest rate is weighted by its share of deposits, with the addition of credit union rates. As described in the Interest Rate NPR, calculating the national rate by market share, rather than branch count, more accurately reflects the marketplace, and provides more

emphasis on institutions with large or exclusive internet presence as described by commenters. However, the FDIC has not been able to find sufficient reliable, robust data to include in its national rate calculation the interest rates on deposit products with special features, such as rewards checking, off-tenor maturities, negotiated rates, cash bonuses, and non-cash rewards.

2. National Rate Cap

In this final rule, the FDIC is adopting the proposed national rate cap with a modification in response to comments. This formulation retains one prong of the national rate cap that was proposed, i.e., the national rate, weighted by deposits (and now including credit unions as described above), plus 75 basis points, which will likely be the higher of the rates produced by the two proposed prongs in low interest rate environments such as the period between 2008 and 2015 and in the current period since March 2020.

However, the FDIC has replaced the other proposed prong, the rate offered at the 95th percentile of rates weighted by domestic deposit share, which would likely be the higher of the rates produced by the two prongs during more normal market conditions. For this prong, the final rule substitutes a rate that is 120 percent of the current yield on similar maturity U.S. Treasury obligations, plus 75 basis points. For nonmaturity deposits, the second prong will be the federal funds rate of interest, plus 75 basis points. This method is consistent with the alternative that was set forth in the proposal.

Thus, the national rate cap being adopted is the higher of: (1) the national rate, as revised to be based on weighting by deposits rather than branches (and including credit unions), plus 75 basis points; or (2) 120 percent of the current yield on similar maturity U.S. Treasury obligations,

plus 75 basis points. The Treasury-based second prong also provides that, for nonmaturity deposits, the prong would be the federal funds rate, plus 75 basis points.

The FDIC is replacing the proposed 95th percentile prong with a cap based on Treasury yields or federal funds, because, and as noted in the Interest Rate NPR, there are certain data limitations with the proposed methodology. Specifically, the data gathered from third party sources is based upon information provided directly by institutions or made available via public sources. As such, some rates being offered for certain products are left unreported or unpublished and therefore may not be captured as part of the data set used to determine the proposed 95th percentile prong.

These limitations are more apparent today than when the FDIC adopted its 2009 regulations that first pegged the national rate calculation to a methodology based upon deposit rates. This is because the 2009 methodology was implemented during a recessionary period, and more recently, a significant number of insured depository institutions offer products with less standard features that often times are either negotiated or not readily provided to third party sources.

As part of this rulemaking process, and in response to commenter concerns about the data limitations, the FDIC reviewed additional data sources to determine whether these data sets could provide a more reliable reflection of the deposit rate market. While some data is available for a certain number of less traditional deposit products, it is difficult to accurately calculate an annual percentage yield (APY) for certain products without more granular data. For example, deposit products that pay rates based upon certain balance thresholds, or the number of transactions made within a specific time period, would require the calculation of APYs based

upon granular data (at the individual depositor level) that is unavailable, or to make general assumptions that would likely result in less reliable APY calculations.

Nonetheless, based on historical data samples the FDIC evaluated, it appears that including the non-traditional deposit products that have a calculable APY in the proposed 95th percentile methodology would generally result in a relatively small increase in applicable rate caps. However, these data samples and analysis had limitations, and the observations may not be robust across all banks and all markets; as a result, the FDIC plans to further explore these issues in the future rather than adopt this methodology as proposed.

As noted above, the final rule retains the first proposed prong for the national rate cap (national rate + 75 basis points). The FDIC is retaining this prong, as proposed, notwithstanding the data limitations described above, because (1) based upon review of the historical information, the first prong will be substantially similar to the branch-based methodology that the FDIC has used for over a decade, (2) the 75 basis point buffer ameliorates, though does not eliminate, some of the potential data concerns,[89] and (3) including a second prong not based on deposit data ensures the FDIC is not fully relying on deposit data in calculating the national rate cap.[90] The FDIC will continue to explore ways and additional data sources to improve the national rate calculation and will continue to consider pegging the national rate cap entirely to deposit rates in the future.

[89] As shown in the appendices, for the period of low interest rates during 2010 to 2015, and from March 2020 to the present, the 75 basis points added to the national rate did not restrict less than well capitalized institutions from competing for market-rate deposits when U.S. Treasury yields were near zero.

[90] As shown in the appendices, for the periods of 1992 and 2008 and 2015 to early 2020, during periods of more normal interest rate environments, the national rate cap based on Treasuries is more reactive to increases in deposit rates than the first prong.

Nevertheless, the FDIC acknowledges that replacing the proposed 95th percentile prong with a cap based on Treasury rates or federal funds rates addresses concerns raised by commenters about the transparency of the underlying data that the FDIC uses to calculate the national rate, as well as the perceived difficulty in replicating the methodology. Further, a national rate cap applicable during normal market conditions based on the 95th percentile of rates is vulnerable to an institution, or a few institutions, with a large deposit share affecting the 95th percentile by withdrawing or introducing a product into the market or initiating a significant rate change. While such fluctuations, caused by factors other than data limitations, would be reflective of changes in the market, these changes could cause volatility in the national rate cap.

As another reason for using a Treasuries-based rate as one of the rate cap prongs, the FDIC notes that it had previously determined that the Treasuries-based rates plus 75 basis points represented a reasonable threshold above which rates "significantly exceeded" or were "significantly higher" than the national rate. This determination was relatively effective for the 16 years between 1992 and 2008 and was only changed in 2009 to the current national rate cap formula because, in part, Treasury-based rates fell significantly below deposit rate averages in the low interest rate environment associated with the financial crisis at that time. It is apparent that neither the current methodology nor the Treasuries-based rate works in all interest rate environments, the methodology adopted by the final rule is expected to be durable under both high-rate or rising-rate environments and low-rate or falling-rate environments.

Additionally, the FDIC will change from publishing the national rates and national rate caps weekly, to publishing such data monthly to limit the need for institutions to continually check the national rates. However, the FDIC may in certain circumstances publish the national

rates and national rate caps more or less frequently, such as during a time of unusual rate volatility.

With respect to nonmaturity deposits, there is no Treasury security of comparable duration. In the NPR, the FDIC asked if the overnight federal funds rate should be used for nonmaturity deposits instead of U.S. Treasury securities products. Several commenters recommended that the FDIC use the federal funds rate.[91]

In the final rule, for nonmaturity products, in lieu of the Treasury-based calculation, the second prong of the national rate cap is the federal funds rate plus 75 basis points. The FDIC notes that, historically, the rate for the three-month Treasury security has tracked closely the federal funds rate. The FDIC has selected the federal funds rate as the reference point for nonmaturity deposits under the second prong because, as an overnight deposit, Federal funds are conceptually closer to nonmaturity deposits.

The charts attached in Appendix 2 of this notice reflect historical data for the interest rates of insured depository institutions that would have resulted from the two prongs of the national rate cap being adopted. The charts also show the average of top rates offered for interest checking, savings, and money market demand accounts, as well as certificates of deposits (CDs) for terms of 1-month, 3-months, 6-months, one-year, two-years, three-years, and five-years.

3. Local Market Rate Cap in the Final Rule

In the final rule, the FDIC is adopting the proposed local market rate cap of 90 percent of the highest offered rate in the institution's local market geographic area. Specifically, a less than

[91] 84 FR at 46480 and 46492.

well capitalized institution may provide evidence that any bank or credit union with a physical presence in its local market area offers a rate on a particular deposit product in excess of the national rate cap. The local market area may include the State, county or metropolitan statistical area, in which the insured depository institution accepts or solicits deposits. The less than well capitalized institution will be allowed to offer 90 percent of the competing institution's rate on the particular deposit product to customers located within the less than well capitalized institution's local market area.

The final rule also eliminates the current two-step process where less than well capitalized institutions request a high rate determination from the FDIC and, if approved, calculate the prevailing rate within local markets. Instead, a less than well capitalized institution must notify its appropriate FDIC regional office that it intends to offer a rate that is above the national rate cap and provide evidence that an insured depository institution or credit union with a physical presence in the less than well capitalized institution's normal market area is offering a rate on a particular deposit product in its local market area in excess of the national rate cap. The less than well capitalized institution would then be allowed to offer 90 percent of the rate offered by the competing institution in the institution's local market area to customers physically located within the institution's local market area. The institution would be expected to calculate the local rate cap monthly, maintain records of the rate calculations for at least the two most recent examination cycles and, upon the FDIC's request, provide the documentation to the appropriate FDIC regional office and to examination staff during any subsequent examinations.

The FDIC is declining to adopt recommendations by commenters that the local rate cap be higher than 90 percent of the highest local rate. Given the changes being made to the national rate cap described above, the FDIC expects the need for banks to resort to the local rate cap to be

less frequent, and, in such cases, 90 percent of the highest local rate will provide a meaningful cap while allowing the institution to compete for funds in its local market. The FDIC is also not revising the proposed rule to include internet rates, because the FDIC believes that it would be inconsistent with the concept of a "local" rate to include institutions that do not have a physical location in the local market and internet rates, which are offered nationally, are reflected in the national rate.

4. Off-Tenor Maturity Products

If an institution seeks to offer a product with an off-tenor maturity for which the FDIC does not publish the national rate cap or that is not offered by another institution within its local market area, then the institution will be required to use the rate offered on the next lower on-tenor maturity for that product when determining its applicable national or local rate cap, respectively. For example, an institution seeking to offer a 26-month certificate of deposit, and no other local institution is offering a 26-month certificate of deposit, must use the rate offered for a 24-month certificate of deposit to determine the institution's applicable national or local rate cap.

On-tenor maturities are defined to include the following term periods: 1-month, 3-months, 6-months, 12-months, 24-months, 36-months, 48-months, and 60-months. All other term periods are considered off-tenor maturities. There is no off-tenor maturity for nonmaturity products such as interest checking accounts, savings accounts, or money market deposit account.

H. Alternatives

Below are alternatives, other than those described above, that were considered as part of this final rulemaking.

Average of the Top-Payers

Some commenters suggested that the FDIC use an average of the top rates paid as the national rate cap. As an example, the FDIC could set the national rate cap based upon the average of the top-25 rates offered (by product type). Under this approach, the FDIC would interpret that a less than well capitalized institution "significantly exceeds the prevailing rate in its normal market area" if it offers a rate that is above the average of the top rates offered in the country. This approach would be simple to administer and the FDIC would be able to provide real-time rate caps because it would no longer need to maintain and review the extensive data it receives from third party data providers to calculate averages.

The FDIC decided not to choose this approach due to the same data limitations as the proposed 95th percentile prong, as described in Part II. Additionally, the subset of banks paying the highest rate may have a small market share and have little to no influence over competitive rates paid in the market. Further, this same small subset of banks could be significant outliers from the rates offered by the market.

Incorporate Specials and Promotions into the Current National Rate Calculation

Several commenters suggested that the FDIC change its methodology in calculating the current national rate and include additional inputs for the published rates, such as special negotiated rates or other monetary bonus offers. As discussed in Part II, the FDIC has not been able to find sufficient reliable, robust data to include in its national rate calculation the interest rates on deposit products with special features, such as rewards checking, off-tenor maturities, negotiated rates, cash bonuses, and non-cash rewards. However, as noted, the FDIC will

continue to explore ways and additional data sources to improve the national rate calculation in the future.

One Vote per Institution

Commenters also recommended that published rates be limited to the highest rate offered by each depository institution rather than incorporating rates paid at all branches. According to commenters, this would prevent a skewing effect on the national rate by the largest institutions with the most branches. In considering this alternative, the FDIC analyzed the impact of this change by comparing the yield curves for the 12-month CD, the current national rate cap (using all branches) and the national rate cap using the highest rate offered by each IDI (in other words, each institutions receives "one vote").[92]. The differences in rates range from 15 to 52 basis points, with a range of 25 basis points between 2012 through 2017.

The FDIC did not choose this alternative because, in the FDIC's view, the one-bank, one vote approach would result in a national rate that would not be as reflective of market rates currently being offered as weighting by market share. The FDIC believes that institutions with more deposits have a greater impact on competition and the market rates.

Federal Home Loan Bank Borrowing Rate

Many commenters suggested that the FDIC amend the current national rate calculation and use the Federal Home Loan Bank (FLHB) borrowing rate for each maturity. The FDIC chose not to propose the FHLB borrowing rate for several reasons. The FHLB borrowing rate is

[92] 84 FR 46470, at 46481 (Sept. 4, 2019).

not based upon rates offered by institutions,[93] but is instead based upon the cost of funds for FHLB member institutions and requires that FHLBs obtain and maintain collateral from their members to secure the advance. Collateral requirements and borrowing interest rates may also vary based on an insured depository institution's financial condition. Moreover, FHLB advances, unlike deposit products, are not insured and not guaranteed by the U.S. government. In addition, there are 11 different FHLB districts, all that establish their own rates that may vary between districts. For these reasons, the FDIC does not believe that the FHLB borrowing rate would be a reliable indicator of rates offered on deposits by insured depository institutions.

I. Expected Effects

The interest rate restrictions apply to an insured depository institution that is less than well capitalized under PCA's capital regime. An institution may be less than well capitalized either because: (1) Its capital ratios fall below those set by the federal banking agencies for an institution to be deemed well capitalized; or (2) it otherwise meets the capital requirements for the well capitalized category, but is subject to a written agreement, order, capital directive, or prompt corrective action directive issued by its primary regulator that requires the institution to meet and maintain a specific capital level for any capital measure.[94]

As noted above, as of June 30, 2020, 10 FDIC-insured institutions had capital ratios that put them in a PCA category lower than well capitalized.[95] The FDIC reviewed the deposit interest rates offered for 11 products during the month of September 2020 by nine of these

[93] Section 29 of the FDI Act restricts less than well capitalized institutions from offering a rate of interest that is significantly higher than the prevailing rates of interest on deposits offered by other insured depository institutions. 12 U.S.C. 1831f(g)(3).
[94] 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).
[95] The 10 institutions do not include any quantitatively well capitalized institutions that may have been administratively classified as less than well capitalized.

institutions for which data were available. None of the nine less than well capitalized institutions offered interest rates above the current or the final rule's national rate caps for any product reviewed.[96]

The definition of local and national rate cap established by the final rule is likely to benefit FDIC-insured institutions. The FDIC believes that the definition of national rate cap adopted by the final rule is more sensitive to a range of interest rate environments. The final rule establishes a more transparent methodology for calculating the national rate cap which should benefit FDIC-insured institutions by facilitating ease of compliance and simplifying their liquidity planning.

The greater sensitivity of the national rate cap in this final rule to prevailing interest rates would likely reduce the potential for severe liquidity problems or liquidity failures at viable banks to arise solely as a result of the operation of the cap. The FDIC believes this aspect of the rule is important, although difficult to quantify given uncertainties about both the future interest rate environment and the future condition of banks. On the other hand, to the extent rate caps are less restrictive, the leeway for some less than well capitalized institution to continue to fund imprudent operations could increase. In this regard, the FDIC believes the final rule continues to comport with the statutory purpose of preventing less than well capitalized institutions from soliciting deposits at interest rates that significantly exceed prevailing deposit interest rates.

The final rule could benefit depositors by enabling them to earn higher rates of return on their deposits. It is difficult to estimate this expected effect because the effect would depend on

[96] Some institutions offered fewer than 11 products.

the future economic and financial conditions, and the rates of return of competing products, among other things.

Finally, the final rule could pose some modest regulatory costs for FDIC-insured institutions associated with making the necessary changes to policies, procedures and internal systems in order to achieve compliance with the final rule.

III. Treatment of Nonmaturity Deposits for Purposes of the Brokered Deposits and Interest Rate Restrictions.

A. Background

Section 29 provides that an "insured depository institution that is not well capitalized may not *accept* funds obtained, directly or indirectly, by or through any deposit broker for deposit into 1 or more deposit accounts" (emphasis added).[97]

Section 29 also contains two interest rate restrictions, one based on when funds are accepted by an institution, the other on when an institution solicits deposits. One restriction provides that an adequately capitalized institution accepting brokered deposits pursuant to a waiver granted under Section 29(c) of the FDI Act or reciprocal deposits may not pay a rate of interest that, at the time the funds are *accepted*, significantly exceeds the prevailing rate.[98] The other interest rate restriction prohibits a less than well capitalized institution from *soliciting* any deposits by offering a rate of interest that is significantly higher than the prevailing rate.[99]

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[97] 12 U.S.C. 1831f(a).
[98] 12 U.S.C. 1831f(c).
[99] 12 U.S.C. 1831f(g)(3) and (h). The restriction in section 1831f(g)(3) operates to deem any less than well capitalized institution a deposit broker and such deposits brokered deposits, if the institution solicits deposits by offering a rate of interest significantly higher than the prevailing rate. As a deposit broker, such an institution may only accept such deposits if it is adequately capitalized and has received a waiver under section 1831f(c). If below adequately capitalized, pursuant to section 1831f(g)(3), the institution would be prohibited from accepting such

For certificates of deposits and other maturity deposits, the timing of when funds for such deposits are accepted is straightforward, and Section 29 directs that such funds are accepted when the maturity deposit is renewed or rolled over.[100] For deposits credited to a nonmaturity account, however, Section 29 does not provide express direction or guidance on when such a deposit is *accepted* or *solicited.* Applying these concepts of solicitation and acceptance to nonmaturity deposits is more relevant today than at the time that the law was enacted, in 1989. At that time, brokered deposits were almost exclusively maturity deposits. However, since 1989, nonmaturity brokered deposits have become more commonplace.

In recent years, there has been some confusion regarding the FDIC's application of section 29 to nonmaturity deposits. The FDIC is adopting an interpretation in a clear, transparent way, through notice and comment rulemaking, to address such confusion.

B. Proposed Rulemakings

Accordingly, through this rulemaking process, the FDIC considered approaches for when nonmaturity deposits held by less than well capitalized institutions are subject to the interest rate and brokered deposits restrictions.

In the Interest Rate Restrictions NPR, the FDIC indicated that it was considering an interpretation under which nonmaturity deposits would be viewed as "accepted" and "solicited" for purposes of the interest rate restrictions at the time any new nonmaturity funds are placed at an institution.

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funds because a deposit broker may not accept brokered deposits and cannot not obtain a waiver to do so. Section 1831(h) results in the same prohibition for undercapitalized institutions.

[100] 12 U.S.C. 1831f (b).

Under the proposed interpretation, balances in an existing money market demand account or other savings account, as well as transaction accounts, at the time an institution fell below well capitalized would not be subject to the interest rate restrictions unless or until new funds were deposited into those accounts. If funds were deposited to such an account after the institution became less than well capitalized, the entire balance of the account would be subject to the interest rate restrictions. Interest rate restrictions would apply to any new nonmaturity deposit accounts opened after the institution fell below well capitalized.

In the Brokered Deposits NPR, the FDIC considered a similar approach for brokered deposits as it did for interest rate restrictions. For brokered nonmaturity deposits, the FDIC considered an interpretation under which nonmaturity brokered deposits are viewed as "accepted" for the brokered deposits restrictions at the time any new nonmaturity funds 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. The restrictions would also generally apply to any new nonmaturity brokered deposit accounts opened after the institution falls to below well capitalized.

C. Comments

The FDIC did not receive comments in response to the proposed interpretation provided in the Brokered Deposits NPR. However, the FDIC received a number of comments in response to proposed interpretation provided in the Interest Rate NPR, which are summarized below.

Interest Rate NPR. A national association that represents banks urged the FDIC not to finalize its proposed interpretation regarding nonmaturity deposits. The association wrote that such an interpretation would be operationally unworkable and would require banks to maintain parallel products and systems to be able to track accounts and multiple rates in the event the bank becomes less than well capitalized. The association also noted that forcing a customer's rate down, should he or she deposit an additional amount in the account would hurt consumers and likely cause a liquidity stress as customers move their balances elsewhere. Instead, the association recommended that once an institution falls below well capitalized, the FDIC should exempt or grandfather all existing deposit accounts from the rate restrictions, restricting only new deposits to new accounts opened with the bank. Similarly, another commenter suggested that existing nonmaturity accounts should be exempt from rate caps, even when new funds are added.

A stakeholder in the banking industry pointed out that some banks can and do pay interest at different rates on different parts of a depositor's balance, so called "tiered interest." The commenter indicated that there is no apparent reason why a bank could not tier interest in a way that would apply an unrestricted rate to the part of the balance that consists of deposits received before the bank became not well capitalized and apply a restricted rate only to new deposits in the account. The commenter indicated that the restricted interest rate could be applied on a last-in, first-out basis.

D. Final Rule

In the final rule, the FDIC is adopting a new interpretation for the solicitation and acceptance of nonmaturity deposits. In adopting the interpretation described below, the FDIC is relying on the plain meaning of the terms "solicit" and "accept" in a way that it is intended to be operationally workable for institutions and the FDIC. The FDIC appreciates the operational difficulties described by commenters that institutions may have faced under the proposed interpretation, and has tried to address such difficulties in the final rule while remaining within the parameters of the statutory text.

1. Solicitation of funds by offering rates of interest.

Section 29 prohibits a less than well capitalized institution from soliciting deposits by offering a rate of interest that is significantly higher than the prevailing rate. Generally, under the interpretation adopted by this final rule, an institution has *solicited* a deposit when a new account is opened or when the institution increases the rate of interest on an existing account. If a depositor adds funds to, or withdraws funds from, an existing nonmaturity account, or leaves funds in an existing nonmaturity account, no solicitation by the institution has occurred.

More specifically, for a nonmaturity account opened after the institution has fallen below well capitalized, under the final rule, an institution has solicited the deposit when the account is opened. For a nonmaturity account opened prior to an institution's PCA status falling below well capitalized, funds already credited to the account at that time have not been solicited by the institution. In addition, an institution will not be considered to have solicited deposits when new funds are added to a nonmaturity account that was opened before the institution fell below well capitalized, unless it has changed the interest rate on the account.

For a nonmaturity account held by a party as agent or nominee of one or more persons, funds are solicited each time the funds of a new beneficial owner are added to, for example, the omnibus account. As a result, a less than well capitalized institution is restricted from soliciting funds of a new beneficial owner at a rate that exceeds its applicable rate caps.

2. Acceptance of Brokered Deposits

Section 29 prohibits a less than well capitalized institution from accepting funds obtained, directly or indirectly, by or through any deposit broker for deposit into 1 or more deposit accounts.

As noted above, for deposits that have a maturity, application of section 29 is straightforward. Funds have been accepted whenever a new account is opened, or when funds are renewed or rolled over.

The treatment of nonmaturity deposits is less straightforward. Under this final rule, the FDIC is adopting an interpretation for when a nonmaturity brokered deposit is considered accepted and therefore subject to the brokered deposits restrictions. Generally, the FDIC finds that funds are accepted whenever (1) a depositor adds funds to a newly opened nonmaturity account (or, similarly, when funds for a new underlying depositor are credited to an omnibus account in the case of an agent or nominee) or (2) for existing nonmaturity accounts, when the aggregate amount of nonmaturity funds accepted by or through a particular deposit broker increases. More specifically, the FDIC is interpreting that for nonmaturity brokered deposits opened prior to an institution's PCA status falling below well capitalized, funds that were already credited to the nonmaturity accounts at that time, by a particular deposit broker, would

not be treated as being accepted. Nonmaturity brokered deposits would be considered accepted in instances when, after an institution becomes less than well capitalized:

- a nonmaturity brokered account is opened;
- the amount of nonmaturity brokered deposits, by or through a particular deposit broker, increases above the balance of nonmaturity brokered deposits existing at the bank, with respect to that particular deposit broker, at the time of downgrade to less than well capitalized; or
- for agent or nominee accounts, new funds of a new beneficial owner are added to the account.

Under this interpretation, if an adequately capitalized bank, for example, retained $10 million in nonmaturity brokered deposits from a particular deposit broker prior to the PCA downgrade, then it can continue to receive funds in and out of the nonmaturity brokered accounts maintained by that deposit broker, without seeking a waiver, as long as: the total amount of nonmaturity brokered deposits from that deposit broker does not increase above $10 million, a new nonmaturity account is not opened, or (for agent or nominee accounts) new funds of a new beneficial owner are not added to the account. In order for the aggregate amount of nonmaturity funds from that particular deposit broker to increase above $10 million, or in order for a new depositor to place funds into a nonmaturity account, the institution would need a waiver from the FDIC.

3. Acceptance of brokered deposits subject to a waiver into a nonmaturity account.

As noted above, for the purposes of section 29's interest rate restrictions, in addition to the restrictions on *soliciting* deposits by offering a rate of interest that is significantly higher than

the prevailing rate, an adequately capitalized institution is also subject to interest rate restrictions when it *accepts* nonmaturity brokered deposits subject to a waiver.

As a result, nonmaturity brokered deposits that are accepted pursuant to a waiver, as described above, would be subject to the applicable rate cap. To take the example above, the institution, upon falling below well capitalized status, would not be restricted by section 29 from paying any rate of interest on nonmaturity funds from that particular deposit broker to existing depositors, so long as the aggregate funds remained below $10 million. The institution could receive a waiver to allow the aggregate funds from that deposit broker for that group of existing depositors to exceed $10 million; however, the institution would not be permitted to pay a rate of interest in excess of the rate cap on more than $10 million in funds. In the event the institution receives such a waiver, the rule does not distinguish *which* funds have been accepted pursuant to the waiver, due to the fungibility of funds and the operational challenges in imposing such a regime, and instead restricts the total amount of funds upon which the institution can pay a rate in excess of the applicable rate cap. The rate cap restrictions would also apply to any new accounts opened by or through the deposit broker after the institution fell below well capitalized.

More specifically, for a nonmaturity account opened prior to an institution's PCA status falling below well capitalized, with respect to a particular deposit broker, brokered funds that were already credited to the nonmaturity account at that time would not be treated as being accepted for purposes of the interest rate restrictions. Funds added to the account after the institution falls below well capitalized, with respect to a particular deposit broker, would be subject to the interest rate restriction to the extent they exceeded the balance of nonmaturity brokered deposits existing at the bank, with respect to that particular deposit broker, at the time of downgrade to less than well capitalized, if the institution has received a waiver to accept

brokered deposits. In addition, with respect to a particular deposit broker, for a nonmaturity account opened after an institution has fallen below well capitalized, the brokered funds will be treated as accepted when the nonmaturity account is opened. For a nonmaturity account held by a party as agent or nominee of one or more persons, with respect to a particular deposit broker, funds are accepted each time funds of a new depositor are added to the omnibus account.

4. Summary of Treatment of Nonmaturity Deposits

To summarize, if a bank falls below well capitalized, under this final rule:

- the bank may not open a new nonmaturity account that pays an interest rate above the applicable rate cap, nor may it add funds on behalf of a new depositor to an existing nonmaturity account that pays an interest rate above the applicable rate cap;
- the bank may continue to pay an interest rate above the applicable rate cap on a nonmaturity account opened prior to the bank falling below well capitalized, but may not increase the rate, and a depositor may add funds to and withdraw funds from such account;
- without a waiver, a bank may not open a new nonmaturity account by or through a deposit broker, nor may funds on behalf of a new underlying depositor be added to an existing omnibus account in the case of an account of an agent or nominee that is a deposit broker;
- without a waiver, the aggregate amount of nonmaturity funds that the bank receives by or through a deposit broker may not exceed the aggregate amount of nonmaturity funds retained from that deposit broker at the time the bank fell

below well capitalized, (meaning that existing depositors may add funds to or withdraw funds from their nonmaturity accounts so long as the aggregate amount does not exceed the aggregate amount at the time the bank fell below well capitalized);

- with a waiver, the aggregate nonmaturity funds received by or through a deposit broker may increase above the aggregate amount at the time the bank fell below well capitalized, subject to the terms of the waiver; and
- with or without a waiver, the amount of nonmaturity funds from a particular deposit broker on which the bank may pay a rate of interest in excess of the applicable rate cap may not exceed the aggregate amount of nonmaturity funds retained from that deposit broker at the time the bank fell below well capitalized.

Appendix 1

Publicly-available Advisory Opinions

AO Number	AO Title
02-2	02-2 Applicability of FDIC Regulations Regarding Brokered Deposits to Credit Unions Servicers That Purchase Certificates of Deposit from FDIC Insured Banks
02-4	02-4 Opinion Regarding Whether “Listing Services" Would Be Considered Deposit Brokers
04-03	04-03 Questions Concerning Capital Market CD Program

04-04	04-04 Question Regarding FDIC's Criteria for Determining When a “Listing Service" is a Deposit Broker
04-05	04-05 Questions Regarding Deposit Insurance Coverage of the interest and CD When Interest is Based on the Consumer Price Index
05-02	05-02 Are Funds Held in “Cash Management Accounts" Viewed as Brokered Deposits by the FDIC?
00-6	00-6 Whether Brokered CDs Purchased at Different Institutions Will be Separately Insured After a Merger of Those Institutions
13-01	13-01 Question Concerning a Deposit Program
15-01	15–01 Question regarding whether Financial Firms that Refer Clients to a Bank Qualify as Deposit Brokers
15-02	15–02 Question regarding whether a Company that Designs Deposit Products is Considered a Deposit Broker–Part I
15-03	15–03 Question regarding whether a Company that Designs Deposit Products is Considered a Deposit Broker–Part II
15-04	15–04 Question regarding whether business professionals qualify as deposit brokers when referring clients to a bank
16-01	16–01 Question regarding whether certain Deposits held for Clearing Purposes at an Affiliated Bank are Brokered Deposits
17-01	17–01 Question regarding whether deposits placed through a Bank Program to allocate Charitable Donations to local Community Organizations would be Considered Brokered Deposits
17-02	17–02 Question regarding whether certain Deposits placed through a Bank's relationship with certain “Middle Market Companies” are considered Brokered Deposits
88-7	88-7 Insurance Coverage of CDs Invested Through Deposit Broker
89-51	89-51 Brokered Deposits Prohibition of Section 29 of the FDI Act Under FIRREA
89-55	89-55 Does Acceptance of Brokered Deposits in Violation of Section 29 of the FDI Act Affect the Insurance of the Deposits So Received
90-11	Brokered Deposits: Master CD's Purchased From Financial Institutions and Held by a Custodian Bank for the Benefit of the Purchasers
90-2	Deposit Insurance for Brokered Deposits
90-24	90-24 Deposit Broker Engaged in the Business of Placing Deposits, or Facilitating the Placement of Deposits
90-40	Domestic Brokered Deposits of Foreign Bank Customer Funds: Recordkeeping Requirements
92-50	92-50 Criteria for Determining Whether a Listing Is a “Deposit Broker" for Purposes of 12 U.S.C. § 1831f and 12 C.F.R. § 337.6
92-51	Extent to Which Trust Department of Bank Is Subject to Registration Requirements Imposed by New Brokered Deposit Prohibitions

92-52	Company and Its Employees Offering Investment Advisory Services and Purchasing CDs in Clients' Names Are Deposit Brokers Subject to Registration Requirements of New Brokered Deposit Prohibitions
92-53	92-53 Company Which Never Has Actual Possession of Investor's Principal But Facilitates Placement of Deposits Is a Deposit Broker
92-54	92-54 Company Which Merely Collects Information on Availability and Terms of Deposit Accounts and Publishes Such Data Is not a Deposit Broker
92-56	92-56 Bank Employee Who Sells Commercial Checking Accounts and Is Paid Solely by Commission Must Register as a Deposit Broker
92-60	92-60 Where Company and Its Clients Are Deposit Brokers, Company May File Master Notice Registering as Deposit Broker on Behalf of Clients
92-66	92-66 Investment Advisor/Fund Administrator for Governmental Authorities Is Deposit Broker with Respect to Optional Certificate of Deposit Placement Program It Offers
92-68	92-68 Bank Acts as Deposit Broker When It Places Portion of Deposits Exceeding Insurance Limit with Affiliated Depository Institutions
92-69	92-69 Renewal or Rollover of Deposit Is Prohibited by 12 U.S.C. § 1831f(a) only if Deposit Broker Continues to be Involved in Transaction; Brokered Deposits Accepted at Rates Significantly Higher than Prevailing Rate but Renewed for Less Does not Constitute Prohibited Renewal
92-71	92-71 Bank Acts as Deposit Broker When, at Request of Customer, It Purchases CDs at Other Depository Institutions and Charges Fee for Such Service
92-73	92-73 Mere Knowledge on Part of Insured Depository Institution That It Is Accepting Funds from Broker Is Sufficient to Subject Institution to Brokered Deposit Restrictions Based on Its Capital Category
92-75	92-75 Brokered Deposits: Employee Compensation May Not Be Adjusted After the Fact to Ensure That Compensation is Primarily Salary
92-77	92-77 Investment Advisor/Broker-Dealer which Establishes System for Marketing Deposits and Receives Consideration Through Receipt of Deposits or Fees by Bank which it Partially Owns Must Register as Deposit Broker
92-78	92-78 FHA Trustees Servicing FHA-Related Mortgage Portfolios Are Not Subject to Brokered Deposit Registration Requirements
92-79	92-79 Associations With Which Insured Institution Has Entered Into Marketing Agreements are Subject to Brokered Deposit Registration Requirements
92-84	92-84 Company that Assist and Advises Mortgage Loan Servicer in Placing Funds Must Register as Deposit Broker
92-86	92–86 Company That Assists Municipalities, Private Investors and Corporations in Locating Depository Institutions Actively Seeking Large Deposits but That Does not Accept Direct Fee from Institution Must Register as a Deposit Broker

92-87	92–87 Agreement Entered into Between Trust Department and Customer for Primary Purpose of Placing Funds With Insured Depository Institutions Requires Bank to Register as Deposit Broker
92-88	92–88 Bankers' Bank Acts as Deposit Broker When It Places Deposits for Its Stockholder Banks and Other Depository Institutions
92-91	92–91 Administrator of State School Cash Management Program Which Places CDs Must Register as Deposit Broker
92-92	92–92 Bank Acts as Deposit Broker When It Places Excess Funds for Municipality Acting as Public Guardian/Administrator and for Other Customers
93-3	93-3 Transaction in Which an Entity Finds Insured Depository Institutions for Trust Department Investments for a Fee or Commission Is Subject to Brokered Deposit Recordkeeping Requirements
93-4	93-4 Deposits Used to Secure Loans to Foreign Customers Are Subject to Brokered Deposit Interest Rate Restrictions
93-5	93-5 An Adequately Capitalized Depository Institution Without a Brokered Deposit Waiver May Not Offer Interest Rates Significantly Higher Than Prevailing Interest Rate Offered by Other Insured Depository Institutions With Same Type of Charter
93-6	93-6 Brokered Deposits: Insured Depository Institutions Must Compare Their Interest Rates to Other Insured Depository Institutions With Same Type of Charter
93-13	93-13 Funds Invested in Federally Insured Minority- or Women-Owned Depository Institutions by Fannie Mae Pursuant to an Irrevocable Trust Are Not Considered Brokered Deposits
93-14	93-14 Bank Acts as Deposit Broker When It Occasionally Invests in CDs With Other Insured Depository Institutions on Behalf of Its Customers
93-16	93-16 Well-Capitalized Institution That Solely Offers High-Rate Deposits Need Not Notify FDIC of Its Deposit Broker Status
93-18	93-18 Clarification of Brokered Deposit Interest Restrictions Imposed by 12 U.S.C. 1831(f)
93-19	93-19 Circumstances Under Which an Adequately Capitalized Institution Operating Under Brokered Deposit Waiver May Use National Rate Instead of Normal Market Rate
93-21	93-21 Legal Requirements Governing Advertisement of Deposits by Deposit Brokers
93-30	93-30 Affinity Groups Are Not Deposit Brokers for Purposes of Sections 29 and 29A of the FDI Act and 12 CFR § 337.6(a)
93-31	93-31 Whether Well-Capitalized Institution Offering Variable-Rate, College Cost-Linked CD and Agents Who Place CD Are Deposit Brokers
93-32	93-32 Clarification of Brokered Deposit Interest Rate Restrictions

93-34	93-34 Whether Corporate Sponsor Participating in Bank Tie-In Promotion Is a Deposit Broker
93-40	93-40 Clarification of Brokered Deposit Interest Rate Restrictions
93-44	93-44 Brokered Deposits: Further Guidance for Listing Services
93-46	93-46 Brokered Deposits: Clarification of “Deposit Broker" Definition and Interest Rate Restrictions
93-47	93-47 Whether Independent Trust Company Which Conducts Activities on Behalf of Affiliated Bank Must Register as Deposit Broker
93-50	93-50 Circumstances Under Which Well-Capitalized Bank Need Not Notify FDIC of Its Employees' Status as Deposit Brokers
93-63	93-63 Bank Deemed as ``Deposit Broker" When Engaging in Deposit Support Services and Customer Service Activities
93-68	93-68 Section 29 of the FDI Act—Effects of an Institution's Inability to Accept Brokered Deposits on Pass-Through Coverage and the Written Notice Requirement
93-71	93-71 Whether Certain Affinity Groups that Endorse the Marketing of Consumer Credit and Deposit Products of a National Bank Are Considered Deposit Brokers
94-13	94-13 Whether Bank Is Considered a Deposit Broker When Offering Secured Credit Card Loans to Its Customers
94-15	94-15 Is Company a Deposit Broker to the Extent It Refers Its Customers to a Particular Bank
94-37	94-37 Deposit Incentive Programs: Would the Bank Be Deemed ``Deposit Broker" or Be Confined by Certain Interest Rate Limitations Under Section 29 of the FDI Act
94-39	94-39 Brokered Deposits: Are Funds Deposited in a Special Reserve Bank Account for the Exclusive Benefit of Customers Brokered Deposits Under Sections 29 and 29A of the FDI Act
94-40	94-40 Deposit Broker: Is an Accounting Service for a Health Care Facility Included Under 12 U.S.C. 1831f
94-41	94-41 Requirements For Qualification For “Second-Tier” Broker Exception Under 12 U.S.C. 1831f--1
94-49	94-49 Deposit Broker Statute: Whether Well Capitalized Insured Depository Institutions May Accept Deposits From a Deposit Broker Without Restriction
95-24	95-24 Interest Rate Restrictions Imposed Through the Brokered Deposit Law
95-25	95-25 Applicability of Brokered Deposit Law to National CD Placement Program
95-9	95-9 Whether an Insurance Agent Is a Deposit Broker If It Is Compensated By a Bank For Referring Deposit Customers to the Bank
96-4	96-4 Whether a Foreign Bank Could Be Considered a Deposit Broker, and if They Would Be Required to Notify the FDIC of Their Status

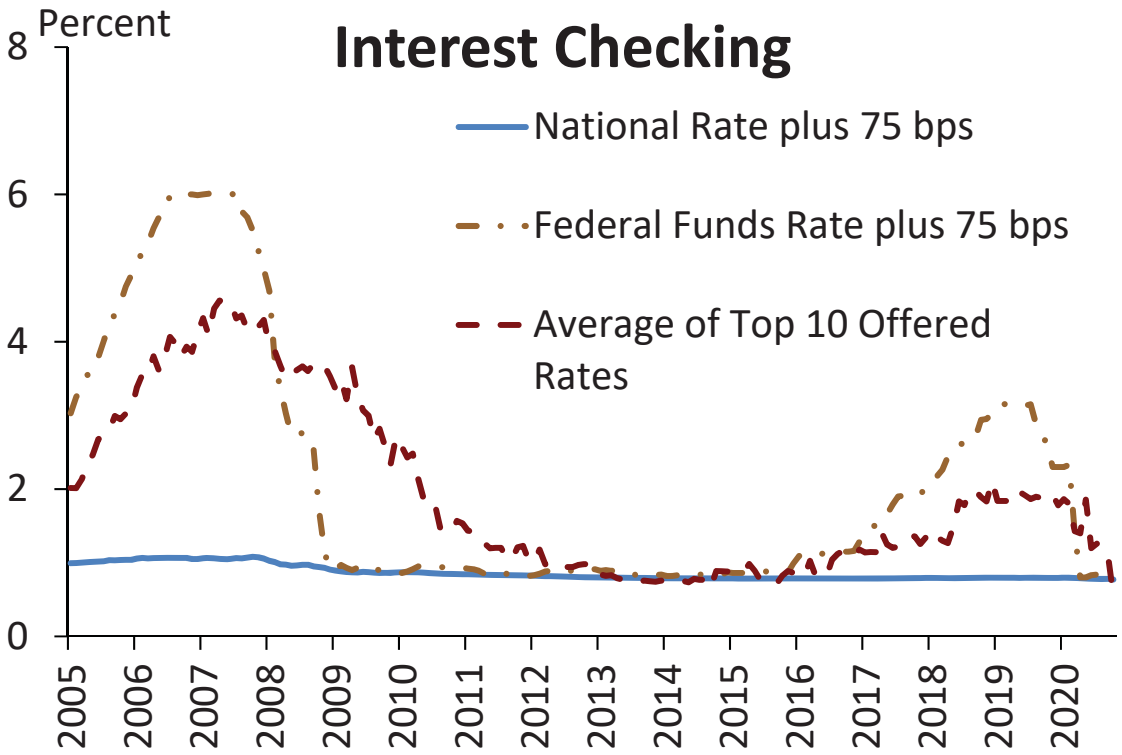
99-3	99-3 Advertisement of ``FDIC Insured" CDs by Deposit Brokers
99-5	99-5 Deposit Brokers and “Transferable Custodial Certificates of Deposit”

Financial Institution Letters

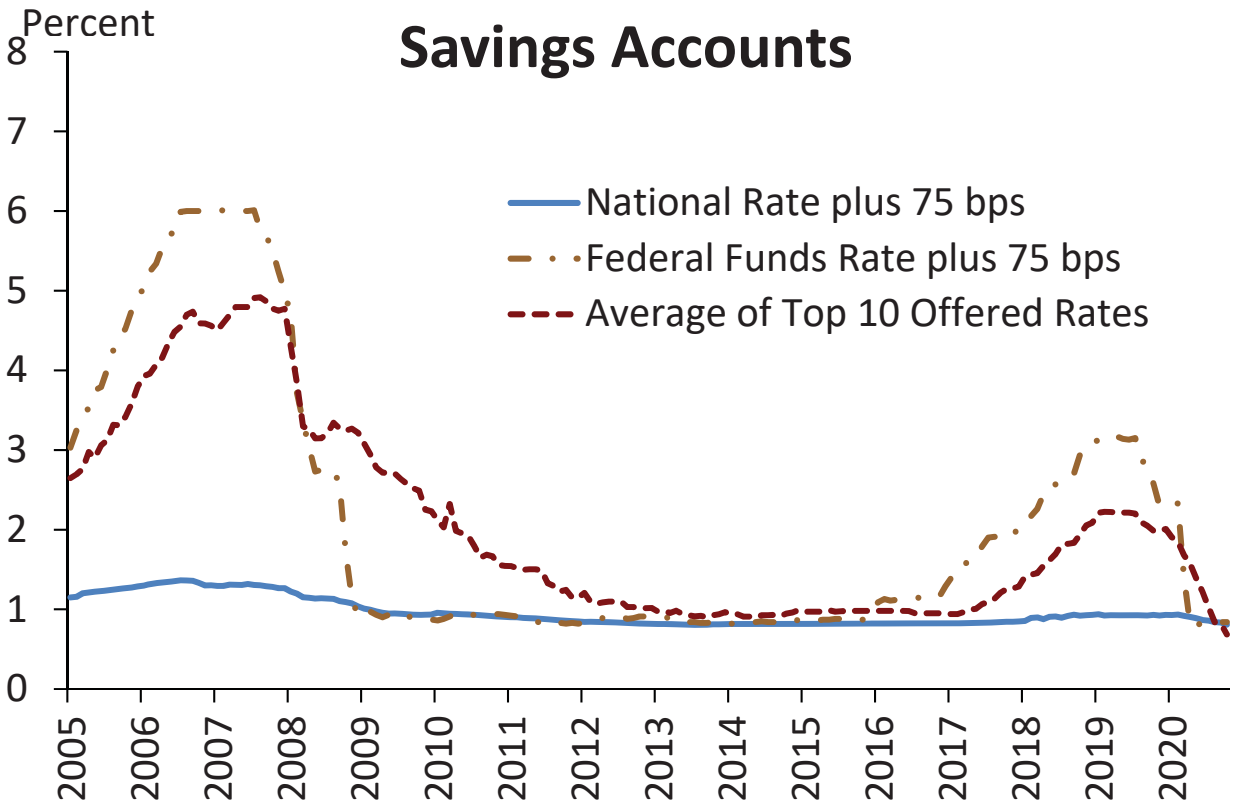
FIL Number/Title
FIL-42-2016 Frequently Asked Questions on Identifying, Accepting and Reporting Brokered Deposits
FIL-69-2009: Process for Determining in An Institution Subject to Interest-Rate Restrictions is Operating in a High-Rate Area

Appendix 2

Historical charts illustrating the final national rate cap, the top rates offered, and the previous and current national rate caps, where applicable, since 2005.



Source: RateWatch, FDIC.



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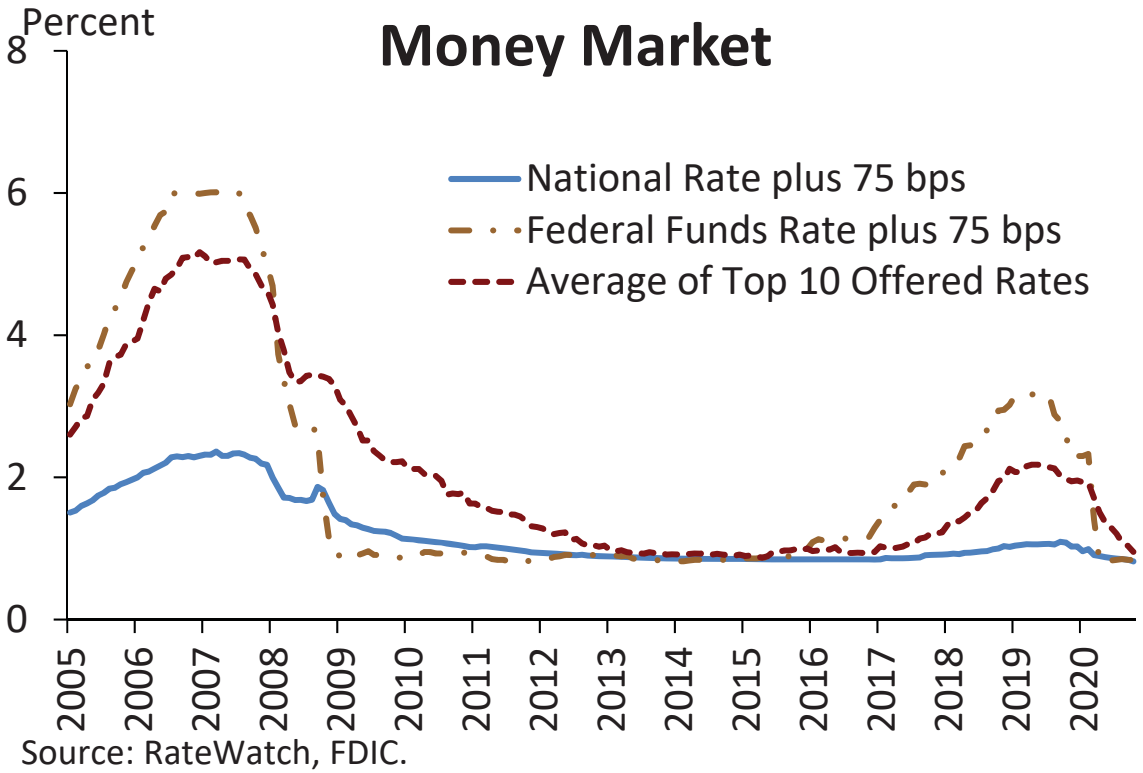
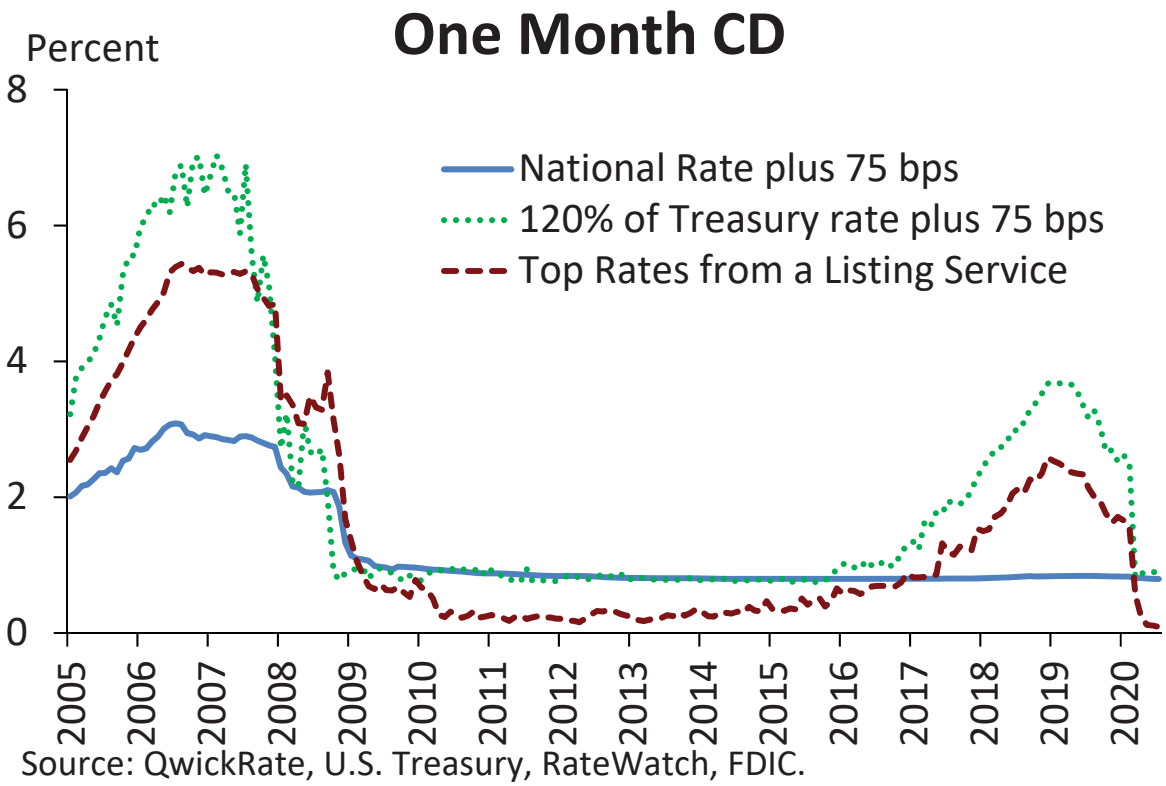
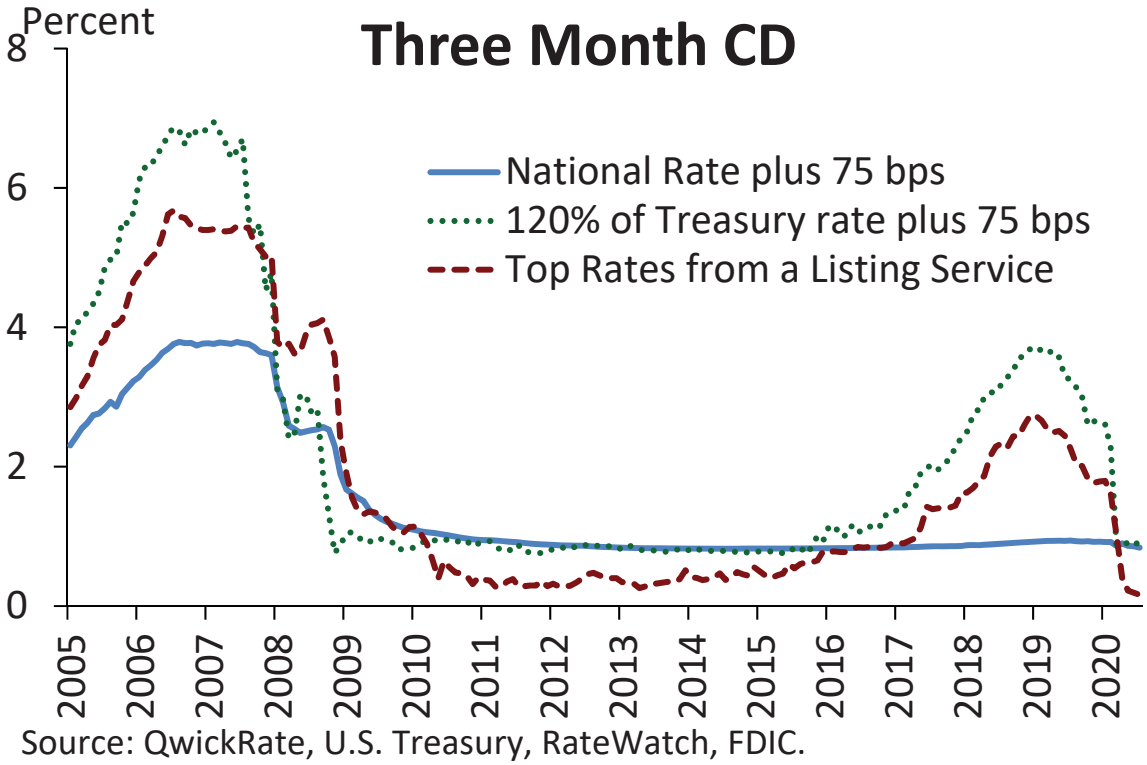


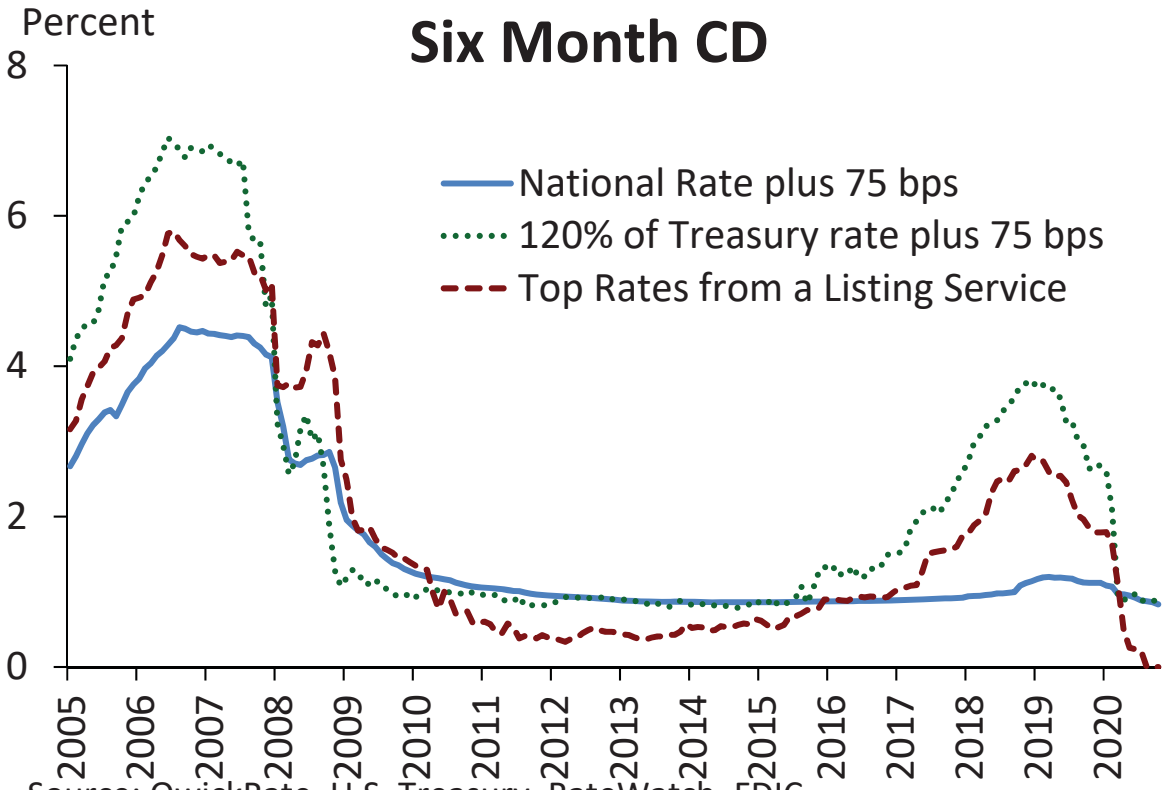
Source: RateWatch, FDIC.



Source: QwickRate, U.S. Treasury, RateWatch, FDIC.



Source: QwickRate, U.S. Treasury, RateWatch, FDIC.



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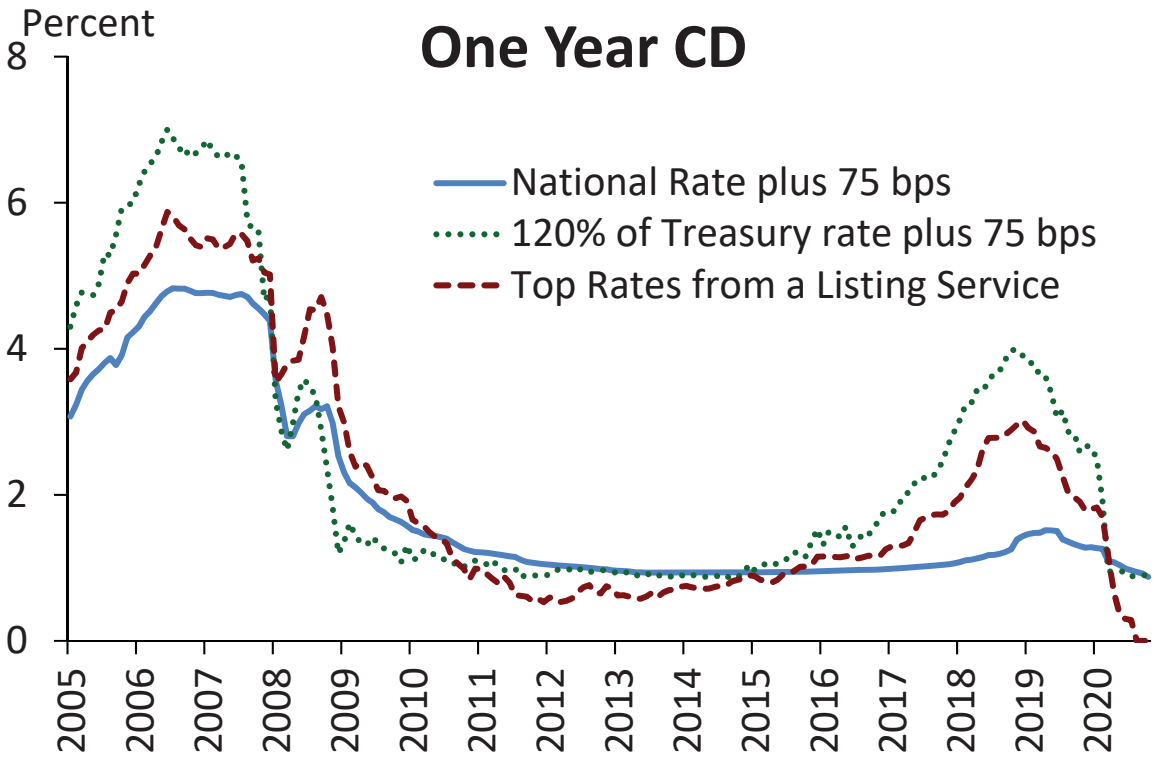
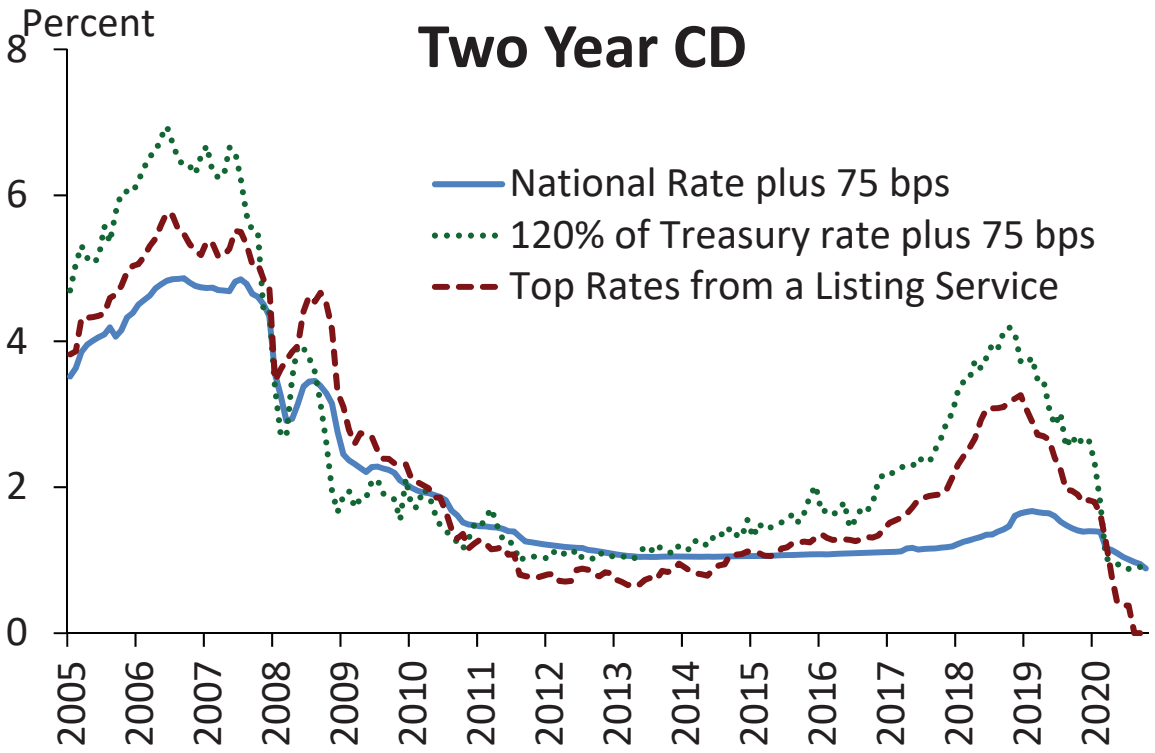
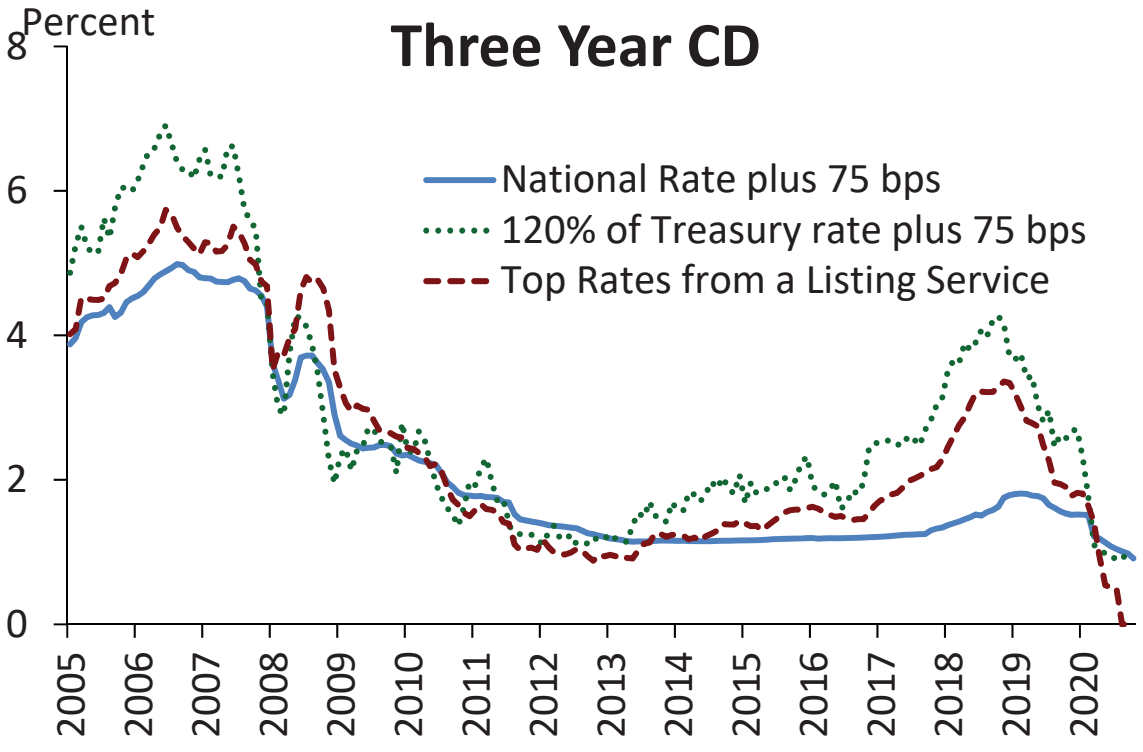


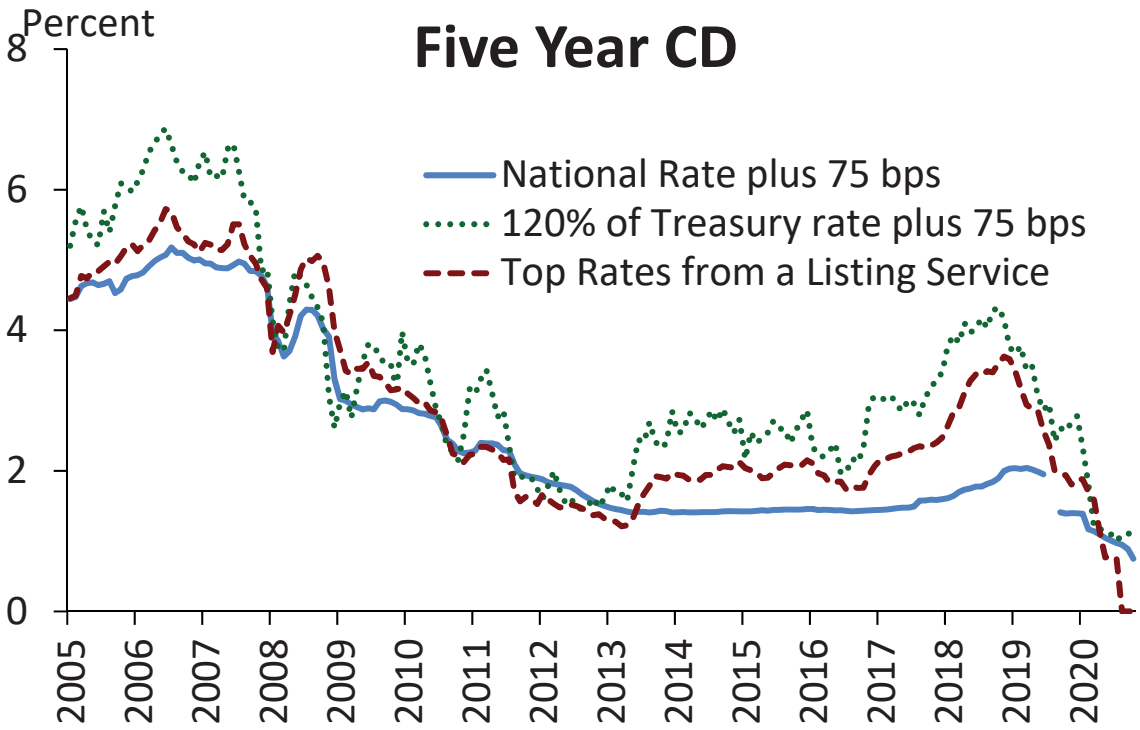
Source: QwickRate, U.S. Treasury, RateWatch, FDIC.



Source: QwickRate, U.S. Treasury, RateWatch, FDIC.



Source: QwickRate, U.S. Treasury, RateWatch, FDIC.



Source: QwickRate, U.S. Treasury, RateWatch, FDIC.

IV. Administrative Law Matters

A. Paperwork Reduction Act

1. Brokered Deposits (RIN 3064-AE84)

Certain provisions of the final rule contain "collection of information" requirements within the meaning of the Paperwork Reduction Act (PRA) of 1995.[101] 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 final rule are being submitted to the Office of Management and Budget (OMB) for review and approval under section 3507(d) of the PRA[102] and section 1320.11 of the OMB's implementing regulations.[103] 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 Requirements for Brokered Deposits."

Current Actions

Under the final rule:

- Respondents may file an application with the FDIC for a waiver of the prohibition on the acceptance of brokered deposits;

[101] 44 U.S.C. 3501–3521
[102] 44 U.S.C. 3507(d).
[103] 5 CFR 1320.

- Respondents may file a notice informing the FDIC that the respondent is availing itself of the Primary Purpose Exception Based on the Placement of Less Than 25 Percent of Customer Assets Under Administration;

- Respondents may file a notice informing the FDIC that the respondent is availing itself of the Primary Purpose Exception Based on Enabling Transactions; and

- Respondents may file an application with the FDIC for a Primary Purpose Exception Not Based on a Designated Exception (reporting requirement to obtain or retain a benefit).

The FDIC estimated the annual burden associated with the final rule based on the following assumptions and according to the methodology described below:

1. The FDIC lacks the data necessary to determine the number of third parties which may avail themselves of the primary purpose exception based on placing less than 25 percent of customer assets under administration and therefore, may make a notice submission to the FDIC. When the notice of proposed rulemaking for this rule was published, the FDIC invited comments on how its estimates could be improved[104] but received no comments on the subject.

   The primary purpose exception based on placing less than 25 percent of customer assets under administration is expected to be utilized largely by broker-dealers. With few exceptions, broker-dealers must register with the Securities and Exchange Commission and be members of FINRA. There were 3,517 FINRA registered broker-dealer firms in 2019. Some of the 3,517 broker-dealers may not engage in activity which meets the

[104] 85 FR 7453 (Feb. 10, 2020).

definition of “deposit broker,” while some firms which do engage in such activity may not be among the 3,517 FINRA registered broker-dealers. However, in the absence of data to estimate future respondents, consistent with the changes in the rule relative to the NPR, the FDIC assumes that 703 firms will submit notices for a “designated exception” under the primary purpose exception based on placing less that 25 percent of customer assets under administration, in the initial year of implementation. Further, the FDIC assumes that 176 firms will submit notices for a “designated exception” under the primary purpose exception based on placing less that 25 percent of customer assets under administration, on average each year, an ongoing basis.

2. The FDIC lacks the data necessary to determine the number of third parties which may avail themselves of the primary purpose exception based on enabling transactions and other business arrangements and may elect to make a notice submission to the FDIC. When the notice of proposed rulemaking for this rule was published, the FDIC invited comments on how its estimates could be improved but received no comments on the subject.

   The FDIC believes that the primary purpose exception based on enabling transactions and on other business arrangements will be utilized by firms engaged in deposit brokering. The FDIC lacks the data necessary to determine the number of firms which engage in deposit brokering. According to Census data, there are 1,223 establishments within the industry in which deposit brokers are classified. Not all 1,223 establishments engage in deposit brokering, and some firms which engage in deposit brokering may be classified in another industry. In the absence of data to estimate future respondents, consistent with the changes in the rule relative to the NPR, the FDIC assumes that 245 firms will submit

notices in reliance on the enabling transactions designated exception in the initial year of implementation. Finally, in the absence of data to estimate future respondents, the FDIC assumes that 61 will file a notice in reliance upon the enabling transactions designated exception, or a designated exception identified in the future that requires a notice, and an additional 61 will submit an application, on average each year, on an ongoing basis.

3. The FDIC lacks the data necessary to determine the number of third parties which may avail themselves of the primary purpose exception not based on one of the designated enabling transactions or placement of less than 25 percent of customer assets under administration, and do not meet a designated exception. When the notice of proposed rulemaking for this rule was published, the FDIC invited comments on how its estimates could be improved but received no comments on the subject.

   The FDIC believes that the exceptions not based on a designated exception, which includes enabling transactions and placement of less than 25 percent of customer assets under administration, 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 1,223 establishments within the industry in which deposit brokers are classified. Not all 1,223 establishments engage in deposit brokering, and some firms which engage in deposit brokering may be classified in another industry. Additionally, the FDIC assumes that 245 firms submit applications for a primary purpose exception in the initial year of implementation. Finally, in the absence of data to estimate future respondents, the FDIC assumes that an additional 61 will submit an application for a primary purpose exception, on average each year, on an ongoing basis.

4. 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.

5. The FDIC estimated the amount of time required to complete each notice submission and application type. The notice submission for a primary purpose exception to the definition of deposit broker based on placing less than 25 percent of customer assets under administration, by business line, with IDIs. For this type of submission two items are required: 1) the total amount of customer assets under control by the third party for that particular business line, and 2) 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 primary purpose exception, 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 information required for this notice submission.

6. The notice submission for a primary purpose exception to the definition of deposit broker based on placing funds to enable transactions requires an entity to submit the following information: a copy of the form of contract 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. Finally, a submission of this type would need to explain 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: and provide a description of the deposit placement arrangement. Because this submission requires 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 notice.

7. The application for a primary purpose exception from the definition of deposit broker not based on a designated exception, which includes enabling transactions and placement of less than 25 percent of customer assets under administration, requires the items enumerated in the regulation, 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 and submit the application.

8. Each notice submission or application has associated quarterly (ongoing) reporting requirements. For approved applications these ongoing requirements are to be spelled out by the FDIC in its written approval. For the first notice submission, the FDIC estimates it would take each respondent an average of 30 minutes per quarter to gather the information and submit the information for an annual average of 2 burden hours. For the second notice submission, the FDIC estimates it will take reach respondent an average of 30 minutes per year to gather and submit the information. The FDIC assumes that the initial quarterly submission may take longer to prepare, but once reporting systems are in place, the FDIC believes an average of 30 minutes per quarter is a reasonable estimate for this ongoing reporting burden. For the application requirement, due to its greater number of required items, is estimated to take each respondent an average of 0.25 hours per quarter to gather the information and submit it for an annual average of 1 burden hour.

9. The FDIC revised its estimates for the information collection “Application for Waiver of Prohibition on Acceptance of Brokered Deposits.” 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.

Estimated Annual Burden –

Information Collection (IC) Description	Type of Burden	Obligation to Respond	Estimated Average Number of Respondents	Estimated Number of Responses	Estimated Time per Response (Hours)	Frequency of Response	Total Estimated Annual Burden (Hours)
Initial Implementation							
Notice submission for Primary Purpose Exception Based on the Placement of Less Than 25 Percent of Customer Assets Under Administration	Reporting	Obtain or Retain a Benefit	703	1	3	On Occasion	2,109
Notice submission for Primary Purpose Exception Based on Enabling Transactions	Reporting	Obtain or Retain a Benefit	245	1	5	On Occasion	1,225
Application for Primary Purpose Exception Not Based on the Business Arrangements that do not meet a Designated Exception	Reporting	Obtain or Retain a Benefit	245	1	10	On Occasion	2,450
Ongoing							
Notice submission for Primary Purpose Exception Based on the Placement of	Reporting	Obtain or Retain a Benefit	176	4	0.5	Quarterly	352

Less Than 25 Percent of Customer Assets Under Administration							
Notice Submission for Primary Purpose Exception Based on Enabling Transactions	Reporting	Obtain or Retain a Benefit	61	1	0.5	Annual	30.5
Reporting for Primary Purpose Exception Not Based on the Business Arrangements that do not meet a Designated Exception	Reporting	Obtain or Retain a Benefit	61	4	0.25	Quarterly	61
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							**6,281.5**
Note: The estimated number of respondents in the *Initial Implementation* section is an annual average calculated over three years.							

2. Interest Rate Restrictions (RIN 3064-AF02)

In accordance with the requirements of the PRA,[105] the FDIC may not conduct or sponsor, and the respondent is not required to respond to, an information collection unless it displays a currently valid OMB control number. This final rule does not create a new or revise an existing information collection as it relates to the interest rate restrictions. Therefore, no PRA clearance submission to OMB will be made.

[105] 44 U.S.C. 3501–3521.

B. Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA) generally requires that, in connection with a final rule, an agency prepare and make available for public comment a final regulatory flexibility analysis describing the impact of the rule on small entities.[106] 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.[107]

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 noninterest expenses. The FDIC believes that effects in excess of these thresholds typically represent significant effects for FDIC-insured institutions.

1. Brokered Deposits Final Rule (AE94)

The FDIC does not believe that the rule will have a significant economic effect on a substantial number of small entities. However, some expected effects of the rule are difficult to assess or accurately quantify given current information, therefore the FDIC has included a Final Regulatory Flexibility Act (RFA) Analysis in this section.

[106] 5 U.S.C. 601 *et seq.*

[107] 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.

Reasons Why This Action Is Being Considered

As previously discussed, the FDIC 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, the FDIC is amending 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 adopting this rule under authorities granted by Section 29 of the 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 rule's legal basis please refer to section I(B).

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 adopting a new framework for analyzing certain provisions of the statutory definition. Among other things, through this rulemaking, the FDIC is amending the primary purpose exception. For a more detailed description of the rule please refer to section I(C) "Final Rule and Discussion of Comments."

Small Entities Affected

The FDIC insures 5,075 depository institutions, of which 3,665 are defined as small institutions by the terms of the RFA.[108] Additionally, of those 3,665 small, FDIC-insured institutions, 1,086 currently report holding some volume of brokered deposits. Further, of those 3,665 small, FDIC-insured institutions, 3,656 are currently classified as well capitalized, while nine are less than well capitalized based on capital ratios reported in their Call Reports.[109]

[108] Call Report, June 30, 2020. 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.

[109] Information based on June 30, 2020 Consolidated Reports of Condition and Income. The 9 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).

Expected Effects

There are potentially three four categories of effects of the rule on small, FDIC-insured institutions: Effects applicable to potentially any small, insured institution; effects applicable to small, less than well-capitalized institutions; effects applicable to nonbank subsidiaries of small, FDIC-insured institutions that may or may not be deemed deposit brokers; and reporting compliance requirements for small, covered entities.

All Small, FDIC-Insured Institutions

The rule could immediately affect the 1,086 small, FDIC-insured institutions currently reporting brokered deposits. Going forward, the rule could affect all 3,665 small, FDIC-insured institutions whose decisions regarding the types of deposits to accept could be affected.

The rule would benefit insured institutions and other interested parties by providing greater legal clarity regarding the classification and treatment of brokered deposits. The FDIC believes that as result of this increased clarity, the 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 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.[110] 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, rather than as part of a relationship with a bank, and as such these deposits may be less stable and more subject to deposit interest rate competition. The behavior of deposits placed through certain sweep arrangements 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 rule reduces bankers' perception of a stigma associated with certain types of deposits, more institutions may be incentivized to accept such deposits.

The rule could incentivize the development of banking relationships between small, FDIC-insured institutions and other firms. The new opportunities could spur growth in the types of companies that provide third party deposit placement services, 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 accurately estimate such potential effects with the information 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 changes to the definition of deposit broker, potentially affecting any insured institution that currently accepts brokered

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

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 rule, a bank's assessment may decrease, all else equal.

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 in the event they fall below well capitalized and become subject to the restrictions set forth in the law and regulations 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 rule would establish reporting requirements for IDIs and other nonbank third parties that apply for and maintain a primary purpose exception. As noted previously, however, the FDIC anticipates that nonbank third parties are 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 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, 2020, brokered deposits make up approximately 1.3 percent of domestic deposits held by less than well capitalized banks, well below the 7.7 percent held by all IDIs.[111] By generally reducing the scope of deposits that are considered brokered, the rule allows less than well capitalized banks to increase their holdings of deposits that are currently reported as brokered but will not be reported as brokered under the final rule. As of June 30, 2020, there are only nine less than well capitalized small, FDIC-insured institutions based on Call report information. These banks hold approximately $2.5 billion in assets, $1.7 billion in domestic deposits, and $21.7 million in brokered deposits.[112] These banks could be directly affected by the rule in that they could potentially accept more or different types of deposits currently designated as brokered.

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

[111] Call Report data, June 30, 2020.
[112] Ibid.

The revisions to the brokered deposit regulations could have effects on some nonbank subsidiaries of small, FDIC-insured institutions. For example, subsidiaries of small, FDIC-insured institutions that may currently meet the deposit broker definition would no longer be a deposit broker under the rule if they solely place deposits at one IDI. Additionally, some nonbank subsidiaries of small, FDIC-insured institutions could employ or seek to determine whether they meet the primary purpose exception. This may include submitting notices or filing applications by some third parties that seek to avail themselves of the primary purpose exception, or by banks submitting notices or filing application on behalf of such entities. Ongoing reporting by these entities is also potentially expected under the final rule.

Reporting Requirements

As previously discussed, the final rule establishes some reporting obligations for certain insured depository institutions or nonbank third parties[113] 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. The rule establishes, for entities that do not engage in one of the designated expectations, 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 non-brokered as a result of the primary purpose exception. As previously discussed, relative to the NPR, the final rule establishes additional designated exceptions that will not require an application. However, institutions that are eligible for these designated exceptions will be required to file a notice submission to the FDIC. Further, certain

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

entities granted an exception under the primary purpose exception may also be subject to periodic reporting requirements under the final rule. These reporting requirements will allow the FDIC to monitor the applicability of the primary purpose exception. Finally, in the event that an entity that has applied and been approved for a primary purpose exception has undergone material changes to its business that renders the business no longer eligible for the primary purpose exception, the FDIC will be able to require the entity to refile a notice, submit an application, reapply for approval, impose additional conditions on the approval, or withdraw a previously granted approval, with notice to the entity.

As previously discussed in the Expected Effect Section, the final rule establishes reporting requirements for an estimated 176 and 703 firms during the year of implementation, and between 9 and 245 firms each year after. The FDIC does not currently have access to data that would facilitate an accurate estimate of how many of these firms are considered "small" for the purposes of RFA. Therefore, the FDIC believes it is possible that the reporting requirements of the final rule could affect up to 703 small entities during the year of implementation, and up to 245 small entities each year afterword.

As previously discussed in the expected Effects Section, in the initial year of implementation the FDIC estimates that the notice for the "25 percent" business relationship will be three hours to complete on average, and 0.5 hours per quarter each year after that. In the initial year of implementation, the FDIC estimates that the notice for the "enabling transactions" will take 5 hours to complete on average, and 0.5 hours each year after that. In the initial year of implementation, the FDIC estimates that the application for exception based on not enabling transactions and other business arrangements, or placing less that 25 percent of customer assets under management will take 10 hours to complete on average, and 0.25 hour per quarter each

year after that. Therefore, based on the above assumptions and methodology, the FDIC estimates the final rule imposes an annual reporting burden of 5,784 hours for the first year and 497.5 hours each year after that for all affected entities. This equates to estimated compliance costs of $613,740 in the first year and $51,589 each year after that for all effected entities.[114] Again the FDIC does not currently have access to data that would facilitate an accurate estimate of how many of these firms are considered "small" for the purposes of RFA. Therefore, therefore the FDIC believes it is possible that the reporting requirements of the final rule could pose reporting compliance costs up to $613,740 in the first year for small entities, and up to $51,589 each year after for small entities.

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.

2. Interest Rate Restrictions (RIN 3064-AF02)

FDIC is revising its regulations relating to interest rate restrictions that apply to less than well capitalized insured depository institutions, by amending the methodology for calculating the

[114] 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.

national rate and national rate cap. The also modifies the current local rate cap calculation and process.

Specifically, the rule defines the national rate for a deposit product as the average rate for that product, where the average is weighted by domestic deposit share. The proposed national rate cap is the higher of 1) the national rate, as revised to be based on weighting by deposits rather than branches (and including credit unions), plus 75 basis points; or (2) 120 percent of the current yield on similar maturity U.S. Treasury obligations, plus 75 basis points.

Because the FDIC's experience suggests some institutions compete for particular products within their local market area, the rule would continue to provide a local rate cap process.

Specifically, the rule would allow less than well capitalized institutions to provide evidence that any bank or credit union in its local market offers a rate on particular deposit product in excess of the national rate cap. If sufficient evidence is provided, then the less than well capitalized institution would be allowed to offer 90 percent of the competing institution's rate on the particular product.

As described in section II(G), above, the FDIC is adopting the national rate methodology as proposed, with a revision to include the rates offered by credit unions in addition to the rates offered by FDIC-insured institutions. Under the final rule, the national rate for a particular deposit product will be the deposit-weighted average rate for that product.

The FDIC is also adopting the proposed methodology for calculating the national rate caps, with a modification suggested by commenters. The proposed methodology defined the national rate cap for a particular deposit product as the higher of the national rate plus 75 basis

points, or the 95th percentile of rates weighted by domestic deposits. The adopted methodology defines the national rate cap for a particular deposit product as the higher of the national rate plus 75 basis points or 120 percent of the current yield on a similar maturity U.S. Treasury obligation, plus 75 basis points. This "Treasury-based" second prong would also provide that, for non-maturity deposits, the rate cap is defined as the midpoint of the target range for the Federal funds rate, plus 75 basis points.

Finally, for the local rate cap the FDIC is adopting the proposed cap of 90 percent of the highest offered rate. The final rule also eliminates the current two-step process where less than well capitalized institutions request a high rate determination from the FDIC and, if approved, calculate the prevailing rate within local markets. Instead, a less than well capitalized institution must notify its appropriate FDIC regional office that it intends to offer a rate that is above the national rate cap and provide evidence that it is competing against an institution or credit union that is offering a rate in its local market area in excess of the national rate cap. The institution would then be allowed to offer 90 percent of the rate offered by a competitor in the institution's local market area.

As of June 30, 2020, the FDIC insured 5,075 institutions, of which 3,665 are small for purposes of the RFA.[115] The adopted national rate caps will affect less than well-capitalized small institutions if those institutions currently offer deposit products with rates above the adopted caps and their local competitors do not offer similarly high rates. As of June 30, 2020, 10 insured institutions are quantitatively less than well-capitalized, of which nine are small for purposes of the RFA.[116] None of the eight small, less than well-capitalized institutions for which

[115] June 30, 2020, Call Report data.
[116] *Id.*

the FDIC had interest rate data offered rates above either the current national rate caps or the national rate caps as defined in this final rule across 11 deposit products analyzed for the month of September.[117] Thus, the FDIC does not believe the final rule will significantly affect any small, FDIC-insured institutions.

Accordingly, the FDIC certifies that this rule will not have a significant economic effect on a substantial number of small entities.

One commenter to the NPR suggested that the FDIC sample a larger group of small banks which could become less than well capitalized and run stress tests simulating various interest rate environments to determine whether the institutions would be able to raise or retain funding under the proposed rate caps. Such a stress testing exercise would be difficult and heavily dependent on assumptions not only about the shape and level of the Treasury yield curve, but about national and local demand for loans and deposits and the nature of deposit interest rate competition resulting from these factors. In response to the comment, the FDIC notes that as described throughout this preamble, the rate caps under this rule are constructed to be more responsive to the prevailing interest rate environment and are generally expected to be moderately less restrictive than the current rate caps.

C. Riegle Community Development and Regulatory Improvement Act of 1994

Pursuant to section 302(a) of the Riegle Community Development and Regulatory Improvement Act (RCDRIA),[118] in determining the effective date and administrative compliance

[117] The FDIC surveyed rates offered on savings, interest checking, and money market demand accounts, as well as certificates of deposit of 1, 3, 6, 12, 24, 36, 48, and 60-month maturities. Only non-jumbo accounts were considered, and not every institution offered every type of account.
[118] 12 U.S.C. 4802(a).

requirements for new regulations that impose additional reporting, disclosure, or other requirements on IDIs, each Federal banking agency must consider, consistent with the principle of safety and soundness and the public interest, any administrative burdens that such regulations would place on IDIs, including small IDIs, and customers of IDIs, as well as the benefits of such regulations. In addition, section 302(b) of RCDRIA requires new regulations and amendments to regulations that impose additional reporting, disclosures, or other new requirements on IDIs generally to 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.[119] The FDIC considered the administrative burdens and benefits of the final rule in determining its effective date and administrative compliance requirements. As such, the final rule will be effective on April 1, 2021, with full compliance with the brokered deposit part of the regulation extended to January 1, 2022.

D. Use of Plain Language

Section 722 of the Gramm-Leach Bliley Act[120] requires the Federal banking agencies to use plain language in all proposed and final rules published after January 1, 2000. The FDIC has sought to present the final rule in a simple and straightforward manner and did not receive any comments on the use of plain language.

Authority and Issuance

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

[119] 12 U.S.C. 4802.
[120] 12 U.S.C. 4809.

PART 303—FILING PROCEDURES

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

Authority: 12 U.S.C. 378, 1464, 1813, 1815, 1817, 1818, 1819(a), (Seventh and Tenth), 1820, 1823, 1828, 1831a, 1831e, 1831o, 1831p–1, 1831w, 1835a, 1843(I), 3104, 3105, 3108, 3207, 5414, 5415 and 15 U.S.C. 1601–1607.

2. Revise § 303.243 to read as follows:

§ 303.243 Brokered deposits.

(a) *Brokered deposit waivers*—(1) *Scope.* Pursuant to section 29 of the FDI Act (12 U.S.C. 1831f) and part 337 of this chapter, an adequately capitalized insured depository institution may not accept, renew or roll over any brokered deposits unless it has obtained a waiver from the FDIC. A well-capitalized insured depository institution may accept brokered deposits without a waiver, and an undercapitalized insured depository institution may not accept, renew or roll over any brokered deposits under any circumstances. This section contains the procedures to be followed to file with the FDIC for a brokered deposit waiver. The FDIC will provide notice to the depository institution's appropriate federal banking agency and any state regulatory agency, as appropriate, that a request for a waiver has been filed and will consult with such agency or agencies, prior to taking action on the institution's request for a waiver. Prior notice and/or consultation shall not be required in any particular case if the FDIC determines that the circumstances require it to take action without giving such notice and opportunity for consultation.

(2) *Where to file.* Applicants shall submit a letter application to the appropriate FDIC office.

(3) *Content of filing.* The application shall contain the following:

(i) The time period for which the waiver is requested;

(ii) A statement of the policy governing the use of brokered deposits in the institution's overall funding and liquidity management program;

(iii) The volume, rates and maturities of the brokered deposits held currently and anticipated during the waiver period sought, including any internal limits placed on the terms, solicitation and use of brokered deposits;

(iv) How brokered deposits are costed and compared to other funding alternatives and how they are used in the institution's lending and investment activities, including a detailed discussion of asset growth plans;

(v) Procedures and practices used to solicit brokered deposits, including an identification of the principal sources of such deposits;

(vi) Management systems overseeing the solicitation, acceptance and use of brokered deposits;

(vii) A recent consolidated financial statement with balance sheet and income statements; and

(viii) The reasons the institution believes its acceptance, renewal, or rollover of brokered deposits would pose no undue risk.

(4) Additional information. The FDIC may request additional information at any time during processing of the application.

(5) Expedited processing for eligible depository institutions. An application filed under this section by an eligible depository institution as defined in this paragraph will be acknowledged in writing by the FDIC and will receive expedited processing, unless the applicant is notified in writing to the contrary and provided with the basis for that decision. For the purpose of this section, an applicant will be deemed an eligible depository institution if it satisfies all of the criteria contained in § 303.2(r) except that the applicant may be

adequately capitalized rather than well-capitalized. The FDIC may remove an application from expedited processing for any of the reasons set forth in § 303.11(c)(2). Absent such removal, an application processed under expedited procedures will be deemed approved 21 days after the FDIC's receipt of a substantially complete application.

(6) Standard processing. For those filings which are not processed pursuant to the expedited procedures, the FDIC will provide the applicant with written notification of the final action as soon as the decision is rendered.

(7) Conditions for approval. A waiver issued pursuant to this section shall:

(i) Be for a fixed period, generally no longer than two years, but may be extended upon refiling; and

(ii) May be revoked by the FDIC at any time by written notice to the institution.

(b) *Primary purpose exception notices and applications*

(1) *Scope*. This section sets forth a process for agents or nominees, or insured depository institutions on behalf of agents or nominees, to notify the FDIC that it will rely upon a designated exception in 337.6(a)(5)(v)(I)(1)(i)-(ii). This section also sets forth a process for agents or nominees, or insured depository institutions on behalf of agents or nominees, to apply for the primary purpose exception, as described in 337.6(a)(5)(v)(I)(2).

(2) *Definitions*. For purposes of this section:

(i) *Third party* means an agent or nominee that submits a notice that it will rely upon a designated exception in 337.6(a)(5)(v)(I)(1)(i)-(ii) or applies to be excluded from the definition of deposit broker pursuant to the primary purpose exception as described in 337.6(a)(5)(v)(I)(2).

(ii) *Notice filer* means a third party, as defined in (i), or an insured depository institution on behalf of a third party, that submits a written notice that the third party will rely upon a designated business exception in 337.6(a)(5)(v)(I)(2)(i)(ii).

(iii) *Applicant* means a third party, as defined in (i), or an insured depository institution on behalf of a third party, that applies to be excluded from the definition of deposit broker pursuant to the primary purpose exception, as described in 337.6(a)(5)(v)(I)(2).

(3) *Notice Requirement for Designated Business Exceptions.* A third party, or an insured depository institution on behalf of a third party, must notify the FDIC through a written notice that the third party will rely upon a designated business exception described in 337.6(a)(5)(v)(I)(1)(i)-(ii) in order to rely on that designated business exception.

(i) *Contents of Notice*. The notice must include: the designated exception upon which the third party will rely; a brief description of the business line; the applicable specific contents for the designated exception; either a statement that there is no involvement of any additional third party who qualifies as a deposit broker or a brief description of any additional third party that may qualify as a deposit broker; and if the notice is provided by a nonbank third party, a list of the insured depository institutions that are receiving deposits by or through the particular business line. The applicable specific contents for the following designated exceptions are:

(a) *25 percent test (as described in 337.6(a)(5)(v)(I)(1)(i)).*

1. The total amount of customer assets under administration by the third party for that particular business line; and
2. The total amount of deposits placed by the third party on behalf of its customers, for that particular business line, at all depository institutions, being placed by that third party.

(b) *Enabling transactions test (as described in 337.6(a)(5)(v)(I)(1)(ii)).*

1. Contractual evidence that there is no interest, fees, or other remuneration, being paid to any customer accounts; and
2. A certification that all customer deposits that are placed at insured depository institutions are in transaction accounts.

(ii) *Additional Information for Notices.* The FDIC may request additional information from the notice filer at any time after receipt of the notice.

(iii) *Additional notice filers.* The FDIC may include notice and/or reporting requirements as part of a designated exception identified under 337.6(a)(5)(v)(I)(2)(xiv).

(iv) *Subsequent Notices.* A notice filer that previously submitted a notice under this section shall submit a subsequent notice to the FDIC if, at any point, the notice filer no longer meets the designated business exception that was the subject of its previous notice.

(v) *Ongoing Requirements for Notice Filers.* Notice filers that submit a notice under *the 25 percent test* must provide quarterly updates to the FDIC on the figures described in 303.243(b)(3)(i)(a) that were provided as part of the written notice.

Notice filers that submit a notice under *the enabling transactions test* must provide an annual certification to the FDIC that the third party continues to place all customer funds at insured depository institutions into transaction accounts and that customers do not receive any interest, fees, or other remuneration.

(vi) *Revocation of Primary Purpose Exception.* The FDIC may, with notice, revoke a primary purpose exception of a third party, or a person required to submit a notice under 303(b)(3)(iii), that qualifies for the primary purpose exception due to reliance on a designated exception, if:

(a) the third party no longer meets the criteria for a designated exception;

(b) the notice or subsequent reporting is inaccurate; or

(c) the notice filer fails to submit required reports.

(4) *Application Requirements.* A third party, or an insured depository institution on behalf of a third party, may submit an application to the FDIC seeking a primary purpose exception for business relationships not designated in 337.6(a)(5)(v)(I)(1).

(i) *Enabling Transactions with Fees, Interest, or Other Remuneration.* Applicants that seek the primary purpose exception where customer funds that are placed at depository institutions are placed into transaction accounts, and fees, interest, or other remuneration are provided to the depositor, must include the following information, with respect to the particular business line:

(a) Contractual evidence on the amount of interest, fees, or other remuneration, being paid on customer accounts;

(b) Any marketing materials provided by the third party to insured depository institutions or its customers;

(c) The average number of transactions for all customer accounts, and 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;

(d) The percentage of customer funds placed in deposit accounts that are not transaction accounts;

(e) A description of any additional third parties that provide assistance with the placement of deposits at insured depository institutions; and

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

(ii) Applicants that seek the primary purpose exception, other than applications under (i), must include, to the extent applicable:

(a) A description of the deposit placement arrangements between the third party and insured depository institutions for the particular business line, including the services provided by any relevant third parties;

(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, with respect to the particular business line;

(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, with respect to the particular business line. 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, as defined in 337.6(a)(5)(v)(I)(3), 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, with respect to the particular business line;

(g) Revenue generated from the third party's activities not related to the placement, or facilitating the placement, of deposits, with respect to the particular business line;

(h) A description of the marketing activities provided by the third party, with respect to the particular business line;

(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.

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

(iv) *Application Timing.*

(a) An applicant that submits a complete application under this section will receive a written determination by the FDIC within 120 days of receipt of a complete application.

(b) If an application is submitted that is not complete, the FDIC will, within 45 days of submission, notify the applicant and explain what is needed to render the application complete.

(c) The FDIC may extend the 120-day timeframe, if necessary, to complete its review of a complete application, with notice to the applicant, for a maximum of 120 additional days.

(v) *Application Approvals*. The FDIC will approve an application—

(a) submitted under 303.243(b)(4)(i) if the FDIC finds that the third party's marketing materials indicate that the primary purpose of placing customer deposits at insured depository institutions is to enable transactions, and:

1. Nominal interest, fees, or other remuneration is being paid on any customer accounts, or
2. The third party's customers make, on average, 6 transactions a month.

(b) submitted under 303.243(b)(4)(ii) if the FDIC finds that 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's business relationship with its customers is a purpose other than the placement or facilitation of placement of deposits.

(vi) *Ongoing Reporting for Applications.*

(a) The FDIC will describe any reporting requirements, if applicable, as part of its written approval for a primary purpose exception.

(b) Applicants that receive a written approval for the primary purpose exception, shall provide reporting to the FDIC and, in the case of an insured depository institution, to its primary federal regulator, if required under this section.

(vii) *Requesting Additional Information, Requiring Re-Application, Imposing Additional Conditions, and Withdrawing Approvals.* At any time after approval of an application for the primary purpose exception, the FDIC may at its discretion, with written notice and adequate justification:

(a) Require additional information from an applicant 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;

(b) Require the applicant to reapply for approval;

(c) Impose additional conditions on an approval; or

(d) Withdraw an approval.

PART 337—UNSAFE AND UNSOUND BANKING PRACTICES

6. 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.

7. Revise paragraph (a) introductory text and (a)(3)(i) through (iii). The revisions read as follows:

(a) Definitions. For the purposes of §§337.6 and 337.7, the following definitions apply:

* * * * *

(3) * * *

(i) For purposes of §29 of the Federal Deposit Insurance Act, this section and § 337.7, the terms well capitalized, adequately capitalized, and undercapitalized,[11] shall have the same meaning as to each insured depository institution as provided under regulations implementing §38 of the Federal Deposit Insurance Act issued by the appropriate federal banking agency for that institution.[12]

(ii) If the appropriate federal banking agency reclassifies a well-capitalized insured depository institution as adequately capitalized pursuant to §38 of the Federal Deposit Insurance Act, the institution so reclassified shall be subject to the provisions applicable to such lower capital category under this section and § 337.7.

(iii) An insured depository institution shall be deemed to be within a given capital category for purposes of this section and § 337.7 as of the date the institution is notified of, or is deemed to have notice of, its capital category, under regulations implementing §38 of the Federal Deposit Insurance Act issued by the appropriate federal banking agency for that

institution.

* * * * *

8. 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 those deposits or 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.

9. Redesignate paragraphs (a)(5)(ii) and (iii) as paragraphs (a)(5)(v) and (vi).

10. Add paragraphs (a)(5)(ii), (iii), and (iv) to read as follows:

(ii) *Engaged in the Business of Placing Deposits.* A person is engaged in the business of placing deposits of third parties if that person receives third party funds and deposits those funds at more than one insured depository institution.

(iii) *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, with respect to deposits placed at

more than one insured depository institution, engaging in one or more of the following activities:

(A) The person has legal authority, contractual or otherwise, to close the account or move the third party's funds to another insured depository institution;

(B) The person is involved in negotiating or setting rates, fees, terms, or conditions for the deposit account; or

(C) The person engages in matchmaking activities.

i. A person is engaged in matchmaking if the person proposes deposit allocations at, or between, more than one bank based upon both (a) the particular deposit objectives of a specific depositor or depositor's agent, and (b) the particular deposit objectives of specific banks, except in the case of deposits placed by a depositor's agent with a bank affiliated with the depositor's agent. A proposed deposit allocation is based on the particular objectives of:

a. a depositor or depositor's agent when the person has access to specific financial information of the depositor or depositor's agent and the proposed deposit allocation is based upon such information; and

b. a bank when the person has access to the target deposit-balance objectives of specific banks and the proposed deposit allocation is based upon such information.

ii. *Anti-evasion*. Any attempt by a person to structure a deposit placement arrangement in a way that evades meeting the matchmaking definition in this section, while still playing an ongoing role in providing any function related to matchmaking may, upon a finding by and with written notice from the FDIC, result in the person meeting the matchmaking definition.

(iv) Engaged in the Business – A person is engaged in the business of placing, or facilitating the placement of, deposits as described in (a)(5)(ii) or (iii), respectively, when that person has a business relationship with third parties, and as part of that relationship, places, or facilitates the placement of, deposits with insured depository institutions on behalf of the third parties.

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

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

(1) Designated Business Exceptions that Meet the Primary Purpose Exception. The following business relationships are designated as meeting the primary purpose exception, subject to 303.243(b)(3): Business relationships where, with respect to a particular business line:

i. less than 25 percent of the total assets that the agent or nominee has under administration for its customers;

ii. 100 percent of depositors' funds that the agent or nominee places, or assists in placing, at depository institutions are placed into

transactional accounts that do not pay any fees, interest, or other remuneration to the depositor;

iii. a property management firm places, or assists in placing, customer funds into deposit accounts for the primary purpose of providing property management services;

iv. the agent or nominee places, or assists in placing, customer funds into deposit accounts for the primary purpose of providing cross-border clearing services to its customers;

v. the agent or nominee places, or assists in placing, customer funds into deposit accounts for the primary purpose of providing mortgage servicing;

vi. a title company places, or assists in placing, customer funds into deposit accounts for the primary purpose of facilitating real estate transactions;

vii. a qualified intermediary places, or assists in placing, customer funds into deposit accounts for the primary purpose of facilitating exchanges of properties under section 1031 of the Internal Revenue Code;

viii. a broker dealer or futures commission merchant places, or assists in placing, customer funds into deposit accounts in compliance with 17 CFR 240.15c3-3(e) or 17 CFR 1.20(a);

ix. the agent or nominee places, or assists in placing, customer funds into deposit accounts for the primary purpose of posting collateral for customers to secure credit-card loans;

x. the agent or nominee places, or assists in placing, customer funds into deposit accounts for the primary purpose of paying for or reimbursing qualified medical expenses under section 223 of the Internal Revenue Code;

xi. the agent or nominee places, or assists in placing, customer funds into deposit accounts for the primary purpose of investing in qualified tuition programs under section 529 of the Internal Revenue Code;

xii. the agent or nominee places, or assists in placing, customer funds into deposit accounts to enable participation in the following tax-advantaged programs: individual retirement accounts under section 408(a) of the Internal Revenue Code, Simple individual retirement accounts under section 408(p) of the Internal Revenue Code, and Roth individual retirement accounts under section 408A of the Internal Revenue Code;

xiii. a Federal, State, or local agency places, or assists in placing, customer funds into deposit accounts to deliver funds to the beneficiaries of government programs; and

xiv. the agent or nominee places, or assists in placing, customer funds into deposit accounts pursuant to such other relationships as the

FDIC specifically identifies as a designated business relationship that meets the primary purpose exception.

(2) An agent or nominee that does not rely on a designated business exception described in this section must receive an approval under the application process in 12 CFR 303.243(b) in order to qualify for the primary purpose exception.

(3) *Brokered CD Placements Not Eligible for Primary Purpose Exception*. An agent's or nominee's 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.

(4) *Brokered CD* means a deposit placement arrangement in which a master certificate of deposit is issued by an insured depository institution in the name of the third party that has organized the funding of the certificate of deposit, or in the name of a custodian or a sub-custodian of the third party, and the certificate is funded by individual investors through the third party, with each individual investor receiving an ownership interest in the certificate of deposit, or a similar deposit placement arrangement that the FDIC determines is arranged for a similar purpose.

12. Amend redesignated paragraph (a)(5)(vi) to read as follows:

(vi) Notwithstanding paragraph (a)(5)(v) of this section, the term *deposit broker* includes any insured depository institution that is not well-capitalized, and any employee of any such insured depository institution, which engages, directly or indirectly, in the solicitation of deposits by offering rates of interest (with respect to such deposits) which

are significantly higher than the prevailing rates of interest on deposits offered by other insured depository institutions in such depository institution's normal market area.

13. Remove paragraph (b)(2)(ii) and (b)(3)(ii) and redesignate paragraphs (b)(2)(i) and (b)(3)(i) as paragraphs (b)(2) and (3)

14. Add (b)(4) to read as follows:

(4) Acceptance of Nonmaturity Brokered Deposits.

(i) A nonmaturity brokered deposit is accepted by an institution that is less than well capitalized—

A. at the time a new nonmaturity account is opened by or through any deposit broker; or

B. in the case of an existing nonmaturity brokered account, or accounts, that had been opened by or through a particular deposit broker:

1. when the aggregate account balance increases above the amount(s) in the account(s) at the time the institution falls to adequately capitalized; or,

2. for agency or nominee accounts, when funds for a new depositor are credited to the nonmaturity account or accounts.

15. Remove paragraph (f).

16. Add § 337.7 as follows:

§ 337.7 Interest Rate Restrictions

(a) *Definitions.*

(1) *National rate.* The weighted average of rates paid by all insured depository institutions and credit unions on a given deposit product, for which data are available, where the weights are each institution's market share of domestic deposits.

(2) *National rate cap.* The higher of:

(A) national rate plus 75 basis points, or

(B) 120 percent of the current yield on similar maturity U.S. Treasury obligations plus 75 basis points or, in the case of any nonmaturity deposit, the federal funds rate plus 75 basis points.

(3) *Local market rate cap.* Ninety (90) percent of the highest interest rate paid on a particular deposit product in the institution's local market area. An institution's local market rate cap shall be based upon the rate offered on a particular product type and maturity period by an insured depository institution or credit union that is accepting deposits at a physical location within the institution's local market area.

(4) *Local market area.* An institution's local market area is any readily defined geographical market area in which the insured depository institution accepts or solicits deposits, which may include the State, county or metropolitan statistical area, in which the insured depository institution accepts or solicits deposits.

(5) *On-tenor and off-tenor maturities*. On-tenor maturities include the following term periods: 1-month, 3-months, 6-months, 12-months, 24-months, 36-months, 48-months, and 60-months. All other term periods are considered off-tenor maturities for purposes of this section.

(b) *Computation and Publication of National Rate Cap.*

(1) Computation. The Corporation will compute the national rate cap for different deposit products and maturities, as determined by the Corporation based on available and reported data.

(2) Publication. The Corporation will publish the national rate cap monthly, but reserves the discretion to publish more or less frequently, if needed, on the Corporation's website. Except as provided in paragraph (f), for institutions that are less than well capitalized at the time of publication, a national rate cap that is lower than the previously published national rate cap will take effect 3 days after publication. The previously published national rate cap will remain in effect during this 3-day period.

(c) *Application.*

(1) *Well-capitalized institutions.* A well-capitalized institution may pay interest without restriction by this section.

(2) *Institutions that are not well capitalized.* An institution that is not well capitalized may not: solicit deposits by offering a rate of interest that exceeds the applicable rate cap; or, where an institution has accepted brokered deposits pursuant to a waiver described in section 337.6(c), pay a rate of interest that, at the time such deposit is accepted, exceeds the applicable rate cap. For purposes of this section, the applicable rate cap is the national rate cap or, if the institution has provided the notice and evidence described in subsection (d) of this section, the local market rate cap for deposits gathered in the institution's local market area. If an institution gathers deposits from more than one local area, it may seek to pay a rate of interest up to its local market rate cap for deposits gathered in each respective local market area.

(d) *Notice Related to Local Market Rate Cap Applicability.* An insured depository institution that seeks to pay a rate of interest up to its local market rate cap shall provide notice and evidence of the highest rate paid on a particular deposit product in the institution's local market area to the appropriate FDIC regional director. The institution shall update its evidence and calculations for existing and new accounts monthly unless otherwise instructed by the appropriate FDIC regional director, and retain such information available for at least the two most recent examination cycles and, upon the FDIC's request, provide the documentation to the appropriate FDIC regional office and to examination staff during any subsequent examinations.

(e) *Offering Products with Off-Tenor Maturities.* If an institution seeks to offer a product with an off-tenor maturity for which the FDIC does not publish the national rate cap or that is not offered by another institution within its local market area, then the institution will be required to use the rate offered on the next lower on-tenor maturity for that product when determining its applicable national or local rate cap, respectively. For example, an institution seeking to offer a 26-month certificate of deposit must use the rate offered for a 24-month certificate of deposit to determine the institution's applicable national or local rate cap. There is no off-tenor maturity for nonmaturity products such as an interest checking account, savings account, or money market deposit account.

(f) *Discretion to Delay Effect of Published National Rate Cap.* In the event of a substantial decrease in the published national rate cap from one month to the next, the Corporation may, in its discretion, delay the date on which the published national rate cap takes effect. The previously published national rate cap will remain in effect until the effective date, as determined by the Corporation, of the subsequent published national rate cap.

(g) *Treatment of Nonmaturity Deposits for Purposes of 337.7.* For purposes of section 337.7, the following definitions apply.

(1) *Solicitation of Nonmaturity Deposits*.

(i) An institution solicits a nonmaturity deposit when—

(A) a nonmaturity account is opened;

(B) the institution raises the rate being paid on a nonmaturity account existing at the time when the institution was last well capitalized; or,

(C) funds for a new depositor are credited to a nonmaturity account existing at the time when the institution was last well capitalized.

(2) Acceptance of Nonmaturity Brokered Deposits Subject to a Waiver.

A less than well capitalized institution that accepts nonmaturity brokered deposits subject to waiver, with respect to a particular deposit broker, may not pay interest in excess of the applicable rate cap on:

(A) any new nonmaturity accounts opened by or through that particular deposit broker;

(B) an amount of funds that exceeds the amount(s) in the account(s) that, at the time the institution fell to less than well capitalized, had been opened by or through the particular deposit broker; or

(C) for agency or nominee accounts, any funds for a new depositor credited to a nonmaturity account or accounts.

Federal Deposit Insurance Corporation.

By order of the Board of Directors.

Dated at Washington, DC, on December [ ], 2020.

James P. Sheesley,

Assistant Executive Secretary.

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