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November 11, 2024

Submitted via E-Mail at: comments@fdic.gov

Federal Deposit Insurance Corporation
550 17th Street NW
Washington, DC 20429

Re: Brokered Deposits Restrictions
[RIN 3064–AF99]

To whom it may concern:

This letter is submitted to the Federal Deposit Insurance Corporation (the "**FDIC**") on behalf of the Innovative Payments Association ("**IPA**"),[1] in response to the proposed rule on Unsafe and Unsound Banking Practices: Brokered Deposits Restrictions issued by the FDIC on July 30, 2024 and published in the Federal Register on August 23, 2024 (the "**Proposed Rule**").[2] We appreciate the opportunity to provide feedback to the FDIC on this important topic and to highlight our members' serious concerns with several aspects of the Proposed Rule. If you have questions about our comments, we would be happy to discuss them further.[3]

Contained in the Proposed Rule is a reversal of a number of important changes made by the FDIC when it last updated the rules governing brokered deposits regulatory in 2020 and 2021. The Proposed Rule eliminates the "Enabling Transactions Exemption," which serves as a bright line test to satisfy the primary purpose exception to the definition of a "deposit broker." The Proposed Rule further eliminates the exception created for persons that maintain an exclusive deposit relationship with a single insured depository institution ("**IDI**"). The inclusion of these exceptions in the prior rulemaking served as an important step for the FDIC in modernizing the regulatory framework for brokered deposits. The exceptions benefited consumers, industry, and the FDIC by providing much needed certainty and bright line tests for providers to follow in developing and offering their products and services in the market, and giving consumers more choice and competition in financial products and services while also ensuring that FDIC

[1] The IPA is a trade organization that serves as the leading voice of the electronic payments sector, including prepaid products, mobile wallets, and person-to-person (P2P) technology for consumers, businesses and governments at all levels. The IPA's goal is to encourage efficient use of electronic payments, cultivate financial inclusion through educating and empowering consumers, represent the industry before legislative and regulatory bodies, and provide thought leadership. The comments made in this letter do not necessarily represent the position of all members of the IPA.
[2] 89 Fed. Reg. 68244 (Aug. 23, 2024).
[3] Since 2015 the IPA has had numerous conversations with FDIC staff, and submitted several comment letters, including a white paper to the FDIC responding to various proposals, statements, and FAQs regarding brokered deposits. In an effort to make sure the current staff, leadership, and all public external stakeholders are aware of the IPA's engagement with the FDIC, we would like to include in the record all the materials the IPA has submitted to the FDIC on this issue: https://www.ipa.org/brokereddeposits.html.

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personnel would not be overburdened by a regular flood of applications for the use of the primary purpose exception. For these reasons, we urge the FDIC to reinstate the enabling transactions and exclusive relationship exceptions as part of any final rulemaking. If, however, the FDIC moves forward with a rulemaking that eliminates the enabling transactions test, the FDIC should then allow such deposits to remain exempt from the definition of "brokered deposits" where they belong to a banking relationship that would require an application under the Bank Merger Act to complete a transfer of accounts to a successor financial institution. As described in more detail below, the Bank Merger Act process is highly involved and takes a significant amount of time, and regulatory approval, to complete, negating any risk that such deposits could be easily or quickly moved from one financial institution to another.

Additionally, we note that the Proposed Rule's changes mark out deposit account products sourced and serviced through fintech-bank arrangement for disparate treatment, making any deposits resulting from such arrangements "de facto" brokered. As we noted in more detail in our response to Interagency Request for Information on Bank-Fintech Arrangements that was issued earlier this year, bank-fintech arrangements have long provided important products and services that offer a path to the mainstream banking ecosystem to every adult, regardless of their financial background and income. While traditional banking services are out of reach for many Americans because they cannot access a branch or meet other worthiness standards, bank-fintech sponsored products such as fee-free accounts, free overdraft, and early access to wages have provided every adult with the power to fully participate in today's technology-driven economy. Treating such arrangements and their resulting deposits as "brokered" ignores these significant benefits and risks harming the further development of these products in the marketplace by signaling to banks and consumers alike that the FDIC views them as inherently risky.

We do not believe there is a rational basis for this view. As discussed in more detail below, it is not supported by the history, statutory authority, or legislative intent behind the "brokered deposits" rules. For these reasons, we urge the FDIC, in addition to retaining the important exceptions described above, to further consider and study the issue of brokered deposits and the likely impact of the changes proposed by the FDIC on the marketplace before moving forward with a final rule. We note that the FDIC itself in its proposal admits that it lacks any recent, relevant qualitative data and analysis on the issue of brokered deposits and that expected impact of its rule are difficult to assess or accurately quantify, particularly with respect to consumers.[4] This shows a clear need for further study on the part of the FDIC before moving forward with rules that will significantly impact the market.

Finally, we note that the FDIC cites certain recent, high-profile events involving failures of banks tangentially related to the fintech marketplace or fintech service providers to underscore the need for the changes included in its Proposed Rule. These include the recent bankruptcy of fintech middleware provider Synapse Financial Technologies, Inc. ("**Synapse**") and the 2023 failures of Silicon Valley Bank ("**SVB**") and First Republic Bank ("**FRB**").[5] While each of these events was unfortunate, the issues that led to these failures had nothing to do with either the source of the deposits or whether they were categorized as "brokered." Therefore, the changes proposed by the FDIC in the Proposed Rule would not have prevented or impacted the outcome of the Synapse, SVB, or FRB failures. Our view is that any changes to the current brokered deposits framework should be the result of data-driven analysis and tailored to any actual risk of

[4] Fed. Reg. 68261.
[5] Fed. Reg. 68245, 68250.

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harm presented by the current framework. We again urge the FDIC to further study this issue prior to moving forward with any rulemaking.

Treating fintech-bank accounts as de facto "brokered" is not consistent with Federal Deposit Insurance Act or the history and intent of the brokered deposits regulatory framework

The Proposed Rule's treatment of companies that distribute financial products that provide access to funds at one or more insured depository institution (an "**IDI**") is not consistent with the statutory definition of "deposit broker" under the Federal Deposit Insurance Act (the "**FDI Act**"). Classifying deposits associated with such accounts as brokered deposits is inconsistent with the FDIC's statutory authority and rules. Moreover, Congress did not intend that deposits associated with such accounts would be classified as "brokered deposits." Finally, we note that the Proposed Rule takes an unduly harsh regulatory approach to deposits associated with fintech accounts that will negatively affect consumers and other third parties and will hinder innovation in the bank sector.

1. Classifying deposits associated with fintech accounts as brokered deposits is inconsistent with the FDIC's statutory authority and rules.

Section 29 of the FDI Act restricts institutions that do not meet minimum capital requirements from accepting funds obtained by or through a deposit broker.[6] Pursuant to the statutory language of Section 29 of the FDI Act, companies in the fintech account distribution chain, should not be deemed "deposit brokers" and therefore deposits made with an IDI pursuant to a fintech account program should not be deemed "brokered deposits."

Section 337.6 of the FDIC's Rules and Regulations implements Section 29 of the FDI Act. Both Section 29 and Section 337.6 define a deposit broker, in pertinent part, as "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."[7] This definition contains limiting language (*i.e.*, "*engaged in the business of*") that is focused on the business of the entity and effectively excludes all entities that are not *engaged in the business of* placing deposits, or facilitating the placement of deposits, with IDIs from the definition of deposit broker. Properly viewed in light of the facts and circumstances pertaining to the companies in the fintech industry are not "*engaged in the business of* placing deposits, or facilitating the placement of deposits."[8] Thus, companies in the fintech distribution chain, or companies that use accounts established through fintech-bank arrangements as an alternative form of disbursement of their own funds, should not fall within the purview of the statutory definition of "deposit brokers."

Fintech companies are not merely providing deposit-placing services to its customers, and therefore are not deposit brokers "*engaged in the business of* placing deposits, or facilitating the placement of

[6] FDIC, FIL-87-2018, Reciprocal Deposit Rulemaking and Request for Comments on Brokered Deposit and Interest Rate Restriction Issues, Advance Notice of Proposed Rulemaking Relating to Brokered Deposits (Dec. 19, 2018), *available at* https://www.fdic.gov/news/news/financial/2018/fil18087.pdf [hereinafter FDIC, *ANPR*].
[7] 12 U.S.C. § 1831f(g)(1)(A) (2017) (emphasis added); 12 C.F.R. § 337.6(a)(5)(A) (2018) (emphasis added).
[8] 12 U.S.C. § 1831f(g)(1)(A) (emphasis added).

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deposits."[9] Any activity related to deposits is only part of a much larger economic activity and industry, namely, the activity and industry of offering payments products or of simply replacing inefficient, costly and environmentally unfriendly paper checks with an electronic payment device. The deposits are linked to an underlying agreement that enables the customer to *spend* an amount of money associated with the account. Fintechs act as service providers to their partner banks for these accounts, enabling the partner banks to access low cost, stable deposits.

It is clear that fintech-bank partnerships and the resultant accounts are generally not *engaged in the business of* placing, or facilitating placement of, deposits. Participants in the industry are instead geared toward a business whose primary purpose is not the collection of deposits for a depository institution, but rather providing a product that allows for the facilitation of payments to consumers or by consumers. The facts are that these accounts are a valuable product used by a number of types of organizations to make a wide variety of financial services and products available to consumers.

2. Congress did not intend that deposits associated with fintech accounts would be classified as "brokered deposits."

In the wake of the savings-and-loan crisis, Congress enacted legislation, principally in the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 ("**FIRREA**"),[10] providing definitions and authorizing the FDIC to regulate brokered deposits. The legislative history behind FIRREA and subsequent legislation, as well as the facts and circumstances surrounding brokered deposits, indicate that Congress did not intend for the definition of "deposit broker" to be so expansive as to automatically encompass participants in the fintech account industry. Congress enacted FIRREA in reaction to perceived risks arising from the placing of brokered deposits, so called "hot money" deposits. Congress intended to restrain the business of placing "hot money" deposits; it did not intend to restrict deposits that are not in the nature of "hot money" deposits.

The risks of brokered deposits were understood even as early as the 1970s, when the FDIC noted that "The use of brokered deposits has been responsible for abuses in banking and has contributed to some bank failures, with consequent losses to the larger depositors, other creditors, and shareholders."[11] In 1984 the FDIC and the Federal Home Loan Bank Board (the "**FHLBB**") adopted a final joint rule placing certain restrictions on brokered deposits, in which the agencies indicated their research showed that "institutions used brokered deposits to pursue rapid growth in risky real estate-related lending without adequate controls and to increase risky lending after problems arose."[12] Congress reacted by holding hearings and subsequently enacting FIRREA to impose restrictions on brokered deposits.

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[9] *Id.* (emphasis added).
[10] Pub. L. No. 101-73, 103 Stat. 183 (1989). Although in subsequent legislation Congress modified the circumstances in which various kinds of financial institutions could accept brokered deposits, the fundamental definition of a "deposit broker" has remained that set forth in FIRREA. Accordingly, the legislative history pertinent to FIRREA is critical to understanding Congress's intent in this arena.
[11] FDIC, *ANPR*, *supra* note 3, at 12 (Dec. 19, 2018) (quoting FDIC, History of the Eighties—Lessons for the Future 119 (Dec. 1997), *available at* https://www.fdic.gov/bank/historical/history/).
[12] FDIC, *ANPR*, *supra* note 3, at 12 (Dec. 19, 2018).

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Congress's goal in enacting FIRREA was "to prevent the flagrant abuse of the deposit insurance system by troubled institutions that take excessive risks and leave the taxpayers to suffer the consequences."[13] As described by Senator Murkowski, the transactions Congress sought to regulate in FIRREA involved entities whose principal role involved "gather[ing] all these funds and shopping throughout the nation for a thrift offering the highest interest rates," and then "dump[ing] many hundreds of thousands of dollars overnight into that thrift."[14]

The legislative record makes clear that Congress was chiefly concerned with traditional deposit brokers that facilitated volatile hot money deposits that posed undue risk to the safety and soundness of the banking system.[15] Deposit brokers, as understood by the members of Congress who drafted the key FIRREA provisions, were not independent providers of a separate payment product (like a card for distribution of payroll or government benefits), but, rather, were entities with no role other than collecting a fee to bundle funds for placement at insured institutions. Accordingly, when Congress enacted the brokered deposit provisions of FIRREA in 1989, it used the term "*the business* of placing deposits, or facilitating the placing of deposits, of third parties,"[16] in recognition of the specific kind of "business" that was to be regulated.

Some of the FDIC's more recent studies also provide the following three risk producing characteristics of brokered deposits:

a. Rapid growth – the extent to which deposits can be gathered quickly and used imprudently to expand risky assets or investments.

b. Volatility – the extent to which deposits might flee if the institution becomes troubled or the customer finds a more appealing interest rate or terms elsewhere.

c. Franchise value – the extent to which deposits will be attractive to the purchasers of failed banks, and therefore not contribute to losses to the Deposit Insurance Fund.[17]

Prior to further revising its framework for regulating brokered deposits, the FDIC should first consider the aforementioned underlying purpose of the brokered deposit statute and the role of the brokered deposit provisions of the FDI Act to the entire statutory scheme, and the particular risks presented by brokered deposits. If anything, we would urge the FDIC to consider revisions to the definition of deposit broker that would be capture the characteristics of "hot money" deposits described above.

3. Fintech account deposits do not have the characteristics of "hot money"

[13] *See* "Insured Brokered Deposits and Federal Depository Institutions," Hearings before the Subcommittee on General Oversight and Government Investigations of the House Committee on Banking, Housing, and Urban Affairs at 10, Cmte. Print 101-28, 101st Cong., 1st Sess. (May 17, 1989) [hereinafter *Hearings*] (remarks of Sen. Murkowski).
[14] *See Hearings*, *supra* note 20, at 15, 16-20, 43, 50.
[15] *See Hearings*, *supra* note 20, at 15, 16-20, 43, 50.
[16] 12 U.S.C. § 1831f(g)(1)(A) (emphasis added).
[17] FDIC, *ANPR*, *supra* note 3, at 19.

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As noted above, Congress's intent was to restrain the *business* of placing "hot money" deposits, and the risks to safety and soundness that resulted. The deposits associated with fintech account programs are not in the nature of hot money deposits Congress intended to regulate when it enacted FIRREA.

Although, consistent with their budgeting function, the duration of a fintech accountholder's use of an account may not be extensive, the dollar value of fintech account portfolios has proved over time to be stable or growing in accordance with the general growth trends of the industry. Put in practical terms, the nature of the business has meant that deposits provided to banks via fintech programs are very stable when considered at the aggregate portfolio level, something that cannot be said of brokered deposits that have caused harm in the past. Thus, deposits associated with fintech account programs lack the rapid growth and volatility elements the FDIC has previously identified to be fundamental characteristics of brokered deposits.

Moreover, and most importantly, characterizing fintech account deposits as "hot money" makes little sense given that common fintech account structures lead to robust regulatory restrictions on transfers of such deposits. It is most often the case that fintech account deposits are held in a pooled custodial account in the bank's name for the benefit of the individual cardholders. Pursuant to the Bank Merger Act, an IDI is generally required to receive written approval from its responsible regulator before assuming "any liability to pay any deposits made in, any other insured depository institution . . . ."[18] Moving the deposits associated with a fintech account program to a new IDI typically requires an application for written regulatory approval under the Bank Merger Act. Thus, it is impractical to characterize these deposits as "hot money" subject to unpredictable movement between institutions, as regulators have significant control over the speed at which such deposits can be transferred. The deposits associated with fintech account programs are thus of a different nature than those intended to be addressed by FIRREA and should not be viewed as brokered.

4. An unduly harsh regulatory approach to deposits associated with fintech accounts will negatively affect fintech consumers and other third parties and will hinder innovation in the bank sector.

Any FDIC changes to the brokered deposits regulatory framework to classify what is in all likelihood the vast majority of fintech account deposits as brokered deposits will affect consumers and other members of the public in a number of negative ways. Doing so will affect how fintech account companies structure their programs and interact with IDIs and consumers. IDIs may be forced to pay significantly

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[18] *See* 12 U.S.C. § 1828(c) (2017) (requiring an IDI to receive written approval from the responsible agency before receiving transferred deposits); *see also* 12 C.F.R. § 5.33 (2018) (requiring OCC review and approval of an application for a "business combination" resulting in a national bank or a Federal savings association. "Business combination" is defined to include "the assumption by a national bank or Federal savings association of any deposit liabilities of another insured depository institution or any deposit accounts or other liabilities of a credit union or any other institution that will become deposits at the national bank or Federal savings association."); *see also* FDIC Statement of Policy on Bank Merger Transactions (Jul. 7, 1998) (stating that IDIs must file an application for approval by the FDIC before assuming "any deposit liabilities of another insured depository institution if the resulting institution is to be a state nonmember bank," or assuming "liability to pay any deposit or similar liabilities of . . . or transfer . . . deposits to . . . a noninsured bank or institution.").

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higher insurance assessments for deposits newly deemed "brokered." Treating such deposits as brokered would also limit the depository institutions that could support fintech account deposits. Industry participants may respond by passing along resulting costs to consumers.

Indeed, innovative intermediaries in the fintech business are creating new, useful products and lowering costs for consumers, employers, governments, and others – they are not simply "deposit brokers" gathering deposits for IDIs. As a result, many consumers who could not obtain traditional bank accounts, credit or debit cards can obtain fintech accounts. In addition to helping many families more effectively budget and allocate their spending, fintech accounts can act as a key gateway to banking for lower-income consumers whom the banking industry is currently unwilling or unable to serve.[19]

Over-inclusive brokered deposit regulatory provisions may also hamper FDIC member banks' ability to innovate within the market for payment services and reach new customers (often underserved or underbanked) that provide stable, low-cost deposits as sources of liquidity. By leveraging relationships with banks to provide solutions to satisfy consumer needs, fintech account programs have reduced the impediments to consumers finding access to reliable financial services products. Consumers have benefitted from the increasingly robust competition that banks add to the market for fintech products and the resulting innovation as existing players and new entrants continue to develop more efficient products. Government agencies have significantly benefited from the cost reductions and efficiencies gained by disbursing payments electronically through fintech accounts rather than paper checks, especially to the unbanked and underbanked constituents that they serve. The participation in new electronic payment mechanisms have resulted in substantial cost reductions that have enabled agencies to provide substantial additional benefits, including new and increased services, passing through costs savings to benefits recipients, and reducing the overall burden on taxpayers. But banks have also benefitted from this relationship by partnering with fintech program managers to provide platforms that respond to customer expectations for faster payments. These banks then have oversight over these providers to ensure compliance with existing laws and regulations.

By reducing the number of banks that may hold fintech sourced deposits and increasing the assessment rate for those banks that do hold such deposits, over-inclusive brokered deposit regulatory provisions could cause weaker competition and less robust innovation among banks, coupled with further reduction of banks' payments-system market share. Well capitalized banks may be reluctant to increase the programs in which they partner. New entrants to this market may opt-out of such partnerships altogether, giving consumers fewer protections and the FDIC and other bank regulators less oversight into these activities.[20] Moreover, the migration of banking activities to less regulated providers may reduce the effectiveness of regulation and make the financial markets more vulnerable.[21]

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[19] FDIC, Survey of Banks' Efforts to Serve the Unbanked and Underbanked (2009); Dan Fitzpatrick & David Enrich, *Big Bank Weighs Fee Revamp*, WALL ST. J., Mar. 1, 2012.

[20] Non-banks providing payments system services are not regularly examined by federal financial agencies with regard to their payments system activities, which means that the oversight that other regulators may exercise may be inadequate to ensure that adequate safeguards and consumer protections are in place.

[21] *See, e.g.*, Statement of Sheila C. Bair, Chairman, FDIC, on FDIC Oversight: Examining and Evaluating the Role of the Regulator during the Financial Crisis and Today before the House Subcommittee on Financial Institutions and Consumer Credit, May 26, 2011, *available at* https://www.fdic.gov/news/news/speeches/archives/2011/spmay2611.html (describing the risk of opaque transactions undertaken outside of the more heavily regulated traditional banking system).

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This insight is particularly important because innovation in the U.S. payment system has largely failed to keep up with developing technology and changing customer expectations. Dissatisfaction with traditional banking coupled by advances in technology has led to significant disintermediation of banks in payments.[22] The number of consumers interested in such technology has only increased over the last few years.[23] Over the next decade, major technology players, retail providers, mobile carriers, emerging payment providers, and financial institutions will continue to compete to offer payment services. Overly restrictive supervisory guidance of bank-offered products may lead banks to become further displaced by non-banks in the payments marketplace as new products evolve.[24]

Conclusion

The FDIC's Proposed Rule would be harmful to the financial services marketplace by first removing important exceptions to the definition of deposit broker that provided needed certainty and clarity to the marketplace and by singling out fintech-bank arrangements for disparate treatment. By the FDIC's own admission, it lacks the necessary information and data needed to properly evaluate the impact of its proposed changes on the marketplace and on consumers in particular. We urge the FDIC to not move forward with any rulemaking until it further studies the issue and resultant impact from any proposed changes. We further ask that, to the extent the FDIC does move forward with changes to the brokered deposits regulatory framework, it retains the enabling transactions and exclusivity exceptions.

The IPA appreciates your consideration of our comments. If you have any questions or wish to discuss this letter, please do not hesitate to contact me at: btate@ipa.org.

Sincerely,

Brian Tate

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[22] According to a 2012 study,60 to 80 percent of U.S. consumers interested in mobile wallets would not only consider using alternatives to their primary banks (such as PayPal, Apple, or Google) for mobile wallets, but also for core banking services. *See* Carlisle & Gallagher Consulting Grp., Mobile Wallet Reality Check: How Will You Stay Top of Wallet (June 4, 2012), available at https://www.carlisleandgallagher.com/sites/default/files/pdf/CG_Research_Paper_Mobile_Wallet_072512.pdf.

[23] *See* Carlisle & Gallagher Consulting Grp., *Mobile Banking: the New American Addiction* (Jan. 27, 2015), *available at* https://www.cgcginc.com/sites/default/files/pdf/MobileBankingWhitePaper.pdf (finding that 52% of consumers are doing more mobile banking than two years ago).

[24] Indeed the FDIC has already recognized the increased competition that banks face. In a recent supervisory newsletter, FDIC staff acknowledged that "[n]on-bank mobile payments providers are devising ways to streamline the current payments system and reduce transaction costs by limiting the role banks play in mobile payments or eliminating them from segments of the payments process altogether." FDIC, Mobile Payments: An Evolving Landscape, Supervisory Insights -Winter 2012, *available at* https://www.fdic.gov/regulations/examinations/supervisory/insights/siwin12/mobile.html#ten.

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