

June 9, 2020

Submitted Electronically

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

Re: Unsafe and Unsound Banking Practices: Brokered Deposits Restrictions, RIN 3064-AE94.

Dear Mr. Feldman,

The Wisconsin Bankers Association (WBA) is the largest financial trade association in Wisconsin, representing approximately 220 state and nationally chartered banks, savings and loan associations, and savings banks. WBA appreciates the opportunity to comment on the Federal Deposit Insurance Corporation's (FDIC) notice of proposed rulemaking on unsafe and unsound banking practices: brokered deposits restrictions (proposal).

FDIC has proposed revisions to the brokered deposit restrictions that apply to less than well-capitalized insured depository institutions. The proposal would create a new framework for analyzing certain provisions of the definition of "deposit broker," including "engaged in the business of facilitating the placement of deposits" and "primary purpose." The proposed rule would also establish an application and reporting process with respect to the primary purpose exception.

The proposal follows an Advance Notice of Proposed Rulemaking to which WBA responded on May 7, 2019. In our comments, WBA supported modernization of brokered deposit regulations. WBA continues to support this review and appreciates FDIC's efforts to promote safe and sound practices while considering what is appropriate given the changes to the banking landscape since 1989, when Section 29 of the Federal Deposit Insurance Act was enacted. WBA appreciates the proposal's increased transparency and objective framework. However, WBA is still concerned that the proposal does not go far enough toward solving the fundamental problems with the current regulations.

The offerings of insured depository institutions (IDIs) are varied and complex, with nearly endless combinations. Thus, WBA understands the difficulty of sorting deposits into statutory categories developed long before modern technologies and today's market existed. However, WBA is concerned that the proposal does not solve the underlying problem. That being the overly broad definition of "deposit broker," which will continue to impose unnecessary costs on otherwise stable funding sources. The comments below present the concerns and action that WBA recommends.

Definitions of "Deposit Broker" and "Facilitation"

The proposal's definition of "facilitation" is overly broad, and improperly increases the scope of deposits classified as brokered. A more precise definition of "deposit broker" and "facilitation" is necessary to avoid this result.

The proposal would revise the definition of deposit broker to be:

1. Any person engaged in the business of placing deposits of third parties with IDIs;
2. Any person engaged in the business of facilitating the placement of deposits of third parties with IDIs;
3. Any person engaged in the business of placing deposits with IDIs for the purpose of selling interests in those deposits to third parties; and
4. An agent or trustee who establishes a deposit account to facilitate a business arrangement with an IDI to use the proceeds of the account to fund a prearranged loan.

WBA supports FDIC's efforts to better define "deposit broker," and move away from the position that all third parties are deposit brokers. However, we are concerned that the scope of who is a deposit broker under the proposal is still too broad. Furthermore, the additional categories create need for further clarification. To that extent, WBA recommends that FDIC provide specific examples of entities and circumstances that are not considered a deposit broker.

1. Persons Engaged in the Business of Placing Deposits

The statute provides that a person meets the definition of "deposit broker" if it is "engaged in the business of placing deposits" on behalf of a third party at insured depository institutions. The FDIC would view 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 on behalf of the customer (e.g., acting as custodian or agent for the underlying depositor). As such, any person that places deposits at insured depository institutions on behalf of a depositor, as part of its business relationship with that depositor, fits within the meaning of the "deposit broker" definition. While WBA supports the concept that brokered deposits must have an underlying business relationship, we recommend that FDIC add a definition of "engaged in the business of placing deposits."

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

FDIC has proposed a four-factor definition of what constitutes "engaged in the business of facilitating the placement of deposits." 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:

- i. The person directly or indirectly shares any third party information with the insured depository institution;
- ii. The person has legal authority, contractual or otherwise, to close the account or move the third party's funds to another insured depository institution;
- iii. The person provides assistance or is involved in setting rates, fees, terms, or conditions for the deposit account; or,

- iv. 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.

This definition is intended to capture activities that indicate that the person takes an active role in the opening of an account or maintaining a level of influence or control over the deposit account even after the account is opened. WBA is concerned that the definition, as proposed, is overly broad, complex, and ambiguous. Specifically, WBA recommends deletion of the first factor (information factor) and instead utilize a test based upon who has discretion over the account as a basis for “facilitation.”

The information factor significantly broadens the scope of deposits that would be classified as brokered, beyond what is covered under current interpretations. As proposed, the information factor would cover any third party information, beyond that which might be deemed “facilitation.” WBA is concerned that would inappropriately include many relationships, such as those in which banks partner with fintech companies and online marketing, in a way that goes beyond what FDIC would otherwise intend to be subject to the regulation.

Overall, the test of sharing information is an inappropriate gauge of whether a business partner is a deposit broker. WBA does not believe that providing information should be viewed as facilitating the placement of deposits. Wisconsin banks share information with third parties through the regular course of business, including data processing, web servicing, consulting, advertising, and marketing. Online advertising, for example, could result in third party information being shared with the advertiser. Often, in the case of affiliate relationships, an IDI and an affiliated broker-dealer work closely together and routinely share information or have access to information that is the basis for to create a seamless experience for the customer. In other cases, such as the Bank Secrecy Act, information sharing is required by law. WBA does not believe these arrangements give a third party “influence or control” over a deposit account in the manner FDIC intends to capture through the facilitation definition, as discussed above. Furthermore, it would restrict information sharing, requiring information to be stored on separate systems, limiting capabilities, and creating inefficiencies for customers. For these reasons, WBA recommends that FDIC delete the information prong of the test (Section 337.6(a)(5)(ii)(A)).

WBA agrees that a third party with exclusive control over the deposit account is likely a deposit broker. However, exclusive and ongoing control should be distinguished from a party that is acting at the discretion of the account holder. As such, “facilitation” should be defined by control over the account by which a third party should be deemed to be facilitating the placement of deposits.

3. Establishing rates, fees, terms, and conditions.

The third “facilitation” factor covers a person that provides assistance or is involved in setting rates, fees, terms, or conditions for the deposit account. WBA agrees that the specific activities involved in “setting rates, fees, terms, or conditions” is an appropriate analysis of influence or control for purposes of classification as a deposit broker. However, WBA recommends that “provides assistance” be removed from the test, or be modified to reflect a relationship that

reflects more direct involvement. WBA is concerned that term “provides assistance” creates too much uncertainty and overall, is unnecessary given the more specific activities outlined in the third prong. For example, a local business might give a customer a list of Wisconsin banks that offer preferred rates (with no compensation to the business), which could be deemed as providing assistance. While WBA does not believe this result was intended, we are concerned it could result, and thus recommend removal of the term “provides assistance” and reliance upon more specific activities.

4. Acting as an intermediary between a third party that is placing deposits.

The final “facilitation” factor covers a person acting, directly or indirectly, with respect to the placement of deposits, as an intermediary between a third party that is placing deposits on behalf of a depositor and an insured depository institution, other than in a purely administrative capacity. WBA requests that FDIC provide more clarity on the term “indirectly,” as the term could foreseeably encompass any activity, and any number of persons, covering a swath of parties as deposit brokers for a single deposit, yet from a practical standpoint it is not sensible to consider an indefinite number of parties to have influence or control over a single deposit.

WBA also requests clarification on the activities not considered facilitation as within an “administrative capacity,” and recommend that FDIC give examples of activities that would meet this factor, and specify a person who is an “intermediary.” In that effort, WBA believes that a third-party working with an IDI that is not otherwise involved in opening or servicing an account, should not be deemed an “intermediary,” as such a person would not have influence or control over the deposit and should not be considered a deposit broker.

FDIC Should Provide Examples of Persons who are not Considered Deposit Brokers.

Section 29 expressly excludes certain persons from the definition of deposit broker. One exception excludes from the definition of “deposit broker” an insured depository institution, with respect to funds placed with that depository institution, also known as the “IDI Exception.” In its proposal, FDIC would expand coverage of the IDI exception to a wholly-owned operating subsidiary, if they meet certain criteria. WBA appreciates and supports this proposal. However, the criteria requires that the subsidiary places deposits of retail customers exclusively with its parent IDI. WBA requests additional clarity on the extent to which this prong is applicable to retail customers (as applicable to, for example, institutional customer deposits).

Furthermore, WBA recommends that affiliates of IDIs be excluded from the definition of deposit broker. Modern technologies, business, and market trends have resulted in banks and their affiliates operating as a single firm to offer a full range of financial products and services to their clients. Customers of an affiliate view this relationship as existing with the entire firm, as do customers of the IDI who engage the affiliate in services outside of lending and deposit products and services. Deposits at Wisconsin banks that originate from customers of an IDIs affiliates are sound and stable, and therefore WBA recommends that FDIC exclude affiliates of IDIs from the definition of “deposit broker.”

In addition, WBA recommends that FDIC adopt the list of parties as proposed by the American Banker's Association as those that should be expressly excluded from the definition of deposit broker:

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

WBA further recommends that the following types of deposits not be classified as brokered:

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

Final Considerations

Section 29 includes an exception for an agent or nominee whose primary purpose is not the placement of funds with depository institutions (primary purpose exception). The proposal would create an application process for the primary purpose exception. WBA recommends that FDIC identify the entities listed above as entities that presumptively qualify for the primary purpose exception, and exempt such entities from the application process.

WBA also encourages FDIC to adopt policies that would enable a transparent application process. FDIC should redact, but otherwise make all opinions, decisions, and determinations for an exception public. Thus, if an entity receives a determination that it is eligible for the primary purpose exception, all entities with comparable relationships should have a means to determine, based on the available determination, whether the primary purpose exception applies to them.

In the proposal, FDIC indicates that as part of the rulemaking process, it intends to evaluate existing staff opinions to identify those that are no longer relevant or applicable based on any revisions made to the brokered deposit regulations. FDIC plans to codify, in any final rule, staff opinions of general applicability that continue to be relevant and applicable, and to rescind any staff opinions that are superseded or obsolete or are no longer relevant or applicable. While WBA supports this effort, there is little indication how the current interpretations will fit into any final rule the FDIC issues. To that extent, WBA recommends that FDIC's review be undertaken publicly, and that FDIC indicate which interpretations will be effective under the final rule. WBA also recommends that FDIC grant a grace period following the effective date of any final rule for IDIs to conform their practices.

In conclusion, WBA supports FDIC's efforts to revise brokered deposits and craft a rule and related policies that align not only with the statute but with modern banking and customer relationships.

WBA is grateful for the opportunity to comment on FDIC's proposed rule modernizing brokered deposit regulations.

We appreciate your consideration of these comments.

Sincerely,

A handwritten signature in black ink, appearing to read "Rose Oswald Poels".

Rose Oswald Poels
President/CEO