FDIC Proposal Would Make Brokered Deposit Regulations More Opaque and Burdensome

August 6, 2024

On July 30, 2024, on a party line 3-2 vote of its Board of Directors, the Federal Deposit Insurance Corporation (the "FDIC") approved a Notice of Proposed Rulemaking[1] (the "Proposal" or the "Proposed Rule") to substantially broaden the scope of deposits that insured depository institutions ("IDIs") would be required to classify as brokered,[2] specifically by expanding the scope of the definition of "deposit broker" and narrowing the scope of exceptions from the definition.[3] More generally, as indicated throughout this analysis, the Proposed Rule, perhaps by design, would roll back certain amendments to the brokered deposit rules designed to provide greater clarity and flexibility to IDIs in structuring their liquidity sources and evaluating whether deposits must be considered brokered.

In summary, the Proposed Rule would:

- Amend the "deposit broker" definition to:
  - eliminate the carve-out for exclusive deposit placement arrangements (the "Exclusivity Exception");
  - replace the "matchmaking activities" prong and replace it with a broader definition related to deposit allocation services (the "Allocation Prong"), and

---

1 The Notice of Proposed Rulemaking 12 CFR part 303.243 (Brokered deposits) and 12 CFR 337.6 (Unsafe and Unsound Banking Practices: Brokered Deposits) can be found here: https://www.fdic.gov/system/files/2024-07/fr-npr-on-brokered-deposit-restrictions_0.pdf.

2 "Brokered deposit" is defined as "any deposit that is obtained, directly or indirectly, from or through the mediation or assistance of a deposit broker." 12 CFR § 337.6(a)(2).

3 For more information regarding the current rules, see *FDIC Finalizes Changes to Brokered Deposit Regulations*, *available* at https://www.debevoise.com/-/media/files/insights/publications/2020/12/20201221-fdic-finalizes-changes-to-brokered.pdf?rev=8dc1ca0ecb34448299f76183ade2b3a3&hash=D881F9A2B9B6A046DBC20EA5C1491C73.

  - incorporate consideration of the compensation or fees paid to the third party (the "Compensation Prong").

- Make substantive and procedural changes regarding the primary purpose exception to the definition of deposit broker (the "Primary Purpose Exception" or "PPE"), including:

  - revising the general scope of the PPE to require consideration of the third party's intent in placing customer funds at a particular IDI;

  - revising the "25% test" designated PPE to a modified 10% test (the proposed "Broker-Dealer Sweep PPE");

  - eliminating the PPE for transactions where 100% of deposits within a particular business line are placed into a non-interest bearing transaction account (the "Enabling Transactions PPE"); and

  - requiring notices or applications for PPEs to be submitted by the applicable IDI (not the third party) and requiring additional information to be included in such submissions.

In addition to these core definitional changes, the Proposal would also clarify how and when an IDI that has lost its "agent institution" status can regain status for purposes of the limited exception for reciprocal deposits.

In this Debevoise In Depth, we first provide contextual information regarding the role that brokered deposits regulation plays in the comprehensive federal bank regulatory framework, as well as some of the differing opinions within the FDIC regarding the necessity and usefulness of the contemplated changes. We then provide an overview of the Proposal's key changes to (1) the definition of "deposit broker," (2) the substantive and procedural changes to the Primary Purpose Exception, and (3) how an IDI can regain "agent institution" status under the limited exception for reciprocal deposits.

Comments on the Proposal are due 60 days after publication in the Federal Register.

I. Background, Rationale and Dissent

The classification of a deposit as "brokered" is significant because (1) banks deemed less than well capitalized (including because of exam ratings) generally cannot pursue or rollover such deposits, (2) such deposits can result in higher bank expenses, and (3) as a

prudential matter, they can be viewed by regulators as less stable than nonbrokered deposits, thus causing higher examination scrutiny.

Beyond its substantive changes expanding the general definition of "deposit broker," the Proposed Rule also would make it more difficult for IDIs to rely on the primary purpose exception from the definition of "deposit broker," rescinding certain exceptions based on the current rules and requiring banks to resubmit notices or applications in accordance with the additional information required by the Proposal to reobtain them. In his statement dissenting from the Proposed Rule, Vice Chairman Travis Hill summarized the likely practical procedural effect of these changes: "Given (1) the number of deposit arrangements that may be newly scoped in by the rule, (2) the more subjective standard by which the FDIC will judge applications, and (3) the lack of grandfathering of existing arrangements, I suspect an enormous avalanche of applications may hit the FDIC on day 1, which the agency is completely unequipped to process in any sort of timely or efficient manner."[4]

The FDIC majority justifies the proposed changes as crucial to improve the "safety and soundness" of the banking industry. The Proposed Rule states that the FDIC has seen a correlation between brokered deposits and an increased "probability of failure and higher losses to the DIF upon failure."[5] Here too, however, there is no consensus on the FDIC Board, with Director Jonathan McKernan highlighting in a dissenting statement that the Proposed Rule does not "offer any evidence that some of the deposits that this proposal would re-classify as brokered deposits actually present the same or similar risks,"[6] and Vice Chairman Hill further noting that he is "generally skeptical of sweeping rules that cut banks off from certain types of funding as their condition deteriorates."[7] Indeed, the Proposed Rule, along with a concurrently published "Request for Information on Deposits" seeking additional information on, among other things, uninsured deposits,[8] could signal a more difficult future landscape for bank deposit

---

4 Vice Chairman Travis Hill's statement on the Notice of Proposed Rulemaking on Brokered Deposit Restrictions can be found here: https://www.fdic.gov/news/speeches/2024/statement-vice-chairman-travis-hill-notice-proposed-rulemaking-brokered-deposit#:~:text=Given%20(1)%20the%20number%20of,1%2C%20which%20the%20agency%20is.

5 Proposal, at 4.

6 FDIC Director Jonathan McKernan's statement on the Proposed Brokered Restrictions can be found here: https://www.fdic.gov/news/speeches/2024/statement-jonathan-mckernan-director-fdic-board-directors-proposed-brokered#:~:text=The%20proposal%20does%20not%2C%20however,for%20the%20primary%20purpose%20exception.

7 Hill, *supra* note 5.

8 The "Request for Information on Deposits" can be found here: https://www.fdic.gov/system/files/2024-07/bc-request-for-information-on-deposits.pdf.

gathering, including via fintechs, even as banks seek more liquidity for lending and other operations and to address regulatory concerns about liquidity management.

II. Deposit Broker Definition

Section 29 of the Federal Deposit Insurance Act ("FDIA") deems a person as a "deposit broker" if, among other things, such person is "engaged in the business of placing deposits, or facilitating the placement of deposits, of third parties."[9] After years of publishing ad hoc interpretive letters and other forms of informal guidance, the FDIC sought to provide additional clarity in its 2020 revisions to the brokered deposits rules (the "2020 Rule") by refining its regulatory definition of "deposit broker" to encompass a third party who, with respect to deposits at *more than one*[10] IDI (1) receives third-party funds and deposits those funds at IDIs (the "Direct Placement Prong"); (2) has legal authority to close the account or move funds to another IDI, or is otherwise involved in negotiating or setting rates, fees, terms, or conditions for the deposit account (the "Facilitation Prong"); or (3) is engaged in matchmaking activities based on the deposit objectives of both the underlying depositor and applicable IDIs (the "Matchmaking Prong").

The Proposal would restructure and revise the regulatory definition of "deposit broker" to substantially broaden its scope, including by (1) eliminating the Exclusivity Exception, (2) replacing the Matchmaking Prong with a new "Allocation Prong" and (3) introducing a new "Compensation Prong." It would also broaden the scope of the codified anti-evasion provisions, which are currently limited only to the Matchmaking Prong.[11]

A. Elimination of the Exclusivity Exception

Current Rule. Third parties that place (or facilitate the placement of) deposits currently fall outside the definition of "deposit broker" as long as their activities are limited to a single IDI. 12 CFR § 337.6(a)(5)(ii), (iii) (emphasis added). In support of this exception, the FDIC took the position that where a "third party has developed an exclusive

---

9 *See* 12 U.S.C. 1831f(g)(1)(A).

10 This is often referred to as providing an exception for exclusive placement arrangements (the "Exclusivity Exception").

11 From a structural perspective, the Proposal also combines the "placing" and "facilitation" prongs, but this consolidation does not have any substantive implications other than the elimination of the Exclusivity Exception. The Proposal would also eliminate the provision addressing what it means to be "engaged in the business of" placing (or facilitating the placement of) deposits.

business relationship with the IDI," the third party "is less likely to move its customer funds to other IDIs in a way that makes the deposits less stable."[12]

Proposed Rule. The Proposal eliminates the Exclusivity Exception of the basis that it enables an IDI to treat deposits that otherwise would be deemed brokered (e.g., brokered CDs) as not brokered solely because the bank has an exclusive arrangement with the deposit provider—often a fintech company. In contrast with the 2020 Rule that created the Exclusivity Exception, the Proposed Rule reflects the FDIC majority's belief that an exclusive arrangement with the provider doesn't materially change the risk profile of the underlying arrangement itself. As a result, under the Proposed Rule the exclusivity of the arrangement would be at most one factor to be considered by the FDIC as to whether a deposit was brokered.

B. Replacement of "Matchmaking" with "Allocation"

Current Rule. A person currently will be deemed a "deposit broker" if the person proposes deposit allocations at or between more than one IDI based upon both (a) the particular deposit objectives of a specific depositor (or depositor's third party) and (b) the particular deposit objectives of specific banks, unless such "matchmaking" was being performed by an affiliate of the IDIs. Accordingly, to determine whether a third party is a deposit broker, an IDI needs to determine whether the person in question has access to certain information about the depositor and the bank and whether the person's allocation decisions are based on such information.[13]

Proposed Rule. The Proposed Rule states that IDIs have expressed concerns that it is difficult to obtain information, such as third-party contracts, to determine if any party in an arrangement falls under the matchmaking definition and that several IDIs have misrepresented deposits for such reasons.[14] As a result, the Proposal would convert the Matchmaking Prong to a more objective (though broader) Allocation Prong, treating as a deposit broker any person that "proposes or determines deposit allocations at one or more [IDIs] (including through operating or using an algorithm, or any other program or technology that is functionally similar)," irrespective of the "particular deposit objectives" of depositors and banks.

The Proposal would also eliminate the carveout for matchmaking or allocation services provided by persons affiliated with an IDI, as "these deposits, when uninsured, do not

---

12 86 Fed. Reg. at 6745.

13 12 CFR § 337.6(a)(5)(iii)(C)(1)(i)-(ii); *see also* FDIC Questions and Answers Related to Brokered Deposits Rule, at §§ C.5, .6 (July 15, 2022), https://www.fdic.gov/resources/bankers/brokered-deposits/brokered-deposits-qa.pdf.

14 Proposal, at 31.

seem to act in a more 'sticky' manner just because there is an affiliation between a broker and an IDI." [15]

C. New Compensation Prong

Current Rule. Notwithstanding the FDIC's historical consideration of compensation in determining whether a person meets the definition of "deposit broker" (as reflected in its pre-2020 interpretative letters), as a result of the 2020 Rule, the current definition of "deposit broker" makes no reference to compensation. Accordingly, that an IDI makes payment—including in the form of volume-based compensation—to persons for referring deposit business to the IDI is irrelevant to whether a person is a "deposit broker."

Proposed Rule. The FDIC asserts that since the 2020 Rule it has recognized that deposits obtained by IDIs through referrals from third parties who receive fees or other remuneration in exchange for such referrals "share characteristics with deposits the FDIC has historically observed as constituting a brokered deposit," such as being "more likely to leave the IDI if another IDI were to offer more favorable terms or pay a higher fee." [16] As such, the Proposal adds a new Compensation Prong to the definition of "deposit broker" to treat as a deposit broker any persons that have a "relationship or arrangement" with an IDI or an underlying depositor pursuant to which the person receives compensation (or other remuneration) from the IDI or the depositor in exchange for, or related to, the placement of deposits. The Proposal does not elaborate on the meaning of "relationship or arrangement" but makes clear that this prong would not be limited to volume-based compensation and would also include any fees for administrative services provided in connection with a deposit placement arrangement. As Vice Chairman Hill notes in his dissenting statement, "[t]his is a broad, sweeping criterion that—if applied literally and consistently—would capture a wide range of businesses that have any involvement in deposit arrangements."[17]

Passive Listing Services. The preamble to the Proposal provides that "passive listing services" that only advertise information on interest rates offered by IDIs would not meet the definition of "deposit broker"; however, this is not codified in the Proposed Rule itself. Additionally, while the preamble discusses passive listing services' receipt of subscription fees, it does not address whether the use of other common payment structures, such as click-based payments, would impact the analysis.[18]

---

15 Proposal, at 32.

16 Proposal, at 34.

17 Hill, *supra* note 5.

18 Proposal, at 35.

While he supports the exception for passive listing services, Vice Chair Hill does not see a principled reason why they should be treated more favorably for purposes of the brokered deposits regulation than other services when a person is paid a fee. He further states that as a result he is "confident that if listing service deposits were first exempted from the rule in 2020, there would not be a carve out in the proposal," which he asserts "reveals the true motivation underlying much of this proposal." [19]

D. Broadened Anti-Evasion Provision

Current Rule. Under the 2020 Rule, the only codified anti-evasion provision applies solely to the Matchmaking Prong, though the adopting release of the 2020 Rule also makes clear that a person that creates multiple legal entities in order to avail themselves of the Exclusivity Exception would be deemed a deposit broker. [20]

Proposed Rule. The Proposal would revise the current anti-evasion provision, which is limited to attempts to evade the Matchmaking Prong, to apply to any attempts to evade the definition of "deposit broker" more generally.

III. Primary Purpose Exception

The Proposed Rule would overhaul the regulation implementing the Primary Purpose Exception to the definition of "deposit broker" with regard to (1) the general definition of the PPE, (2) the enumerated business relationships that qualify for the PPE (the "Designated PPEs") and (3) the procedural requirements to rely on certain PPEs. Additionally, all IDIs who currently rely on a PPE subject to a notice or application requirement would no longer be able to do so and would thus need to submit a new notice or application (as applicable), rely on a different Designated PPE that does not require notice or application to the FDIC or otherwise re-classify their deposits as brokered. More generally, as noted by Vice Chair Hill, the Proposed Rule would revert from the consistent standards in the 2020 Rule back to a framework that "greatly expands the 2020 Rule's application process, adding more subjectivity to the process…. The new standard is harder to understand, harder to meet, and farther removed from the words of the statute." [21]

A. General Focus of the Primary Purpose Exception

Current Rule. Consistent with the statutory definition, the PPE currently encompasses "an agent or nominee whose primary purpose is not the placement of funds with

---

[19] Hill, *supra* note 5.

[20] 86 Fed. Reg. at 6745.

[21] Hill, *supra* note 5.

depository institutions."[22] However, although the 2020 Rule itself retained the same general statutory definition, the adopting release to the 2020 Rule provided that the analysis was focused on the third party's relationship with its customers, not its relationship with the IDI. In other words, under the 2020 Rule, the analysis of whether a particular third party qualifies for the PPE focuses on the relationship between the third party and its customers; it does not look at the relationship between the third party and the IDI.

Proposed Rule. The Proposal would revise the definition of the PPE to encompass "an agent or nominee whose primary purpose in placing customer deposits at IDIs is *for a substantial purpose other than to provide a deposit-placement service or FDIC deposit insurance with respect to particular business lines between the individual [IDI] and the agent or nominee*."[23] According to the Proposed Rule, the intent of this change is to ensure that the proposed change also will cover (in addition to the relationship between the customer and the third party) the relationship between the IDI and the third party (e.g., a broker-dealer), a factor that the Proposed Rule believes is important in determining the purpose motivating the placement of third-party deposits, and which is consistent with its historical views. [24] See Part III.C below for more information regarding the Proposal's changes to the PPEs' procedural requirements.

B. Changes to the Designated PPEs[25]

The 2020 Rule identifies 13[26] designated business relationships that the FDIC affirmatively deemed as qualifying for the PPE. A third party that does not rely on one of these Designated PPEs must receive approval from the FDIC in order to qualify for the PPE.[27] Additionally, in order to rely on two of these Designated PPEs—the Enabling Transactions PPE and the 25% PPE—either the applicable third party or the IDI on its

---

22 12 CFR § 337.6(a)(5)(v)(I).

23 Proposal, at 111-12 (emphasis added).

24 Proposal, at 37-38. Prior to the 2020 Rule, the FDIC's PPE analysis focused on understanding the intent of the third party in placing deposits: if the intent of the third party was to earn fees through the placements of deposits, the PPE was not applicable. *See* FDIC *Frequently Asked Questions Regarding Identifying, Accepting, and Reporting Brokered Deposits, §* E7 (Nov. 13, 2015), https://www.fdic.gov/sites/default/files/2024-03/fil15051b.pdf.

25 The FDIC also proposes to codify the non-discretionary custodial PPE that it published in the Federal Register, substantively consistent with how it is described therein. *See* 87 Fed. Reg. 1065 (Jan. 10, 2022). Accordingly, we do not discuss it here.

26 The FDIC also included a catch-all as a 14th designated business relationship for "such other relationships as the FDIC specifically identifies as a designated business relationship that meets the primary purpose exception," such as the PPE for non-discretionary custodial placements referenced above. 12 CFR § 337.6(a)(5)(v)(I)(1)(xiv).

27 12 CFR § 337.6(a)(5)(v)(I)(2).

behalf must submit a notice to the FDIC in accordance with the FDIC's codified procedures.[28]

1. Elimination of Enabling Transactions PPE

Current Rule. The 2020 Rule makes a Designated PPE a person placing or facilitating the placement of deposits at IDIs for the purpose of enabling subsequent transactions. To be eligible for this exception, 100% of the deposits placed with respect to a particular business line must be placed into transactional accounts that do not pay any fees, interest or other remuneration to the depositor.[29]

Proposed Rule. The Proposal would eliminate the Enabling Transactions PPE on the basis that it would not, on its face, satisfy the Proposal's revised definition of the PPE, namely that placing deposits into non-interest-bearing transactional accounts does not necessarily reflect a "substantial purpose other than to provide deposit insurance or a deposit placement service."[30] Accordingly, the Proposal would also make conforming changes to eliminate the specific application process for Enabling Transactions that involve the use of accounts that pay remuneration to depositors. Moreover, all IDIs that currently rely on a third party's Enabling Transactions PPE would no longer be able to do so, and instead would themselves need to submit an application to the FDIC for non-Designated PPEs, as discussed in Part III.C.1 below.

2. Replacement of the 25% Percent Test with the Broker-Dealer Sweep PPE

Current Rule. The 2020 Rule provides a Designated PPE for business relationships where less than 25% of the total assets that the third party has under administration for its customers with respect to a particular business line are placed at an IDI.[31] In order for an IDI to treat deposits placed pursuant to such an arrangement as not brokered, either the IDI or the applicable third party must file a notice with the FDIC in accordance with the requirements set forth in part 303.

Proposed Rule. The FDIC proposes to replace the 25% Test with a Broker-Dealer Sweep PPE that would substantially reduce the scope of third parties that would be eligible for this Designated PPE, and further subject even qualifying arrangements to greater scrutiny.

---

[28] *See* 12 CFR § 303.243(b).

[29] 12 CFR § 337.6(a)(5)(I)(1)(ii).

[30] Proposal, at 54 ("The FDIC believes that there is no relevant difference between an agent or nominee's purpose in placing deposits to enable transactions and placing deposits to access a deposit account and deposit insurance.").

[31] 12 CFR § 337.6(a)(5)(I)(1)(i).

Eligibility. First, as the retitling of the exception suggests, the Proposal would limit eligibility only to SEC-registered broker-dealers or investment advisers. Of note, the Proposal glosses over the reasoning for this change, acknowledging the change only somewhat in its discussion of the difference between "assets under administration" and "assets under management." Second, these broker-dealers or investment advisers must be sweeping less than 10% of the total assets under management[32] (down from 25%) in a particular business line to IDIs.[33] The Proposal states that this reduced cap would be more indicative that the primary purpose for broker dealers and investment advisers in placing customer funds at IDIs is for the purpose of reinvestment, rather than to provide a deposit placement or deposit insurance.

Process. The Proposal also states that an IDI may file a designated exception notice for the Broker-Dealer Sweep PPE *only if* no other third party (including any affiliate) is involved in the sweep program. In other words, for the designated exception notice to be available, the third party must not rely on the services of a third party to assist with such placement. Additionally, whereas IDIs are currently able to rely on a PPE at the time of submission of a notice to the FDIC, under the Proposal, an IDI would be able to rely on this exception only if the FDIC has not provided a written disapproval within 90 days from submission, which the FDIC may extend for an additional 90 days. Notice filers would also be subject to quarterly updates as well as requests from the FDIC for additional information at any time, and failure to comply with such requests can result in revocation of an effective notice.[34]

In the event that an arrangement involves the use of an additional third party, such as to facilitate the sweep of deposits to an IDI, then the IDI would instead be required to submit an *application* consisting of additional information to assist the FDIC in assessing whether the other third party meets the definition of "deposit broker." The FDIC would also be able to request additional information from the IDI at any time during the application process. The FDIC would have 120 days from receipt of a complete application to issue a written determination, which the FDIC may extend for an additional 120 days upon notice.[35]

---

[32] The 2020 Rule uses the phrase "assets under administration"; however, the Proposal uses the phrase "assets under management" to more closely align with terminology used in the securities industry.

[33] Proposal, at 47.

[34] Proposal, at 49-50. A notice may also be revoked if the broker-dealer or investment adviser no longer meets the criteria to rely on the exception, an additional third party is involved in the business line, or the notice or subsequent reporting is inaccurate.

[35] Proposal, at 51-52 (discussing, among other things, the additional information to be included in the application).

C. Procedural Changes

As indicated above, in order to rely on (i) a PPE that is not a Designated PPE or (ii) the Broker-Dealer Sweep PPE, an application (or in some limited instances, a notice) must be submitted to the FDIC. The Proposal would make certain changes to this process, including with respect to who is permitted to submit such applications (or notices) as well as to the scope of information required to be provided. Moreover, under the Proposal, IDIs and third parties relying on previously approved applications or notices would have such applications and notices revoked, and IDIs would be required to submit a new application (or notice, if applicable).

1. Who May Submit a Notice or Application

Current Rule. Currently, either the third party (e.g., a broker-dealer) or the IDI on the third party's behalf may submit the notice or application to the FDIC.

Proposed Rule. Due to alleged trends in third parties not providing sufficient information during the application process, the Proposal would no longer permit third parties to apply or submit notice (if applicable) for a PPE. Rather, any IDI that wants to rely on a PPE would need to submit its own application for its particular deposit placement arrangement; IDIs would not be permitted to rely upon the fact that a particular would-be deposit broker is exempt as to its relationship with a different IDI. In other words, as Vice Chair Hill notes in his dissent, "if an entity works with 10 banks, every single bank would need to apply individually and receive approval from the FDIC to treat the arrangement as non-brokered under the primary purpose exemption."[36] This is part of the reason that, as noted in the introduction, Vice Chair Hill foresees an "avalanche" of applications if the Proposed Rule becomes final.

2. Scope of Information to Be Submitted with Applications (Other Than the Application for Certain Broker-Dealer Sweep PPEs)[37]

Current Rule. Currently, the FDIC requires a third party to submit (1) evidence regarding the amount of interest, fees, or other remuneration paid on customer accounts, (2) marketing materials given to IDIs or customers by the third party, (3) the average number of transactions for all customer accounts, (4) the percent of customer funds placed in deposit accounts that are not transaction accounts and (5) documentation of any additional third parties that provide assistance with the placement of deposits.[38]

---

[36] Hill, *supra* note 5.

[37] See *supra* Part III.B.2 above for more information regarding the Broker-Dealer Sweep PPE.

[38] 12 CFR § 303.243(b)(4)(i).

Proposed Rule. In addition to the information required under the current rule, the Proposal would amend § 303.243(b)(4)(ii) to include consideration of three additional factors pertaining to (1) fees received by the third party, (2) the third party's discretion with respect to where such funds are placed, and (3) whether the third party is placing funds at the IDI in order to discharge a legal obligation to disburse funds to its customers. IDIs would also be required to provide copies of contracts relating to the deposit placement arrangement, in addition to the IDI's description of the deposit placement arrangement. [39]

IV. Regaining "Agent Institution" Status under the Limited Exception for Reciprocal Deposits

The Proposed Rule is not, however, limited to rescinding many of the provisions about brokered deposits in the 2020 Rule. The Proposed Rule also amends the standards for certain IDIs seeking to rely on the limited exception for "reciprocal deposits," a rule amended in 2018 implementing section 202 of the Economic Growth, Regulatory Relief, and Consumer Protection Act (the "Reciprocal Deposits Rule"). [40] Under the Reciprocal Deposits Rule, eligible IDIs may treat a capped amount[41] of reciprocal deposits—that is, deposits received through a deposit placement network in the same amount and maturity as deposits[42] placed by the IDI—to be exempt from brokered deposit treatment.

Current Rule. An IDI's eligibility for the limited exception for reciprocal deposits turns on whether the IDI meets the definition of "agent institution."[43] An IDI can qualify as an "agent institution" in one of three ways: (1) its most recent composite CAMELS rating was outstanding or good, and it is well capitalized; (2) it has obtained a waiver from the FDIC pursuant to § 337.6(c); or (3) it does not receive an amount of reciprocal deposits greater than the total average of reciprocal deposits held by the third party on the final day of the preceding four calendar quarters. [44] An IDI may lose its agent institution status if it fails to satisfy all of the foregoing prongs; however, the current

---

39 Proposal, at 41-42.

40 Section 202 of the Economic Growth, Regulatory Relief, and Consumer Protection Act, codified in 12 U.S.C. 1831f.

41 Under the Reciprocal Deposits Rule, if the total reciprocal deposits of a well-capitalized and well-rated institution does not exceed either $5 billion or 20% of the bank's total liabilities, reciprocal deposits are not considered brokered deposits. *See* 12 CFR § 337.6(e)(2)(v) (defining "reciprocal deposit").

42 Only core deposits placed through a deposit placement network are eligible for this exception.

43 12 CFR § 337.6(e).

44 12 CFR § 337.6(e)(2)(i).

regulation does not address how an IDI might regain agent institution status after losing such status.

Proposed Rule. The Proposal seeks to provide clarity as to when an IDI that lost its "agent institution" status can regain its agent institution status under various circumstances. Specifically, an IDI would be eligible to regain its agent institution status as follows:

- if the IDI is well capitalized, as of the date the IDI is notified that its CAMELS composite condition is rated outstanding or good at its most recent examination under 12 U.S.C. § 1820(d);
- if the IDI is well-rated, as of the date the IDI is notified, or is deemed to have notice, that it is well capitalized;
- as of the date the FDIC grants a brokered deposit waiver; or
- on the last day of the third consecutive calendar quarter during which the IDI did not at any time receive reciprocal deposits that caused its total reciprocal deposits to exceed its special cap.[45]

The first three "clarifications" under the Proposed Rule appear reasonably straightforward and are consistent with practice in other areas. It is less clear, however, why an IDI that exceeds the cap in a particular quarter, even inadvertently, then has to wait for three quarters to again be eligible for the exception. This approach appears all the more harsh because it is not simply the excess deposits above the special cap, but all reciprocal deposits that must be treated as brokered during any period the reciprocal deposit exception is not available.

V. Conclusion

The Proposed Rule represents a material expansion of the scope of what constitutes "brokered deposits," as well as a material increase in FDIC subjectivity and process to determine whether or not a particular arrangement can be classified as brokered. If

[45] Proposal, at 57. Under the Reciprocal Deposits Rule, an IDI's reciprocal deposits are subject to a "special cap" if, when examined under section 10(d) of FDIA, the IDI did not have a composite condition of outstanding or good or is not well capitalized and has not received a brokered deposit restrictions waiver. A "special cap" is the average number of reciprocal deposits held at the IDI on the final day of the four quarters preceding the quarter in which the agent was examined to not be well capitalized or not have a composite condition of outstanding or good.

implemented, the Proposed Rule could significantly change the characterization of deposits on IDI balance sheets, and, in conjunction with several other agency actions and pronouncements, significantly complicate and impair their ability to use other parties, including broker-dealers, investment advisers and fintechs, to facilitate efficiently gathering the deposits critical to their liquidity management and lending operations.

* * *

Please do not hesitate to contact us with any questions.

Gregory J. Lyons
Partner, New York
+1 212 909 6566
gjlyons@debevoise.com

Chen Xu
Counsel, New York
+1 212 909 6171
cxu@debevoise.com

Tejas N. Dave
Associate, New York
+1 212 909 6155
tndave@debevoise.com

Alexandra N. Mogul
Associate, New York
+1 212 909 6444
anmogul@debevoise.com