American Bankers Association
Building Success. Together.

Alison Touhey

November 21, 2024

James P. Sheesley
Assistant Executive Secretary
Federal Deposit Insurance Corporation
550 17th Street NW
Washington, DC 20429

RE: Comments—RIN 3064–AF99, Unsafe and Unsound Banking Practices: Brokered Deposits Restrictions

Dear Mr. Sheesley:

The American Bankers Association (ABA) appreciates the opportunity to submit this comment letter on the Federal Deposit Insurance Corporation's (FDIC) proposed revisions (the "NPR")[1] to its regulations relating to the brokered deposits restrictions that apply to less than well-capitalized insured depository institutions (IDIs).[2]

The NPR would revise the definition of "deposit broker;" modify the application of the "primary purpose" exception to the deposit broker definition; and modify two of the designated business relationships under the primary purpose exception. The NPR also would make changes to the notice and application process for the primary purpose exception and clarify when an IDI may regain status as an "agent institution" under the limited exception for a capped amount of reciprocal deposits.

For the legal and policy reasons set forth below, ABA does not support the changes to the brokered deposit framework proposed in the NPR and recommends that it be withdrawn.

---

[1] Unsafe and Unsound Banking Practices: Brokered Deposits Restrictions, 89 Fed. Reg. 68244 (August 23, 2024).
[2] 12 C.F.R. Parts 303 and 337.

The NPR does not meet the legal standards required for rulemaking under the Administrative Procedure Act (APA) and is inconsistent with the statute upon which it is based. The NPR perpetuates an unnecessary and harmful stigma of brokered deposits that stretches the brokered deposit regulations beyond the intent of the law. The NPR also fails to sufficiently justify the proposed changes to the brokered deposit regulations; it does not provide data to support the proposed changes to the brokered deposit regulations; and it does not address the costs and benefits of the proposed changes.

If finalized as proposed, the changes to the brokered deposit regulations would needlessly disrupt deposit relationships between IDIs and third-parties that were established in reliance upon a brokered deposit rule adopted by the FDIC just four years ago (the "2020 Final Rule").[3] This will result in a cliff effect, whereby a potentially large amount of funding arbitrarily deemed to be "risky" must be replaced. It also will impact lending activities, as IDIs seek alternative sources of funding for loans. The NPR also is likely to cause analysts, investors, and even IDIs themselves to have an adverse view of IDIs with higher ratios of brokered deposits.

Furthermore, the changes proposed in the NPR will adversely affect liquidity risk management at well-capitalized IDIs. IDIs, together with regulators, work diligently to identify, manage, and mitigate liquidity risk. Liquidity risk, however, is not binary, whereby one type of deposit is "bad" or risky and all other deposits are "good" and stable. Such an approach to liquidity risk is particularly problematic for deposits interpreted as "bad" under an outdated perception of brokered deposits that does not align to today's technology, banking, and financial services ecosystem or the improvements made to banking supervision and regulation since the brokered deposit framework was put in place in 1989.

In short, finalization of the proposed rule would be harmful to IDIs and their customers. Below is a summary of our legal and policy concerns with proposal.

[3] On December 15, 2020, the FDIC adopted a final rule that established a new framework for analyzing whether certain deposit arrangements qualify as brokered deposits. That final rule was published in the Federal Register on January 22, 2021 (86 Fed. Reg. 6742 (January 22, 2021)), with an effective date of April 1, 2021, and a compliance date of January 1, 2022. In the NPR, the FDIC refers to this final rule as the "2020 Final Rule." Accordingly, we have adopted the same designation for that rule in this letter.

- **The NPR arbitrarily reverses recent policy decisions based on no or faulty data.** Following extensive public consultation, the FDIC revised its brokered deposit rule in 2020 in response to technological and market developments. When a federal agency changes policy it is incumbent upon the agency to provide a reasoned explanation for the change. Yet, in the NPR the FDIC fails to provide sufficient data or policy analysis for the proposed changes, or articulate how or why its prior rule, which followed the submission of 257 comment letters and 18 meetings with interested stakeholders, was invalid. In support of the NPR, the FDIC links brokered deposits to recent failures of IDIs, as well as relationships between IDIs and large nonbank depositors. However, these are ad-hoc examples not representative of broader trends.

- **The NPR is inconsistent with the statute upon which the regulation is based**. Section 29 of the Federal Deposit Insurance Act was enacted in 1989 to prevent less than well-capitalized IDIs from attempting to grow their way out of trouble by raising expensive, rate dependent funding. The NPR goes far beyond that purpose, expanding the reach of the brokered deposit regulations to well-capitalized IDIs, not just "troubled" institutions. For example, the NPR proposes to revise the definition of a deposit broker to include a merchant that receives a fee for referring its customers to an IDI, even though the referred is designed to benefit the customer. The NPR also interprets the primary purpose exemption in Section 29 to exclude any third-party that places funds with an IDI, no matter what the primary purpose of the third-party. As a result, the NPR would subject well-capitalized IDIs to higher deposit insurance assessments, adverse treatment under liquidity regulations, unnecessary and increased scrutiny from bank examiners, and negative treatment by credit rating agencies and bank counterparties.

- **The NPR perpetuates a misleading stigma of brokered deposits**. The FDIC's view of brokered deposits is based upon an outdated construct that fails to account for modern banking practices. There is little evidence that the more "classic" types of brokered deposits pose the same risks today as they did in the 1980s. In

fact, longer term brokered CDs provide a key source of funding and interest rate risk management for community banks and other IDIs. Deposits based upon relationships with third parties, including broker-dealers, fintechs, traditional nonbank service companies, and merchants have become a stable source of funding for IDIs, but could be classified as brokered under the NPR. Rather than adhere to an outdated view of brokered deposits, we encourage the FDIC to take steps to mitigate the stigma of brokered deposits for well-capitalized IDIs, thereby allowing them to maintain a diverse and cost-effective funding base that can support the credit needs of consumers and businesses in their communities.

- **The NPR prejudges ongoing agencies reviews.** The FDIC has issued a request for information (RFI) on the characteristics that affect the stability and franchise value of different types of deposits,[4] and together with the other federal banking agencies, an RFI on bank-fintech arrangements involving banking products and services distributed to consumers and businesses.[5] The FDIC should analyze the results of these reviews before proposing any changes to the existing brokered deposit framework.

[4] 89 Fed. Reg. 63946 (August 6, 2024).
[5] 89 Fed. Reg. 61577 (July 31, 2024).

I. Legal and Policy Concerns with the NPR

The NPR is based upon an outdated view of brokered deposits and banking markets and the revisions proposed in the NPR would stretch the brokered deposit regulations beyond the intent of the law.

In 1989, Congress added Section 29 to the Federal Deposit Insurance Corporation Act[6] to impose restrictions on the acceptance of brokered deposits following the failure of IDIs that used brokered CDs to support risky, and sometimes fraudulent, loans and investments. The failure of Penn Square Bank in Oklahoma in 1982 and the near failure of Continental Bank in Chicago in 1984 are prime examples of this practice. In the late 1970's and early 1980's Continental Bank acquired a large amount of oil and gas loans from Penn Square Bank. Penn Square's loans were poorly underwritten and funded by "expensive funds borrowed in national money markets."[7] Continental, in turn, funded its purchase of the loans made by Penn Square by tapping "money market sources, such as the Eurodollar market, for much of its funding."[8] Penn Square Bank failed based upon its risky lending practices. Continental Bank avoided failure by receiving financial support from the FDIC and the Federal Reserve.

The 1980's also saw rapid growth in the savings and loan industry that "was fueled by an influx of deposits as … thrifts began paying higher and higher rates to attract funds… engaging in a 'go for broke' strategy of investing in riskier projects, hoping they would pay off in higher returns."[9] This rapid growth, combined with the riskier investments, ultimately led to the failure of over 700 savings and loan associations.[10]

In response to these failures, Congress passed the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 (FIRREA), which included a provision prohibiting

---

[6] 12 U.S.C.§1831f.

[7] Statement of William Isaac, Chairman of the Federal Deposit Insurance Corporation, on the Failure of Penn Square Bank, before the Committee on Banking, Finance and Urban Affairs, House of Representatives, July 15, 1982, https://fraser.stlouisfed.org/title/penn-square-bank-failure-748/part-1-23604/fulltext.

[8] Federal Reserve Board, Federal Reserve History, Continental Bank: A Bank That Was Too Big To Fail, https://www.federalreservehistory.org/essays/continental-illinois, ("Fed History on Continental").

[9] Federal Reserve Board, Federal Reserve History, Savings and Loan Crisis 1980-1989, https://www.federalreservehistory.org/essays/savings-and-loan-crisis#:~:text=Resolution-,In%20the%201980s%2C%20the%20financial%20sector%20suffered%20through%20a%20period,though%2C%20grew%20even%20more%20severe.

[10] Id.

"troubled," IDIs (i.e., undercapitalized institutions) from accepting so-called "hot money" deposits from a "deposit broker." [11] That Act also authorized the FDIC to impose additional restrictions on the acceptance of brokered deposits by troubled institutions.

In the years following the enactment of FIRREA, the FDIC used its regulatory authority to expand the type of funding arrangements subject to the prohibition. As a result, the brokered deposit regulations evolved from regulations focused on less than well-capitalized IDIs to regulations that affected a broad range of deposit relationships and all IDIs, not just those that are undercapitalized.

For example, in a series of rulings, the FDIC found that nonprofit affinity groups (e.g., members of a professional association) and affiliates of a bank (e.g., an investment company) may be classified as deposit brokers when they facilitate the placement of deposits at a bank by regularly referring members or customers to the bank.[12] The FDIC also concluded that a securities firm that places deposits in a bank on behalf of a customer is a deposit broker, unless the primary purpose of the program was not to provide the clients with a deposit-placement service.[13] Yet, these deposit arrangements do not share the same characteristics as brokered certificates of deposit that contributed to the bank and thrift failures in the 1980s. Deposits that are based upon contractual agreements with affinity groups, that are generated by an affiliate of an IDI, or that are placed under a sweep arrangement with a broker-dealer tend to be vary stable.

In 2019, the FDIC officially recognized that its brokered deposit regulations had not kept pace with the changes in technology, business models, and products that had occurred in the banking industry since 1989 and undertook a comprehensive review of the regulations.[14]

---

[11] Pub. L. No 101-73, August 9, 1989, 103 Stat. 183. In the 1991, in the Federal Deposit Insurance Corporation Improvement Act (Pub. L. No. 102-242, § 301, 105 Stat. 2236 (1991)) Congress revised the prohibition on brokered deposits to apply to any "insured depository institution that is not well-capitalized." In effect, this extended the prohibition to adequately capitalized banks as well as undercapitalized banks.

[12] Federal Deposit Insurance Corporation, Study on Core Deposits and Brokered Deposits, July 8, 2011, p. 25.

[13] Id., p. 26.

[14] The FDIC issued an advance notice of proposed rulemaking in 2019 inviting public comment on all aspects of the brokered deposit regulation. That request elicited over 130 comments from individuals, banking organizations, nonprofits, as well as industry and trade groups, representing banks, insurance companies, and the broader financial services industry (84 Fed. Reg. 2366 (February 6, 2019)). A year later, the FDIC issued a notice of proposed rulemaking inviting public comment on specific changes to the brokered deposit regulation (85 Fed. Reg. 7453 (February 10, 2020.))

Following that review, and based upon comments received from the banking industry and other interested parties, the FDIC materially revised the deposit insurance regulations, having concluded that the prior regulations governing brokered deposits "were outdated and did not reflect current industry practices and the marketplace."[15]

The 2020 Final Rule clarified the types of activities that cause a person or entity to be classified as a deposit broker. It recognized that exclusive deposit relationships between well-capitalized IDIs and third parties, including many fintechs and traditional nonbank service companies, were governed by contractual agreements that made such deposits relatively stable (the "exclusive deposit placement arrangement exception"). It increased opportunities for well-capitalized IDIs to enter marketing arrangements with merchants to provide deposit and other banking services to the merchants' customers by eliminating the consideration of fees paid to the merchant by the IDI. It gave broker-dealers and other entities more flexibility to move customer funds into IDI accounts (the "25 percent designated business exception"), and it permitted an agent to place 100 percent of its customer funds into transaction accounts at an IDI as long as no fees, interest, or remuneration was provided to the depositor or the agent (the "enabling transactions exception").

Collectively, the changes made in the 2020 Final Rule narrowed the scope of the brokered deposit regulations to permit well-capitalized IDIs to access stable funding in today's markets using today's tools, such as the Internet, which were not contemplated when Section 29 was enacted. The regulation and supervision of the banking industry also has changed dramatically since 1989. Today, all IDIs are subject to greater capital, liquidity, risk management, and resolution requirements that have materially reduced the risk of failure. As a result, in the past few years, there have been relatively few failures of weakened IDIs,[16] and, as discussed further below, brokered deposits were not a factor in the dramatic failures of Silicon Valley Bank or First Republic in 2023.

The NPR would reverse many of the changes made in the 2020 Final Rule. This will unfairly disrupt actions that IDIs have taken in reliance upon the 2020 Final Rule. It would

---

[15] 86 Fed. Reg. 6742 (January 22, 2021).

[16] There were no bank failures in 2021 and 2022, only five in 2023, which, as noted, were not caused by brokered deposits, and only two failures so far in 2024, also not caused by brokered deposits. See: https://www.fdic.gov/resources/resolutions/bank-failures/in-brief/index.html.

significantly and arbitrarily expand the type of deposits classified as brokered and cause the brokered deposit regulations to become "de facto" regulations for well-capitalized IDIs. This expansion of the brokered deposit regulations will stretch the regulations well beyond the intent of the law.

For example, the definition of a deposit broker in Section 29 excludes "an agent or nominee whose primary purpose is not the placement of funds with depository institutions."[17] The NPR would limit this statutory exemption by requiring that the agent or nominee have a "substantial purpose" other than to provide a deposit placement service or FDIC deposit insurance. Section 29 includes no such requirement. The NPR also interprets the primary purpose exemption in Section 29 to exclude any third-party that places funds with an IDI, no matter what the primary purpose of the third-party.

Prior to the recent Supreme Court decision in *Loper Bright Enterprises v. Raimondo*,[18] the FDIC's interpretation of the brokered deposit statute would have been entitled to deference. That is no longer the case. Instead, an agency must show that its interpretation of the brokered deposit statute is supported by, among other things, "the validity of its reasoning and its consistency with earlier and later pronouncements."[19] The NPR fails this standard. The FDIC provides no persuasive evidence that the current primary purpose standard has led to bank failures or runs, and the NPR is inconsistent with the recent FDIC pronouncements as evidenced by the 2020 Final Rule.

Further, the Supreme Court has made it clear that when an agency is engaged in a rulemaking that will have a significant impact on the economy or policy, the Congressional authorization must be specific and clear. As explained in the recent Supreme Court case of *West Virginia v. EPA*, when major policy issues are involved, "a court should not assume that Congress intends to leave such weighty decisions to Federal agencies in the absence of clear Congressional instruction."[20]

---

[17] 12 U.S.C. §1831f(g)(2)(I).
[18] 603 U.S. ___ (2024). __ _____
[19] *Skidmore v. Swift & Co*., 323 U.S. 134 (1944).
[20] 597 U.S. ___ (2022).

By construing the primary purpose to be a limited and narrow exception to the brokered deposit restrictions, the FDIC is making a significant policy decision that will have repercussions for a large segment of the financial industry, including not just IDIs, but also broker/dealers, investment advisers, fintech companies, and consumers. Pursuant to the principles elucidated by the Supreme Court, the FDIC should defer to Congress to modify Section 29 and should not assume the authority to adopt these changes absent clear Congressional direction.

Recent failures do not justify the revisions to the brokered deposit regulations proposed in the NPR.

In the NPR, the FDIC states that "… experiences since the 2020 Final Rule have shown that some of the underlying reasons to narrow the coverage of the rule have proved to be problematic," citing the failures of First Republic Bank, Silicon Valley Bank, Voyager, and Synapse.[21] These failures do not justify the changes proposed in the NPR and therefore do not provide a basis for changing the FDIC's prior position.

Both the FDIC's own report on the failure of First Republic and the report by the FDIC's Office of Inspector General (OIG) on that failure indicate that a lack of appropriate supervisory oversight was a major contributing factor to the failure (First Republic received a CAMELS 1 rating for liquidity prior to failure) and that the failure of similar institutions caused a run on uninsured deposits, risk management deficiencies, and idiosyncratic business models.[22] The OIG report, in particular, was blunt: "The FDIC missed opportunities to take earlier supervisory actions and downgrade First Republic Bank component ratings consistent with the FDIC's forward-looking supervisory approach." These reports found that a run by uninsured depositors, in addition to other contributing factors, was the immediate cause of the failure, and the only recommendations relating to brokered deposits were that the FDIC should *consider* the existence of brokered deposits in its supervisory review of banking institutions, and that brokered deposits

[21] 89 Fed. Reg. 68245 (August 23, 2024).
[22] FDIC OIG, Material Loss Review of First Republic Bank (2023); See also Remarks by FDIC Chairman Martin J. Gruenberg to the Center for Financial Studies at Goethe University Frankfurt: "A Tale of Two Unions – Deposit Insurance in the United States and Europe" Oct. 29. 2024), ("We have clear evidence now, based on the 2023 experience and the failures of Silicon Valley Bank (Silicon Valley), Signature Bank (Signature), and First Republic Bank (First Republic), that the heavy reliance of those banks on uninsured deposits for funding created a destabilizing contagion effect on other banks. The runs materialized after we announced that the failure of Silicon Valley Bank would result in losses to uninsured depositors.").

should be *considered* when a bank conducts a liquidity stress test.[23] Both of these recommendations are a better option than imposing burdensome regulatory requirements on the entire industry, as proposed in the NPR. Subsequently, the FDIC OIG released a material loss review of First Republic that contains extensive discussion of brokered deposits.[24] The report in no way suggests that there is any need to broadly reclassify certain deposits as brokered, as this NPR would do. To the contrary, in addition to focusing principally on the brokered deposit waiver application process, the report illustrates the stabilizing role that some forms of brokered deposits can play in times of stress.[25]

Similarly, the Federal Reserve Board's review of the failure of Silicon Valley Bank found that *uninsured* deposits, not brokered deposits, were a significant contributing factor in the failure of that bank:

> Consistent with SVBFG's governance and risk-management weaknesses, SVBFG's capabilities for managing liquidity risk were not suitable for a $200 billion firm. SVBFG's funding inherently relied on large, concentrated, and uninsured deposits. This construct, coupled with broadly deficient liquidity risk-management practices, created an environment where SVBFG was neither prepared for nor capable of responding to the acute liquidity event in March 2023. Throughout the period of SVBFG's rapid growth while in the RBO portfolio, supervisors also did not consistently identify and communicate changes in SVBFG's risk profile and the weakness in SVBFG's liquidity risk management. Supervisory assessments after SVBFG's transition to the LFBO portfolio were more reflective of SVBFG's practices; however, shortcomings in judgment and a slow pace to further act on concerns led to missed opportunities for early intervention or to require timely remediation.[26]

---

[23] FDIC's Supervision of First Republic Bank, September 2023, pp. 28 and 57; FDIC OIG, Material Loss Review of First Republic Bank, p. 41.
[24] FDIC Office of Inspector General Material Loss Review of Republic First Bank Evaluation Report - Final - Audits, Evaluations, and Cyber November 2024 | No. EVAL-25-01.
[25] Id.
[26] Federal Reserve Board, Review of the Federal Reserve's Supervision and Regulation of Silicon Valley Bank Silicon Valley Bank, April 28, 2023, p. 52.

As for Voyager and Synapse, neither institution was an IDI, and their failures did not result in the failure of an IDI. Their failures did result in confusion for consumers and businesses, but the FDIC has taken steps to address that problem, which lies very far outside of the purview of the brokered deposit framework.[27]

Furthermore, as discussed above, the purpose of the brokered deposit regulation is to protect the FDIC's deposit insurance fund by limiting the flow of "hot money" to "troubled" IDIs that then attempt to "grow their way" out of trouble through risky investments. It is not intended to address the solvency of a deposit broker. Thus, the failures of Voyager and Synapse are not a valid basis for any change in the brokered deposit regulation.

Finally, the NPR jumps to conclusions about recent failures while at the same time there are ongoing interagency initiatives designed to gather information on appropriate policy responses to those failures and to relationships between IDIs and nonbanks. The FDIC has issued a request for information ("RFI") on the characteristics that affect the stability and franchise value of different types of deposits,[28] and together with the other federal banking agencies, an RFI on bank-fintech arrangements involving banking products and services distributed to consumers and businesses.[29] It is simply premature to make changes to the brokered deposit regulation prior to analyzing the results of these regulatory initiatives.

<u>In the NPR, the FDIC fails to explain why prior factual findings that supported the 2020 Final Rule are no longer valid.</u>

Prior to finalization of the 2020 Final Rule, the FDIC issued an advance notice of proposed rulemaking and a notice of proposed rulemaking, which allowed for extensive information gathering from the public.[30] Yet, in the NPR, the FDIC does not assert that it was misinformed when it promulgated the 2020 Final Rule, nor does it dispute any of the factual underpinning for the 2020 Final Rule. Rather, the FDIC states that it has "found significant

---

[27] Last year, the FDIC finalized a regulation that clarifies the FDIC's regulations governing misrepresentations of deposit insurance coverage by addressing specific scenarios where consumers may be misled as to whether they are conducting business with an IDI and whether their funds are protected by federal deposit insurance. See: 89 Fed. Reg. 3504 (January 18, 2024).
[28] 89 Fed. Reg. 63946 (August 6, 2024).
[29] 89 Fed. Reg. 61577 (July 31, 2024).
[30] See, *supra,* note 15.

reliance on brokered deposits increases an institution's risk profile, particularly as its financial condition weakens."[31]

The evidence cited for this conclusion is drawn from studies that were conducted *prior* to the issuance of the 2020 Final Rule and were considered by the FDIC when promulgating the 2020 Final Rule. Moreover, in the preamble to the 2020 Final Rule, the FDIC acknowledged that available data was subject to significant limitations:

> "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 DIF loss rates. *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 underline 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.*[32]

At best, the FDIC's prior studies on brokered deposits indicate that it is rapid asset growth, often accompanied by lax underwriting standards, which cause the failure of IDIs.[33] A study published by the FDIC in 1997 is illustrative. In that study, which examined failures in the 1980's, the FDIC acknowledged that "Brokered deposits had a largely *indirect influence* on bank failures in that many weak savings institutions used them to fund rapid loan expansion in competition with healthier banks and thrift institutions."[34] That study also noted that other

[31] 89 Fed. Reg. 68244 (August 23, 2024).
[32] 86 Fed. Reg. 6762 (January 22, 2021), emphasis added.
[33] Silicon Valley Bank demonstrated such rapid asset growth. See, e.g., Material Loss Review of Silicon Valley Bank ("SVB experienced rapid and unchecked growth: Its total assets doubled twice in a 5-year period, from just over $50 billion at the start of 2018 to over $100 billion in 2020 and then to more than $200 billion in 2021…").
[34] FDIC, History of the Eighties – Lesson for the Future, 1997, p. 13.

factors, especially, broader economic factors, had a more direct link to the failure of an IDI during the 1980s:

> "…bank failures were generally associated with regional recessions that had been preceded by rapid regional expansions --- that is, they were associated with boom-and-bust patterns of economic activity. Bank loans helped to fuel the boom phase of the cycle, and when economic activity turned down, some of these loans went sour, with the result that banks holding these loans were weakened. By contrast, recessions that were preceded by relatively slow economic activity, such as those in the Rust Belt, generally did not lead to widespread bank failures."[35]

More recent studies confirm that the failures occurring post 2021 (the effective date of the 2020 Final Rule) were not caused by brokered deposits, but rather by large uninsured deposits accompanied by concentrations in particular industries.[36]

In support of the changes proposed in the NPR, the FDIC also explains that there was a significant decline in the amount of brokered deposits reported after the 2020 Final Rule took effect. Yet, this was one of the stated objectives of the 2020 Final Rule. When the 2020 Final Rule was issued, the FDIC recognized that smaller IDIs, in particular, would benefit from having greater certainty and greater access to funding sources that would no longer be designated as brokered deposits; could develop new banking relationships with other firms; and that subsidiaries that may have been treated as deposit brokers before the 2020 Final Rule would no longer be subject to that classification.[37]

If the FDIC now disagrees with the conclusion reached in 2020, it is incumbent on the agency to explain why in the current rulemaking. It is improper for a regulatory agency to simply disregard its prior conclusion without providing a reasonable explanation or new, post-2020, findings and data.

---

[35] Id., p. 19.
[36] See: Federal Reserve Board, Review of the Federal Reserve's Supervision and Regulation of Silicon Valley Bank, April 28, 2023, p. 18 ("As a result, SVBFG's client base was heavily concentrated in venture capital-backed (VC-backed) and early-stage start-up firms.").
[37] 86 Fed. Reg. 6784 (January 22, 2021).

The FDIC provides no new data or analysis to support the revisions to the brokered deposit regulations proposed in the NPR.

Not only does the FDIC disregard its prior conclusions that were the basis for the 2020 Final Rule, but it also provides no new data or analysis to support many of the changes proposed in the NPR. For example, there is no data to support the elimination of the exclusive deposit placement agreement exception or the proposed reduction in the 25 percent designated business exception (renamed the Broker/Dealer Sweep Exception) from 25 percent of assets under administration to 10 percent of assets under management. Instead of providing evidence of any change in risk associated with deposits that would be impacted by the NPR, the FDIC cites "recent experience" or "recent events" or "historical observations." These conclusory statements are not sufficient to justify a significant change in agency position such as the case here.

The proposed combination of the placing and the facilitation prongs in the definition of deposit broker is a relatively minor change, but the rationale for the change is illustrative of the lack of analytical support for the changes proposed in the NPR. In the 2020 Final Rule, the FDIC established separate tests for the first two prongs of the definition "in an effort to provide *clarity* around when a third party meets the definition [of a deposit broker]."[38] The FDIC now proposes to reverse this change and combine the first two prongs because "[the change makes] the 'deposit broker' definition *more straightforward* for IDIs and other stakeholders to apply."[39] Is there any distinction between a change that provides "clarity" and a change that is "more straightforward?" The FDIC also asserts that the proposed change "would better align the regulatory text with the statutory language."[40] Yet, the plain text of the statute separates the first two parts of the definition prongs with the word "or." Thus, it seems clear that these are two separate prongs and retaining the separate tests for each prong is actually a better alignment with the statute than the proposed change.

The FDIC fails to provide a reasoned explanation for the changes proposed in the NPR, and IDIs and members of the public have taken actions in reliance on the prior rule.

---

[38] 86 Fed. Reg. 6744 (Jan. 22, 2021).
[39] 89 Fed. Reg. 68251 (August 23, 2024).
[40] Id.

Courts have recognized that an agency may change existing policies, but in doing so, the agency must provide a *reasoned* explanation for the change.[41] The agency must consider the alternatives that are within the ambit of the prior regulation, and the agency must take into account whether private parties relied on the prior policy when making business decisions.[42] An agency's failure to consider these effects in a rulemaking may be arbitrary and capricious.[43]

In *Encino Motorcars, LLC v. Navarro*,[44] the Supreme Court held that it was arbitrary and capricious for the Department of Labor to reverse a prior regulation without adequate explanation. The Court stated that an agency may change its position, but it must show that there are *good reasons* for the new policy and be cognizant that the private parties made business decisions that relied on the prior policy. The Court added that in explaining its changed position, an agency must also give a reasoned explanation for why it is disregarding the facts and circumstances that underlay the prior policy.

In this case, there has been considerable reliance by IDIs and other members of the public on the 2020 Final Rule. Since the issuance of the 2020 Final Rule, many IDIs and other stakeholders have modified systems, policies and procedures to comply with the 2020 Final Rule. Reversing key provisions of the brokered deposit regulation that were adopted in the 2020 Final Rule would needlessly disrupt or significantly increase the cost of many existing business relationships that pose little, if any, risk to a well-capitalized IDIs or the DIF. These relationships include:

- Funding arrangements between rural banks and technology platforms that enable well-capitalized IDIs to support community lending for consumers, small businesses, and agriculture;

---

[41] *Encino Motorcars, LLC v. Navarro*, 579 U.S. 211, 221 (2016).
[42] *Dep't. of Homeland Security v. Regents of the University of California*, 591 U.S. __, 207 L.Ed.2d 353 (2020).
[43] *See, e.g., Navient Sols., LLC v. Dep't of Educ.*, 646 F. Supp. 3d 705, 719 (E.D. Va. 2022) ("When an agency is not 'writing on a blank slate,' it is required to assess 'whether there were reliance interests, determine whether they were significant, and weigh any such interests against competing policy concerns.' If the agency neglects to do so in making its determination, that 'failure [is] arbitrary and capricious in violation of the APA.'" (quoting *Dep't of Homeland Sec. v. Regents of the Univ. of Ca.*, 140 S. Ct. 1891, 1915, 207 L.Ed.2d 353 (2020))).
[44] 579 U.S. 211 (2016).

- Relationships between well-capitalized IDIs and technology platforms that provide a range of services to homeowners' associations, including the placement of funds with IDIs;
- Sweep programs between broker/dealers and well-capitalized IDIs;
- Partnerships with fintechs that enable well-capitalized IDIs, especially smaller IDIs, to provide deposit and other banking products and services to consumers and businesses;
- Exclusive partnerships between well-capitalized IDIs and traditional nonbank financial services companies that provide customers with access to banking services, including deposit products; and
- Marketing agreements between well-capitalized IDIs and third parties, including retail merchants, advertising platforms, and non-profits such as universities, which introduce the well-capitalized IDI to the third party's audience for the provision of deposit and other banking products and services.

These arrangements do not facilitate the type of "hot money" deposits with "troubled" institutions that Section 29 was designed to restrict. In contrast, the relationships listed above typically involve direct, and continuing, contact between consumers and businesses and a well-capitalized IDI. They provide well-capitalized IDIs with a stable source of funding, and a needed service for consumers and businesses. The NPR, however, would inappropriately classify many of the deposits obtained through these relationships as brokered. Moreover, the NPR does not consider the risk management practices of third-party partners that have their own risk parameters and limits, which often prevent them from entering into arrangements with less than well-capitalized IDIs or require that deposits are covered by deposit insurance. Ultimately then, there is no rational basis for the changes proposed in the NPR, and they would only serve to stigmatize a broad scope of deposit funding for all banks, including well-capitalized banks, and force less than well-capitalized banks to roll off otherwise stable funding.

<u>The FDIC fails to appropriately evaluate the costs and benefits of the changes proposed in the NPR.</u>

Courts have held that a regulation is arbitrary and capricious if an agency fails to consider an important aspect of the problem, and that includes considering the costs and benefits associated with the regulation, even when not specifically mandated by statute.[45] As part of that cost-benefit analysis, the agency must identify benefits that "bear a rational relationship to the . . . costs imposed."[46]

The FDIC has not met this standard. In numerous instances in the NPR, the FDIC proposes to reverse changes made in the 2020 Final Rule without providing an adequate evaluation of the costs and benefits of the proposed change. For example, in discussing potential costs to IDIs, the FDIC admits that it does not have the data to estimate the amount of deposits that would be reclassified as brokered at particular IDIs, nor does it have data to show how many IDIs might make changes to the structure of their liabilities based upon the proposed changes.[47]

Furthermore, as discussed below, the NPR fails to acknowledge the benefits of the 2020 Final Rule for consumers and economic development in local communities; fails to address the complications the NPR creates for liquidity management; and fails to acknowledge the benefits of bank/fintech partnerships.

Today's banking customers are increasingly looking for a suite of products and services that provide convenient access to their funds and services such as direct deposit, bill pay, and investment management. In other words, in the modern marketplace for deposits, factors other than the interest rate, such as brand awareness/loyalty, customer service, ease of access, mobile applications, digital wallets, etc., are often the most critical factors for acquiring and retaining customers.

In the 2020 Final Rule, the FDIC recognized how online banking and other marketplace developments have altered relationships between consumers, businesses and IDIs. The changes to the brokered deposit regulation made in the 2020 Final Rule facilitated these relationships, without creating undue risk for an IDI or the FDIC's deposit insurance fund. Those changes enable IDIs to diversify funding sources and access funds that can be used to support lending activities in local markets.

---

[45] *Motor Vehicles Manufacturing Assn. v. State Farm*, 463 U.S. at 43

[46] *Chamber of Commerce of United States v. SEC*, 85 F.4th 760 (5th Cir. 2023).

[47] 89 Fed. Reg. 68259-60 (August 23, 2024).

The 2020 Final Rule also has allowed innovative marketing and other relationships between well-capitalized IDIs, consumers, and businesses.[48] For example, in the preamble to the 2020 Final Rule, the FDIC envisioned that the changes made would benefit unbanked and underbanked customers:

> 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.[49]

One way in which IDIs have been able to provide such benefits to unbanked and underbanked customers is through the marketing relationships with merchants permitted by the 2020 Final Rule. Under marketing relationships between IDIs and merchants, unbanked or underbanked consumers who spend on necessities but may lack a banking relationship can be introduced by the merchant to an IDI and the consumer can voluntarily opt to become a customer of the IDI. In so doing, a consumer benefits from the opportunity to build savings, learn greater financial responsibility, receive interest on deposits as compared to holding cash, and establish an organized financial life to enhance stability and personal prosperity. IDIs, in turn, benefit from an influx of new customers who provide stable, organic deposits that flow in from customers who have learned about the IDI from a merchant and who form a "customer relationship" with the IDI. Shutting down this avenue of introducing consumers to banking would neither increase financial soundness of IDIs nor render any societal value. Instead, the changes made in the NPR would negate the benefits of the 2020 Final Rule for unbanked and underbanked consumers without any offsetting benefit and would reverse progress made since 2020 in lessening the divide between consumer spending and personal savings.

Furthermore, the NPR would negatively impact the asset side of a well-capitalized IDIs balance sheet. Deposits are used to support loans. Disincentivizing certain stable deposits by

---

[48] These and other benefits of brokered deposits are discussed in an article by James R. Barth, Wenling Lu, and Yanfei Sun entitled *Regulatory Restrictions on U.S. Bank Funding Sources: A Review of the Treatment of Brokered Deposits*, which appears in the Journal of Risk and Financial Management in June 2020.

[49] 86 Fed. Reg. 6761-62 (January 22, 2021).

arbitrarily classifying them as brokered will mean that well-capitalized IDIs will have to (ironically) raise more expensive and less stable funding, or shrink their balance sheets, directly impacting the ability of well-capitalized IDIs to support economic growth in their communities. This is another cost of the proposed changes that is ignored in the NPR.

The NPR would cause undue, yet intentional, harm to fintech and other bank partnerships.

The evolving relationships between banks and fintech companies represent an advancement in technologies that can benefit consumers and small businesses. However, in the NPR, the FDIC cites the growth of bank/fintech partnerships as one reason for the proposed changes:

> "Since the April 1, 2021, effective date of the 2020 Final Rule, the FDIC has observed the continued expansion of IDI arrangements with third parties to deliver deposit products (particularly those with transactional features) for a variety of IDI objectives, including to expand geographic reach, offer innovative products, and raise deposits. In these arrangements, an IDI typically makes deposit products or services available through an arrangement in which a third party, rather than the IDI, markets, distributes, or otherwise provides access to or assists in the placement of customer deposits at particular IDIs. Recent events, however, underscore the precarious nature of these funding arrangements as they can be highly unstable, with either the third party or the underlying customers moving funds based on market conditions or other factors. [50]

This statement fails to acknowledge the evolution of these relationships, including how these partnerships may be structured to benefit a specific customer base, such as underserved or younger demographics.[51] This statement also fails to acknowledge the stability of deposits, which typically are based upon contracts that place conditions on the termination of the relationship, or in accounts opened directly with IDIs, where third parties have no control over the flow of funds or setting rate. And it ignores recent studies by the Federal Reserve Board and the Office of the Comptroller of the Currency finding the recent liquidity stresses, including runs

[50] 89 Fed. Reg. 68250 (August 23, 2024).
[51] 89 Fed. Reg. 61579 (July 31, 2024).

that resulted in bank failures, were related to withdrawals by large uninsured depositors, not brokered deposits.[52]

The NPR would materially disrupt these arrangements. The proposed elimination of the enabling transactions exception and the exclusive deposit placement arrangement exception, combined with the consideration of deposit relationships that include a fee, will discourage such partnerships, regardless of how they are structured to protect well-capitalized IDIs and consumers.

Moreover, the NPR would disrupt and discourage not just these arrangements, but also more traditional ones that use these exceptions. Changes to the brokered deposit regulations are not the appropriate means to address FDIC's concerns with partnership funding arrangements.

In sum, the FDIC's attempt to regulate bank/fintech partnerships through the brokered deposit regulation is another example of regulatory overreach by the agency. As noted above, the purpose of the statute authorizing the brokered deposit regulation is to prevent an undercapitalized IDI from relying on "hot money" to make risky investments or otherwise attempt to "grow their way" out of trouble. The statute is not designed to address the stability of fintech partners. Any regulatory response to bank/fintech partnerships should be taken in a broader context that involves all federal financial regulators, not within the context of the brokered deposit regulation.

The changes proposed in the NPR would needlessly complicate liquidity risk management for IDIs.

The FDIC, and other federal banking agencies, have long stressed the importance of liquidity management for sound banking organization. The FDIC states in its examination manual, sufficient liquidity is essential to meet customer withdrawals, compensate for balance sheet fluctuations, and provide funds for growth.[53] Moreover, the FDIC and the other federal banking agencies have long encouraged IDIs to diversify sources of funding.[54]

---

[52] See *supra*, note 22.
[53] FDIC Manual of Examination Policies, Liquidity and Funds Management.
[54] Interagency Policy Statement on Funding and Liquidity Risk Management, 75 Fed. Reg. 13657 (March 22, 2010). ("The agencies believe that a diversification of funding sources strengthens an institution's ability to withstand idiosyncratic and market wide liquidity shocks.')

Expanding the amount of deposits classified as brokered, which the FDIC proposes to do in the NPR, is inconsistent with this guidance. The changes proposed in the NPR will cause many well-capitalized IDIs, to curtail their acceptance of funds classified as brokered in order to avoid the stigma associated with such deposits, higher deposit insurance premiums, and for larger IDIs, recalibration of the liquidity coverage ratio and the net stable funding ratio.

Expanding the amount of deposit classified as brokered also is at odds with one of the perceived benefits of the 2020 Final Rule. In the preamble to the 2020 Final Rule, the FDIC noted that the rule would enhance liquidity risk management by IDIs:

> 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.[55]

Moreover, the NPR comes at a time when the Federal Home Loan Banks are tightening standards for advances, which are a major source of liquidity for IDIs, particularly in times of market stress. In September 2024, the Federal Housing Finance Agency (FHFA) released new guidance advising the Federal Home Loan Banks to apply more stringent requirements for member IDIs to obtain liquidity advances.[56] The guidance is expected to reduce the ability of a member IDI to obtain advances, especially in times of financial stress. This concern is reinforced by the recent declaration issued by FHFA stating the Federal Home Loan Banks cannot functionally serve as a lender of last resort for troubled members. The curtailment of the Federal Home Loan Banks as a source of liquidity during periods of stress compounds the liquidity risks that arise from the proposed rule's treatment of brokered deposits. The Federal Reserve Board also recently announced a review of its policies and procedures governing extensions of discount window loans to IDIs.[57]

---

[55] 86 Fed. Reg. 6762 (January 22, 2021).
[56] Federal Housing Finance Agency, Advisory Bulletin, AB 2024-03: FHLBank Member Credit Risk Management.
[57] 89 Fed. Reg. 73415 (September 10, 2024).

In sum, requiring IDIs to restructure liquidity risk management is a matter that should be undertaken and considered in a broader context that involves all federal banking agencies, not just the FDIC within the context of the regulation of brokered deposits.

II. Specific Provisions in the NPR that are Arbitrary and Capricious or Inconsistent with Section 29

The NPR would arbitrarily amend the definition of deposit broker to automatically classify a party as a deposit broker if an IDI or customer pays a fee for the placement of deposits; proposed section 337.6(a)(5)(ii)(E).

The NPR would add a new prong in the definition of a deposit broker to cover any person that receives a fee or other remuneration from an IDI or from a customer in exchange for the placement of deposits. Under this prong, a person will be deemed to be a deposit broker if:

> The person has a relationship or arrangement with an insured depository institution or customer where the insured depository institution or the customer pays the person a fee or provides other remuneration in exchange for deposits being placed at one or more insured depository institution.[58]

This proposed change would arbitrarily reverse a policy adopted by the FDIC following the 2020 Final Rule and thereby cause deposits gathered under many existing marketing and referral relationships to be classified as "brokered," without an adequate explanation for why the change is needed. As a result, a large number of marketing and referral relationships would inappropriately and unreasonably be considered "brokered" regardless of the stability of such deposits.

Prior to the issuance of the 2020 Final Rule, the FDIC had a long-standing policy of considering several factors in determining whether a person was a deposit broker, including whether the person received a fee from an IDI based upon the volume of deposits placed. This policy was applied on a case-by-case basis.

---

[58] Proposed §337.6(a)(5)(ii)(E).

In our 2019 comment letter to the FDIC on the advance notice of proposed rulemaking that preceded the 2020 Final Rule, we identified a number of fee-based marketing and referral relationships between IDIs and third parties and recommended that deposits generated under such relationships not be classified as brokered when customers have a direct and continuing contact with the IDI.[59] In support of this recommendation, we noted that there was scant evidence that such deposits posed enhanced risk to the FDIC's deposit insurance fund.

In the preamble to the 2020 Final Rule, the FDIC accepted this recommendation, stating that:

> 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.[60]

In reversing this policy, the FDIC provides no analytical support for the change and ignores prior decisions that found that some marketing arrangements are a source of stable deposits.[61] In the NPR, the FDIC simply states that deposits gathered under fee arrangements have been "historically" treated as brokered.[62]

The FDIC also fails to explain why the NPR classifies deposits received through fee-based marketing and referral services as brokered when the customer is directly involved in opening the deposit account, but justifies the classification of deposits received through fee-

---

[59] Letter to Robert E. Feldman, Executive Secretary, Federal Deposit Insurance Corporation, from Alison Touhey, Vice President & Senior Regulatory Advisor, American Bankers Association, May 7, 2019 (the "2019 Comment Letter").
[60] 86 Fed. Reg. 6760 (January 22, 2021)
[61] See: FDIC, Study on Core Deposits and Brokered Deposits, July 8, 2011, p. 23 (which addresses FDIC Advisory Opinion No. 93-30 (June 15, 1993)), available at https://archive.fdic.gov/view/fdic/6706.
[62] Id.

based passive listing services as not brokered deposits because "any funds to be invested in deposit accounts are remitted directly by the depositor to the IDI and not, directly or indirectly, by or through the passive listing service."[63] In both cases, it is the customer that makes the deposits, not a third party. The proposal arbitrarily differentiates between these two scenarios without explanation and creates confusion by *not* explicitly exempting passive listing services in the proposed regulatory text.

Further, the proposed change does more than just reverse the FDIC's prior case-by-case policy. As noted above, prior to the 2020 Final Rule, the FDIC considered fees paid by an IDI in exchange for deposits on a case-by-case basis and did so in conjunction with other factors.[64] While we have previously questioned the basis for those factors,[65] they gave the FDIC some discretion in determining whether a particular arrangement fell within the scope of the regulation. That would not be the case if the proposed change is adopted. The proposed change leaves no discretion in the hands of the FDIC. It would require that *any* person that receives a fee or remuneration *from an IDI* or *from a customer* in exchange for deposits being placed in one or more IDIs would be classified as a deposit broker, even in those cases in which the consumer makes the deposit directly.

For example, under the proposed change the following individuals and entities would be classified as deposit brokers and the deposits deemed to be risky brokered deposits, even though each of the following arrangements is designed to benefit depositors and to provide a stable source of funding for an IDI:

[63] 89 Fed. Reg. 68252 (August 23, 2024).
[64] Those other factors are: (a) whether the fees could be justified as compensation for administrative services (such as recordkeeping) or other work performed by the third party for the insured depository institution (as opposed to compensation for bringing deposits to the insured depository institution); (b) whether the third party's deposit placement activities, if any, are directed at the general public as opposed to being directed at members (or "affinity groups") or clients; (c) whether there is a formal or contractual agreement between the insured depository institution and the third party (e.g., referring or marketing entity) to place or steer deposits to certain insured depository institutions; (d) whether the third party is given access to the depositor's account, or will continue to be involved in the relationship between the depositor and the insured depository institution. See: 84 Fed. Reg. 2371 (February 6, 2020).
[65] See the 2019 Comment Letter.

- A financial planner or pension consultant who is paid by its customer to recommend investment products, including deposit products, even if there is no fee paid to the financial planner by the IDI, but a fee is paid by the customer.[66]

- A "finder" or other marketing service that introduces an IDI to a consumer and that consumer opens a deposit account with the IDI under standard procedures and terms, and the finder is not involved in the onboarding of the account but is paid a fee for the introduction. (Indeed, it would be difficult to distinguish between these third parties and passive listing services, which the NPR's preamble states would not be captured by the fee prong.)

- An organization that pays a fee to an IDI in order to obtain better rates/services for its members by pre-negotiating terms with an IDI (e.g., members of a club or affinity group receive certain transactions for free or certain fees are waived), even though members are not required to bank with the IDI.

Additionally, fee-based products and services that result such as administrative, recordkeeping and other similar fees, or fees in exchange for ancillary services that become available after the placement of deposits with a given IDI would also cause deposits to be "brokered." In support of the proposed change, the FDIC asserts that unless it can consider fees and other remuneration, a less than well-capitalized IDI could accept third-party deposits that share characteristics with deposits the FDIC historically observed as constituting a brokered deposit.[67] However, the proposed definition is not limited to less than well-capitalized institutions. Rather, it could impact well-capitalized IDIs that have established fee-based marketing and referral arrangements, causing those IDIs to incur additional regulatory costs and stigma associated with the acceptance of brokered deposits.

---

[66] The trustee of a pension plan or other employee benefit plan is exempt, but if the trustee utilizes a financial advisor to recommend deposit products, the advisor would not be qualified for the "pension plan" exemption under the regulation.

[67] 89 Fed. Reg. 68252 (August 23, 2024).

In sum, proposed Section 337.6(a)(5)(ii)(E) is an example of the arbitrary and capricious nature of the proposed regulation, where the agency proposes to make a change that would have significant impact on the financial services industry and consumers, without any data or analysis to support it, or a rational basis for the change.

The proposed termination of the exclusive deposit placement exemption is inconsistent with Section 29 and is arbitrary and capricious; §§337.6(a)(5)(ii)(A), (D), and (E).

Section 29 defines a 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."[68] The 2020 Final Rule implemented this statutory definition as written, so that a person that places deposits in a single insured institution is not defined as a deposit broker.

The FDIC now seeks to reverse this position and treat a deposit broker as any person that places deposits or facilitates the placement of deposits at even just one insured depository institution. In the NPR, the FDIC asserts that reading the word "institutions" to include a single institution is "consistent with the general statutory interpretation rule that provides that words importing the plural include the singular, unless the statutory context indicates otherwise," citing 1 U.S.C. § 1 as support.[69] That section of the U.S. Code provides that "*unless the context indicates otherwise* – words importing the singular include and apply to several persons, parties, or things; words importing the plural include the singular; …." (emphasis added)

In this case, the context indicates that the word "institutions" is not intended to include a single "institution." The definition of a deposit broker uses the plural term "institutions" in the first part of the definition and the singular term "institution" in the second part of the definition.[70] It is a maxim of statutory interpretation that "when the legislation uses certain language in one

[68] 12 U.S.C. § 1831f(g)(1)(A).
[69] 89 Fed. Reg. 68253 (August 23, 2024).
[70] The term "deposit broker" means - (A) 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
(B) 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. (12 U.S.C.§ 1831f(g)(1)).

part of the statute and different language in another, the court assumes different meanings were intended."[71] Thus, by using both terms in the definition of a deposit broker, it is clear that Congress knew the difference between the two terms, and that it choose to use the plural version in the first part of the definition, which applies the placement and facilitation of deposits on behalf of third parties.

Furthermore, the termination of the exclusive deposit placement exception is arbitrary and capricious and ignores the significant policy reasons for retaining the provision. A deposit relationship with a single IDI clearly indicates that the third-party is not in the business of being a deposit broker and the deposits made under such relationships are not "hot money." These relationships are business relationships designed to benefit the customers of the third-party. Any unmitigated risk that may arise from exclusive deposit arrangements, such as potential concerns about concentrations, can easily be addressed by the existing supervisory and regulatory framework.

In addition, this proposed change, like the proposed change related to consideration of fees that is discussed above, would disrupt many existing relationships established in reliance on the 2020 Final Rule. For example, this proposed change would:

- Cause a subsidiary or an affiliate of a well-capitalized IDI to be treated as a deposit broker if the subsidiary or affiliate places funds with the IDI. To avoid this result, some IDIs may merge the subsidiary or affiliate into the IDI to take advantage of the exception for an IDI to place funds into itself. Doing so, however, is not without some cost. A merger is a costly transaction, especially if it triggers an application under the Bank Merger Act, and it can complicate the preparation of resolution plans for IDIs that must file such plans.

- Impact sweep arrangements between an IDI and an SEC-registered broker/dealer. This change, combined with the proposed percentage limitation on sweep deposits proposed in the NPR, would limit the amount of deposits that the broker/dealer could place with the IDI. This limitation would disrupt many arrangements that benefit consumers who rely

[71] *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004), note 9, citing 2 A N. Singer Statutes and Statutory Construction §46:06, pa 194 (6th Ed 2000).

on their broker/dealer to automatically sweep the proceeds of securities transactions into insured deposits.

- Affect a number of deposit relationships between IDIs and nonbank fintechs. As discussed above, these relationships are an efficient means for IDIs to raise funds that are relatively stable because they typically are based upon contracts that require termination only under certain conditions, and only after sufficient prior notice to the IDI.

- Remove the clear permissibility of marketing arrangements whereby a professional or fraternal organization exclusively refers members to become depositors at an IDI, despite that those depositors would form their own customer relationship with the IDI—and thus be more likely to bring stable deposits as acknowledged by the FDIC's own past findings.[72]

- Result in the punitive treatment of exclusive deposit arrangements between IDIs and more traditional nonbank financial services companies. IDIs form exclusive deposit referral and similar partnership arrangements with other types of traditional financial institutions that do not offer deposit products, such as insurance companies. These exclusive partnerships are designed to meet customers' financial needs, take a significant amount of time and effort to establish, result in stable deposits, and do not pose the concerns that the brokered deposit regulations are intended to address.

In the preamble to the 2020 Final Rule, the FDIC concluded that deposits received under an exclusive deposit placement arrangement are relatively stable because they are based upon a business relationship.[73] The FDIC now arbitrarily asserts that under this exception an IDI: (a) may rely for one hundred percent of its deposits on an unaffiliated third party without any of those deposits considered brokered; (b) could fall below well-capitalized and still rely on those

---

[72] See: FDIC, Study on Core Deposits and Brokered Deposits, July 8, 2011, p. 50 (discussing stability of deposits based on "customer relationship").

[73] 86 Fed. Reg. 6745 (January 22, 2021). ("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.")

third party placed deposits for one hundred percent of its funding without any of those deposits being considered brokered; and (c) could form multiple "exclusive" third party relationships to fund itself without any of those deposits considered brokered.[74] The FDIC and the other federal banking agencies may easily use their existing supervisory authorities, including their authority to prevent any unsafe or unsound practice, if any of these scenarios are deemed to be unsafe or unsound.

Further, the FDIC provides no data or analysis to support the claim that these scenarios are likely or merely speculative. The FDIC does not claim that these concerns are based on new information that the agency was unaware of when it promulgated the 2020 Final Rule, or that there is any evidence that the theoretical concerns have actually occurred. Instead, the FDIC cites the recent failure of two nonbanks that had deposit relationships with IDIs, Synapse and Voyager. The failure of those firms, however, did not cause the failure of any IDI and as discussed above, the FDIC has taken other policy initiatives that seek to address the problems associated with those failures and can take further action to mitigate concerns about consumer confusion or the insured status of a deposit.

In sum, the proposed termination of the exclusive deposit arrangement provision is inconsistent with the statute, ignores significant policy problems with the proposal, fails to provide data or a cogent explanation for the need for this change, and cites no credible basis why a rule, rather than the normal supervisory process, is necessary to deal with the speculative scenarios put forward to justify the proposal.

The proposed changes to the primary purpose exception standard are not in accordance with law, §337.6(a)(5)(iv)(I) and §303.234(6).

Section 29 excludes from the definition of a deposit broker a person or entity that is "an agent or nominee whose primary purpose is not the placement of funds with depository institutions." In the NPR, the FDIC proposes to revise the primary purpose exception to focus not on the primary purpose of the third party, but instead on the primary purpose for the deposit transaction. The FDIC also proposes additional changes related to this exception. These proposed

[74] 89 Fed. Reg. 68253 (August 23, 2024).

changes disregard the statutory text of Section 29. Consider, for example, an alumni organization that provides an insured savings option for its members through a relationship with an IDI. The NPR focuses on the primary purpose of the deposit (providing a safe place to save) and not on the primary purpose of the organization (providing alumni services). This construction of the statute makes no sense, since any organization that places or assists in placing funds in an IDI would likely meet the proposed standard, no matter the primary purpose of the third-party organization.

The proposal also disregards the statute by adding a new requirement. Under the proposal, the primary purpose of making the insured deposit must be for a *substantial purpose* other than to provide a deposit placement service or FDIC deposit insurance with respect to particular business lines. Section 29 states that the primary purpose exception applies to "an agent or nominee whose primary purpose is not the placement of funds with depository institutions."[75] The statute does not qualify this exception with a "substantial" standard. As noted previously, the FDIC is not entitled to deference under the *Loper Bright* case when it interprets a statutory provision and cannot "amend" a statute to add language that Congress did not authorize.

Furthermore, in the NPR the FDIC states that it will consider various factors, including fees and other remuneration provided to the third party, in determining whether the intent of the third party in placing deposits at an institution is for a substantial purpose other than to provide a deposit-placement service or FDIC deposit insurance. Again, this is not in the statute and will likely lead to absurd results. For example, an association devoted to securing benefits for senior citizens, such as AARP, charges a membership fee, and may receive a fee for referring its members to a particular IDI. Under this scenario, the AARP would be a deposit broker. Notwithstanding that the primary purpose of the organization has nothing to do with placing insured deposits.

This problem is compounded by the onerous limitations that the NPR would impose on obtaining an FDIC opinion that a particular program meets the primary purpose exception. Those limitations are discussed in greater detail.

[75] 12 U.S.C. §1831f(g)(2)(I).

Collectively, the proposed change in the standard to apply for the primary purpose exception and the proposed changes in the procedures for filing an application will make it more difficult for IDIs and third parties to utilize the exception. This frustrates the intent of Congress when it adopted the primary purpose exception and, therefore, is contrary to law.

The proposed changes to the primary purpose application process are arbitrary §303.234.

The 2020 Final Rule currently allows a third party or an IDI on behalf of a third party to submit an application for a primary purpose exception. In the NPR, the FDIC proposes that only an IDI may apply for this exception, and that the application must include the submission of additional information, such as all third-party contracts. Moreover, applications approved pursuant to the 2020 Final Rule would be revoked (i.e., no grandfathering), which means that IDIs would be required to submit a new application to seek a primary purpose exception and report the associated deposits as brokered until and unless an application is approved.

The FDIC explains that it is proposing these changes in the application process because some third parties have not provided sufficient information in an application and some IDIs have misunderstood the process, which has resulted in some IDIs filing inaccurate Call Reports. Such administrative errors, however, are not a sufficient basis for the proposed procedural changes. The FDIC has ample authority to require third parties to supply all necessary information in an application. Moreover, in the preamble to the 2020 Final Rule, the FDIC recognized that a third party seeking a primary purpose exception on its own behalf was in the best position to file a complete application since the information required to complete an application is in the possession of the third party.[76] Eliminating the ability of a party other than the IDI to request a review of a proposed program also will significantly limit the ability of third parties to develop new types of programs that could benefit IDIs and their customers. The FDIC should, therefore, retain the ability for a third-party to submit an application or notice. However, if it does not, the FDIC should incorporate a "good faith" standard about the accuracy of information contained in the application(s) or notice(s) submitted by an IDI that the IDI received from a third-party, or otherwise clarify the IDI's responsibility for verifying such information.

[76] 86 Fed. Reg. 6757 (January 22, 2021).

The revocation of prior approvals is particularly problematic. As we noted earlier in this submission, when an agency reverses a position, as it would with the repeal of prior approvals, it must provide a reasoned explanation for the change and must take into consideration how private parties have relied upon the prior policy, and a failure to do so is arbitrary and capricious. In this case, IDIs have established relationships with third parties in reliance upon the 2020 Final Rule that would be disrupted. This will create significant operational and reputational challenges for IDIs. It may cause some IDIs to terminate long-standing relationships and will damage the confidence third-parties have in establishing relationships with IDIs. These consequences, however, are not addressed in the NPR, which makes the proposed revocation of prior approvals arbitrary and contrary to the public interest.

The proposed changes to the 25 percent designated business exception are not justified by data and are contrary to public policy, and the proposed procedural changes to this exception are arbitrary; §337.6(a)(5)(iv)(I)(1)(i), §337.6(a)(11), and §303.234.

Pursuant to the 2020 Final Rule, an agent or nominee can meet the primary purpose 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, are placed at IDIs. Thus, for example, a broker/dealer that sweeps customer funds to IDIs is eligible for the primary purpose exception if less than 25 percent of that broker-dealer's total assets under administration for its customers are placed at IDIs. The 2020 Final Rule also established a notice process for agent/nominees and IDIs to utilize this exception.

In the NPR, the FDIC proposes several material changes to the 25 percent designated business exception. First, this exception would be available only to SEC-registered broker-dealers and SEC registered investment advisors and would re-designate the exception as the "Broker/Dealer Sweep Exception." Second, the 25 percent limit would be reduced to 10 percent. Third, the asset base for this calculation would be revised to be the total assets that the broker-dealer or investment adviser has under *management* in a particular business line rather than assets under *administration*. Assets under management would be defined to mean securities portfolios and cash balances that a broker/dealer or investment adviser provides continuous and regular supervisory or management services. This is a narrower base than assets under administration. Fourth, an application procedure, rather than a notice procedure, would apply if a

third-party is involved in the arrangement. As discussed below, we find each of these proposed changes problematic, not supported by a rational basis or objective data, and likely to lead to significant adverse unintended consequences.

The NPR includes no rationale for limiting the exception to SEC-registered broker/dealers and investment advisers

In the NPR, the FDIC provides no rationale for limiting the exception to SEC-registered broker/dealers and SEC-registered investment advisers. Smaller investment advisers, those with $100 million or less of assets under management, are typically registered with State securities agencies.[77] Futures commission merchants are regulated by the CFTC, but may sweep customer funds into an FDIC insured account.[78] Various other parties that are supervised at the State or Federal level, but not by the SEC, are inapplicably excluded, without explanation or even acknowledgement it discriminates against small companies that are regulated by State securities agencies.

The NPR incudes no data to support the lower percentage threshold for the exception.

In developing the 2020 Final Rule, the FDIC concluded that a 25 percent limit demonstrated that the primary purpose of the third party was not the placement of deposits in an IDI. In the NPR, the FDIC now arbitrarily concludes "because a third party that places less than 25 percent of its customer's assets under administration in a bank account does not, by itself, demonstrate that the deposit-placement activity is for a goal other than to provide deposit insurance or a deposit placement service."[79]

The FDIC provides no data or analysis to support this change in view. Instead, the NPR simply states that "placing less than 10 percent of customer funds at IDIs would be more indicative that the primary purpose for broker dealers and investment advisers in placing customer funds at IDIs is to temporarily safe-keep customer free cash balances (e.g., uninvested funds) that are awaiting reinvestment."[80] The FDIC also cites the 10 percent threshold as

[77] See, https://www.investor.gov.
[78] Futures Industry Association Protection of Customers' Funds (May 2014).
[79] 89 Fed. Reg. 68256 (August 23, 2024).
[80] Id.

evidence that a de-minimis amount of customer funds are placed into deposit accounts.[81] The statutory test, however, is not whether the amount of deposits is de-minimis, but whether the primary purpose of the agent or nominee is the placement of deposits. The 10 percent threshold has no basis in the statute. Furthermore, no study or analysis is provided to explain why the 10 percent limit is more indicative than a different limit, for example a 15 percent limit, or why the 25 percent limit is problematic. Plucking the 10 percent cap out of thin air is precisely the type of arbitrary action the APA was designed to police and prevent.

In the NPR, the FDIC also states that "lowering the threshold to 10 percent may reduce potential risks to safety and soundness and to the DIF by providing more transparency regarding the characteristics of the deposits so placed."[82] Yet, it is not obvious how dropping the threshold from 25 percent to 10 percent adds "more transparency" to the exception. The FDIC also has a concern with third-parties but is not clear how modifying the threshold addresses those concerns.

Reducing the threshold also will have unintended consequences. For example, investors typically have asset allocations that include a certain cash percentage. Lowering the percentage from 25 percent to 10 percent reduces the cushion that IDIs have for accepting customer cash. Moreover, lowering the threshold may exacerbate procyclicality. In periods of market stress, customers typically move more funds into cash. This would cause a broker/dealer's percentage to increase based upon customer-driven activity. With the lower threshold, however, IDIs will be limited in the amount of cash they may accept from a broker/dealer or investment adviser, and with less cash an IDI will have a reduced ability to extend credit during periods of economic stress. Also, it is unclear what happens if deposits exceed the 10 percent threshold; is the excess amount or the entire amount treated as brokered?

In short, the 10 percent limit, proposed without any evidence or analysis, is a prime example of an agency action that is "arbitrary and capricious" and an abuse of discretion, and therefore inconsistent with the Administrative Procedure Act.

The NPR fails to explain the proposed change in the denominator for the percentage limit

[81] Id.
[82] Id.

Revising the denominator for purposes of this exception from "assets under administration" to "assets under management" is equally problematic and untethered to the statute. Broker/dealers hold funds that they do not manage for customers. These are self-directed accounts that the customers manage themselves. In the 2020 Final Rule, the FDIC explicitly recognized this fact, and rejected the use of the term assets under management in favor of the term assets under administration because: "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."[83] We agree with this interpretation.

The FDIC now states that the phrase assets under management would "be appropriate under the proposed rule to *accurately reflect the scope* of the types of services provided by broker dealers and investment advisers."[84] This is not only incorrect but once again, the NPR provides no substantive analysis for this change, and the rationale for the change is flawed. In 2020, the FDIC concluded that assets under management was "accurate," the FDIC now simply asserts the assets under administration is "more accurate." Under the APA the agency must justify its decisions with facts, not simply unsupported assertions.

The notice/application process for the Broker-Sweep Exception is arbitrary.

In the 2020 Final Rule, the FDIC created an expedited procedure for third-parties and IDIs to utilize the 25 percent designated business exception and the enabling transactions designated business exception upon submission of notice to the FDIC. In the NPR, the FDIC not only proposes to eliminate the enabling transactions exception, which we discuss below, but also proposes to modify the notice and application process for the proposed 10 percent Broker-Sweep Exception, which would replace the 25 percent designated business requirement exception.

First, only an IDI could file the notice to utilize the Broker-Sweep Exception, not a third-party, such as a broker/dealer. Second, an IDI could not rely upon the exception until 90 days after filing a complete notice if the FDIC has not disapproved the notice, and the FDIC may, at its discretion, extend the time period for an additional 90 days to review and potentially disapprove the notice. Third, if a third party is involved in the arrangement, the IDI must file an

[83] 86 Fed. Reg. 6751 (January 22, 2021).
[84] 89 Fed. Reg. 68256 (August 23, 2024).

application rather than a notice to demonstrate that the third-party is not a deposit broker, regardless of whether the program involves an affiliate or non-affiliate. The FDIC would act on the application within 120 days, but the NPR indicates that the application process could take more than 240 days following the submission of a "complete application." These proposed procedural changes to the Broker-Sweep Exception, like the proposed procedural changes to the primary purpose exception, are arbitrary and contrary to the public interest.

The NPR provides no rationale for precluding a third-party from filing the relevant notice or application. As a practical matter, it would be the broker/dealer that would have the information necessary to complete the notice or application. The broker/dealer would know whether the 10 percent limit is met. IDIs do not have much of this information, and so it makes little sense to shift the application burden to them. More generally, this will require a large operational build-out, which will impose substantial costs on IDIs.

Nor does the NPR explain the rationale for converting the notice process into a notice and disapproval process that occurs over a three-to-six-month period, while at the same time reducing the amount of funds that could be transferred pursuant to the notice from 25 percent of assets under administration to 10 percent of assets under management.

Furthermore, the proposed application process for sweep arrangements that involve third-parties imposes an arbitrary disadvantage, with no policy basis, on IDIs when they receive deposits from broker/dealers that lack the internal infrastructure to operate a sweep program without service provider support. Traditionally, IDIs have been able to treat deposits from affiliated broker/dealers as "core" regardless of whether a third party is involved and regardless of what the third party is doing. This treatment is based on the fact that the clients of broker/dealers are clients of the firm as a whole; they have brokerage accounts, but they also place deposits at the broker/dealer's affiliated IDI and obtain loans from those IDIs. As a result, the deposits are stable, and it does not matter whether a third party helps the broker operate the sweep program. The clients are clients of the broker/dealer, and of the affiliated IDIs, not the third-party provider.

<u>The proposed change to the current "matchmaking" provision is arbitrary, and violative of the APA; existing §337.6(a)(3)(C).</u>

The FDIC is proposing to replace the "matchmaking" activities prong in the definition of a deposit broker with a "deposit allocation" prong. As part of this proposed change, the FDIC would eliminate an existing exception in the matchmaking activities prong that allows third parties to provide deposit allocation services between an IDI and its affiliates. Also, no consideration would be given to the goals of allocation or the needs of the depositor.

The current exception for matchmaking activities between an IDI and its affiliates has been used by IDIs to facilitate deposit sweep arrangements with affiliated broker-dealers. In the NPR, the FDIC defends the proposed change in the treatment of affiliated sweep deposits by asserting that they are not "stickier" than unaffiliated sweep deposits. In support, the NPR mentions only one of the many hundreds of bank failures over the past two decades, citing a large decline in uninsured affiliated sweep deposits at First Republic Bank during the first quarter of 2023 and a much smaller decline in insured affiliated sweep deposits during that quarter.

However, the facts surrounding the failure of First Republic Bank are more complicated. During the quarter leading up to failure, First Republic Bank reported a sharp decline in affiliate sweep deposits that were *not fully insured*, from $8.3 billion to $1.1 billion from December 31, 2022, to March 31, 2023. However, First Republic Bank also reported relatively sticky *insured* affiliated sweep deposits, declining only from $1.9 billion to $1.4 billion. And during the same period, the bank reported an increase in fully insured non-affiliate sweep deposits, from $7.3 billion to $8.7 billion. This data demonstrates that uninsured deposits are not as sticky as fully insured deposits, but that overall, fully insured sweep deposits were not only stable, but grew. At most, the First Republic statistics show that, unsurprisingly, insured deposits are more stable than uninsured deposits. Additionally, the only other example cited in the NPR did not involve a bank failure at all.[85]

Finally, the proposed rule's treatment of affiliated sweep deposits, rather than reducing any risk to IDIs, actually may increase potential risk. If an IDI experiences a run on relationship deposits that extends to affiliated sweep deposits, the IDI's access to replacement deposits may

---

[85] 89 Fed. Reg. 68256 (August 23, 2024).

[85] *See* 89 Fed. Reg. at 68245 (citing failure of "crypto company Voyager," which was not a bank).

depend on whether a service provider that supports multiple sweep programs is involved. If such a service provider is involved, it may be able to replace funds that left the IDI with available excess funds from other broker/dealers, thus helping to prevent the IDI's failure.[86] Without such a service provider, the IDI may have greater difficulty replacing the funds. Sound FDIC policy would encourage the use of a service provider that provides this potential backstop. The proposed rule, however, promotes exactly the opposite. It penalizes the use of such a service provider by making the IDI's affiliated sweep deposits brokered if the service provider is used.

In sum, the NPR does not include the data necessary to support the FDIC's conclusion that these deposits, even with affiliated institutions, are less "sticky" than other types of deposits. It is our experience that deposits between a broker and an affiliated IDI are relatively stable because, among other factors, they are based on a relationship between the customer and the organization as a whole, and the FDIC has acknowledged this in a prior study. [87] Thus, removing the matchmaking activities prong entirely without substantive support is arbitrary and capricious.

The proposal also fails to clearly identify what constitutes "deposit allocation." In the NPR, the FDIC describes deposit allocation systems as an algorithm or functionally similar program or technology that determines deposit allocations among IDIs by directing the flow, or facilitating the flow, of third-party funds to be deposited at a particular IDI.[88] This description is extremely broad and could be read to capture core banking systems. This lack of clarity is another example of why this proposed change needs to be withdrawn.

<u>The enabling transactions exception should be retained; existing § 337.6(a)(5)(v)(l)(1)(ii).</u>

Under the 2020 Final Rule, and subject to a notice requirement, an agent or nominee could place 100 percent of its customer funds with a depository institution into transaction accounts and not be deemed a deposit broker if no fees, interest, or other remuneration is provided to the depositor, the agent or nominee. The 2020 Final Rule also provides that if the

---

[86] Such funds from other broker/dealers would be brokered, but they would still provide potentially valuable liquidity to the IDI.

[87] Federal Deposit Insurance Corporation, Study on Core Deposits and Brokered Deposits, July 8, 2011, p. 55 ("There is also some reason to believe that deposit sweeps from affiliated broker-dealers do not tend to leave for high rates or during periods of stress.")

[88] Id.

customer earns some fee, interest or remuneration, the exception could still apply and be subject to an application process rather than a notice process.

The NPR would repeal this "enabling transactions" exception because, as the FDIC explains in the NPR: "The current enabling transactions test would not satisfy the proposed primary purpose exception because placing deposits into accounts with transactional features would not, by itself, prove that the substantial purpose of the deposit placement arrangement is for a purpose other than providing deposit insurance or a deposit placement service."[89] As explained above, this list is not supported by the statutes, which speaks to a primary purpose, not a substantial purpose. Additionally, under the NPR, applications previously approved under this exception would be rescinded.

As noted above, this exception has been used by well-capitalized IDIs and third parties to establish relationships that permit the well-capitalized IDI to receive relatively stable funds. It could harm consumers who benefit from these arrangements. Since the NPR offers no additional data or analysis to support this change, we recommend that the exception be retained.

<u>The proposed rule's treatment of the special cap on reciprocal deposits is contrary to law. § 337.6(e).</u>

Under the proposed rule, if an IDI that is subject to the "special cap" in the agent institution definition receives an amount of reciprocal deposits that causes it to exceed the special cap, the IDI cannot again receive non-brokered reciprocal deposits for a period of at least two successive reporting quarters.[90] The statute does not support this result. Rather, the statute makes the question in each instance whether, when an IDI receives deposits, the IDI "does not receive" deposits that cause it to exceed the special cap.[91] Even if the IDI receives such an amount of deposits at one time, the IDI is nonetheless an agent institution, and the deposits are reciprocal deposits, if the IDI "does not receive" such an amount at another time. Nothing in the statute permits the result to depend on whether two quarters or any other amount of time has elapsed.[92]

[89] 89 Fed. Reg. 68257 (August 23, 2024).
[90] Proposed Rule at § 337.6(e)(3)(iv)(B).
[91] 12 U.S.C. § 1831f(i)(2)(A)(iii).
[92] The proposed rule also appears to rest on a mistaken premise, which is that it is possible under the statute for an IDI to receive an amount of reciprocal deposits that causes it not to be an agent institution. If deposits are not

Moreover, the practical effect of the agent institution provision in the proposed rule would be highly detrimental. An IDI is subject to the special cap only if it has not been rated outstanding or good or is not well-capitalized and has not received an FDIC waiver.[93] For such an IDI, a sudden loss of access to reciprocal deposits threatens to make recovery less likely by depriving the IDI of a critical liquidity source. It also threatens to make an acquisition less likely by devaluing the IDI. Congress specifically sought to avoid such results by permitting an IDI that does not satisfy the rating or capital requirements to continue to receive reciprocal deposits within the special cap. Suspending that ability for two reporting quarters, for which Congress did not provide, would defeat the congressional purpose and work against the FDIC's policy goals.

<u>Passive listing services should be specifically exempted from the regulation; §337.6(a)(5)(iv).</u>

In the NPR, the FDIC states that passive listing services that only advertise information on interest rates offered by depository institutions would not meet the definition of a "deposit broker."[94] Section 337.6(a)(5)(iv) of the regulation should be revised to specifically exempt such services to avoid any ambiguity over the potential application of the regulation to such services. Moreover, the FDIC should clarify that analogous third parties that do not have any involvement in the opening or closing of an account, and instead receive a fee for providing potential customers with information regarding an IDI's deposit services – and therefore operate exactly like passive listing services – are also not deposit brokers.

III. Conclusion

In closing, ABA reiterates its request that the FDIC withdraw the NPR. The NPR is based upon an outdated view of brokered deposits and banking markets. As a result, its implementation would have unintended harmful effects on the banking industry, which is not in the public interest. Moreover, many of the changes proposed in the NPR are at odds with the statute upon which the brokered deposit is based and are not supported by sufficient data or analysis. A court would not uphold any final rule based on the proposal for the reasons described. In sum, in order to avoid unnecessary disruption in settled business relationships, increased compliance

---

received by an agent institution, the statutory consequence is that they are not reciprocal deposits, 12 U.S.C. § 1831f(i)(2)(E), not that the IDI becomes unable to receive non-brokered reciprocal deposits in the future.

[93] 12 U.S.C. § 1831f(i)(2)(A)(i)-(iii).

[94] Id, at 68252.

costs for the industry (including higher deposit insurance assessments), adverse impacts on consumers who would otherwise receive higher returns on their accounts, and a host of other unanticipated consequences, we recommend that the FDIC withdraw the NPR.

If you have any questions about these comments, please contact the undersigned at [redacted].

Sincerely,

Alison Touhey
SVP, Bank Funding
American Bankers Association