To:
James P. Sheesley
Assistant Executive Secretary

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

November 21, 2024

Re: Unsafe and Unsound Banking Practices: Brokered Deposits Restrictions - Notice of Proposed Rulemaking - RIN 3064-AF99

Coinbase, Inc. (**CBI** and together with its subsidiaries, **Coinbase**) appreciates the opportunity to respond to the Notice of Proposed Rulemaking referenced above (the **Proposal**) issued by the Federal Deposit Insurance Corporation (**FDIC**).

Coinbase is not a deposit broker, and therefore no aspect of the Proposal should apply to Coinbase. Despite language in the Proposal that could be interpreted (incorrectly) to find otherwise, our business model does not bring us within any logical understanding of the statutory definition of “deposit broker.” Our primary business is to facilitate trading on our platform. The possibility that the Proposal could allow for an alternative conclusion to be reached regarding Coinbase or other similar businesses indicates the Proposal has fundamental substantive defects that make it wholly unfit for its intended purpose.

The Proposal also suffers from fundamental procedural flaws that would make any final rule the FDIC may seek to adopt plainly arbitrary and capricious. Among other things, the Proposal would significantly alter the FDIC’s brokered deposit rules and reverse statutory interpretations without (i) a clear policy rationale to support its actions; or (ii) sufficient data on the proposed effects. The FDIC compounds these deficiencies by citing, without context, the bankruptcy case of the crypto firm Voyager Digital Holdings and the failures of Silicon Valley Bank and First Republic Bank as evidence of a relationship between the crypto Industry and problems with brokered deposits, despite the

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fact that those cases had nothing to do with any brokered deposit problems.

Taken together, the cumulative effects of the substantive, procedural, and factual flaws with the Proposal fatally undermine the FDIC's ability to justify any conclusions regarding the appropriate treatment of brokered deposits. Unfounded prejudicial statements of the kind made in the Proposal regarding the crypto industry (or any industry), in particular, have no place in the FDIC's rulemaking process, which is appropriately expected to be evidence-based and unbiased.

Accordingly, the Proposal should be withdrawn so that the FDIC may expunge the factual inaccuracies and references to unrelated topics from the rulemaking record, and take other steps necessary to fairly consider whether further rulemaking regarding brokered deposits is appropriate. Should the FDIC choose (inappropriately) to proceed with rulemaking despite the evident concerns with the Proposal, we offer suggestions throughout our comments below that may reduce the damage certain to be caused by doing so.

Yours sincerely,

Faryar Shirzad
Chief Policy Officer

I. The Proposal is substantively flawed because its proposed interpretations of key terms have no legal basis, and it makes factually inaccurate and irrelevant references to the crypto industry.

A. The Proposal's interpretations of key terms have no basis in the law.

The Federal Deposit Insurance Act (**FDI Act**) defines a deposit broker as a person "engaged in the business of placing deposits[] or facilitating the placement of deposits," and it excludes any person "whose primary purpose is not the placement of funds with depository institutions."[1] As a threshold matter, Coinbase's business model does not bring it within any logical understanding of the statutory definition of "deposit broker." Coinbase's primary business is to facilitate trading on its platform, and it places deposits at banks only in service of that business. It is not engaged in the business of brokering deposits, much less as its primary purpose.

The Proposal,[2] however, would supplant the primary purpose test in the current brokered deposit rule (**2021 Rule**)[3] with a broader and more nebulous test that assesses whether the primary purpose of an entity's relationship with the bank is for a "substantial purpose" other than a "deposit-placement service or FDIC deposit insurance."[4] The statute is unambiguous: if an entity is not engaged in the business of brokering deposits, or if its primary purpose is not the placement of funds with depository institutions, it is not a deposit broker. Full stop. Whether the entity has some other "substantial purpose" in its relationship with the bank is irrelevant to the analysis, and the FDIC has no basis to interpret the statute otherwise.

The FDIC attempts to clarify this proposed interpretation of the Primary Purpose Exception (**PPE**) by explaining it "would be similar to how the FDIC historically interpreted the exception before 2020."[5] In other words, the exception would apply "when the intent of the third party, in placing deposits or facilitating the placement of deposits, [is] to promote some . . . goal . . . other than the goal of placing deposits for others."[6] Yet nowhere does the Proposal clarify how an agent or nominee could demonstrate that it has a goal that is somehow different from its primary purpose. That confusing standard would deprive regulated parties of fair notice because it would be exceedingly difficult for parties like Coinbase to understand how the FDIC would implement it in any rational or consistent way.

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1 12 U.S.C. § 1831f(g)(1)(A), (g)(2)(I).

2 Unsafe and Unsound Banking Practices: Brokered Deposits Restrictions, 89 Fed. Reg. 68,244 (Aug. 23, 2024) (**Proposal**), https://www.federalregister.gov/documents/2024/08/23/2024-18214/unsafe-and-unsound-banking-practices-brokered-deposits-restrictions.

3 Unsafe and Unsound Banking Practices: Brokered Deposits and Interest Rate Restrictions, 86 Fed. Reg. 6,742 (Jan. 22, 2021).

4 Proposal at 68,253.

5 *Id.* at 68,253.

6 *Id.*

The FDIC's unlawful interpretation will, contrary to the statute, capture entities like Coinbase that are not engaged in the business of brokering deposits at all, let alone as their primary purpose. Moreover, the Proposal also exceeds the FDIC's authority in requiring banks or third parties to request the agency's permission to invoke the PPE. If an entity is not a deposit broker under the statute, then the FDIC has no jurisdiction over the entity, and the statute does not allow the FDIC to demand that the entity or a bank apply for permission to do what the statute by its plain language permits.

B. The Proposal lacks relevant evidence and relies on factually inaccurate characterizations.

The Proposal seeks to justify the need for changes to the brokered deposit rule by citing the bankruptcy case of Voyager Digital Holdings (**Voyager**) and to the failures of Silicon Valley Bank (**SVB**) and First Republic Bank (**First Republic**) as evidence of a relationship between the crypto industry and problems with brokered deposits. However, the FDIC's reliance on Voyager and the referenced bank failures as a justification for the Proposal is legally unsound and factually unsupported. The FDIC offers no evidence that any of the deposits that the Proposal would reclassify as brokered deposits present the same or similar risks. The Proposal also does not even attempt to analyze the role that brokered deposits did—or did not—play in those failures. In that respect, the FDIC's Deposits Request for Information[7] and Bank-Fintech Request for Information[8] are telling admissions that the FDIC's current understanding of deposits, how they work today and the risks they present, is incomplete. That is why the FDIC (in addition to Coinbase and the broader community of other impacted parties) cannot meaningfully assess the Proposal's impacts. Not even the FDIC has the requisite data it needs. Instead, the Proposal appears to be entirely driven by a desire to roll back the clock, on a highly accelerated timeframe, without the requisite data and analysis needed to justify a policy change.

Perhaps the FDIC did not attempt to provide evidence because the agency itself has acknowledged that neither deposit broker[s] nor brokered deposits (as those terms are currently defined under the 2021 Rule) were at issue in Voyager.[9] The actual causes of Voyager's failure were due to turbulent market conditions, a widespread selloff in the cryptocurrency industry, the collapse of Terra Luna, and other factors having nothing to do with brokered deposits at Metropolitan Community Bank, which held the deposits of Voyager customers.[10]

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[7] Request for Information on Deposits, 89 Fed. Reg. 63946 (Aug. 6, 2024) (Deposits RFI), https://www.federalregister.gov/documents/2024/08/06/2024-17298/request-for-information-on-deposits.

[8] Request for Information on Bank-Fintech Arrangements Involving Banking Products and Services Distributed to Consumers and Businesses, 89 Fed. Reg. 61,577 (July 31, 2024) (Bank-Fintech RFI), https://www.federalregister.gov/documents/2024/07/31/2024-16838/request-for-information-on-bank-fintech-arrangements-involving-banking-products-and-services.

[9] Proposal at 68,245 ("Moreover, in the case of the failure of crypto company Voyager, it was not considered a ''deposit broker''— and Voyager deposits were not considered brokered—because it had an exclusive deposit placement arrangement with one IDI.")(internal citation omitted).

[10] *See* Declaration of Stephen Ehrlich, Chief Executive Officer of the Debtors, in Support of Chapter 11 Petitions and First Day Motions, *In re Voyager Digital Holdings, Inc.*, No. 22-10943 (Bankr. S.D.N.Y. Jul. 6, 2022) (No. 15).

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Official post-mortem reviews of the failures of SVB and First Republic found that their failures were due to the mismanagement of interest rate, liquidity, and other risks rather than any brokered deposit problem.[11] The Proposal puts forth no evidence that brokered deposit outflows preceded these failures either. Instead, the true source of deposit flight was corporate account owners with uninsured, non-brokered deposits held under standard (non-fintech sourced) deposit agreements.[12] Neither the FDIC's report on the failure of First Republic nor the Material Loss Review by the FDIC's Office of Inspector General cites brokered deposits as a reason these banks failed.[13]

Any strained comparisons to the Voyager bankruptcy or the 2023 bank failures are nothing more than poor attempts to mask the lack of factual support for the FDIC's Proposal and distract attention from the supervisory lapses associated with unprecedented bank failures.

II. The Proposal is procedurally flawed and would unnecessarily limit fair access to banking services for many businesses.

Under the Administrative Procedure Act (**APA**), an agency rule is unlawful if it exceeds the agency's constitutional or statutory authority or is arbitrary, capricious, or an abuse of discretion. The APA requires agencies to reasonably explain their rules, account for the costs imposed by their rules, and fairly balance the facts and circumstances presented in the record before them when reaching their conclusions. The Proposal suffers from procedural defects in all three of these respects.

A. Failure to adequately explain

One of the basic procedural requirements of administrative rulemaking is that an agency's rule must be "reasonable and reasonably explained."[14] As the Supreme Court explained in *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983), an agency rule is "arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency

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[11] *See* Bd. of Governors of the Fed. Rsrv. Sys., Review of the Federal Reserve's Supervision and Regulation of Silicon Valley Bank (2023) (FRB Review of SVB); FDIC, FDIC's Supervision of First Republic Bank (2023) (**FDIC Review of First Republic**).

[12] Bd. of Governors of the Fed. Rsrv. Sys., Material Loss Review of Silicon Valley Bank 15 (2023), https://oig.federalreserve.gov/reports/board-material-loss-review-silicon-valley-bank-sep2023.pdf ("On March 9, 2023, SVB customers withdrew deposits totaling $42 billion, nearly 25 percent of the bank's $166 billion total deposits.").

[13] FDIC Review of First Republic Bank; FDIC, Office of Inspector General, Material Loss Review of First Republic Bank (Nov. 29, 2023), https://www.fdicoig.gov/news/summary-announcements/material-loss-review-first-republic-bank.

[14] *Ohio v. EPA*, 603 U.S. 279, 292 (2024).

expertise." In addition, an agency must provide a "more detailed justification" when its "prior policy has engendered serious reliance interests that must be taken into account."[15]

i. Substantial contradictory evidence from the 2020 process

Had the FDIC engaged with the industry or collected data from the banks and nonbanks active in these partnerships prior to issuing the Proposal, the agency would have confirmed its findings from the 2021 Rule rulemaking process. For example, it is still the case today that deposits sourced through exclusive deposit placement arrangements are stable, predictable, and relatively low-cost sources of funding and liquidity for banks.[16] Instead, the Proposal rests on a 13-year-old FDIC study that necessarily could not have included modern exclusive deposit placement arrangements that have developed since that time.[17] Accordingly, the Proposal is an unjustified return to an antiquated understanding of the business of banking.

ii. Lack of supporting evidence

The FDIC cites a single study in support of the Proposal, claiming that "statistical analyses and other studies have found that an IDI's use of brokered deposits in general is correlated with a higher probability of failure and higher losses to the DIF upon failure."[18] The statistical analyses (updated with data through 2017) and unspecified "other studies" upon which the Proposal purportedly relies are neither current nor relevant to our modern banking system. Indeed, the outstanding Deposits RFI[19] and Bank-Fintech RFI[20] are a clear indication that the federal banking agencies currently lack relevant data on deposit-placement related partnerships. The Bank-Fintech RFI, for example, seeks to understand "the implications of such arrangements [and] whether enhancements to existing supervisory guidance may be helpful in addressing risks associated with these arrangements."[21] On this basis, the FDIC cannot meet the *Encino Motorcars* standard because it does not have—and certainly could not have considered—the relevant data. The FDIC cannot articulate a satisfactory explanation for its actions, including any

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15 *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009); *see also Encino Motorcars, LLC v. Navarro*, 579 U.S. 211, 221 (2016).

16 2021 Rule at 6,746 ("The FDIC recognizes that a number of entities, including some financial technology companies, partner with one insured depository institution to establish exclusive deposit placement arrangements. Under these arrangements, the third party has developed an exclusive business relationship with the IDI and, as a result, is less likely to move its customer funds to other IDIs in a way that makes the deposits less stable.").

17 FDIC, Study on Core Deposits and Brokered Deposits (July 8, 2011) (FDIC Study), https://www.fdic.gov/regulations/reform/coredeposit-study.pdf.

18 Proposal at 68,244.

19 Request for Information on Deposits, 89 Fed. Reg. 63946 (Aug. 6, 2024) (Deposits RFI), https://www.federalregister.gov/documents/2024/08/06/2024-17298/request-for-information-on-deposits.

20 Request for Information on Bank-Fintech Arrangements Involving Banking Products and Services Distributed to Consumers and Businesses, 89 Fed. Reg. 61,577 (July 31, 2024) (Bank-Fintech RFI), https://www.federalregister.gov/documents/2024/07/31/2024-16838/request-for-information-on-bank-fintech-arrangements-involving-banking-products-and-services.

21 *Id.* at 61,578..

rational connection between the facts and its proposed policy choice to roll back the brokered deposits framework.

iii. Failure to consider reliance interests

The Proposal fails to consider and address banks' and partners' reliance interests over the past four years. Since the 2021 Rule was adopted, entities have necessarily structured deposit arrangements with banks to comply with the 2021 Rule and avoid (or accept) a "deposit broker" designation. Coinbase, for example, has relied on the FDIC's granting of the "enabling transactions" exception since March 28, 2022. So too have Coinbase's partner banks, who with Coinbase, would effectively be starting at square one upon the effective date of any final rule. This is especially concerning given the inherent difficulty for crypto companies to secure bank relationships.[22] This reliance by Coinbase and the broader industry, often in collaboration with the FDIC, has resulted in an updated brokered deposits regime that is working and predictable. The Proposal lacks a reasoned explanation for its policy reversal, as it ignores the four years of reliance interests that the FDIC created by premising the Proposal on a single study (preceding the 2021 Rule) and using that as the proposed basis to reach contradictory conclusions.

iv. Failure to consider alternatives

Before rescinding a prior policy and disrupting the industry's reliance on that policy, an agency must "consider the 'alternatives' that are 'within the ambit of the existing policy.'"[23] More generally, "[a]n agency is required to consider responsible alternatives to its chosen policy and to give a reasoned explanation for its rejection of such alternatives."[24] "This principle goes to the heart of reasoned decisionmaking."[25] Contrary to this requirement, the Proposal fails to identify *any* alternatives to the proposed curtailing of the PPE and the elimination of the "enabling transactions" designated exception - which renders the Proposal fatally flawed.

To the extent the FDIC is open to looking at reasonable alternatives, should the FDIC choose to proceed with this rulemaking Coinbase requests adhering to the statutory PPE language, allowing third parties to rely on the public report of entities submitting notice for a PPE, restoring the enabling transactions designated exception, and grandfathering previously granted PPE approvals, at least until updated PPE applications are reviewed and decisioned under any final rule. Details of such remedial actions are described below in our responses to individual questions from the Proposal.

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[22] *See* The Reality Behind the Crypto Banking Crackdown: 'Operation Choke Point 2.0' Is Here.

[23] *Dep't of Homeland Sec. v. Regents of the Univ. of Cal.*, 591 U.S. 1, 30 (2020) (quoting *Motor Vehicle Mfrs. Assn. of United States, Inc. v. State Farm Mut. Automobile Ins. Co.*, 463 U.S. 29, 51 (1983)).

[24] *Spirit Airlines, Inc. v. Dep't of Transp.*, 997 F.3d 1247, 1255 (D.C. Cir. 2021) (internal quotations omitted).

[25] *Id.*

B. Failure to consider the costs and other effects of the Proposal

Agencies also have a general obligation under the APA to consider the costs of their actions when regulating. In *Michigan vs. Environmental Protection Agency et al. (Michigan v. EPA)*, the Court found that the EPA improperly excluded cost concerns from its decision to regulate hazardous air pollutants emitted from power plants.[26] The Court held that federal administrative agencies must engage in "reasoned decisionmaking," which requires the agency to consider costs when deciding to regulate.[27]

In this case, the FDIC acknowledges in at least 11 separate instances that the agency "does not have the data" or "does not have the information" to estimate the cost, impact, or volume of changes that would be required.[28] For example, the Proposal acknowledges that the effects of the proposed changes may be significant, and that consumers who access services through affected relationships, "might experience changes in interest rates on those funds, or costs associated with placing those funds with different entities."[29] Yet the FDIC makes no effort to quantify those changes in rates and costs. By the FDIC's own admission, the Proposal is bereft of relevant data on costs, and therefore, under *Michigan v. EPA*, cannot be the result of reasoned decisionmaking.

C. Undue weight given to FDIC supervisory experience

The Proposal is almost entirely predicated on conjecture and experience the FDIC states it has gained through its supervisory experience. The agency's failure to explain its experience in more detail and the absence of any quantitative data undermines the integrity of the APA-mandated rulemaking process and hampers the ability of Coinbase (and all commenters) to provide specific feedback. For these reasons alone, any final rule stemming from the Proposal will be defective because the FDIC has neither sufficiently explained the reasons behind its regulatory policy change, nor relied on relevant data. Instead, the FDIC has proposed to act as both the source of factual information upon which the rulemaking is based and the

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[26] *Michigan v. EPA*, 576 U.S. 743 (2015).

[27] *Id.* at 750–51.

[28] Proposal at 68,259–60 ("The FDIC does not have the data to estimate the amount of deposits that would be reclassified as brokered by the proposed rule at particular IDIs, nor how many IDIs, if any, might make changes to the structure of their liabilities"); *id.* at 68,260 ("The FDIC does not have the data to estimate the amount of deposits that would be reclassified as brokered by the proposed rule at individual IDIs, and thus cannot estimate how many IDIs, if any, may incur costs associated with maintaining compliance with, or maintaining management buffers relative to, these regulatory ratios because of the proposed rule."); *id.* ("The FDIC does not have the data to be able to reliably estimate the costs associated with these changes, but expects that they are likely to be modest."); *id.* at 68,261 ("The FDIC does not have the information necessary to quantify the potential changes in filings that are likely to occur if the proposed rule was adopted."); *id.* at 68,264 ("The FDIC does not have data to be able to reliably estimate the amount of deposits that would be re-classified as brokered under the proposed rule."); *id.* at 68,265 ("The FDIC does not have information on the number or size of potentially affected third parties; however, the FDIC believes it is likely that some affected third parties may be small entities.").

[29] Proposal at 68,261.

judge of the credibility and relevance of that information, a dual procedural role not permitted under the requirements of the APA.

III. The Proposal's substantive, procedural, and factual flaws indicate the FDIC is incapable of fairly justifying the Proposal and its expected harmful effects. Withdrawal of the Proposal is necessary; reconsideration is required.

Taken together, the cumulative effects of the substantive, procedural, and factual flaws with the Proposal fatally undermine the FDIC's ability to use the existing record to justify any conclusions regarding the appropriate treatment of brokered deposits. For these reasons, Coinbase believes the only appropriate remedy is for the Proposal to be withdrawn so that the FDIC may (i) expunge the factual inaccuracies and references to unrelated topics from the rulemaking record, (ii) engage in substantial gathering of relevant information, conduct the necessary analysis, and make both available to the public for comment; and (iii) complete its review of comments on the outstanding RFIs on deposits and bank-fintech arrangements before considering whether further rulemaking regarding brokered deposits is appropriate.

Should the Proposal not be withdrawn, Coinbase strongly encourages the FDIC to carefully identify, estimate, and consider the potential adverse effects of the Proposal before issuing a final rule and to take steps to ensure its brokered deposit rule does not—intentionally or unintentionally—restrict fair access to banking services. Doing so is required to reduce the damage certain to be caused by proceeding with rulemaking despite the manifest defects associated with the Proposal.

Coinbase is particularly concerned that should the Proposal be finalized we and similarly situated crypto companies would be subjected to unduly burdensome disparate treatment by the FDIC. This is true not only because the proposed elimination of the enabling transactions designated exception (which Coinbase bank partners rely on), but also because a final rule in the form proposed would both curtail significantly the availability of the PPE and increase the FDIC's discretion to interpret its scope. At a minimum, should the FDIC move forward toward a final rule, it should adhere to the statutory "primary purpose exception" language, or alternatively explain how a person's purpose in placing customer deposits at an IDI could be "primary" but not also "substantial." The proposed amendment is confusing and would be exceedingly difficult for parties to understand how the FDIC would implement on any rational or consistent basis.

Conclusion

Coinbase appreciates the opportunity to comment on the Proposal. The Proposal, if implemented, would have meaningful economic impacts on Coinbase and other similarly situated companies. Therefore we urge the FDIC to carefully consider our comments and take actions consistent with them. We also are willing to speak with FDIC staff to address any questions they may have.

Annex: Responses to Individual Questions in the Proposal

Deposit Broker Definition

Question 1: Does the FDIC's proposed amendment to the "deposit broker" definition align more closely with the statutory language and purpose of section 29 of the FDI Act? Why or why not?

No, the proposed amendment to the "deposit broker" definition does not align with the statutory language and purpose of the FDI Act. The statute defines a deposit broker as a person "engaged in the business of placing deposits[] or facilitating the placement of deposits," and it excludes any person "whose primary purpose is not the placement of funds with depository institutions." 12 U.S.C. § 1831f(g)(1), (g)(2)(*I*). As a threshold matter, Coinbase's business model does not bring it within any logical understanding of the statutory definition of "deposit broker." Coinbase's primary business is to facilitate trading on its platform, and it places deposits at banks only in service of that business. It is not engaged in the business of brokering deposits, much less as its primary business.

The Proposal, however, would adopt a broader and more nebulous "primary purpose" test that assesses whether the primary purpose of an entity's relationship with the bank is for a "substantial purpose" other than a "deposit-placement service or FDIC deposit insurance." That test could be interpreted, contrary to the statute, to capture entities (like Coinbase) that are not engaged in the business of brokering deposits as their primary purpose. The Proposal also exceeds the FDIC's authority in requiring banks or third parties to request the agency's permission to invoke the PPE. If an entity is not a deposit broker, the statute does not allow the FDIC to demand that the entity or a bank apply for permission to do what the statute permits.

Section 29 was intended to restrict the weakest, least capitalized banks from paying exorbitant interest rates and using brokered deposits as a way to "grow out of their problems,"[30] not to discourage healthy banks from holding a diverse funding mix. Moreover, the Proposal no longer includes any bright-line standards for determining whether any entity meets the statutory definition of "deposit broker." Instead, the Proposal contains a catch-all provision in section 337.6(a)(5)(ii)(E) that significantly broadens the "engaged in the business of" definition, which could be interpreted to render <u>all</u> fintechs "deposit brokers" under section 337.6(a)(5)(ii).

This result is contrary to the text, spirit, and purpose of Section 29—i.e., to address "brokered and high-rate deposits" that "were sometimes considered less stable."[31] As the Proposal and the FDIC's own advanced notice of public rulemaking notes, "historically, most institutions that use brokered deposits have done so in a prudent manner and appropriately measure, monitor, and

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[30] Jelena McWilliams, Chairman, FDIC, Keynote Remarks at the Brookings Institution, Washington, D.C.: Brokered Deposits in the Fintech Age (Dec. 11, 2019), https://www.fdic.gov/news/speeches/2019/spdec1119.html.

[31] Proposal at 68,245.

control risks associated with brokered deposits."[32] That the Proposal would label all crypto companies de facto "deposit brokers"— particularly where the deposits at issue have not been shown to have any "less stable" or "hot money" characteristics—does nothing to address the issues top of mind for the FDIC, stemming back to the early 1970s, regarding the statutory language and purpose of Section 29.

Primary Purpose Exception Analysis

Question 4: Is the proposed updated primary purpose exception analysis appropriate? Why or why not?

The proposed updated PPE analysis is not appropriate, as both the proposed exception and the analytical narrative are not sufficiently clear to provide a reasonable basis for comment. Therefore, the Proposal should be withdrawn to develop a more complete analysis. Should the FDIC move forward toward a final rule—despite the fact that Coinbase is not a deposit broker--Coinbase requests that the FDIC adhere to the statutory "primary purpose exception" language, or alternatively explain how a person's purpose in placing customer deposits at an IDI could be "primary" but not also "substantial." The proposed amendment is confusing and would be exceedingly difficult for parties like Coinbase to understand how the FDIC would implement on any rational or consistent basis.

Question 5: Are the proposed changes to the primary purpose exception application process appropriate? Is it appropriate to limit the application process to IDIs? Is the proposed process sufficiently clear to allow IDIs to obtain the required information on all third parties within a deposit placement arrangement?

No, the Proposal exceeds the FDIC's authority in requiring banks or third parties to request the agency's permission to invoke the PPE. If an entity is not a deposit broker under the statute, then the FDIC has no jurisdiction over the entity, and the statute does not allow the FDIC to demand that the entity or a bank apply for permission to do what the statute by its plain language permits.

In addition, the proposed changes to the PPE exception application process are inappropriate and unnecessary. First, the FDIC's claim that some insured depository institutions "misunderstand and misreport deposits" remains unsubstantiated by any data or analysis. Even taken as a given, the appropriate and targeted response in these instances is to deny such PPE applications until the information is corrected. Second, to the extent greater clarity is needed for the broader industry's benefit, there is an existing Q&A document,[33] periodically updated by FDIC staff, that serves as the appropriate vehicle for industry-wide clarification on the

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[32] *Id*.

[33] *See* FDIC, *Questions and Answers Related to Brokered Deposits Rule – As of July 15, 2022*, https://www.fdic.gov/sites/default/files/2024-03/brokered-deposits-qa.pdf.

application process (and any question relating to the 2021 Rule). Third, should the FDIC nevertheless decide to abandon the current Q&A process, the proposed solution goes too far—instead, as noted above, the Coinbase requests that the FDIC restore the ability for fintechs and other third parties (collectively, "applicants") in section 303.243(b) to file for PPE applications—but in consultation with their respective bank partners—to minimize the stated risk of applicants providing "insufficient information." This change would entail replacing the existing language in this section with "for an agent or nominee, in consultation with an insured depository institution . . ."

Question 6: Are there any additional factors the primary purpose exception application process should consider?

No. The statute is unambiguous: if an entity is not engaged in the business of brokering deposits, or if its primary purpose is not the placement of funds with depository institutions, it is not a deposit broker.

Designated Exceptions

Question 7: Should previously approved primary purpose exceptions be added to the regulatory list of "designated exceptions" as meeting the primary purpose exception under the proposed rule if they satisfy the proposed primary purpose exception?

Yes—to the extent the FDIC is referencing previously approved PPE applications, Coinbase requests that the FDIC grandfather previously approved PPE exemption applications and notices under the 2021 Rule at least until updated PPE applications are reviewed and determined under any final rule stemming from the Proposal. Rescinding previously approved exemption applications[34] upon the effective date of any final rule would upend banks' existing arrangements with crypto companies and hamper parties' ability to transition their relationships in a safe and sound manner.

Question 8. Should any of the designated exceptions be removed, or new ones added? Please explain.

As noted above, to the extent the FDIC is open to looking at reasonable alternatives, Coinbase requests adhering to the statutory PPE language, allowing third parties to rely on the public report of entities submitting notice for a PPE, restoring the enabling transactions exception, and grandfathering previously granted PPE approvals at least until updated PPE applications are reviewed and determined under any Final Rule. Otherwise, in the absence of any relevant data or analysis supporting the Proposal (including from the Deposits RFI or Bank-Fintech RFI), Coinbase sees no reason to expand the 2021 Rule.

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[34] Proposal at 68,257 ("Applications previously approved under this provision would be rescinded.").

Question 16: Are there any additional alternatives the FDIC should consider?

Furthermore, the FDIC should add non-depository trust companies as a designated business relationship. Under the 2021 Rule, the FDIC has the authority to identify additional business arrangements not described in the rulemaking that it determines meet the primary purpose exception without requiring an application. The FDIC has exercised this authority once since the 2021 Rule was finalized for deposits placed by non-discretionary custodial agents.[35]

Using this authority, the FDIC should designate relationships where deposits are placed with IDIs by non-depository trust companies in connection with their regular course of business. Because such trust companies cannot take deposits, they must use IDIs to hold customer funds in support of the licensed trust activities. We note, however, that such a designated business exception would merely recognize what is already required by law. As discussed above, when a non-depository trust company, such as Coinbase Custody Trust Company, places deposits in this manner, its primary purpose remains the performance of its licensed trust activities, and therefore, the trust company is not a deposit broker under the plain meaning of the statute.

[35] Unsafe and Unsound Banking Practices: Brokered Deposits, 87 Fed. Reg. 1,065 (Jan. 10, 2022).