



November 21, 2024

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

Sent via E-mail to comments@fdic.gov

Re: Proposed Rule on Unsafe and Unsound Banking Practices: Brokered Deposits Restrictions – RIN 3064-AF99

Dear Mr. Sheesley,

The letter responds to the August 23, 2024 Unsafe and Unsound Banking Practices: Brokered Deposits Restrictions notice of proposed rulemaking (“Proposed Rule”) issued by the Federal Deposit Insurance Corporation (“FDIC”).¹ Sutton Bank (“Bank”) has a compelling interest in responding to the Proposed Rule as our relationships with fintechs, a core component of our overall business strategy, are predicated on deposits made by intermediaries on behalf of third parties.

I. Absence of Risk of Flight

With regards to the Bank’s relationships, a predominant risk of brokered deposits is absent as deposits placed by third parties at the Bank are not subject to the risk of flight. The FDIC points out in its Proposed Rule that one of the main concerns around brokered deposits is that they are prone to leave a bank quickly if a better rate is offered elsewhere or if a depositor becomes aware of problems at a bank.² However, the Bank’s relationships with third party depositors are formed to offer and establish transactional accounts for businesses and consumers. The relationships with these third parties are governed by contracts that include terms requiring the third party to maintain a minimum amount of funds at the Bank. Those minimum amounts cannot be moved around to different institutions as they are required to be maintained at the Bank to satisfy funding requirements.

The contracts with third parties are for long durations, with many agreements in place for five or more years. The contracts contain clauses that make it difficult for either party to terminate the contract. If a contract does terminate, the contract contains wind-down provisions

¹ 89 Fed. Reg. 68244 (Aug. 23, 2024).

² *Id.* at 68245.

that provide the parties ample to time to prepare the relationship to end. Given the requirements to maintain funds on deposit and the long duration of the agreements between a bank and third parties, the risk of flight of deposits is non-existent.

Additionally, there are numerous operational hurdles fintechs encounter if they wish to end a relationship with its partner bank. For example, if the fintech wishes to work with a new partner bank, then it will need to issue new debit cards that include the new partner bank's Bank Identification Number ("BIN") and identify the new bank as the card issuer. If the fintech moves to a new partner bank, the fintech may need to contract with a new payment processor, which could require extensive operational changes. The fintech would also need to notify its customers of the change and may need to ask customers to enter into a new account agreement with the new partner bank. Additionally, a fintech choosing to work with a new banking partner would need to inform customers receiving ACH direct deposits to change the routing number used by the customers' payors. All of these items disfavor a fintech from moving to a new partner bank for advantageous terms compared to the terms its receiving from its current banking partner. There is too much risk for business disruption and the loss of customers.

As such, deposits placed at banks by fintechs for the purpose of maintaining transactional accounts are not at risk of flight and should not be treated as brokered deposits.

II. Proposed Rule

Since the 2020 and 2021 updates to the rules governing brokered deposits, insured depository institutions ("IDIs"), including the Bank, have benefited from the bright line rules surrounding the definitions of "deposit brokers" and "brokered deposits" and their corresponding exceptions.³ Under the current rules, if an agent places 100 percent of its customers' funds into transaction accounts, and no fees, interest, or other remuneration is provided to the depositor, the agent will meet the designated exception of enabling transactions ("Enabling Transaction Exemption") and will not be deemed a deposit broker so long as the agent provides notice to the FDIC.⁴ However, in scenarios where the depositor earns some amount of interest, fees, or other remuneration, the agent may still apply for the Enabling Transactions Exemption via the application process established by the FDIC.⁵

The primary product offerings we offer with our fintech partners are transactional products that necessitate the deposit of funds at the Bank to allow customers to transact. The enabling transactions exemption is important to the Bank as it allows the Bank to categorize a significant portion of deposits placed at the bank for transactional purposes as non-brokered deposits.

If adopted as written, the Proposed Rule would end the current enabling transactions exemption.⁶ The FDIC cites that the current enabling transactions test would not satisfy the Proposed Rule's Primary Purpose Exception ("PPE") because placing deposits into accounts

³ 12 CFR § 337.6

⁴ 12 CFR § 337.6(a)(5)(v)(l)(1)(ii); 12 CFR § 303.243(b)(3)(i)(B)

⁵ 12 CFR 337.6(5)(v)(l)(2); 12 CFR § 303.242(b)(4)

⁶ 89 Fed. Reg. 68244, 68251.

with transactional features would not, by itself, demonstrate that the substantial purpose of the deposit placement arrangement is for a purpose other than providing deposit insurance or a deposit-placement service.⁷ The FDIC believes that there is no relevant difference between an agent or nominee's purpose in placing deposits to enable transactions and placing deposits to access a deposit account and deposit insurance.⁸ Under the Proposed Rule, IDIs that currently rely on the enabling transactions test under the notice or application process could file an application under the general PPE application process.⁹

Additionally, the Proposed Rule removes the ability of third parties to provide notice they qualify for the exemption and now places the responsibility on IDIs to apply and seek approval for a primary purpose exemption.¹⁰ Instead of multiple IDIs being able to rely on a third party's exemption, each IDI receiving deposits from the third party will now need to independently apply for a primary purpose exemption. The risk with this approach is that third parties may limit the number of IDIs with whom they place deposits and take business away from innovative community banks.

Eliminating the Enabling Transactions Exemption is a backslide from the well-reasoned 2020 Final Rule. The 2020 Final Rule took into consideration the need to ensure “that the classification of a deposit as brokered appropriately reflects changes in the banking landscape.”¹¹ In fact, the FDIC admittedly recognized that “its regulations governing brokered deposits are outdated and do not reflect current industry practices and the marketplace.”¹² The FDIC failing to place any credence into the representations made by intermediaries that they are placing deposits into transactional accounts highlights the unwillingness of the FDIC to accept the changes that are occurring in the banking landscape. As a result, deposits that are truly placed for transactional purposes are treated as brokered.

III. Sutton Bank's Requests

The Bank requests that the FDIC consider the Proposed Rule's impact on banks and their fintech partners that have forged relationships to provide transactional accounts to millions of Americans. As mentioned above, deposits placed by fintechs on behalf of customers in transactional accounts should not be considered brokered deposits because such deposits are not at risk of flight. Those deposits are not at a bank because the bank happens to be offering a higher rate of return compared to competitor banks. Instead, those deposits are held at a bank because the bank and the fintech forged a relationship to offer a transactional account service to customers where the bank and fintech intend to partner for a considerable length of time. Any changes to the brokered deposit rules should consider bank/fintech relationships and acknowledge that deposits placed for the purpose of transactional accounts are not at risk of flight and should be exempt from being categorized as brokered deposits.

⁷ *Id.* at 68256.

⁸ *Id.* at 68257.

⁹ *Id.*

¹⁰ 89 Fed. Reg. 68244, 68254.

¹¹ 86 Fed Reg. 6742 (Jan. 22, 2021).

¹² *Id.*

Alternatively, the Bank requests that the FDIC maintain the current Enabling Transactions exemption processes. We ask that the FDIC continue to allow those entities who provided prior notice for the Enabling Transactions Exemption and those entities where the FDIC has already granted approval of an Enabling Transactions Application Exemption from being deemed to be deposit brokers.

The Bank appreciates your consideration of our comments. If you would like to discuss this letter, please contact me at [REDACTED].

Sincerely,

James Booker
Senior Counsel