November 21, 2024

Submitted via E-Mail to comments@fdic.gov

James P. Sheesley, Assistant Executive Secretary
Attention: Comments—RIN 3064–AF99
Federal Deposit Insurance Corporation
550 17th Street NW
Washington, DC 20429

Re: Proposed Rule on Brokered Deposits Restrictions RIN 3064–AF99

Dear Mr. Sheesley:

Visa Inc. ("Visa") appreciates the opportunity to submit comments on the Federal Deposit Insurance Corporation's (FDIC) proposed rule regarding Unsafe and Unsound Banking Practices: Brokered Deposits Restrictions published in the Federal Register on August 23, 2024 (the "Proposed Rule").[1] We write to express our significant concern that the Proposed Rule would unnecessarily raise costs and impose unwarranted restrictions that would collectively have a significant negative effect on prepaid and debit card programs in which sponsoring banks partner with fintech companies in order to provide innovative financial products to underserved populations.[2]

For more than sixty years, Visa has enabled people, businesses, and governments to make and receive payments across the globe. As a global payments technology company, we connect financial institutions, merchants, and governments around the world with credit, debit, and prepaid products. Among the many products we support are prepaid and debit card services which are offered by insured depository institutions ("IDIs") and often marketed or managed by third-party service providers to those banks. Visa also offers Visa Direct, a funds disbursement solution used by many financial institutions and financial technology companies to send funds to consumers and businesses in near real time.

1. Background on the Regulation of Brokered Deposits

Section 29 of the Federal Deposit Insurance Act (the "Act") prohibits IDIs that are not well-capitalized from accepting funds obtained, directly or indirectly, through any deposit broker. A "deposit broker" is then defined as any person engaged in the business of placing

[1] 89 Fed. Reg. 68244 (Aug. 23, 2024).
[2] Visa is a member of the Innovative Payments Association (the "IPA") and also supports the views expressed in the comment letter submitted by the IPA on the Proposed Rule.

deposits, or facilitating the placement of deposits, of third parties with IDIs or the business of placing deposits with IDIs for the purpose of selling interests in those deposits to third parties.[3]

In its 2020 rule addressing brokered deposits (the "2020 Rule"),[4] the FDIC treated the placement and facilitation of deposits separately. The Proposed Rule would revoke this position and combine the two activities into a single definition. In addition, the 2020 Rule included engaging in matchmaking activities as a form of facilitation. The Proposed Rule would replace this matchmaking provision with two new prongs, one dealing with deposit allocation and the other with fees. The deposit allocation provision would deem any person who "proposes or determines deposit allocations at one or more insured depository institutions (including through operating or using an algorithm, or any other program or technology that is functionally similar)"[5] to be engaged in the business of placing or facilitating the placement of deposits. The fee provision would define any person who 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"[6] to be a deposit broker.

The Act includes a number of exceptions from the definition of deposit broker, including one for "an agent or nominee whose primary purpose is not the placement of funds with depository institutions."[7] This carve out, commonly referred to as the Primary Purpose Exception ("PPE"), includes a list of designated business models that qualify for the PPE. The 2020 Rule provided a more detailed list of designated business models that meet the PPE. That regulation deemed business arrangements in which all of a depositor's funds are placed in a transactional account that does not pay interest or other renumeration to the depositor[8] (the "Enabling Transactions Test") to qualify for the PPE. The Proposed Rule eliminates the Enabling Transactions Test.

Each of these changes in the Proposed Rule would undo foundational pieces underpinning how the industry has structured third-party programs in reliance upon the 2020 Rule, without substantive explanation.

2. The Proposed Rule Modifies and Expands the Definition of Deposit Broker in an Impermissible and Detrimental Manner

With regard to the definition of brokered deposits, the Proposed Rule deviates significantly from the underlying statute and modifies existing regulations with scant

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[3] 12 U.S.C. §1831f(g)(1).
[4] Unsafe and Unsound Banking Practices: Brokered Deposits and Interest Rate Restrictions Final Rule, 86 Fed. Reg. 6742 (Jan. 22, 2021).
[5] Proposed Rule §337.6(a)(5)(ii)(D).
[6] Proposed Rule §337.6(a)(5)(ii)(E).
[7] 12 U.S.C. §1831f(g)(2)(I).
[8] 12 CFR §337.6(a)(5)(v)(ii).

justification for the changes. The intent of the proposal is to expand the reach of the brokered deposit rule while simultaneously removing a number of exemptions, with an end result of categorizing a significantly larger number of third-party programs as brokered. We express our concerns regarding three separate modifications to the definition of brokered deposit.

A. Primary Purpose Exception / Enabling Transactions Test. The Proposed Rule eliminates the Enabling Transactions Test which will force a majority of prepaid and debit card programs issued by sponsor banks and managed by fintechs to recategorize their deposits as brokered deposits. These programs, relying on the 2020 Rule, are structured under an assumption that the deposits involved are not brokered and their risk assessments, reporting and economics are all built upon that assumption. The Proposed Rule will likely cause most programs to be subject to increases in deposit insurance assessments. Providers will be required to reassess their programs and modify compliance and reporting processes. These additional costs and premiums will force sponsor banks and their partners to renegotiate the economics of their programs and the reduced revenue will negatively impact safety and soundness. This effort and expense seem especially unnecessary given that prepaid and debit card programs do not pose the types of risks that the brokered deposits rule is intended to reduce (*see* Section 3 below).

The Proposed Rule provides only a single example of a program where the primary purpose might not be placing customer deposits at the IDI – a third party disbursing customer funds as part of a court-mandated settlement – and even then the preamble notes "[t]he FDIC would balance this consideration with the other factors, such as payment of fees, in determining the third party's primary purpose in placing deposits."[9] Even though the Act specifically exempts "an agent or nominee whose primary purpose is not the placement of funds with depository institutions,"[10] it is abundantly clear that under the Proposed Rule, no program is going to qualify for the PPE.

This outcome is especially perplexing given that in its 2015 "Frequently Asked Questions Regarding Identifying, Accepting, and Reporting Brokered Deposits," the FDIC concludes that programs that disburse government benefits through prepaid and debit cards could qualify for the Primary Purpose Exception.[11] The FAQ described a government program where payments were mandated by law, came from a single source, and no fees were paid back to the government agency. There are many payroll card programs that are structured in a remarkably similar manner – wage payment mandated by law, single source of funds, and no payment back to the employer. The FDIC should explain why a payroll card program would not qualify for the PPE when a similarly structured government benefits program would. The Proposed Rule should be redrafted in a manner that preserves the Primary Purpose Exception as required by the Act.

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[9] 89 Fed. Reg. 68244, 68254.
[10] 12 U.S.C. §1831f(g)(2)(I).
[11] Question E12, https://www.fdic.gov/sites/default/files/2024-03/fil15051b.pdf.

B. Fees. The Proposed Rule adds a new prong to the definition of "engaged in the business of placing or facilitating the placement of deposits" which is not found in the Act. This new language expands the meaning of "engaged in the business" to include any person who 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."[12] The preamble justifies this addition because "the receipt of fees indicates that the third party is engaged in the business of providing deposit placement services or facilitating the placement of deposits."[13] But the preamble goes on to state: "Fees that would be covered under the proposed 'deposit broker' definition would include fees for administrative services provided in connection with a deposit placement arrangement."[14] Under the Proposed Rule, fees for deposit placement are evidence of deposit placement, but fees for administrative services other than deposit placement would also be evidence of deposit placement. Given this false logic, any relationship between an IDI and third party in which the third party is paid for its work will be deemed to be a brokered deposit arrangement even if the fee paid has nothing to do with deposit placement. This result contravenes the plain meaning of the Act, and the proposed fees prong of the definition should be removed.

C. Allocation. The Proposed Rule adds a new prong to the definition of placing or facilitating deposits which is triggered if a person "proposes or determines deposit allocations at one or more insured depository institutions (including through operating or using an algorithm, or any other program or technology that is functionally similar)."[15] The preamble attempts to clarify the scope of the provision, noting that it would include technology that operates "by directing the flow, or facilitating the flow, of third-party funds to be deposited at a particular IDI."[16] Unfortunately, this comment only makes the problem worse by expanding the reach of the provision from determining deposit allocations (which is a central function of deposit placement activities) to any activity that facilitates the flow of funds.

This provision is incredibly broad and vague and could encompass a wide variety of activities. Banks employ third parties to facilitate payments and funds flow in a large number of situations for a myriad of reasons. The allocation provision would appear to cover deposit sweep programs such as IntraFi[17] and R&T[18] which allow depository institutions to sweep certain deposits to other institutions in order to manage funds and risks and to afford customers additional deposit insurance. Deposit sweep networks are important tools for depository institutions, especially smaller banks that require these services to compete with larger

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[12] Proposed Rule §337.6(a)(5)(ii)(E).
[13] 89 Fed. Reg. 68244, 68252.
[14] *Id.*
[15] Proposed Rule §337.6(a)(5)(ii)(D).
[16] 89 Fed. Reg. 68244, 68252.
[17] https://www.intrafi.com/.
[18] https://rnt.com/.

institutions. Rules that disadvantage or jeopardize deposit sweep facilities will harm smaller IDIs. In addition, because the provision applies to deposit allocations at "one or more insured depository institutions," it could apply to almost any automated process that moves money to a single bank. For example, under the Proposed Rule, a cash concentration system which monitors a customer's accounts at local banks that receive cash deposits and then transfers those funds to a central corporate account when the local balances reach a set threshold would qualify as brokered. This modification to the regulations is not consistent with the terms of the Act and we request that the FDIC remove this provision from the Proposed Rule.

3. Prepaid and Debit Card Programs Do Not Pose the Kinds of Risk to Safety and Soundness that the Brokered Deposit Rules are Intended to Address

The Proposed Rule notes that brokered deposits are of concern to regulators for three reasons:

> Brokered and high-rate deposits became a concern among bank regulators and Congress before any statutory restrictions were enacted. This concern arose because (1) such deposits could facilitate a bank's rapid growth in risky assets without adequate controls; (2) once problems arose, a problem bank could use such deposits to fund additional risky assets to attempt to ''grow out'' of its problems, a strategy that ultimately increased the losses to the DIF when the institution failed; and (3) brokered and high-rate deposits were sometimes considered less stable because at that time, deposit brokers (on behalf of customers), or the customers themselves, were often drawn to high rates and prone to leave the bank quickly to obtain a better rate or if they became aware of problems at the bank.

Fundamentally, deposits backing prepaid and debit card programs are quite sticky and do not suffer from the ailments that the Proposed Rule seeks to address and should not be subjected to the restrictions placed on deposit programs that do. Prepaid programs have been around for 30 years or more.[19] Prepaid and debit card programs have seen steady growth over that time, but these programs have not created unmanageable risk for IDIs. While banks that issued high rate certificates of deposit were sometimes forced to offer even higher rates in order to maintain deposits, card programs compete based on features and level of service and most do not even pay interest on deposits. The cycle of increasingly risky assets seen in some deposit product verticals simply does not occur with prepaid and debit card programs. The deposits these programs generate cannot be moved quickly. The contracts between IDIs and program managers are multiyear arrangements with significant notice periods for nonrenewal. Further, the winddown or transition of a program to a new sponsor bank takes six months to a year to

[19] *See generally*, FDIC, General Counsel's Opinion No. 8: Stored Value Cards, 61 Fed. Reg. 40490 (Aug. 2, 1996).

accomplish. The process involves significant operational change not to mention multiple notices to cardholders.

Moreover, the actual transfer of deposits from one IDI to another is subject to the Bank Merger Act which itself is a six-to-nine month process which ultimately requires approval from the appropriate regulator. Accordingly, deposits supporting prepaid and debit card programs are simply not "hot money" that justifies the restrictions placed on brokered deposits. The Proposed Rule should not remove exemptions for these programs.

4. The Proposed Rule Fails to Provide Adequate Justification to Extend the Brokered Deposit Rules to Cover Prepaid and Debit Card Programs

The FDIC justifies the Proposed Rule by citing to the recent bankruptcy of Synapse Financial Technologies, Inc. ("Synapse"), a fintech middleware provider that connected IDIs with other fintech companies.[20] Other than a vague reference to the bankruptcy, the Proposed Rule does not explain how the events at Synapse are connected to brokered deposits or how the changes the FDIC is proposing would have prevented the bankruptcy. In fact, the problems at Synapse stem from the company's inability to maintain adequate records regarding customer accounts and its failure to reconcile in a timely manner with its primary banking partner. In response to the Synapse bankruptcy, the FDIC has issued a proposed rule that would require IDIs holding certain custodial deposit accounts for which beneficial ownership records are held by a third party to maintain direct and continuous access to those records and to reconcile on a daily basis with the third party.[21] In short, the problems at Synapse are idiosyncratic and arise from complex and systemic problems. The Proposed Rule would not have prevented the events associated with Synapse and thus Synapse should not serve as a justification for implementing the Proposed Rule.

5. Conclusion

For the reasons stated above, we respectfully request that the FDIC withdraw its Proposed Rule, and if it nonetheless believes that it is necessary to revisit the brokered deposit rules to deal with potential risks that it has observed in certain third-party programs, issue a new proposal tailored to the actual deficiencies identified in the recent program failures. At a minimum, we urge the FDIC to confirm its position in the 2020 Rule that third-party prepaid and debit programs that meet the exceptions set forth in that rule are not brokered deposits.

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[20] 89 Fed. Reg. 68244, 68250.
[21] FDIC, Proposed Rule: Recordkeeping for Custodial Accounts, 89 Fed. Reg. 80135 (Oct. 2, 2024), https://www.fdic.gov/system/files/2024-09/fr-npr-on-requirements-for-custodial-deposit-accounts.pdf.

Visa appreciates the opportunity to comment on the Proposed Rule. If you have questions about any of the foregoing or would like to further discuss our comments, please do not hesitate to contact me at [redacted] or [redacted].

Sincerely,

Ky Tran-Trong
Vice President and Associate General Counsel
Global Risk and Regulatory Affairs
Visa Inc.