December 28, 2015

Federal Deposit Insurance Corporation
550 17th Street, N.W.
Washington, D.C. 20429
(BrokeredDepositFAQs@fdic.gov)

Re: Financial Institutions Letter (FIL) 51-2015: Request For Comment on Frequently Asked Questions Regarding Identifying, Accepting, and Reporting Brokered Deposits

Ladies and Gentlemen:

The Clearing House Association L.L.C., the American Bankers Association, the Financial Services Roundtable, the Independent Community Bankers of America, and the Institute of International Bankers (collectively, the "**Associations**")[1] appreciate the opportunity to comment on the Federal Deposit Insurance Corporation's (the "**FDIC**") proposed update to its frequently asked questions (the "**FAQs**") "Regarding Identifying, Accepting, and Reporting Brokered Deposits,"[2] as requested in the August 11, 2015 letter to the FDIC's General Counsel, Charles Yi (the "**Comment Letter**"),[3] by several of the signatories to this letter.[4] The Associations appreciate the willingness of the FDIC to identify and consider the potential implications for insured depository institutions ("**IDI**") of the FAQs as originally issued. As we will discuss, establishing an appropriate definition of "deposit broker" is critical both for the banking industry and the FDIC.

As set forth in the Comment Letter, the signatories had significant concerns that the original FAQs might have been construed so as to improperly characterize certain stable deposits

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1 Descriptions of the Associations are provided in *Annex A* of this letter.

2 Federal Deposit Insurance Corporation, Financial Institutions Letter (FIL) 51-2015 (FAQ), FDIC Seeking Comment on Frequently Asked Questions Regarding Identifying, Accepting, and Reporting Brokered Deposits (November 13, 2015), *available at*: https://www.fdic.gov/news/news/financial/2015/fil15051.html.

3 Letter to Charles Yi, General Counsel, Federal Deposit Insurance Corporation, from The Clearing House Association L.L.C., the American Bankers Association, and the Institute of International Bankers (the "**Comment Letter**") (August 11, 2015), *available at*: https://www.theclearinghouse.org/~/media/action%20line/documents/20150811%20tch%20letter%20to%20fdic%20re%20brokered%20deposits.pdf.

4 A copy of the Comment Letter is enclosed hereto as *Annex B* of this letter. Because many of our comments remain relevant to the proposed update to the FAQs, we are incorporating the entirety of our comments into this letter and will reference our original analysis herein as appropriate.

associated with dual, dual-hatted, contract, and affiliate employees as "brokered deposits"[5] and thus could have had a material impact on IDIs' organizational customer service arrangements. The signatories were also concerned about the potential adverse supervisory, examination, and reputational implications the original FAQs could have had for IDIs. The FDIC's proposed update to the FAQs alleviates a number of these concerns. In particular, the revisions to the FAQs appear to resolve the principal concern raised in the Comment Letter by acknowledging and reiterating, consistent with both FDIC precedent and logic, that classifying deposits as brokered requires an analysis of all relevant facts and circumstances. The facts and circumstances approach is also consistent with Chairman Gruenberg's statement in his letter to Chairman Neugebauer[6] that the FDIC has the necessary flexibility under existing law and implementing regulations to tailor its regulation and supervision of banks with respect to brokered deposits as the industry continues to change. The flexibility enables the FDIC to consider whether a particular type of deposit exhibits the characteristics that led to the enactment of the brokered deposit restrictions under Section 29 of the FDIA ("**Section 29**")—volatility and well-above market interest rates. The updated FAQs also helpfully describe certain factors that the FDIC may consider in deciding whether to classify an individual or an entity not otherwise covered by a statutory exception as a "deposit broker." Our understanding of the effect of these changes is described in greater detail below.

Although the revised FAQs are substantially improved, the Associations continue to have concerns with some FAQs that address factual scenarios that do not involve these employee relationships. These issues and concerns are highlighted below given their importance. We are particularly concerned that these matters be resolved, because appropriately characterizing deposits is of far greater importance today than when the brokered deposit restrictions under Section 29 were first enacted. The classification of deposits as "brokered deposits" now has substantial implications that go well beyond the restrictions applicable to those deposits under Section 29.[7] As noted in the Comment Letter, many banking organizations, both large and small, are required to pay additional deposit insurance assessments for brokered deposits, and may be subject to certain supervisory limitations by their primary federal regulator regarding the amount of brokered deposits the institution can accept, regardless of its capital position. Most importantly, there are now a variety of capital and liquidity regulations—including, for example, the new provisions of the Basel III-based U.S. revised capital rules, the G-SIB surcharge, and the liquidity coverage ratio—that impose significantly different restrictions based on whether a deposit is classified as a brokered deposit. As with the original restrictions, these regulations presume that deposits designated as brokered are a significantly less stable source of funding than those originated organically. Accordingly, it is now of *far greater* importance that the definition of "brokered deposits" reflect the true nature of the deposits, and thereby provide banks

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[5] As set forth in this letter, "dual" employees encompass those who are employed by two legal entities (for example, the IDI and a broker-dealer affiliate), while "dual-hatted" employees are those who are employed exclusively by one entity, such as an IDI, but who may perform functions on behalf of an affiliate (*e.g.*, IDI employees who are associated persons of an affiliated broker-dealer).

[6] June 8, 2015 Letter from FDIC Chairman Martin J. Gruenberg to House Subcommittee on Financial Institutions and Consumer Credit Chairman Randy Neugebauer re: FDIC Financial Institution Letter (FIL) 2-2015, Guidance on Identifying, Accepting, and Reporting Brokered Deposits.

[7] Section 29 of the FDIA provides that if an IDI is not well-capitalized, it may no longer (absent a waiver) accept brokered deposits and is limited in the interest rate it may pay. 12 U.S.C. § 1831f(a), (e), and (f).

sufficient flexibility to engage in modern banking practices to attract stable deposits without being exposed to undue consequences. As described below, the deposits generated through many of these modern banking practices bear few, if any, of the characteristics of brokered deposits that Congress initially intended to capture when adopting Section 29.[8]

In this regard, as discussed in the Comment Letter, the Associations continue to stress that any factors or circumstances the FDIC prescribes as relevant for the classification of brokered deposits must relate to the purpose and intent behind the adoption of Section 29. The legislative history of Section 29 indicates that the statutory definition of "deposit broker," someone "*engaged in the business* of placing deposits, or facilitating the placement of deposits, of third parties with insured depository institutions," was intended to capture the archetypal deposit broker envisioned by Congress—someone who was not employed by an IDI and who, *primarily for direct pecuniary gain tied to the volume of deposits placed*, actively, and on a programmatic basis, marketed deposit products on an unsolicited basis, to persons typically having no previous relationship with the banking organization.[9] These brokers were typically focused solely on placing these deposits for pecuniary gain. They were not working to provide customers or potential customers of a particular institution with access to banking products or to create or deepen customer relationships with the IDI, and their success was largely dependent on luring depositors with high interest rates, virtually assuring that the deposits would have a significant degree of volatility. As a result, deposits originated by true deposit brokers are more likely to run than those originated organically.

Section I of this letter discusses the Associations' understanding of the effect of the FDIC's proposed changes in relation to the concerns expressed in the Comment Letter regarding dual, dual-hatted, and affiliate employees. Section II sets forth the Associations' concerns with respect to several of the updated FAQs, including concerns relating to: (i) inconsistencies between several of the FAQs and the text of Section 29, the FDIC's regulations, and its prior staff advisory opinions; (ii) the ability to rely on certain statutory exceptions set forth in Section 29; (iii) the availability of FDIC staff's interpretative guidance; (iv) the treatment of non-time deposits that may be classified as brokered under the FAQs; and (v) the treatment of deposits associated with the provision of federal and state government benefits.

I. Effect of Proposed Revisions on Dual or Affiliate, and Dual-Hatted IDI Employees

The FDIC's proposed revisions to the FAQs resolve many of the concerns set forth in the Comment Letter. As discussed further below, we believe that, consistent with the statutory language and purpose, the updated FAQs may be interpreted to properly except from the ambit of brokered deposits those deposits resulting from customer contact with many: (i) affiliate or dual employees; and (ii) dual-hatted IDI employees. Although there are other employees that the FAQs clearly exclude, such as call center employees who perform a variety of customer service functions and administrative services, as well as other employees described in Annex B of the Comment Letter, the examples described below are of particular importance to the Associations and warrant further discussion.

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[8] *See* Comment Letter at 5-9.

[9] 12 U.S.C. § 1831f(g)(1) (emphasis added).

As an initial matter, we appreciate that the revised FAQs appear to recognize that the statutory test for determining whether an individual or entity, not covered by a specific statutory exception, is a deposit broker is whether the individual or entity is "engaged in the business of placing deposits" or "engaged in the business of facilitating the placement of deposits."[10] As we noted in the Comment Letter, the original FAQs appeared to untether the requirement of being "in the business of" from the concept of "facilitating the placement of deposits," contrary to the statutory language.[11]

Further, we believe that many of our concerns are resolved by the updated FAQs and the introductory letter's acknowledgment of the facts and circumstances nature of analyzing whether deposits should be classified as brokered. Indeed, new FAQ E4 reaffirms Chairman Gruenberg's statement that the FDIC does not believe that dual employees or contractors should be classified as deposit brokers in all situations, and this assertion is underscored by the FDIC's analysis of certain relevant factors throughout the updated FAQs that the FDIC considers to be important in determining whether an individual or entity, including a dual or affiliate employee, will be considered to be a deposit broker. For example, in the context of a referral arrangement, those factors include: the payment of fees based on the volume of deposits placed and the relative materiality of those fees to both the payer and the recipient, the "ongoing involvement" of an employee with a deposit account (although our concerns with this factor in some cases are discussed further in Section I.A.2. below), and whether the particular program or relationship is designed for the specific purpose of "significantly driv[ing] deposit growth to the" IDI. We appreciate the FDIC's efforts in this regard.

We note that the FDIC's FAQs do not explicitly address IDI employees that we have described as "dual-hatted," meaning those who are employed exclusively by an IDI, but who may perform functions on behalf of, and may be licensed with, an affiliate. As set forth in Section I.B. below, we believe that dual-hatted IDI employees who are exclusively employed by the IDI can qualify for the statutory exception for IDI employees as set forth in Section 29 and FAQ E3. Given that these employees are exclusively employed by the IDI, they are even less likely than dual employees or affiliate employees to meet the definition of "deposit broker," or to implicate the Congressional concerns that led to the adoption of Section 29. Accordingly, we assume that, at a minimum, any analysis that results in a conclusion that a dual employee or affiliate employee is not a deposit broker would apply equally to a dual-hatted IDI employee (including the analysis set forth in Section I.A. below or the analysis under the "primary purpose" exception as discussed in Section II.B. below), if the "employee" exception of Section 29 were otherwise found not to apply.

A. Dual or Affiliate Employees

1. General

New FAQ B7 provides that deposit referral arrangements between employees of affiliates or subsidiaries of an IDI and the IDI do not result in brokered deposits where certain facts and circumstances are present, including that the referral program is not designed to drive significant

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[10] Revised FAQ E4. Our comments on several of the FAQs that are inconsistent with these revisions can be found in Section II.A. of this letter.

[11] *See* Comment Letter at 11.

deposit growth at the bank. This FAQ further notes that the FDIC considers the size of the incentive package relative to the total deposits raised, whether the fee is *de minimis* to the recipient, and the relative cost of the program to the bank. This FAQ also notes that the FDIC may consider whether the affiliate employee has ongoing involvement with the deposit account after it is opened.[12] Although we have concerns with this final factor in some cases, as noted below, new FAQ B7 does appear to establish a reasonable framework for addressing deposits resulting from customer interactions with certain dual or affiliate employees who may assist a customer in opening a deposit account at the affiliated IDI, including via a referral. Under this FAQ, when dual or affiliate employees make a referral in a manner that is sufficiently limited, consistent with FAQ B7, these employees will not be considered to be deposit brokers. The FAQ states that a securities affiliate employee who refers interested customers to the bank for a fee that is relatively small with respect to both the bank and the recipient and capped in total amount or limited in frequency per individual, and who does not have any ongoing interaction with the customer's deposit account as part of the employee's responsibilities to the affiliate or IDI, and who does not make the referral as part of a program designed to "significantly drive deposit growth to the" IDI, would not be a deposit broker under the updated FAQs. Based on this analysis, pure "hand-off," non-programmatic referrals by other dual or affiliate employees subject to the fee limitations described in this FAQ would also not result in brokered deposits. We believe that this is consistent with the conclusion in the Comment Letter that dual and affiliate employees who provide a holistic package of nonbanking and deposit products and services to customers, and who are not paid commissions or fees that are explicitly tied to the volume of deposits placed or raised, are not engaged in the business of placing deposits or the business of facilitating such placement.

Likewise, in new FAQ E4, the FDIC describes a particular factual scenario involving a dual employee that highlights certain factors that would be relevant in determining whether deposits will be classified as brokered. This new FAQ describes two scenarios in which contract or dual employees (those employed by more than one legal entity in a bank holding company structure)[13] may or may not result in deposits being classified as brokered. In each scenario, employees of a broker-dealer affiliate of an IDI are also employees of the IDI whose "fundamental role" is to sell securities to clients, but who "may also recommend deposit products." The FDIC states that in a scenario involving a broker-dealer affiliate who is paid a fee, part of which is paid to the dual employee as a sales commission for opening the account, another part of which is paid for the employee's continual interaction with the client in order to monitor balance activity, address client inquiries about rates, and provide information regarding additional accounts or account services, and the last part of which is an "ongoing fee . . . based on the balance of the account," the affiliate employee will be considered to have "facilitated the placement of deposits" and the resulting deposits would therefore be brokered. We discuss the absence of the modifying concept of being "engaged in the business" of facilitating deposit placement in this and other FAQs further below. This new FAQ thus highlights that the FDIC will likely consider the nature of fees paid by the IDI, including fees explicitly tied to the volume of deposits placed, and the ongoing involvement of the employee in the deposit account (although our concerns with this factor in

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[12] Revised FAQ B7.

[13] The FDIC defines dual employee to be "a person employed jointly by an insured depository institution and the institution's parent or affiliate." *See* FAQ E3. The FDIC's definition would thus exclude "dual-hatted" employees, who are persons employed exclusively by an IDI, but who are authorized to perform functions on behalf of an affiliate.

some cases, including certain dual employee and affiliate employee customer relationships, are discussed in the subsection below) in evaluating whether deposits will be considered to be brokered.

2. "Ongoing Involvement"

We note that new FAQs B7 and E4 reference whether the employee has ongoing involvement with the deposit account after it is opened for purposes of determining whether an employee is a deposit broker. We do not believe that in all cases an employee's ongoing involvement with the customer's account, including dual and affiliate employees of the type described in those FAQs, should be relevant for purposes of determining whether those persons should be classified as deposit brokers. As an initial matter, as described below with respect to FAQ F2, in several advisory opinions, the FDIC has found that administrative services such as recordkeeping, which necessarily require access to account balances, without more, do not cause a person to become a deposit broker.[14]

The ongoing involvement in a deposit account by third-party deposit brokers that are of the type considered by Congress when adopting Section 29 may be a relevant factor because such persons have no interest in the depositor's ongoing relationship with the bank, and therefore their ongoing involvement would not be in furtherance of such relationship but rather, could be indicative of the deposit broker's intent to place the deposits of third parties. Indeed, such persons have an economic incentive for the deposit to be moved upon maturity, and therefore, deposits raised by deposit brokers tend to be volatile. However, as described in the Comment Letter, the ongoing involvement in a deposit account by an employee, including certain dual or affiliate employees, regardless of whether that particular employee initiated the customer's deposit, may be evidence of the provision of holistic, "one-stop shop," banking services to the customer by the IDI, its affiliates, and their respective employees, a hallmark of modern banking practices, as opposed to evidence that the employee is engaged in the business of placing or facilitating the placement of deposits. As further set forth in the Comment Letter, in these circumstances, the ongoing involvement would be evidence that the dual or affiliate employee's primary purpose behind the deposit referral and ongoing involvement was not the placement of deposits at the IDI, but rather the provision of these holistic banking services.

As a result, because in these cases the purpose of the ongoing involvement of an employee, including certain dual or affiliate employees, is not for the placement of deposits, the deposits should also not be considered brokered under the primary purpose exception. For these reasons, in evaluating the "ongoing involvement" of an employee in a deposit account, the FDIC should recognize that in some instances, including those in which the employee provides holistic banking services to customers, such "ongoing involvement" does not necessarily support the conclusion that the employee is engaged in the business of placing or facilitating the placement of deposits and indeed, is

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[14] *See, e.g.*, FDIC Advisory Opinion 94-40 (finding that Medicaid accounting services provided by an administrator, whereby the administrator maintained deposit account records relating to sub-accounts for Medicaid recipients on behalf of nursing homes and a depository institution, did not cause the administrator to become a deposit broker because it "simply makes record-keeping entries; it allocates funds between the subaccounts and the nursing homes' accounts, and transmits that data to the financial institution," and did not place deposits with the bank); FDIC Advisory Opinion 93-63 (finding that customer service providers whose activities are limited to "bookkeeping functions, documentation sorting, and customer inquiries," are not deposit brokers so long as the service providers were not placing deposits).

typically part of the provision of a complete package of financial services, rather than the placement of deposits. Such recognition of this fact would be consistent not only with modern banking practices, but also with the language and intent of Section 29 to capture those that, *primarily for direct pecuniary gain tied to the volume of deposits placed*, actively, and on a programmatic basis, marketed deposit products on an unsolicited basis, to persons typically having no previous relationship with the banking organization.

B. Dual-Hatted IDI Employees

We believe that the statutory language and intent of Section 29 and the flexible, facts and circumstances framework for determining whether certain relationships will result in brokered deposits described in the updated FAQs confirm that dual-hatted IDI employees (those who are solely employed by an IDI, but who perform functions on behalf of an affiliate and may be licensed to sell non-bank products and services, including instances where the employee is an associated person of an affiliate and licensed with FINRA, the Securities and Exchange Commission, or state securities or insurance regulators)[15] can qualify for the statutory exception for employees as set forth in Section 29 and FAQ E3. Such an employee would qualify where the employee: (i) is employed ***solely*** by the IDI; (ii) receives compensation that is primarily in the form of a salary; (iii) does not share his compensation with any deposit broker; and (iv) has a specific place of business that is used exclusively for the benefit of the IDI.[16] We reiterate that many of these employees would also not be considered deposit brokers under alternative analyses, including the primary purpose exception as discussed in Section II.B. below or the framework discussed above in Section I.A. for dual employees under FAQs B7 and E4. Indeed, it would be nonsensical to treat dual-hatted IDI employees as deposit brokers when dual employees would not be so categorized, as dual-hatted IDI employees are exclusively employed by the IDI.[17]

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[15] We reiterate the discussion in the Comment Letter that dual-hatted IDI employees are often required under other law or regulation to be licensed through an affiliate in order to provide customers with access to multiple services as part of a more holistic banking experience. For example, IDI employees must be FINRA-registered representatives to provide certain investment advice.

[16] FAQ E3 relates to an employee that is "jointly" employed by an IDI and another organization. In contrast, dual-hatted IDI employees are employed solely by the IDI.

[17] As described below, even if the statutory "employee" exception of Section 29 were otherwise found not to apply, which we believe it clearly does, we note that the FAQs appear to support the conclusion that dual-hatted IDI employees generally will not be deposit brokers. As discussed, in classifying deposits as brokered, the FDIC will likely consider: the nature of compensation received by an individual; whether the individual performs deposit-placing functions on behalf of an affiliate; and the nature of any fees or commissions received from the IDI related to deposit placement, including whether they are tied to the amount of deposits placed (the factors discussed in each of FAQ B7 and E4). While we do not believe that an analysis for the factors set forth in these FAQs, which relate to affiliate and dual employees, would be necessary in the majority of scenarios involving dual-hatted IDI employees because we believe that those employees qualify for the employee exception in Section 29, we reference the factors that the FDIC may consider in classifying deposits involving affiliate or dual employees simply to illustrate that the analysis set forth in those FAQs supports the result that dual-hatted IDI employees qualify for the statutory exception and will not be considered deposit brokers.

As we noted in the Comment Letter, an inflexible interpretation of Section 29's definition of "employee"—which was adopted prior to the expansion of banking services and permitted affiliations—would not adequately reflect the reality of modern banking for many IDI employees. In light of consultations with FDIC staff and Chairman Gruenberg's statement in his letter to Chairman Neugebauer[18] regarding the FDIC's ability to tailor its regulation and supervision of banks with respect to brokered deposits as the industry continues to evolve, we believe that dual-hatted IDI employees, who are solely employed by the IDI, but who are able to perform functions on behalf of an affiliate, should qualify under the employee exception.[19]

With respect to the first prong of the definition of "employee" under Section 29, which requires that the employee be exclusively employed by the IDI, a dual-hatted IDI employee who is paid exclusively by the IDI, routinely opens deposit accounts for customers, and has ongoing responsibility for managing account relationships with IDI depositors, but who does not perform deposit-placement or facilitation activities on behalf of an affiliate, would meet this test. Although an IDI employee may perform various duties for an affiliate that may require a license to sell the financial products or services of an affiliate, if these duties are unrelated to deposit-gathering activities, the employee should continue to be considered to be "exclusively" employed by the IDI for purposes of Section 29. The employee is acting entirely in his or her capacity as an IDI employee in opening the deposit accounts, and the performance of distinct functions on behalf of, and that are specific to, an affiliate does not mean that he or she is not exclusively employed by the IDI. In addition, this result is consistent with the apparent spirit behind this prong of the employee exception, which recognizes that depository institutions must generally act through their employees who should not be deemed deposit brokers. We believe that this conclusion is also consistent with the statutory exception relating to "exclusive employment" as reflected in modern banking practices.

With respect to the second prong, relating to the employee's compensation, as discussed in the Comment Letter, we do not believe that an employee who is compensated in the form of salary and is eligible for a banking organization's general discretionary incentive compensation program should be disqualified from being considered an "employee" for purposes of Section 29, provided that such compensation is not tied directly and materially to the volume of deposits placed.

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[18] June 8, 2015 Letter from FDIC Chairman Martin J. Gruenberg to House Subcommittee on Financial Institutions and Consumer Credit Chairman Randy Neugebauer re: FDIC Financial Institution Letter (FIL) 2-2015, Guidance on Identifying, Accepting, and Reporting Brokered Deposits.

[19] *See* 12 C.F.R. § 7.3001. Banks' use of dual-hatted IDI employees to meet the breadth of customer needs in the context of modern banking represents prevailing industry practice and is recognized as such in various bank regulations and other guidance, including those of the FDIC, the Office of the Comptroller of the Currency, and the Federal Reserve Board. Examples include the OCC's regulations on bank activities and operations (12 C.F.R. § 7), the Federal Reserve Board's Regulation W, which governs transactions between member banks and their affiliates (12 C.F.R. § 223), and the FDIC's supervisory guidance on transactions between banks and affiliated businesses. FDIC, Risk Management Manual of Examination Policies, § 4.3 – Related Organizations, *available at*: https://www.fdic.gov/regulations/safety/manual/section4-3.html. Further, the Interagency Statement on Retail Sales of Nondeposit Investment Products acknowledges the use of third-party arrangements and establishes expectations on how those relationships should be managed. The FDIC has adopted this guidance without any suggestion that these relationships could have implications on the nature of deposits accepted at locations where these third-party arrangements exist.

Such a compensation arrangement would not appear to incent the employee to solicit additional deposit funding for pecuniary gain that may be volatile or demonstrate other characteristics associated with traditional "hot money" deposits, contrary to the fee-based arrangements in which deposit brokers generally are compensated directly and explicitly on the volume of deposits placed.

The fourth prong of the statute requires that the employee's "specific place of business [be] used exclusively for the benefit of the insured depository institution which employs such individual."[20] We believe that IDI employees who share space with affiliate employees, including dual-hatted IDI employees, should be able to meet this requirement, subject to certain conditions described below. If this prong of the employee definition were to be interpreted inflexibly with respect to all IDI employees, there could be some illogical results. As an extreme example, a deposit account opened in a branch by an IDI employee, such as a teller, for a walk-in bank customer might be considered brokered simply by virtue of the fact that space is available in the branch to be used by an affiliate.

We note that the employee definition, including the fourth prong of the statute, was written at a time before the expansion of banking services and permitted affiliations that exist today, and at a time when brick and mortar, bank-only branches were the norm. For instance, many employees who are paid solely by the IDI may be located in offices that share space with employees of affiliates of the bank.[21] This office space arrangement is common in both rural and urban branches, and allows IDIs and affiliates to generate cost savings and economic efficiency and to provide customers with a convenient, "one-stop shop" banking experience. Similarly, IDI employees who also have a FINRA license with a broker-dealer affiliate in order to perform securities activities with business clients may conduct business at a location that is designated in part as a branch or office of the IDI and in part as a branch or office of the broker-dealer for FINRA purposes.[22] If the definition of "employee" were construed to preclude tellers or other similar IDI employees, for example, from utilizing the employee exception based on the common practice of bank-affiliate office sharing, a large number of IDI employees conducting ordinary banking activities could be deemed deposit brokers—a result inconsistent with the purpose and intent of the statute.

As discussed in the Comment Letter, we believe that employees of IDIs that share office space with affiliate or third-party employees should qualify for the statutory exception so long as, consistent with regulatory restrictions on shared space set forth in Sections 23A and 23B of the Federal Reserve Act and Regulation W and the federal banking agencies' guidance on shared IDI office space for the sale of financial products,[23] the space used by the employee for banking activities is used solely for the benefit of the IDI, while the portion of the space used to perform functions for a subsidiary or an

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[20] 12 U.S.C. § 1831f(g)(4)(D); FAQ E3.

[21] If the definition were interpreted narrowly, although a dual-hatted employee is exclusively employed by the IDI, the mere fact that a dual-hatted IDI employee may perform functions on behalf of another entity wherever the employee is located could itself preclude the availability of the employee exception.

[22] Likewise, for cost savings and customer convenience purposes, private bankers, who are typically IDI employees, and wealth management professionals, who may be employees of an affiliate, may work in shared office space.

[23] See Note 19 above.

affiliate of the IDI or a third-party entity, is used solely for the benefit of that entity. Because dual-hatted IDI employees are no differently situated from IDI employees, such as tellers, with respect to sharing office space with employees of affiliates or other entities for purposes of the employee exception, dual-hatted IDI employees that share space with non-IDI employees in accordance with the requirements of Sections 23A and 23B of the Federal Reserve Act and Regulation W and the federal banking agencies' regulatory guidance should also be able to satisfy this prong of the statutory test. This space allocation concept has developed over the past few decades as affiliations between banks and non-bank financial companies, such as broker-dealers, have grown and have been permitted by the federal banking agencies in their own regulations.

We believe that dual-hatted IDI employees are not precluded by the statutory language from qualifying for the employee exception. Likewise, even if the statutory exception did not apply to dual-hatted IDI employees, such dual-hatted IDI employees would not be deposit brokers under: (i) the analysis in FAQ B7 (to the extent their activities are limited to referral activities consistent with the factors in FAQ B7); (ii) the analysis in FAQ E4 (to the extent they are not paid commissions related to the balance of deposits placed or the balance of deposits in the client's account); or (iii) the primary purpose exception, as discussed in Section II.B. below.

II. Additional Comments on the FAQs

While many of the revisions to the FAQs underscore the importance of facts and circumstances in determining whether deposits should be considered brokered, we note that some of the FAQs could still be interpreted overly broadly in characterizing deposits that may be considered to be brokered, which could undermine the FDIC's attempt to clarify that determining whether deposits are brokered is a fact-specific, case-by-case process.

A. FAQs B2, B3, E2, E3, E4, and E12: The FAQs should not broadly prescribe certain activities as resulting in brokered deposits in a manner that is inconsistent with Congress' intent in promulgating Section 29.

We appreciate the FDIC's recognition in certain areas of the updated FAQs that the statutory test for determining whether an individual or entity is a deposit broker is whether the individual or entity is "engaged in the business of placing deposits" or "engaged in the business of facilitating the placement of deposits."[24] In addition, we appreciate the FDIC's discussion of those factors that the FDIC may consider in determining whether an individual or entity, including certain dual or affiliate employees, is engaged "in the business of" placing deposits or engaged "in the business of" facilitating the placement of deposits, and thus, in determining whether resulting deposits will be classified as brokered.

Despite the accurate reference to the statutory test in some provisions of the FAQs and the introduction of a more analytical and appropriate approach for classifying deposits associated with dual and affiliate employees, the Associations remain concerned that some of the FAQs, in particular FAQs B2, B3, E2, E3, E4, and E12, continue to ignore the statutory "in the business of" requirement and

[24] Revised FAQ E4.

could create the impression that the facilitation of the placement of deposits will result in the person or entity becoming a deposit broker. The elimination of this statutory language in these FAQs is inconsistent with Congressional intent in adopting Section 29 of the FDIA, which was unequivocally focused on deposits associated with persons who place or facilitate the placement of deposits at an IDI in exchange for pecuniary gain, or, persons engaged in the business of placing deposits or facilitating such placement.[25] As noted in the *Study on Core Deposits and Brokered Deposits*, "brokered deposits are considered volatile, interest-rate sensitive deposits from customers in search of yield."[26] By contrast, deposits resulting from holistic banking practices aimed at developing a long-term relationship with the customer tend to be stable.

For example, FAQ B2 does not reflect the statutory language that requires a person or entity to be "in the business of" the placement or the facilitation of the placement of deposits,[27] and appears to imply that virtually any third-party "connection" of a depositor and an IDI would be the "facilitation of the placement of deposits." This broad categorization of any connection by a third party in the absence of the "in the business of" statutory requirement, regardless of purpose or effect, cannot be found in a rational interpretation of the statutory language, the legislative history or intent behind the adoption of Section 29. Further, while revised FAQ B2 includes a citation to an FDIC staff advisory opinion, that opinion does not broadly prescribe that "any action that connect[s]" an IDI with a depositor constitutes the facilitation of the placement of deposits. Rather, the cited advisory opinion, FDIC Advisory Opinion 92-79, involved a programmatic marketing agreement by an affinity group that steered deposits toward a particular IDI in exchange for an "incentive fee" that was based on the amounts of deposits that were steered. Consistent with the legislative history noted above, FDIC staff found that the affinity group's activities were the facilitation of the placement of deposits because the group's primary purpose of marketing the deposits was for direct pecuniary gain tied to the volume of deposits placed. FAQ B2, however, ignores this context, and, when read in conjunction with FAQ B3, could imply that the "in the business of" prong in the statute has no meaning—a result that would contradict the statutory construction, the legislative history, and the Advisory Opinion cited by the FDIC, and could be interpreted as opining that the mere "connection" of depositors with an IDI could result in brokered deposits. As a result, the FDIC should revise FAQ B2 to reflect the statutory definition of a "deposit broker" by adding the "in the business of" statutory modifier to the concept of the placement of deposits and the facilitation of such placement. The FDIC should, at a minimum, remove the language that could imply that the "mere" connection of a depositor and an IDI by a third party could be sufficient to render a person a deposit broker.

FAQ B3 discusses circumstances in which a person may not be facilitating the placement of deposits, but only refers to a very limited statutory exception (trustees of a pension or other benefit plan) in this regard. The FDIC does not outline those circumstances in which a person will not be considered to be "in the business of" placing or facilitating the placement of deposits in the first instance. Rather, when read in connection with FAQ B2, FAQ B3 could imply that persons who "connect" an IDI with a depositor are deposit brokers, absent the availability of another exception such as the

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25 *See* Comment Letter at 5-7.

26 *Id.* at 32.

27 *See* FAQ B2.

trustee exception.[28] We do not think that this is the intended result and therefore request that the FDIC clarify FAQ B3 to explicitly recognize the "in the business" prong of the statute.

Similarly, FAQs E2, E3, E4, and E12 state or imply that the statutory test for determining whether a person or entity is a deposit broker is whether the person is engaged in "facilitating the placement of deposits," thus untethering the concept of being "in the business of" facilitating such placement, contrary to the statutory language and intent of Section 29. As noted above, the legislative history to Section 29 makes clear that Congress' intent behind the adoption of Section 29 was to capture those persons who, for pecuniary gain, were placing or facilitating the placement of deposits at an IDI. This is because such persons have no interest in the depositor's ongoing relationship with the bank and, indeed, have an economic incentive for the deposit to be moved upon maturity. As a result, the deposits raised by deposit brokers are highly volatile. This legislative history is further evidenced in Advisory Opinion 92-79 discussed above. Accordingly, we recommend that the FDIC ensure that the FAQs are amended so that they do not contain broad language that is inconsistent with the statutory language of Section 29 or Congress' intent in adopting Section 29.

B. Revised FAQ E7: Section 29 and the FDIC's regulations thereunder do not provide that the primary purpose exception will apply only in limited circumstances nor do they require a specific determination by the FDIC in order for an institution to rely on statutory exceptions to the definition of deposit broker.

FAQ E7 (prior FAQ E6) states that an IDI that is seeking to rely on the "primary purpose exception" to the definition of "deposit broker" should be aware that "the primary purpose exception applies only infrequently" and will "typically require [] a specific request for a determination from the FDIC."[29] The Associations are deeply concerned by this FAQ. This FAQ is the first public pronouncement in writing by the FDIC regarding either the "infrequent" application of the exception or a requirement (or de facto requirement) that firms must seek a specific determination to rely on a statutory exception in Section 29. None of Section 29, the FDIC's brokered deposit regulations, its advisory opinions, or its recent 2011 report to Congress as mandated by the Dodd-Frank Wall Street Reform and Consumer Protection Act[30] has mentioned this apparently severe limitation. Given the absence of such a requirement in Section 29 and the FDIC's regulations and the lack of notice to the industry, we believe that the FDIC does not have the authority to curtail a statutory exception, and certainly not without notice and comment rulemaking that identifies the authority and rationale for doing so. Thus, we believe that this FAQ's pronouncement is unwarranted and should be removed from the FAQs. We further note that there are other enumerated exceptions included within Section 29, none of which, like the "primary purpose exception," has a specific statutory or regulatory limitation of application or a requirement to seek a determination from the FDIC. With respect to these other exceptions, the FDIC

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[28] Although certain of the FAQs (*e.g.*, revised FAQ B8) would also exclude endorsements of IDIs by third parties that fall short of "connecting" an IDI and a depositor, the Associations strongly believe that the mere "connection" of an IDI and a depositor is inconsistent with the text of Section 29 and its legislative history.

[29] FAQ E7.

[30] Federal Deposit Insurance Corporation, Core and Brokered Deposit Study as Mandated by Section 1506 of the Dodd-Frank Wall Street Reform and Consumer Protection Act (July 8, 2011), *available at*: https://www.fdic.gov/regulations/reform/coredeposit-study.pdf.

does not appear to have sharply limited the exception or applied a specific approval requirement, thus creating an inconsistency between exceptions that is not found within Section 29 or the FDIC's regulations.

The Associations understand that the application of the "primary purpose exception" is fact specific. However, where an IDI's program meets the requirements of existing FDIC precedent or where the situation clearly meets the requirements of the exception, a prior approval requirement is unwarranted, particularly in the absence of a requirement in Section 29 and the FDIC's regulations. For example, deposits that are made pursuant to a statutory obligation such as tenant security deposits or Housing Authority performance deposits and certain deposits that are subject to limited custodial control under a deposit account control agreement to secure loan obligations should each not be considered brokered under the "primary purpose exception" and should not require FDIC consultation.

Due to the time involved in receiving a determination from the FDIC, a preclearance requirement would operate as an effective bar. If this route were pursued, it would not only unduly burden IDIs but may also burden FDIC staff who would be required to address the increased volume of inquiries after the adoption of the FAQs because most IDIs were unaware that the consultation may be a precondition to use of the exception. Indeed, with regard to factors it has adopted as conditions or requirements to classification of certain persons as deposit brokers, the FDIC has seemingly rejected an approval requirement, stating that "if the requirements are satisfied, the [person] is not a deposit broker under the 'primary purpose' exception . . . [and] if the requirements are not satisfied, the [person] is a deposit broker."[31]

Accordingly, because there is no statutory or regulatory rationale for so limiting the application of the primary purpose exception, we respectfully request that the FDIC either delete FAQ E7 or at least clarify that the primary purpose exception may be applicable where the particular facts and circumstances at issue indicate that the primary purpose of the individual or entity is "not the placement of funds with depository institutions,"[32] but is "to promote some other goal (*i.e.*, other than the goal of placing deposits for others)."[33] As discussed in our Comment Letter, and noted above, there are numerous scenarios involving dual or affiliate employees (or dual-hatted IDI employees to the extent the employee exception does not apply) whose primary purpose is not the placement of deposits but rather to promote some other goal, such as to provide customers with a full-service, holistic banking experience, in response to customer demand.

C. FAQ F2: The FDIC's statement that "any involvement" of a deposit broker at the time of rollover or renewal is sufficient to cause such deposits to remain brokered is inconsistent with the text and purpose of Section 29.

FAQ F2 provides that a brokered time deposit, such as a certificate of deposit ("**CD**"), that does not have any ongoing involvement of a third party at the time of renewal or rollover will no

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31 *Id*.

32 *See* 12 U.S.C. § 1831f(g)(2).

33 FAQ E7.

longer be brokered even where the third party opened the original account at the IDI.[34] FAQ F2 further provides, however, that *any* involvement by the third party at the time of renewal or rollover (such as access to account balances), regardless of whether the activity would cause such person to be a deposit broker in the first instance, will result in the deposits remaining brokered upon renewal or rollover.[35] This latter pronouncement is inconsistent with the text of Section 29, which requires that a person be a "deposit broker" at the time of "acceptance" for the deposit to be deemed to be "brokered."[36] "Acceptance" under Section 29 is defined to include the "renewal of an account . . . and any rollover of any amount on deposit."[37] Thus, under the text of Section 29, a deposit will only be deemed to be brokered upon renewal or acceptance if a deposit broker is involved.

Under a literal reading of FAQ F2, however, mere access to a person's account by a third party will result in the deposit continuing to be deemed brokered. As discussed above, such a standard would not only be inconsistent with Section 29, the legislative history to Section 29, and the FDIC's regulations—which do not provide that mere "involvement" with a deposit account after it has been opened is indicative of being engaged in the business of placing or facilitating the placement of deposits—but it would also be untenable because an IDI cannot definitively know each time a depositor has granted a third party access to his or her account.[38] We note that, in several advisory opinions, the FDIC has found that administrative services such as recordkeeping, which necessarily require access to account balances, without more, do not cause a person to become a deposit broker.[39] According to these FDIC advisory opinions, such persons are not placing or facilitating the placement of deposits. As a result, because the text of Section 29 requires such person to be a "deposit broker" at the time of acceptance, which is defined to include rollover or renewal, we believe that this FAQ should be amended in a manner consistent with the requirements of Section 29. A third party whose actions at

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34 FAQ F2.

35 *Id.*

36 12 U.S.C. § 1831f(a), (b).

37 *Id.*

38 As discussed above, the ongoing involvement in a deposit account by a dual or affiliate employee may be the result of the provision of holistic, "one-stop shop," banking services to the customer, a hallmark of modern banking practices, as opposed to evidence that the employee is engaged in the business of placing or facilitating the placement of deposits. As further set forth in the Comment Letter, in these circumstances, the ongoing involvement would be evidence that the dual or affiliate employee's primary purpose behind the deposit referral and ongoing involvement was not the placement of deposits at the IDI, but rather the provision of this range of financial services. As a result, the Associations also believe that the deposits should not be considered brokered pursuant to the primary purpose exception.

39 *See, e.g.*, FDIC Advisory Opinion 94-40 (finding that Medicaid accounting services provided by an administrator, whereby the administrator maintained deposit account records relating to sub-accounts for Medicaid recipients on behalf of nursing homes and a depository institution, did not cause the administrator to become a deposit broker because it "simply makes record-keeping entries: it allocates funds between the subaccounts and the nursing homes' accounts, and transmits that data to the financial institution," and did not place deposits with the bank); FDIC Advisory Opinion 93-63 (finding that customer service providers whose activities are limited to "bookkeeping functions, documentation sorting, and customer inquiries," are not deposit brokers so long as the service providers were not placing deposits).

the time of the rollover or renewal would not cause it to be a deposit broker at the time of initial acceptance should not render it to be a deposit broker at the time of such rollover or renewal, consistent with the definition of "deposit broker" under Section 29. Should the FDIC find that mere access to an account by a third party (or other merely ministerial functions) causes it to become a deposit broker, the FDIC would capture a nearly indeterminable amount of deposits.

Although the revised FAQs cite to a recently released FDIC staff advisory opinion (FDIC Advisory Opinion 15-01), we note that this advisory opinion was not released until after the publication of the original FAQs. As a result, almost all IDIs, other than the one that received the advisory opinion, were unaware of the FDIC staff's position and did not know the basis for its conclusions.

D. The FDIC should ensure that the public has access to all of the relevant brokered deposit determinations by FDIC staff to ensure that all affected institutions can benefit from these letters.

The fact that some FDIC staff positions with respect to brokered deposits are not public runs counter to the requirements of the Administrative Procedure Act ("**APA**") and the Freedom of Information Act ("**FOIA**"), as well as the FDIC's basic commitment to transparency. To this effect, we believe that the FDIC should publicly release each of its prior and future determinations in a timely manner so that IDIs may understand the specific circumstances that the FDIC considers when evaluating deposits. We note that the FDIC has released few FDIC staff advisory opinions that cover only a limited number of circumstances. We are concerned that the entire industry has not had the benefit of the FDIC's interpretations, in particular, with respect to the applicability of the "primary purpose exception," to the extent that those interpretations have been set forth in non-public letters only to certain firms.[40] This would run counter to the principles of the APA and FOIA, which are designed to ensure that all similar persons have equal information on regulations that purport to equally affect such persons.[41] Thus, we respectfully urge the FDIC to release each of its brokered deposit opinion letters (on a redacted basis) in a timely manner so that all institutions can benefit from these opinion letters and to ensure that these letters are consistent with statutory mandates.

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[40] *See Nat'l Labor Relations Bd.* v. *Sears, Roebuck & Co.*, 421 U.S. 132, 152 (1975) (noting that the affirmative disclosure requirements in the Freedom of Information Act, which include "statements of policy and interpretations which have been adopted by the agency and are not published in the Federal Register" represent "a strong congressional aversion to 'secret [agency] law' and represent[] an affirmative congressional purpose to require disclosure of documents which have 'the force and effect of law'") (citing H.R. Rep. No. 1497, p. 7, U.S. Code Cong. & Admin. News, 1966, p. 2424).

[41] *See* 5 U.S.C. § 552(a)(2) (requiring the disclosure of all "statements of policy and interpretations which have been adopted by the agency and are not published in the Federal Register"); *see also* 5 U.S.C. § 551 *et seq.* (establishing standards for public agency determinations and the standard of review for agency actions).

E. The FDIC should not consider traditional transactional deposit account products involving a direct, continuing relationship between a customer and an IDI as brokered deposits.

Although the FAQs provide several examples with respect to brokered CDs, the Associations note that the FAQs do not discuss the circumstances in which a transactional account (*e.g.*, a checking account) would be classified as a brokered deposit in accordance with the guidance set forth in the FAQs. In contrast to CDs, where a depositor makes a fixed, often one-time, placement of funds at an IDI, often with little continuing interaction with an IDI, a traditional transactional account typically is the product of a direct and ongoing relationship between the bank and its depositors, involving deposits and withdrawals by the depositor to meet the depositor's transactional needs. As a result, most transactional account customers have a direct, ongoing relationship with the IDI, and all resulting deposits from these relationships result in consistent, stable funding for an IDI.

Even where such a depositor is introduced to an IDI through the mediation of a deposit broker or the initial deposit is placed by a deposit broker, the depositor's subsequent interactions are typically solely with the IDI. Accordingly, the Associations believe that other than any initial deposit that is placed or introduced by a deposit broker, subsequent deposits placed solely by the depositor through use of their transactional accounts should not be deemed brokered where the deposit broker does not continue its mediation or placement of deposits. Likewise, with respect to the original deposit, the Associations believe that after a reasonable period of time, the initial deposit should no longer be deemed brokered.

The Associations believe that this result is not only consistent with industry practice, but is also consistent with the FDIC's guidance, the text of Section 29, the FDIC's regulations, and the basic Congressional objective and intent. As noted above, under each of Section 29 and the FDIC's regulations, a deposit will only be deemed to be a brokered deposit if, at the time of acceptance, the deposit is the result of the mediation or placement by a "deposit broker." In the case of subsequent deposits to a transactional account such as periodic direct deposits from an employer, each of which is an "acceptance" under Section 29, these deposits cannot be said to have originated through the mediation or placement of the original deposit broker where, after the initial deposit, the depositor ceases to have any significant contact with the broker and his or her principal continuing relationship remains with the IDI.[42] With respect to the original deposit, although transactional accounts are non-maturity deposits, the Associations believe that after a reasonable period of time the deposit should no longer be characterized as brokered due to the cessation of the mediation of the deposit broker.

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[42] Such circumstances would include deposits associated with dual or affiliated employees that are characterized as brokered deposits where, following the initial mediation of the dual or affiliate employee, the depositor's subsequent interactions are with the IDI and its employees (other than the introducing employee). However, as discussed above, the ongoing involvement in a deposit account by a dual or affiliate employee may be the result of the provision of holistic, "one-stop shop," banking services to the customer, a hallmark of modern banking practices, as opposed to evidence that the employee is engaged in the business of placing or facilitating the placement of deposits. Further, as noted above with respect to FAQ F2, the dual or affiliate "involvement" in the account that has been deemed to be brokered should not be sufficient for the deposits to remain brokered where the "involvement" does not constitute actions that would result in the deposits being deemed brokered in the first instance.

F. Revised FAQ E12: Government agencies administering benefits programs should not be considered deposit brokers.

FAQ E12 explains that federal and state agencies sometimes use debit cards or prepaid cards to deliver funds to the beneficiaries of government programs. This FAQ states that although the deposits belong to the beneficiaries of such programs rather than the government, because the federal or state agency "might be involved in choosing the insured depository institution or in opening the deposit accounts," the agency "might be 'facilitating the placement of deposits' that will belong to third parties," which would render the agency a deposit broker absent the applicability of one of the statutory exceptions. As an initial matter, as we describe in Section II.A above, this is an inaccurate description of the statutory test for determining whether a person or entity is a deposit broker. In order to be a deposit broker, a person or entity must be "engaged in the business of" placing deposits or "engaged in the business of" facilitating such placement. Thus, we recommend that the FDIC ensure that this and all FAQs contain a description of the statutory definition of a "deposit broker" that is phrased in a manner consistent with that standard. We do not believe that government agencies that deliver funds via debit or prepaid cards as part of benefits programs are "in the business of" placing or facilitating deposits.

Furthermore, even if the FDIC were to determine that government agencies distributing funds in connection with benefit programs via debit or prepaid cards are engaged in the business of placing or facilitating deposits, the primary purpose exception should apply to all government benefit card programs. FAQ E12 provides that the primary purpose exception "might" apply when a government agency administering a benefit program satisfies the following three factors: (i) the federal or state agency is mandated by law to disburse the funds to the beneficiaries; (ii) the federal or state agency is the sole source of funding for the deposit accounts; and (iii) the deposits owned by the beneficiaries do not produce fees payable to the federal or state agency by the insured depository institution. This FAQ explains that satisfying these requirements would indicate that the primary purpose of the federal or state agency is not to provide the beneficiaries with a deposit-placement service or to assist the insured depository institution in expanding its deposit base, but is simply to discharge the government's legal obligations to the beneficiaries.

Due to the exceedingly narrow factors provided by the FDIC, this FAQ would not capture many government programs that are clearly designed to provide benefits for its recipients and not designed to place deposits at an IDI, because many banks offer governments an earnings credit rate (or a similar incentive) as part of the program administration. Accordingly, we believe that this FAQ should be amended to provide that all government benefit card programs should fall within the primary purpose exception. This can be accomplished by eliminating or modifying the third factor. Under the contractual terms governing many government card programs, institutions are required to pay the government fees to help offset the costs to the government associated with administering the program. These fees are not paid as a reward to the government for directing deposits to the institution, unlike the case with respect to fees paid to true deposit brokers compensated based on the volume of deposits placed solely for steering deposits to the institution. Rather, they are required by the government to help the government offset the administrative costs of managing the benefit programs. Therefore, we request that the FDIC amend this FAQ to provide that the payment of such fees to the government will not disqualify a government benefit card program from falling within the primary purpose exception.

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The Associations appreciate the opportunity to provide comments on the Guidance. We greatly appreciate your consideration of our views and would welcome the opportunity to discuss them further with you. Should you have any questions or need further information about the points outlined above, please do not hesitate to contact Paige E. Pidano at (202) 649-4619 or paige.pidano@theclearinghouse.org.

Respectfully submitted,

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ANNEX A
The Associations

The Clearing House. Established in 1853, The Clearing House is the oldest banking association and payments company in the United States. It is owned by the world's largest commercial banks, which collectively hold more than half of all U.S. deposits and which employ over one million people in the United States and more than two million people worldwide. The Clearing House Association L.L.C. is a nonpartisan advocacy organization that represents the interests of its owner banks by developing and promoting policies to support a safe, sound and competitive banking system that serves customers and communities. Its affiliate, The Clearing House Payments Company L.L.C., which is regulated as a systemically important financial market utility, owns and operates payments technology infrastructure that provides safe and efficient payment, clearing and settlement services to financial institutions, and leads innovation and thought leadership activities for the next generation of payments. It clears almost $2 trillion each day, representing nearly half of all automated clearing house, funds transfer and check-image payments made in the United States. See The Clearing House's web page at www.theclearinghouse.org.

The American Bankers Association. The American Bankers Association is the voice of the nation's $16 trillion banking industry, which is composed of small, regional and large banks that together employ more than 2 million people, safeguard $12 trillion in deposits and extend more than $8 trillion in loans.

The Financial Services Roundtable. As advocates for a strong financial future™, FSR represents 100 integrated financial services companies providing banking, insurance, and investment products and services to the American consumer. Member companies participate through the Chief Executive Officer and other senior executives nominated by the CEO. FSR member companies provide fuel for America's economic engine, accounting directly for $98.4 trillion in managed assets, $1.1 trillion in revenue, and 2.4 million jobs.

Independent Community Bankers of America®. Independent Community Bankers of America, the nation's voice for more than 6,000 community banks of all sizes and charter types, is dedicated exclusively to representing the interests of the community banking industry and its membership through effective advocacy, best-in-class education and high-quality products and services.

With 52,000 locations nationwide, community banks employ 700,000 Americans, hold $3.6 trillion in assets, $2.9 trillion in deposits, and $2.4 trillion in loans to consumers, small businesses, and the agricultural community. For more information, visit ICBA's website at www.icba.org.

The Institute of International Bankers. The Institute of International Bankers is the only national association devoted exclusively to representing and advancing the interests of the international banking community in the United States. Through its advocacy efforts the IIB seeks results that are consistent with the U.S. policy of national treatment and appropriately limit the extraterritorial application of U.S. laws to the global operations of its member institutions.

ANNEX B
Comment Letter

August 11, 2015

Charles Yi, Esq.
General Counsel
Federal Deposit Insurance Corporation
550 17th Street, N.W.
Washington, D.C. 20429

Re: January 5, 2015 Financial Institutions Letter (FIL-2-2015) Re: Guidance on Identifying, Accepting, and Reporting Brokered Deposits; Frequently Asked Questions: Dual Employment and Affiliate Deposit Referrals

Dear Mr. Yi:

This letter is submitted by The Clearing House Association L.L.C., the American Bankers Association, and the Institute of International Bankers (collectively, the "**Associations**")[1] in response to the guidance (the "**Guidance**") published by the Federal Deposit Insurance Corporation (the "**FDIC**") in the January 5, 2015 Financial Institutions Letter (FIL 2-2015) setting forth Frequently Asked Questions regarding Identifying, Accepting, and Reporting Brokered Deposits (the "**FAQs**"). We are writing because the proper characterization of deposits as brokered is of vital importance to all insured depository institutions ("**IDIs**") and their customers given the regulatory and prudential restrictions relating to an IDI's acceptance of brokered deposits, including multiple restrictions and requirements beyond those set forth in the Federal Deposit Insurance Act ("**FDIA**").[2] In addition, the inappropriate classification of deposits as brokered could have material implications for banks' organizational customer service arrangements, as well as potential supervisory, examination and reputational implications.

In light of the importance of this issue, the Associations appreciate the FDIC's effort to provide guidance regarding brokered deposits, as well as FDIC Chairman Gruenberg's indication in his recent letter to House Subcommittee Chairman Neugebauer that "the FDIC welcomes the feedback . . . received from the industry [with respect to the Guidance] . . . and plans to consider their comments and

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1 Descriptions of the Associations are provided in Annex A of this letter.

2 Section 29 of the FDIA provides that if a bank is not well-capitalized, it may no longer (absent a waiver) accept brokered deposits and is limited in the interest rate it may pay. 12 U.S.C. § 1831f(a), (e), and (f).

requests for clarification."[3] In that context, we respectfully submit this letter to (i) express our concerns about the potential overbreadth of the Guidance's characterization of certain deposits as brokered, particularly with respect to deposits resulting from client-servicing activities performed by dual, contract, and affiliate employees, and (ii) request that the FDIC clarify that deposits resulting from client-servicing activities performed by dual, contract, and affiliate employees in connection with those employees' providing a "one stop shop," full-service banking experience, whose compensation is not directly or explicitly tied in any material respect to the volume of deposits placed, would generally not constitute brokered deposits.

I. Executive Summary

The Associations are concerned that the FAQs may significantly broaden the scope of the types of activities and deposits that are deemed to be "brokered" by characterizing, for the first time, certain deposits resulting from modern banking affiliations and certain customer relationships as brokered, volatile, "hot money" deposits.[4] In particular, the Guidance appears to upset long-settled expectations of IDIs of all sizes by characterizing the client-servicing activities of certain dual, "dual-hatted," contractual, and other employees[5] intended to meet customer demand for a holistic, cost-effective banking experience as being tantamount to the activities of "deposit brokers." Such characterization would result in deposits arising from these employee-customer interactions as being classified as brokered "hot money," despite the fact that deposits placed by customers with a holistic relationship with the banking organization tend to be exceedingly stable. In addition, the Guidance appears to unduly capture similarly stable deposits resulting from certain bank-affiliate relationships, as well as *all* deposits obtained by contract employees, such as those typically used by banking organizations to staff customer service call centers. In light of modern banking organizations' widespread use of dual and contract employees and affiliations with non-banking entities, the Associations believe that the FAQs could require deposits resulting from a large amount of deposit-taking activities, including those that occur at the vast majority of branch locations and call centers, to be classified as brokered.

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[3] June 8, 2015 Letter from FDIC Chairman Martin J. Gruenberg to House Subcommittee on Financial Institutions and Consumer Credit Chairman Randy Neugebauer re: FDIC Financial Institution Letter (FIL)-2-2015, Guidance on Identifying, Accepting, and Reporting Brokered Deposits (hereafter, the "**Gruenberg Letter**").

[4] As described in Annex B, the Guidance appears to require deposits to be classified as brokered that result from a wide variety of arrangements used by modern banking organizations to provide banking and other financial services, including the use of dual, contract, and affiliate employees, as well as a range of strategies and relationships used to obtain stable funding and provide cost-effective services and products.

[5] As set forth in this letter, "dual employees" encompass those who are employed by or whose services are contracted for by an IDI but who perform services on behalf of one or more affiliates of an IDI, such as a broker-dealer or insurance company, as part of providing a complete and holistic banking experience. For example, a dual or dual-hatted employee may be an IDI employee who is also registered with an affiliated broker-dealer to provide customer access to investment products and services or an IDI employee who is also registered as an insurance agent with an affiliated insurance company. In these instances, employee compensation and other administrative arrangements are typically made through the IDI, as the "employer" of the individual. However, administrative practices vary across institutions, and we believe the classification of deposits should not turn on back office administrative arrangements for such employees, but rather should be based on the activities of the employee from which deposits may result, as described further herein.

As described further herein, absent clarification, the Guidance could require that deposits resulting from the following typical customer interactions with dual, affiliate, or contract employees be classified as brokered, even where the employee's compensation is not directly or explicitly tied in any material respect to the volume of deposits placed: customer interactions with IDI employees, including bank tellers, who share office space with affiliate or third party employees, despite the fact that the proceeds related to the IDI's business and activities inure exclusively to the benefit of the IDI, as required by applicable regulation; customer interactions with customer service call center employees who function as IDI employees but who are employed by an affiliate or by a service contractor; deposit referrals to an IDI on behalf of customers by an affiliate employee as part of providing a holistic banking experience, such as a referral by a financial advisor employed by an affiliated broker dealer; and customer interactions with IDI employees who also have licenses through affiliated entities, such as a broker-dealer or insurance agency. If further clarification is not provided, the Guidance likely will ultimately lead IDIs to alter their employee and affiliate relationships in a manner that will cause customers significant harm.

The Associations are mindful of the FDIC's concern that, in stressed conditions, certain types of deposits may be less likely to remain at an institution than others, and we support appropriately designed measures to encourage institutions to rely on and seek stable sources of funding. However, as described herein, the FAQs could be interpreted as characterizing a very substantial volume of *stable* deposits resulting from certain dual, contract, and affiliate employee customer interactions as brokered. Because of the significant implications of an increase in the volume of deposits that must be classified as brokered, the FDIC's Guidance likely would unnecessarily disincentivize IDIs' acceptance of these stable sources of funding. An overly broad interpretation of brokered deposits as described above could particularly affect IDIs and branches operating in lower-traffic locations that tend to rely on employees to perform multiple functions for economic and efficiency reasons, with corresponding negative implications for their customers.[6] With respect to IDIs that may not currently have affiliates, an overly broad interpretation of the types of employee activities that will be considered to be tantamount to those of a deposit broker would likely disincentivize banks from affiliating with non-bank entities in the future if those IDIs could not use dual employees without the resulting deposits being classified as brokered. This result would inhibit customers' ability to access a full complement of banking and other financial services. The Associations would welcome the opportunity to provide data to the FDIC to illustrate these and other likely consequences of the Guidance if further clarification is not provided.

The need to appropriately characterize deposits is of even greater importance today than when the brokered deposit restrictions under Section 29 of the FDIA ("**Section 29**") were first enacted, because there are now additional significant restrictions and requirements relating to the

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[6] Banks of all sizes have shifted to the use of dual employees to meet customer demand for efficient access to a full suite of banking and other products on a cost-effective basis. Even those IDIs that may not currently have affiliates have been increasingly shifting to the use of "universal bankers," which are employees who perform multiple tasks on behalf of the IDI. *See*, *e.g.*, ABA Bank Marketing and Sales, "Universal Banker: The New Staffing Approach," November 2014, p. 16, *citing* Novantas SalesScape Benchmarking available at: http://magazines.aba.com/bmmag/november_2014?sub_id=zS8vQ0UPCnrq#pg1. This trend indicates that to the extent that those institutions were to affiliate with other entities in the future, they likely would rely on dual employees to provide a variety of functions for customers.

acceptance of brokered deposits beyond the restrictions set forth in Section 29.[7] Improperly characterizing certain deposits as brokered for these purposes would create yet further incentives for modern banking organization to move away from dual and contract employee and affiliate arrangements that are designed to meet the full spectrum of customer needs, thereby ultimately harming consumers. For example, many banking organizations, both large and small, are required to pay additional deposit insurance assessments for brokered deposits, and may be subject to certain supervisory limitations by their primary federal regulator regarding the amount of brokered deposits the institution can accept, regardless of its capital position. In addition, the Liquidity Coverage Ratio ("**LCR**") penalizes brokered deposits, as does the capital surcharge imposed on global systemically important banking organizations ("**GSIBs**"). Accordingly, it is now *increasingly* important that the FDIC clarify that brokered deposits do not include stable deposits, such as those resulting from certain customer interactions with dual, contract, and affiliate employees bearing few (if any) of the characteristics of "hot money" deposits.

The Associations recognize that the methodologies for attracting deposits involve a broad spectrum of approaches and practices and that identifying brokered deposits must necessarily involve a line-drawing exercise between brokered and other deposits. We respectfully submit that the Guidance draws this line far too broadly and could thus be interpreted as capturing as brokered hundreds of billions of dollars of deposits resulting from customer interactions with certain dual, contract and affiliate employees that do not possess the characteristics of brokered "hot money."[8] The Associations describe below the key characteristics to be evaluated in classifying deposits as brokered that result from customer interactions with certain dual, contract, or affiliate employees.

As described in greater detail below, the statutory language and legislative history of Section 29 demonstrate that the definition of "deposit broker" was intended to capture only those entities engaged in *the business of* placing or *the business of* facilitating the placement of deposits whose primary purpose is to place deposits for pecuniary gain directly or explicitly tied to the volume of deposits placed, rather than individuals employed by, or acting on behalf of, the banking organization to provide customers with access to a full suite of banking and affiliate products and services. Because the Guidance could be interpreted as capturing virtually *any third party connection of a depositor and an IDI*, as described further below, we respectfully request that the FDIC clarify that deposits resulting from client-servicing activities performed by dual, contract, and affiliate employees in connection with those employees' providing a "one stop shop," full-service banking experience, whose compensation is not directly or explicitly tied in any material respect to the volume of deposits placed,[9] would generally not

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[7] *See* footnote 2, *supra*.

[8] While the Associations believe that there could be a substantial increase in the volume of deposits that could be brokered based on the current Guidance, the Associations also believe that the operational challenges of making deposit classification determinations as contemplated by the Guidance would be substantial, as most subject banking organizations do not at this time have in place the technological or operational capability to analyze virtually all customer interactions with certain dual, contract, or affiliate employees that may result in the placement of deposits, as the Guidance would appear to require.

[9] For this purpose, a compensation policy that rewards employees on a discretionary basis based on a variety of factors that may include an assessment of the extent to which the employee successfully provides customers with a holistic banking experience, which may include the fact of the placement of deposits, as

constitute brokered deposits because either: (i) the individual is not in "the business of" placing or facilitating the placement of deposits for purposes of the definition of "deposit broker" in Section 29; or (ii) the "primary purpose" statutory exception would apply because the employee's primary purpose is not the placement of deposits at the bank but rather to serve customer's holistic banking needs. To avoid evasion, the FDIC could make a determination, through an advisory opinion or other public communication, that dual, contract, or affiliate employees whose actions are driven by the prospect of direct pecuniary gain explicitly tied in a material respect to the volume of deposits placed at the IDI, or whose primary job function is to actively market deposit products on a programmatic basis rather than to provide customers with information about or access to a variety of financial products, are deposit brokers within the meaning of the statute.

At a minimum, we urge the FDIC to suspend application of the broad conclusions set forth in the Guidance regarding dual, contract, and affiliate employees until the FDIC, or the industry, has conducted a public and transparent study of: (i) the volume of deposits that would be redefined as "brokered deposits" if the Guidance were not clarified as requested above; (ii) the level of stability and the rates of interest that apply to these deposits; and (iii) whether banks could afford to accept such deposits if they were classified as brokered, and the resulting impact on credit availability. With this information, the FDIC could make an informed, reasoned judgment as to the impact of the Guidance as it could presently be interpreted and revise or enhance the Guidance accordingly.

Part I of this letter discusses the statutory background and legislative intent of brokered deposit regulation. Part II of this letter sets forth our analysis of how certain banking organization employees' dealings with customers are outside the purview of the relevant statute and regulations. Part II also requests confirmation of the Associations' interpretation of the statutory employee exception. Finally, Part III of this letter describes the negative collateral consequences for banks of all sizes and their customers that are likely to result from the Guidance's apparent characterization of certain dual and contract employee functions, as well as certain IDI-affiliate relationships, as resulting in brokered deposits, absent further clarification from the FDIC.

II. Background

A. Congress' intent in promulgating Section 29 of the FDIA was to require increased regulatory scrutiny of "hot money" deposits.

Although there is no statutory definition of a "brokered deposit," the legislative history reveals that Congress was undoubtedly using this term in Section 29 to provide for the regulation of so-called "hot money" that had exacerbated, and even fueled, the savings and loan crisis in the 1980s, that prompted the enactment of significant financial reform, including the brokered deposit restrictions. Rather than directly defining "brokered deposit," Section 29 defines "deposit broker" and classifies a deposit as brokered if it has been raised by or through a deposit broker. Specifically, Section 29 defines "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

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opposed to the volume of deposits placed, would not constitute compensation that is directly or explicitly tied in any material respect to the volume of deposits placed.

deposits with insured depository institutions for the purpose of selling interests in those deposits to third parties."[10] In order to limit Section 29's application to actual "hot money", Section 29 excludes certain types of entities from the definition whose activities do not tend to result in "hot money." In particular, Section 29 excludes "an agent or nominee whose primary purpose is not the placement of funds with depository institutions" and "an employee of an insured depository institution, with respect to funds placed with the employing depository institution."[11]

The legislative history indicates that during the savings and loan crisis, institutions with deteriorating loan portfolios and "regulators . . . breathing down [their] throat[s]" would "go out and buy funds" through third-party brokers as their "only chance for survival" when other depositors were leaving the organization.[12] Congress noted that during this period:

> There [were] many ways to *buy* funds, but one way that is very much attributed to the difficulties of the organizations is their ability to go out and buy what they call brokered deposits. [To obtain brokered deposits, brokers will] go out and solicit . . . deposit investors and then go [offer them] to these bank and thrift institutions that have to have deposits to offset the runoff they have had in their core deposits, and these institutions issue certificates of deposit offering a return at a higher-than-market rate [because] they have to have the money.[13]

The legislative history further describes a "typical transaction" resulting in brokered deposits as one in which "the customer gets a certificate of deposit for $100,000 [the then maximum insured amount], the financial institution gets $95,000, and the broker gets $5,000 [in] premiums paid."[14]

This legislative history thus indicates that the statutory definition of "deposit broker," someone "engaged in the *business* of placing deposits, or facilitating the placement of deposits, of third parties with insured depository institutions," was intended to capture the archetypal deposit broker envisioned by Congress—someone who, *for the primary purpose of direct pecuniary gain tied to the volume of deposits placed*, actively, and on a programmatic basis, marketed deposit products on an unsolicited basis, to persons typically having no previous relationship with the banking organization.[15] These brokers were typically focused solely on placing these "hot money" deposits for pecuniary gain. They were not acting with the primary purpose to provide customers or potential customers of a particular institution with access to a wide suite of banking and affiliate products. Indeed, to help ensure that the statute would capture only those types of brokers, Congress specifically sought to

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[10] 12 U.S.C. § 1831f(g)(1)(A) (emphasis added); 12 U.S.C. § 1831f(a).

[11] 12 U.S.C. § 1831f(g)(2).

[12] Senate Congressional Record, Proceedings and Debates of the 101st Congress, First Session, 135 Cong. Rec. S4238-01, 1989 WL 191889 (April 19, 1989).

[13] *Id.* (emphasis added).

[14] *Id*.

[15] 12 U.S.C. § 1831f(g)(1) (emphasis added).

exclude entities who may place or facilitate the placement of deposits, but whose "primary purpose" was not the placement of deposits at an IDI.

It is noteworthy that the FDIC recognized shortly after enactment of Section 29, consistent with Congressional intent, that the universe of deposit brokers, entities engaged in the business of placing or facilitating the placement of deposits, was narrowly circumscribed. In connection with its estimate of the annual reporting burden for the collection of information from deposit brokers in the proposing release implementing the Section 29 amendments, the FDIC determined that there would be only 50 deposit broker respondents, and does not appear to have contemplated that IDIs or their affiliates, acting through employees, would be deposit brokers, consistent with the statutory language and legislative intent.[16]

Thus, it would be contrary to Congressional intent and the FDIC's initial assessment of the number of deposit brokers if a substantial number of customer-focused interactions between certain dual, contract or affiliate employees and customers, where the employees are not engaged in marketing deposits on a programmatic basis and whose compensation is not directly or explicitly tied in any material respect to the volume of deposits placed, were deemed tantamount to the activities of deposit brokers envisioned by Congress. Furthermore, deposits resulting from these interactions generally do not present the volatile characteristics that Congress was concerned about. Rather, these deposits are, or at least share the same characteristics as, traditional "core" or "brick and mortar" deposits—high retention rates, based on direct and often long-term relationships with customers, and low-cost.

B. The Guidance reflects an overbroad and outdated approach to deposit classification that captures a much broader universe of deposits as brokered than Congress intended.

While the FDIC has stated that the Guidance attempts to codify existing FDIC interpretations, many of these interpretations were issued prior to the rapid transformation experienced within the banking industry in the late 1990s through the early 2000s, including the increased affiliations between banks and other entities[17] and the proliferation of online, mobile, and digital banking to meet customer needs and demands. As a result of this transformation and resulting customer demand for efficient, cost-effective access to banking and financial products and services, in many cases, customers have generally ceased establishing relationships with IDIs in person, but rather tend to do so through the facilitation of the telephone or internet. Additionally, customers often prefer that institutions provide a "complete package" of services or a "one-stop shop" experience that includes a number of products and services offered by the IDI and its affiliates, such as deposit and loan products, asset management, broker-dealer services, and insurance products. This is particularly true in less densely populated and "underbanked" areas in which often only a few employees of a banking

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[16] 57 Fed. Reg. 11,442 (April 3, 1992).

[17] The Gramm-Leach-Bliley Act of 1999 authorized banks to affiliate with other financial companies, which led to a significant increase in the number of affiliations between banks and non-bank financial companies, such as broker-dealers and insurance companies. For example, there are currently approximately 300 banks that have insurance company subsidiaries or affiliates. *See* SNL Financial.

organization must service the wide range of customer needs. To meet the needs and demands of customers, IDIs and their affiliates have increasingly shifted to the use of dual employees, as permitted under applicable regulation, to allow a single employee to fully serve the multiple financial needs of the customer in a cost-effective and efficient manner.[18]

Despite the statutory language and legislative history indicating that the definition of "deposit broker" was intended to capture only those entities engaged in *the business of* placing or *the business of* facilitating the placement of deposits whose primary purpose was to place deposits for pecuniary gain directly or explicitly tied to the volume of deposits placed, the Guidance could be interpreted as capturing virtually *any third party connection of a depositor and an IDI*. For example, in A2 and A5, the Guidance recites the statutory definition of deposit broker, but fails to reference the qualifying language of "in the business of."[19] The response to A2 provides that "[s]ubject to certain exceptions, a deposit broker is any person, company or organization engaged in 'placing deposits' belonging to others, or 'facilitating the placement of deposits' belonging to others, at an insured depository institution." Similarly, the response to E3 provides that a "contractor or dual employee will be a deposit broker if he/she facilitates the placement of deposits at the insured depository institution," ignoring the qualifying language in the statutory standard of being engaged *in the business of* facilitating the placement of deposits to be considered a deposit broker. By disregarding the qualifying language "in the business of," the Guidance appears to capture deposits resulting from all customer interactions of dual, affiliate or contract whose activities are intended to service banking organizations' customers' needs and thus, who are not engaged *in the business of facilitating* the placement of deposits. The Guidance does not appear to except deposits resulting from these client-servicing activities, even in cases in which those employees' primary purpose is not to place deposits and their compensation is not directly or explicitly tied in any material respect to the volume of deposits placed. In light of the structure and employee arrangements used by modern banking organizations, the volume of core deposits that would likely have to be categorized as brokered if the Guidance is not clarified would be substantial.

III. The Guidance should be clarified to avoid an unduly broad interpretation of what constitutes "brokered" deposits.

Because of the evolution in the banking industry since the enactment of Section 29, as described above, the fact of which Chairman Gruenberg acknowledged in his recent letter to Chairman Neugebauer, and in light of the substantial potential impact of the Guidance on IDIs and their customers,

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[18] *See* 12 C.F.R. § 7.3001. Banks' use of dual, affiliate, and contract employees to meet the breadth of customer needs in the context of modern banking represents prevailing industry practice and is recognized as such in various bank regulations and other guidance, including those of the FDIC, the Office of the Comptroller of the Currency ("**OCC**") and the Federal Reserve Board. For example, the OCC's regulations on bank activities and operations (12 C.F.R. § 7), the Federal Reserve Board's Regulation W, which governs transactions between member banks and their affiliates (12 C.F.R. § 223) and the FDIC's supervisory guidance on transactions between banks and affiliated businesses. FDIC, Risk Management Manual of Examination Policies, § 4.3 – Related Organizations, *available at* https://www.fdic.gov/regulations/safety/manual/section4-3.html.

[19] Guidance A2 and A5.

as discussed below, we respectfully request that the FDIC clarify that deposits resulting from dual, contract, and affiliate employees' client servicing activities, where the employee's primary purpose is to meet customer needs and the employee is not compensated directly or explicitly in any material respect on the volume of deposits placed, generally will not be categorized as brokered. We agree with Chairman Gruenberg's recent statement that the FDIC does "not believe that a dual employee should be classified as a deposit broker in all situations," because (i) "in some cases, the activities of certain dual employees may not qualify as being engaged in the business of 'placing deposits' or 'facilitating the placement of deposits,'" and (ii) "the definition of 'deposit broker' includes an exception for 'an agent or nominee whose primary purpose is not the placement of funds with depository institutions.'"[20] Thus, we focus our discussion on the application of those statutory provisions to such employee-customer relationships. We then set forth our understanding of the statutory exception for IDI employees and request clarification on its application to specific factual circumstances.

A. The statutory definition of "deposit broker" does not encompass customer interactions with certain dual, affiliate or contract employees unless they are actually "in the business of" placing or facilitating the placement of deposits.

On its face, the Section 29 definition of "deposit broker,"[21] does not encompass deposits that result from customer assistance provided by dual or contract employees, or deposits referred from an affiliate employee, in connection with those employees' providing access to a full complement of banking and affiliate products and services where their compensation is not directly or explicitly tied in any material respect to the volume of deposits placed. Such persons do not meet the statutory standard of being "engaged in the business of placing deposits," or "engaged in the business of" "facilitating the placement of deposits" as described in the legislative history of Section 29. As noted, being "in the business of" is a prerequisite criterion of being a deposit broker—facilitation itself is not a standalone concept under the statutory language. This is consistent with the legislative history and Congress's intent to capture primarily fee-based deposit referrals to IDIs by individuals and entities engaged in actively marketing deposits primarily for pecuniary gain directly and explicitly tied to the volume of deposits placed.

Indeed, consistent with the language of the statute and the legislative history of Section 29, past FDIC interpretive guidance has generally required some form of *active*, programmatic intermediation—beyond mere connection or typical customer assistance—or compensation, in order for any resulting deposits to be considered brokered. For example, in a recent advisory opinion, FDIC staff explained that deposit referrals by attorneys and other licensed professionals that are not made as part of a "programmatic framework," involving written agreements or fees, will *not* be considered to be engaged in the business of placing or facilitating deposits.[22] In addition, the Congressionally-mandated

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[20] Gruenberg Letter.

[21] As noted previously, the definition of "deposit broker" includes "any person engaged ***in the business of placing*** *deposits*, or ***facilitating the placement of deposits***, of third parties with insured depository institutions," 12 U.S.C. § 1831f(g)(1) (emphasis added).

[22] "FDIC Issues Private Letter to Elaborate on Brokered Deposit FAQ" (February 16, 2015), *available at* http://www.corporatefinancialweeklydigest.com/2015/02/articles/banking/fdic-issues-private-letter-to-elaborate-on-brokered-deposit-faq/ (emphasis added).

2011 FDIC brokered deposit study summarized fact-specific interpretations previously given by the FDIC regarding activities that would be considered to be those of a deposit broker.[23] These interpretations have generally found that to be a deposit broker, the individual or entity in question must be engaged in some activity that constitutes the business of facilitating the placement of deposits, beyond activities conducted for other purposes that may lead to deposits being placed.[24] For example, activities such as actively marketing and steering deposits towards institutions for deposit-based fees on a programmatic basis have been found to be indicative of an entity's status as a deposit broker. In light of this fact, the client-servicing activities of certain dual, affiliate, or contract employees performed to provide customer access to a complete suite of banking and affiliate products, whose compensation is not directly or explicitly tied in any material respect to the volume of deposits placed, without more, generally should not constitute the business of facilitating deposit placements.

Additionally, Congressional and regulatory concerns with brokered deposits in general are inapplicable to many deposit relationships resulting from customer interactions with these dual, affiliate, and contract employees. Many of the depositor accounts that result from depositor interactions with dual or affiliate employees are due in large part to the banking organization's desire to establish a relationship with the depositor or to deepen an existing relationship with the depositor. As a result, the resulting deposits have proven to be exceedingly stable over time. Indeed, as the FDIC noted in its 2011 Study, "[affiliate] referrals are ancillary to the affiliates' legitimate businesses and are usually based upon a relationship between the customer and the affiliate," and "because depositors have a relationship with an affiliate of the bank, these deposits may behave more like deposits where the bank itself has a relationship with the depositor, and thus may be more stable and less likely to leave for higher rates or when the bank is under stress."[25]

Despite the legislative history, certain FDIC precedent, and the stable nature of deposits resulting from holistic customer relationships with banking organizations, as previously noted, the Guidance appears to divorce the concept of "facilitation" from the concept of "engaged in the business" and takes an expansive view of the concept of "facilitation," as illustrated, for example, by FAQs A2, A5, and E3. Further, the Guidance states that "[w]hen a third party takes *any actions that connect* an insured depository institution with depositors or potential depositors, the third party may be 'facilitating the placement of deposits.' Hence, the third party may be a deposit broker."[26]

Similarly, FAQ E4 indicates that any deposit resulting from a banking organization's customer's interaction with a call center employee who is employed by an affiliate or by a service

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[23] *See* 2011 Study on Core Deposits and Brokered Deposits (the "**2011 Study**"), at 21-24, Federal Deposit Insurance Corporation, Study on Core Deposits and Brokered Deposits (July 8, 2011), *available at* https://www.fdic.gov/regulations/reform/coredeposit-study.pdf.

[24] *See* 2011 Study at 24.

[25] 2011 Study at 56-57. Indeed, in another, but relevant, context, the Federal Reserve and other U.S. federal banking agencies have acknowledged a distinction between affiliate and non-affiliate deposit arrangements to reflect their very different stability profiles during stress periods. *See* Federal Reserve System, Liquidity Coverage Ratio: Liquidity Risk Measurement Standards, 79 Fed. Reg. 61,440 at 61,493 (October 10, 2014).

[26] Guidance B2.

contractor would be considered a brokered deposit.[27] However, we do not believe that deposits resulting from customer interactions with call center representatives should be considered brokered. In this scenario, a customer generally has a relationship with the banking organization, prompting his contact with the call center, and is unlikely to be cognizant of the fact that the call center representative is not an employee of the IDI or the banking organization. The call center employee functions entirely as an employee of the banking organization, providing a requested service to a customer, and as a result, the vast majority of deposits resulting from this type of customer interaction are stable in nature. Further, the call center employee does not actively seek to place or facilitate the placement of deposits on a programmatic basis, nor is the employee's compensation directly or explicitly tied in any material respect to the volume of deposits placed. Rather, call centers are primarily in the business of resolving customer issues. The mere fact of contract employment does not somehow transform this customer service activity into that of an individual engaged "in the business" of placing or facilitating the placement of deposits primarily for monetary gain directly or explicitly tied in a material manner to the volume of deposits placed. In the absence of clarification, IDIs will likely be disincentivized from using call centers to allow customers to efficiently resolve issues without having to travel to a physical branch location, which will ultimately harm consumers unnecessarily.

As the above example illustrates, an expansive scope of "facilitation," untethered from the concept of "engaged in the business" of facilitating the placement of deposits, will likely result in core deposits being classified as brokered in an overly broad manner. Indeed, it is likely to result in many classes of deposits never before classified as brokered being classified as such, including, in addition to the above: direct deposits from employers, including via prepaid payroll cards (the employer is a third party placing deposits on the depositor's behalf); electronic benefits deposits (the benefits administrator is a third party placing deposits on the benefits recipient's behalf); and security deposits placed on behalf of another depositor. The classification of deposits resulting from direct deposits and prepaid payroll cards as brokered may have a particularly negative impact on the unbanked and underbanked, as banks may be disincentivized from offering those products as a result of such classification. This result would further disintermediate the unbanked and underbanked from relationships with depository institutions, thereby limiting their ability to meet their economic needs safely and securely within the mainstream banking system.

B. The primary purpose exception should apply to deposits resulting from the customer-servicing activities of dual, affiliate, and contract employees performed in connection with providing a holistic banking experience.

The activities in which certain dual, affiliate, and contract employees engage in providing customers information about and access to a full complement of products and services offered by the IDI and its affiliates should fall within the "primary purpose" exception, provided that the employee is not directly or explicitly compensated in any material respect based on the amount of deposits placed at the IDI. A dual, contract, or affiliate employee acting to meet customer needs, that places or facilitates the placement of deposits on behalf of the customer as part of meeting the customer's needs, should not be treated as a deposit broker. The employee's primary purpose is not to place deposits, but rather to: (i) provide customers with seamless, efficient access to a full suite of

[27] Guidance E4.

financial products appropriate for the particular customer and his or her financial needs, which may, in some cases, include the placement of deposits to help the customer achieve his financial goals; and (ii) deepen customer relationships by cross-selling multiple products, which tends to result in more stable deposits, as customers are less likely to move their deposits. The primary purpose of these employees' job function, to provide customers access to a variety of products and services and to deepen customer relationships, is simply not the same as the primary purpose of deposit brokers who actively market deposit products, typically on a programmatic basis, primarily for pecuniary gain directly or explicitly tied to the volume of deposits placed, as contemplated by Section 29.

Although we note that the FDIC has previously found that deposits referred by employees of a bank affiliate constitute brokered deposits, even in the absence of formal compensation arrangements by the bank, because such referrals may result in "indirect" compensation by the affiliate,[28] we respectfully submit that the increased affiliations between bank and non-bank financial companies and the shift to the one-stop-shop, holistic banking experience business model since this interpretation, has resulted in an increase in both bank and affiliate employees whose primary purpose is to meet the affiliate's or banking organization's customer's holistic banking needs. In the course of meeting such needs, the affiliate employee may, in some cases, place or facilitate the placement of deposits on behalf of the customer in connection with serving the customer's needs. Deposits resulting from these holistic banking relationships tend to be among an IDI's most stable and do not present the characteristics of "hot money" that prompted Congress's enactment of the brokered deposit restrictions. These referrals should not be considered to be tantamount to the activities of a deposit broker to the extent that the affiliate employee's actions are not for the primary purpose of placing deposits but to provide customers with information about or access to a variety of financial products, including deposits, and to the extent that the employee is not compensated directly or explicitly on the volume of deposits placed. As noted previously, to avoid evasion, the FDIC could make a public determination that dual, contract, or affiliate employees whose actions are driven by the prospect of direct pecuniary gain explicitly tied in a material respect to the volume of deposits placed at the IDI, or whose primary job function is to actively market deposit products on a programmatic basis rather than to provide customers with information about or access to a variety of financial products, are deposit brokers within the meaning of the statute.

Indeed, such a finding would in fact be consistent with other FDIC interpretations. For example, instances in which the FDIC has found affiliate referrals to constitute "the business of facilitation" falling outside the primary purpose exception have typically involved "commissions paid . . . by banks for the placement of deposits"[29] to affiliates "as financial intermediaries."[30]

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[28] FDIC Advisory Opinion 94-15 (March 16, 1994), *available at* https://www.fdic.gov/regulations/laws/rules/4000-8870.html.

[29] FDIC Advisory Opinion 93-31 (June 17, 1993), *available at* https://www.fdic.gov/regulations/laws/rules/4000-8200.html.

[30] As described further below, the FDIC has defined "commissions" to mean "compensation based on percentage of amount collected, received or agreed to be paid for results accomplished." *See* FDIC Advisory Opinion 92-56 (August 6, 1992), *available at* https://www.fdic.gov/regulations/laws/rules/4000-7470.html#fdic400092-56.

Further, we also request that the FDIC clarify that banks may generally rely on this exception in those cases in which the facts and circumstances are substantially similar to those described above and that, in those cases, an individual determination by the FDIC for each employment arrangement at every bank would not be required.

C. The exception from the definition of "deposit broker" for IDI employees should be clarified regarding its application to certain categories of IDI employees.

Each of Section 29 and the FDIC's regulations[31] provide the following exception to the definition of deposit broker:

> An employee of an insured depository institution, with respect to funds placed with the employing depository institution,[32] where "employee" includes any employee (i) who is employed exclusively by the insured depository institution, (ii) whose compensation is primarily in the form of a salary, (iii) who does not share such employee's compensation with a deposit broker, and (iv) whose office space or place of business is used exclusively for the benefit of the insured depository institution which employs such individual.[33]

The exception for IDI employees recognizes that banks must act through their employees to place or facilitate the placement of deposits on behalf of customers. This exception also reflects the fact that employees acting on behalf of banking organization customers facilitate deposit relationships that have demonstrated a degree of stability such that they do not pose the same policy concerns as the deposits described in the legislative history to Section 29 of the FDIA. This exception has long been understood to mean that deposits associated with employees acting on behalf of banking organization customers to facilitate deposit relationships are not characterized as brokered when the employee may otherwise be considered a "deposit broker" under the statutory definition. But for this exception, the essential and traditional model of obtaining deposits through the bank's employees would result in almost universal characterization of deposits as brokered. In light of certain statements made in the Guidance regarding this exception, we respectfully request further clarification from the FDIC with regard to certain provisions of the employee exception, as described below.[34]

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[31] 12 C.F.R. § 337.6.

[32] 12 C.F.R. § 337.6(a)(5)(B).

[33] 12 C.F.R. § 337.6(a)(6).

[34] It is also currently unclear what factors would signify an employee as a "dual employee"—that is, whether the classification would be based on which entity pays the employee, a facts and circumstances determination, or other criteria. The corporate decisions that influence these criteria are often made based on factors that are largely unrelated to deposit-taking activities. Without a system of employee classification that can be applied to a variety of idiosyncratic organizational structures, IDIs will not be in a position to definitively classify deposits resulting from employee contact as brokered or non-brokered with any degree of certainty. *See* footnote 5, *supra*, for an explanation of the Association's suggested definition of a "dual employee."

1. Exclusive employment

Among the requirements set forth in the employee exception is a requirement that the employee be "employed exclusively by the insured depository institution." FAQ E3 of the Guidance states that the requirement that the employee be employed exclusively by the IDI precludes any "dual employee" from qualifying for the employee exception. However, we do not believe that this statement regarding dual employees should be interpreted to preclude persons who are employed ***solely*** by the IDI and registered or licensed with an affiliate, such as a broker-dealer affiliate, from satisfying the exclusive employment prong of the employee exception.

As noted, banking organizations have increasingly employed dual employees who can provide customers with information about and access to both IDI products and services and products and services offered by affiliates. In some cases, dual employees may be employed solely by the IDI, but registered or licensed through an affiliate to offer a range of products and services to customers of the banking organization.

In those cases in which an IDI employee assists a customer in placing deposits at the IDI, the fact that the IDI employee happens to be registered or licensed through an affiliate to provide access to a more complete set of products and services does not alter the fact that the employee is, in fact, employed exclusively by the IDI and acting on behalf of the IDI in placing the deposits. One of the realities of the modern customer-banking organization relationship is that customers are likely to have a variety of routine interactions with IDI employees, who may happen to hold a registration through an affiliate to help provide the organization's customers with a holistic banking experience.[35] In light of this fact, we ask that the FDIC clarify that deposits resulting from customer interactions with IDI employees who also hold registrations or licenses through one or more affiliates, when such employees are acting exclusively on behalf of an IDI in accepting the deposits, are *not* brokered.

2. Compensation primarily in the form of a salary

Among the requirements set forth in the employee exception is a requirement that the employee be "compensated primarily in the form of a salary."[36] FDIC staff has previously interpreted the compensation prong of the employee exception to require that more than 50 percent of the employee's compensation consist of salary. The FDIC has interpreted "salary," to mean "a fixed and periodical payment payable without regard to actual results achieved, as distinguished from 'commission' which means compensation based on percentage of amount collected, received or agreed

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[35] For example, in a situation in which a customer seeks to, and does, place deposits either by entering a branch and interacting with an IDI employee who happens to be a dual employee or interacting with a bank customer service representative via telephone [or virtually] who also serves as a customer service representative for the bank's affiliates, the fact that the customer happens to be assisted by an IDI employee who is either a dual employee or contractor does not transform the fundamental nature of the transaction into one in which the employee is engaging in the business of placing deposits or facilitating the placement of deposits within the meaning of the "deposit broker" definition in Section 29.

[36] 12 C.F.R. § 337.6(a)(6).

to be paid for results accomplished."[37] In this FDIC advisory opinion, compensation arrangements that rely solely on commissions dependent on the amount of deposits placed at an IDI are considered inconsistent with the employee exception.

We believe that the FDIC's interpretation of this prong of the employee exception is appropriate and equally applicable to employees of banking organizations. Thus, we ask that the FDIC confirm that compensation will be considered to be "primarily in the form of a salary"[38] when, in accordance with the FDIC interpretation, the compensation is less than 50 percent commission-based and is not tied directly or explicitly in any material respect to the volume of deposits placed. An employee who is eligible for discretionary bonuses or compensation as part of a banking organization's general discretionary incentive compensation program that is not tied directly or explicitly in any material respect to the volume of deposits placed should not be disqualified from being considered an employee for purposes of Section 29.[39] Such a compensation arrangement would not appear to incent the employee to solicit additional deposit funding for pecuniary gain that may be volatile or demonstrate other characteristics associated with traditional "hot money" deposits, contrary to the fee-based arrangements in which deposit brokers generally are compensated directly and explicitly on the volume of deposits placed.[40]

3. Exclusive use of office space or place of business for the benefit of the IDI

Among the requirements set forth in the employee exception is a requirement that the employee's "office space or place of business is used exclusively for the benefit of the insured depository institution which employs such individual."[41] As part of the expansion of permissible activities in which banking organizations may engage, discussed above, as well as to meet customer demand for efficient and cost-effective access to a full suite of banking and other products, IDIs and affiliates increasingly share employees, customer service centers, and office space. Banks and their affiliates are permitted to share office space subject to appropriate regulation.[42] Indeed, the Federal Reserve's Regulation W permits a member bank and its affiliate to share office space provided that the bank is "adequately compensated for . . . the use of its facilities and personnel by other parts of the holding company organization" such that the bank does not "pay for expenses for which it does not

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37 *See* FDIC Advisory Opinion 92-56 (August 6, 1992), *available at* https://www.fdic.gov/regulations/laws/rules/4000-7470.html#fdic400092-56.

38 12 C.F.R. § 337.6(a)(6).

39 *See* footnote 9, *supra*.

40 *See* FDIC Advisory Opinion 04-04 (July 28, 2004), *available at* https://www.fdic.gov/regulations/laws/rules/4000-10280.html. We note that this construction of the statute is consistent with the type of compensation the FDIC has found to be outside the scope of the type of compensation structure used by true third-party deposit brokers in connection with third-party marketing and deposit referral programs.

41 12 C.F.R. § 337.6(a)(6)

42 *See, e.g.*, 12 C.F.R. § 7.3001.

receive a benefit."[43] Such regulation of bank interactions with affiliates ensures that costs and benefits of shared spaces are allocated according to the activities for which they are used. In those cases in which an IDI employee performs his employment functions in office space where proceeds related to the IDI's business and activities inure exclusively to the benefit of the IDI, but such office space is incidentally shared with an IDI affiliate's employees, the required allocation of costs and benefits between the bank and any affiliate under Regulation W ensures against any detriment to the IDI, consistent with the underlying purpose of this prong of the employee exception.

In light of this fact and the contemporary realities of activities that take place on banking organizations' premises, we respectfully request that the FDIC reevaluate the application of this prong of the employee exception. Absent such reevaluation, banking organizations would be disincentivized, or even unable, to continue current employee, affiliate, and even third-party premises-sharing practices designed to meet customer needs in a cost-effective and efficient manner. This would reduce substantially customer access to a variety of banking and financial products on an efficient and cost-effective basis. The notion that an IDI employee's office space is somehow "tainted" by the presence of a non-IDI employee would lead to the truly bizarre and presumably unintended result that virtually all deposits placed through IDI employees sharing office space with affiliate employees or third-party entities would be brokered. This could have a disproportionately negative impact on customers of banks and branches located in rural or less populated areas, as IDIs operating in those locations tend to share space with other tenants to reduce costs. For example, one common business model used by IDIs of all sizes is the establishment of bank branches inside of grocery stores for convenience and cost-savings. In these cases, all deposits could be "tainted" and classified as brokered due to the presence of the grocery store's non-banking business in the same location. In rural or less populated areas, these branches are particularly important, as they are frequently used by IDIs in place of standalone branches as a cost-saving measure, and thus are a critical access point for these customers to the banking system. Indeed, in 2013, there were approximately 5,750 grocery store branches in the United States.[44] To the extent that IDIs are disincentivized from operating those branches as a result of deposits placed there being classified as brokered, and the negative implications resulting from such classification, customers, particularly those in lower-traffic areas, will lose this access point to IDIs and thus, will likely lose access to banking products more generally. These consequences would fail to serve the underlying regulatory purpose of categorizing deposits according to their relative stability, and ultimately would be harmful to customers who would lose efficient and cost-effective access to banking and financial products and services.

IV. Collateral Consequences: Impact of the Guidance on Insured Depository Institutions

When Section 29 was enacted, the only consequences of accepting brokered deposits were exactly as Congress intended, as set forth in the statute—namely, to reduce the potential dangers of "hot money" by limiting the ability of financially troubled banks to accept these deposits. If a bank

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[43] Federal Reserve Board, Bank Holding Company Supervision Manual, § 2020.0.1 – Analysis of Intercompany Transactions (January 2015), *available at* http://www.federalreserve.gov/boarddocs/supmanual/supervision_bhc.htm. *See* 12 C.F.R. § 223.

[44] *See* "SNL's annual in-store branch rankings," *available at*: https://www.snl.com/InteractiveX/Article.aspx?cdid=A-17064517-14631.

was not well-capitalized, it could no longer (absent a waiver) accept brokered deposits, and it was limited in the interest rate it could pay.[45]

Since that time, however, the consequences of accepting brokered deposits have expanded far beyond Congress's original intent and include potentially harmful consequences that pertain irrespective of a bank's financial condition, as described further below. These include:

- **FDIC Assessments:** Because the Guidance will have the effect of classifying additional deposits as brokered, IDIs may be required to amend previous deposit insurance assessments to reflect the increased classification of brokered deposits.
- **LCR:** Brokered deposits receive a significantly higher outflow rate under the LCR, requiring IDIs to hold additional high-quality liquid assets ("**HQLA**"), rather than loans, against such deposits, thus reducing lending capacity.
- **GSIB Surcharge:** The level of deposits classified as brokered will flow directly into a subject banking organization's calculation of its capital surcharge requirement under the Federal Reserve's framework imposing a capital surcharge on **GSIBs**.
- **Supervisory Guidance:** The Guidance may impact IDIs' ability to abide by certain prudential restrictions that have been imposed on IDIs by their primary federal supervisors.
- **Structural Costs:** The Guidance's broad definition of deposits that may be considered brokered likely will force subject banking organizations to undertake substantial restructurings of employee relationships within the organization to avoid future classification of what would previously have been considered "core" deposits in order to comply with, and reduce the impact of, these consequences.

A. Reclassification of deposits as brokered will impact an IDI's deposit insurance assessment.

By statute, assessments on insured banks must be risk-based and, pursuant to Dodd-Frank, were revised to better account for risk and take into account losses from bank failures. The amount of brokered deposits at an IDI can affect certain components of its deposit insurance assessment rate, including: (i) for a large or highly complex institution, its core deposits ratio, (ii) for a small institution (generally under $10 billion in assets) that has experienced a more than 40% growth in assets over the past four years, its adjusted brokered deposit ratio, and (iii) for any institution that is either not well capitalized or that has a composite CAMELS rating below a "2," and that has a ratio of brokered deposits to domestic deposits greater than 10 percent, an additional brokered deposit adjustment.[46] To the extent that the Guidance will require IDIs to reclassify large amounts of their core deposits as brokered, the impact on IDIs' deposit insurance assessments could be substantial. The effect of these revisions could also result in a significant *restatement* of many IDIs' previous assessments.

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[45] *See* footnote 2, *supra*.

[46] FDIC, The Deposit Insurance Fund: Assessments, *available at* https://www.fdic.gov/deposit/insurance/.

B. The Guidance will affect the liquidity risk management and capital planning of IDIs and potentially reduce the availability of credit.

To the extent that the Guidance, interpreted broadly without further clarification as described above, results in reclassification of a significant percentage of core deposits as brokered where such deposits do not exhibit the qualities of "hot money," the Guidance will unjustifiably impact the LCR and capital charges of banking organizations and, in turn, their capacity to extend credit. Indeed, a substantial reclassification of deposits as brokered would increase the amount of HQLA (which does not include loans) that a subject IDI will be required to hold against those deposits, which, in turn, will reduce lending capacity. Because the LCR uses the FDIC's definition of "deposit broker" as a baseline for liquidity requirements applicable to subject banking organizations,[47] the Guidance's apparent broadening of the way in which the definition is applied in practice, will impact the outflow rates (that is, the minimum dollar amount that will be required to be offset by HQLA) assigned to such reclassified deposits, thus unnecessarily requiring additional HQLA to be held against these stable deposits. Notably, the federal banking agencies—in response to comments received regarding the breadth of stable deposits covered by the FDIC's definition—altered the final LCR to introduce finer gradations to its application to brokered deposits, by applying different outflow rates to brokered deposits depending on their specific liquidity characteristics.[48] Even within this more nuanced approach to brokered deposits, reclassification of core deposits as brokered will increase the outflow rates assigned to such deposits under the LCR, thus requiring IDIs to needlessly hold additional HQLA rather than loans against those deposits, despite the core nature of many of the deposits implicated under the Guidance as brokered.

In addition, the level of deposits classified as brokered will flow directly into a subject banking organization's calculation of its capital surcharge requirement under the framework established by the Federal Reserve applicable to GSIBs.[49] Under the GSIB capital surcharge framework, brokered deposits are included as a component of a short-term wholesale funding factor that, when factored into the surcharge calculation, impacts the level of the GSIB capital buffer subject banking organizations will be required to meet. To the extent the Guidance results in substantial reclassifications of what were previously considered core deposits as brokered, such reclassifications would impact capital requirements at subject banking organizations in a manner not anticipated by the Federal Reserve in its proposed or final framework.

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[47] 79 Fed. Reg. 61,440, 61,490 (October 10, 2014), *available at* http://www.gpo.gov/fdsys/pkg/FR-2014-10-10/pdf/2014-22520.pdf.

[48] 79 Fed. Reg. 61,440, 61491 (noting that the agencies are adopting a final rule with revisions to certain elements of the brokered deposit coverage in response to commenters and to better reflect the liquidity risks of brokered funding).

[49] *See* Final Regulatory Capital Rules: Implementation of Risk-based Capital Surcharges for Global Systemically Important Bank Holding Companies (July 20, 2015), available at: http://www.federalreserve.gov/newsevents/press/bcreg/bcreg20150720a1.pdf.

C. The Guidance in many instances departs from industry understanding and practice regarding brokered deposits, which may in turn require amendments to an IDI's past and future Call Reports.

The amount of an IDI's brokered deposits is reported on its Consolidated Reports of Condition and Income, or Call Reports, and the Call Report instructions rely on the FDIC's brokered deposit regulations for purposes of deposit classification under Schedule RC-E.[50] As noted, the Guidance appears to provide that almost all dual and contract employee arrangements, and affiliate referrals, would constitute facilitation by a deposit broker of the placement of deposits. As a result, it will be necessary for IDIs to reflect changes in classification of deposits in future and possibly previously filed call reports.[51] The Guidance's effectuation of significant changes to the Call Report's instructions will impose a meaningful burden on IDIs that will be required to undertake substantial infrastructure revisions to report properly newly categorized brokered deposits in the future and potentially to amend previously filed Call Reports.[52]

D. The Guidance may in some cases represent a departure from individual supervisory guidance from bank regulators regarding the level of permissible brokered deposits.

The Associations are concerned that the revisions to industry practice relating to the classification of brokered deposits compelled by the Guidance, and any uncertainty regarding the classification of deposits as brokered, will potentially jeopardize an institution's ability to comply with the prudential supervisory expectations established by their primary federal regulator through the supervisory and examination process. Specifically, we note that, apart from the restrictions set forth in Section 29, the primary federal regulator of many IDIs has established prudential restrictions on the amount of brokered deposits that may be held at an IDI. An inability to comply with these expectations could result in supervisory actions that could have a substantial negative impact on the depository institution.

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50 FDIC, Schedule RC-E – Deposit Liabilities (FFIEC 031-041), *available at* https://www.fdic.gov/regulations/resources/call/crinst/897rc-e.pdf.

51 In this regard, we note that one of the consequences of the absence of public notice and the opportunity to comment on the Guidance is that requirements of the Paperwork Reduction Act were not fulfilled. That Act requires 60-day notice in the Federal Register to solicit public comment regarding the accuracy of the agency's estimate of the burden of the proposed collection of information in an effort to minimize the burden of the collection of information on those who are to respond. 44 U.S.C. § 3504(c). In this case, the Call Report instructions rely on the FDIC's brokered deposit regulations for purposes of deposit classification under Schedule RC-E. We note that, the term "burden" means "time, effort, or financial resources expended by persons to generate, maintain, or provide information to or for a Federal agency, including resources expended for (i) reviewing instructions; and (ii) adjusting the existing ways to comply with any previously applicable instructions and requirements. 12 U.S.C. § 3502(2) (emphasis added).

52 44 U.S.C. § 3507.

E. The Guidance will force organizations to substantially restructure operational arrangements, adversely impacting customers' ability to access banking and financial services, particularly through existing branch networks.

The Guidance's broad interpretation of what deposits could be considered brokered will likely force subject banking organizations to undertake substantial restructurings of employee relationships within the organization to avoid future classification as brokered of what would previously have been considered "core" deposits in order to reduce the impact of the implications discussed above. Specifically, IDIs will likely have to, at a minimum, review all of their employment arrangements to determine which arrangements are now captured by the Guidance. In some cases, IDIs may have to substantially revise the entirety of their employee and affiliate relationships to avoid the wholesale classification of certain deposit relationships as brokered. This endeavor would be at a great cost to all IDIs, regardless of size. We believe an appropriately conducted quantitative impact study would demonstrate these consequences and the ultimate economic impact, including the impact on customers at risk of losing the benefits currently enjoyed as a result of banking organizations' use of dual and contract employees and affiliations with non-banking entities.

* * *

The Associations appreciate the opportunity to provide comments on the Guidance and would welcome the opportunity to provide data to you to illustrate the likely consequences of the Guidance if further clarification is not provided, as described above. We greatly appreciate your consideration of our views and would welcome the opportunity to discuss them further with you. Should you have any questions or need further information about the points outlined above, please do not hesitate to contact Jeremy Newell at 202-649-4622 (email: jeremy.newell@theclearinghouse.org), Denyette DePierro at 202-663-5333 (email: ddepierr@aba.com), or Richard Coffman at 646-213-1149 (email: rcoffman@iib.org).

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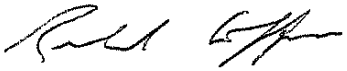

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The American Bankers Association. The American Bankers Association is the voice of the nation's $16 trillion banking industry, which is composed of small, regional and large banks that together employ more than 2 million people, safeguard $12 trillion in deposits and extend more than $8 trillion in loans.

The Institute of International Bankers. The Institute of International Bankers is the only national association devoted exclusively to representing and advancing the interests of the international banking community in the United States. Through its advocacy efforts the IIB seeks results that are consistent with the U.S. policy of national treatment and appropriately limit the extraterritorial application of U.S. laws to the global operations of its member institutions.

ANNEX B:

Dual and Affiliate Employee Scenarios

Below we provide generic descriptions of several ordinary course deposit management practices of IDIs that could result in brokered deposits under the Guidance, but that the Associations believe are clearly distinguishable from the "hot money," fee-based third-party deposit referrals that Section 29 was intended to target.

Affiliate Employees. An affiliate employee might be an employee of a broker-dealer subsidiary who, when he or she receives a request for a deposit account from a client of such subsidiary, hands off the client to a colleague at the affiliated IDI to open the deposit account and take in the funds. These referrals should not be considered to be tantamount to the activities of a deposit broker to the extent that the affiliate employee's actions are not for the primary purpose of placing deposits but to provide customers with information about or access to a variety of financial products, including deposits, and to the extent that the employee is not compensated directly or explicitly on the volume of deposits placed.

Call Center Contract Employees. If a customer calls the bank's telephone banking number to discuss opening an account or transferring funds into an existing demand deposit account, the call center may be operated by an affiliated service company that operates under a service agreement with the bank. The call center employees are employed by the service company. However, the customer relationship is with the IDI in this scenario, and the customer is unlikely to be aware that the person at the call center is not a direct IDI employee. Even if all the call center employee does is forward the call to a bank employee, FAQ E4 would indicate that any resulting deposit is brokered because the service company employee facilitated the deposit. This produces an irrational result that would impose unreasonable restrictions on how a banking organization may be able to manage customer service and costs.

Dual Employees and Branch or Private Banking. Many IDIs have employees who also hold licenses through an affiliated broker-dealer or insurance agency to enable the IDI employee to present the full suite of services offered to a banking organization customer. In some organizations, these individuals may offer services to branch customers—particularly in less densely populated areas served by fewer branches—while in others they may be private bankers who discuss an array of investment and banking alternatives with their clients. These bankers may offer bank deposit products to their clients for both cash management and investment needs. The bankers must be FINRA-registered representatives to provide certain investment advice, which could lead to dual employee (bank and broker) designation under the Guidance. In instances in which a customer enters a banking center seeking to open a demand deposit account, and the customer meets with such an IDI employee who also happens to be a licensed financial advisor for the affiliated broker-dealer, the Guidance could be interpreted as requiring the resulting deposits to be classified as brokered. When opening the account, the employee is acting in its capacity as a banker, and the broker-dealer affiliation is at best incidental if not irrelevant. Indeed, it is often the case at such banking organizations that the bankers are employees of record of the IDI for tax purposes (that is, on the IRS Form W-2), are presented to customers as IDI employees, and whose salaries are paid by the IDI. Even where the customer and the personal banker never discuss any topic other than the opening of the deposit account, FAQ E3 would indicate that any resulting deposit is brokered because the banker would not meet the "exclusive employment" prong of the employee exemption.

Furthermore, as noted, while it is often the case that these bankers are employees of record of the IDI for tax purposes (that is, on the IRS Form W-2), are presented to customers as IDI employees, and whose salaries are paid by the IDI, in some cases IDIs may require that their employees are employees of record of the broker dealer for tax and salary purposes. Under these circumstances, a dual employee who

opens a deposit account consistent with the facts above could be considered to be a deposit broker under FAQs A2 and A5 that recite the statutory definition of deposit broker but fail to reference the qualifying language of "in the business of," and FAQ B2, which defines facilitation so broadly that any deposits resulting from this relationship could be considered brokered. This should not be deemed the type of facilitation that causes a deposit to be deemed brokered.

Investment and Global Banking. Bankers serving the capital advisory needs of institutional clients are also FINRA-registered (often Series 79, as well as Series 24 for some).[53] Client needs may include relevant banking services such as cash management, custody, clearing services and similar banking products, which these bankers may directly discuss with clients or refer clients to solutions specialists. Similarly, bankers serving commercial banking customers whose primary focus is traditional banking products, such as deposits, cash management, and credit, may be FINRA-registered to provide commercial banking customers with information about any potential investment banking-related needs. In this capacity these bankers are IDI employees. Like the private banking example above, this could also lead to dual employee designation under the Guidance.

Shared Office Space. Affiliate employees and IDI employees often have offices located in the same physical space, such as a branch or banking office. When a customer walks into a banking center on his or her own initiative to open a demand deposit account, the customer is directed to meet with a personal banker. The personal banker opens up the deposit account. The personal banker is an IDI employee. However, at the banking center, a brokerage-employed financial advisor may occupy an office in close proximity to that of the personal banker. FAQ E3 appears to indicate that the personal banker IDI employee does not meet the employee exception from being a deposit broker because the space or place of business is not used exclusively for the benefit of the bank. If read literally, without the benefit of distinguishing facts or circumstances, this could mean that every deposit accepted at this banking center, even those accepted at a teller window, would be brokered because an affiliate (or third party) occupies space in the same building. This leads to the bizarre and presumably unintended result that almost every deposit taken in person by the IDI would be deemed "brokered" because the office space is tainted by the presence of a non-IDI employee. Similarly, deposits taken by IDI employees at branches located inside grocery stores could be considered to be brokered due to the presence of the grocery store's non-banking business in the same location. In less populated areas, these branches are particularly important, as they are frequently used by IDIs in place of standalone branches as a cost-saving measure, and thus are a critical access point for these customers to the banking system.

Access to Customer Account Data. When a customer opens up a demand deposit account or time deposit at the IDI (that is not considered brokered at inception) it is common and appropriate for bank systems to capture customer data based on total relationships and allow relationship managers, who may be employees of an IDI affiliate or contract employees rather than the IDI itself, to not only see this data, but also to use it to understand customer needs. This may in fact be required in some cases, for example to facilitate anti-money laundering compliance. FAQ F2 states that *any* involvement by a third party (which presumably would include an affiliate)—including access to account information—would transform the deposit into a brokered deposit, even if the third party was not actually involved in the

[53] The FINRA Series 79 examination is the entry-level investment banker examination of FINRA that demonstrates a recipient's knowledge of basic investment banking services such as financial advisory services. The FINRA Series 24 examination is the general securities examination that qualifies a recipient to manage broker-dealer services.

any transaction. This would be an example of the Guidance's overly broad interpretation of the concept of "facilitation," as indicated by FAQs A2, A5, and B2. This should not be deemed the type of facilitation that causes a deposit to be deemed brokered.

Affiliate Referrals. It has been the experience of many IDIs that the deposits of customers with multiple relationships with a banking organization tend to be among the most stable within a banking organization. In addition, the ability to serve customers with multiple products allows banks to get to know their customers better, enhancing the ability of banks to offer the most suitable products to the customer, as well as improving the profitability of a particular customer relationship. Referrals to the IDI for deposit products by affiliate employees may occur (i) when a customer interacts with an employee of an affiliate—such as a broker-dealer or investment advisor—or (ii) where the customer's needs are being monitored and met by a formal or informal team consisting of both affiliate and IDI employees. The customer may approach a team member with requests for any array of products or services.

For example, in cases in which a customer has a brokerage account relationship with a financial advisor of an affiliated broker dealer, as part of routine customer relationship management discussions, the customer may request to open a demand deposit account. This request could either be raised solely by the customer on his or her own initiative or it could arise from cross-selling discussions such as describing to the customer potential relationship benefits and pricing advantages for having combined balances of loans, deposits, brokerage and other products. The financial advisor is not an IDI employee and cannot open the account, but refers the client to an IDI employee who then works with the customer to open appropriate deposit accounts and any transactional needs. The financial advisor has no involvement in intermediating balances to be placed, the execution of the deposit or management of the deposit account. The financial advisor generally does not receive volume-based compensation based on actual balances placed. At most, the financial advisor may receive compensation in the form of credit for having made a referral, which is typically factored in as one element of an overall performance indicator. However, FAQs A2, A5, and B2 define facilitation so broadly that any deposits resulting from this relationship could be considered brokered. This should not be deemed the type of facilitation that causes a deposit to be deemed brokered.

Alternatively, similar to the above, a broker-dealer employee may work on a formal or informal team with an IDI employee. A customer may approach the broker-dealer employee or the IDI employee seeking advice on deposit and other types of products. The team members would then work together to present the customer with a range of options, and this customer interaction may result in the placement of deposits at the IDI. The IDI employee on the team would advise on such deposit products, complete the necessary paperwork, and IDI employees (the IDI employee team member or tellers, etc.) would accept funds for deposit. This should not be deemed the type of facilitation that causes a deposit to be deemed brokered.

The characterization of either situation as resulting in "brokered deposits" could lead to a bizarre situation in which the deposits of essentially every customer who has a wealth management relationship or private banking relationship that also includes a brokerage account could be viewed as brokered.