



August 11, 2015

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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

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 employees⁵ 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.

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

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

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

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

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 entities¹⁷ 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

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,

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

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

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

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 regulations³¹ 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

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

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

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

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?cid=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.

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.

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, 61,491 (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.

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).


Respectfully Submitted,



Jeremy R. Newell
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The Clearing House Association L.L.C.

A handwritten signature in black ink, appearing to read "Denyette DePierro". The signature is fluid and cursive, with the first name being the most prominent.

Denyette DePierro
Vice President and Senior Counsel
Office of Regulatory Policy
American Bankers Association

A handwritten signature in black ink, appearing to read "Richard Coffman". The signature is cursive and somewhat stylized.

Richard Coffman
General Counsel
Institute of International Bankers

cc: Martin J. Gruenberg
Federal Deposit Insurance Corporation

Robert Feldman
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ANNEX A

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 hold more than half of all U.S. deposits. The Clearing House Association L.L.C. is a nonpartisan advocacy organization representing—through regulatory comment letters, amicus briefs and white papers—the interests of its owner banks on a variety of important banking issues. Its affiliate, The Clearing House Payments Company L.L.C., provides payment, clearing and settlement services to its member banks and other financial institutions, clearing almost \$2 trillion daily, which represents nearly half of the 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 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.