



Financial Services & Products ADVISORY ■

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FDIC Releases Financial Institution Letter Providing Clarification on Brokered Deposits

On January 5, 2015, the Federal Deposit Insurance Corporation (FDIC) released a Financial Institution Letter¹ (FIL) on brokered deposits. The FIL provides guidance, in the form of frequently asked questions, to aid depository institutions in identifying, accepting and reporting brokered deposits. The FIL consolidates previous agency opinion letters and a 2011 study.² The FIL also addresses when non-banking firms that market financial services and products, such as prepaid cards, bank networks and listing services, are considered deposit brokers.

Background

The FDIC is charged with making the determination of when deposits at any insured depository institution, regardless of its primary regulator, are considered to be “brokered deposits.” This distinction is important for all institutions because it can affect deposit insurance assessments. Further, pursuant to FDIC prompt corrective action regulations,³ only well-capitalized banks may solicit and accept brokered deposits without restriction. For all banks, brokered deposits have to be reported on call reports, and over-reliance on brokered deposits can be perceived as a safety and soundness concern by the regulators regardless of whether the bank is well-capitalized.

The FDIC regulations define “brokered deposits” as any deposit that is “obtained, directly or indirectly, from or through the mediation or assistance of a deposit broker.”⁴ The term “deposit broker” is defined as “(A) [a]ny 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 deposits with insured depository institutions for the purpose of selling interests in those deposits to third parties; and (B) [a]n agent or trustee who establishes a deposit account to facilitate a business arrangement with an insured depository institution to use the proceeds of the account to fund a prearranged loan.”⁵

¹ FIL-2-2015, available at <https://www.fdic.gov/news/news/financial/2015/fil15002.html>

² FDIC Study on Core Deposits and Brokered Deposits. Available at <https://www.fdic.gov/regulations/reform/coredeposits.html>.

³ See 12 C.F.R. § 337.6.

⁴ 12 C.F.R. § 337.6(a)(2).

⁵ 12 U.S.C. § 1831f(g)(1). See also 12 C.F.R. § 337.6(a)(5)(i).

Beyond the statutory definitions of brokered deposits, the FDIC has generally only issued one-off advisory opinions to help banks and others understand what constitutes a brokered deposit. In our experience, the FDIC has held to a broad interpretation of what constitutes brokered deposits, and advisory opinions have been distinguished on factual grounds. As a result, in many situations it has been challenging to ascertain the FDIC's view, in the absence of asking for an advisory opinion. Thus, the FIL may offer valuable guidance for both depository institutions and non-banking firms that market financial services and products on how resulting deposits would be viewed by the FDIC.

Summary of Key Points

The FIL covers a wide range of topics regarding brokered deposits, including what activities qualify as placing deposits and facilitating the placement of deposits, when bank networks are deposit brokers, when listing services are deposit brokers, exemptions from the definition of deposit broker, what "acceptance" of a deposit means and the procedures for obtaining waivers from the FDIC to accept brokered deposits.

Some particularly interesting points:

- When a depository institution utilizes a third party for advertising or referrals in exchange for volume-based fees, the FDIC takes the position that such third parties are facilitating the placement of deposits by connecting the depository institution with the new account holders; therefore, the new accounts are considered brokered deposits.
- Although third parties that merely design deposit products with special features, such as reward systems, are not considered deposit brokers by default, they may be considered deposit brokers if they market the deposit products in exchange for volume-based fees.
- The FDIC takes the position that insurance agents, lawyers and accountants who refer clients to a bank are considered deposit brokers; therefore, the resulting accounts would be brokered deposits.
- Bank networks, through which participating banks place a depositor's funds with other participant banks in order to ensure that the depositor receives full insurance coverage, are considered to be deposit brokers. This is the case even if all banks within the network are affiliated.
- Listing services that aggregate and publish information about deposit accounts at many different banks may be considered deposit brokers unless the company meets certain criteria established by the FDIC. Specifically, the FDIC considers the fee structure and the services performed by the listing service, and the listing service must not be involved in the physical placement of the deposits.
- Trust departments of banks, which are excluded from the statutory definition of deposit broker in cases where the relationship in question was not established for the primary purpose of placing funds with the depository institution,⁶ may still be determined by the FDIC to be deposit brokers in some circumstances. Thus, the FDIC applies a subjective "primary purpose" test of an agreement with a trust department to determine if deposits in question are considered brokered deposits.
- The general "primary purpose" statutory exception to the definition of deposit broker,⁷ which provides that an "agent or nominee whose primary purpose is not the placement of funds with depository institutions" is not a deposit broker, does not apply to companies that sell or distribute financial products such as prepaid cards. The FIL specifically provides that deposit accounts established by companies that sell or distribute general purpose prepaid cards are considered brokered deposits.

⁶ 12 C.F.R. § 337.6(a)(5)(ii)(C)

⁷ 12 U.S.C. § 1831f(g)(2). See also 12 C.F.R. § 337.6(a)(5)(ii).

The FIL provides one example of a company that distributes prepaid cards without being classified as a deposit broker. If a company distributes prepaid cards as part of a rebate program, and the funds deposited at the bank are the company's own funds rather than those of the cardholder, the company would not be considered a deposit broker. If a third party was involved in placing the company's funds into the account, however, the third party would be a deposit broker, and such funds would be considered brokered deposits.

The FDIC considers renewals and rollovers of accounts to be acceptances of deposits. If a third party is involved in the placement of time deposits, such as certificates of deposit, sufficient to make such deposits brokered deposits, the deposits are considered to be accepted each time the deposit is rolled over or renews. As a result, if a bank becomes less than well-capitalized, the FDIC maintains the position that the bank may not renew any of its brokered time deposits.

Conclusion

The new FIL provides important, easily comprehensible clarity on when deposits are considered brokered. This is especially important as the FDIC has made clear that, despite criticism of its distinctions between core and brokered deposits, the treatment of brokered deposits is unlikely to change in the near future.

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