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FDIC Updates Brokered Deposits Resources

On November 13, 2015, the Federal Deposit Insurance Corporation (FDIC) published FIL-51-2015 to update an introductory letter and a frequently asked questions document (FAQs) on brokered deposits, which had been issued through FIL-2-2015 on January 5, 2015. In the press release accompanying the update, the FDIC noted that "[t]he agency said in January it would provide updates to the FAQs as necessary" and that it "is updating the document in response to further inquiries and comments." The introductory letter was revised to note that the FAQs will be updated "annually, as needed." The FDIC has invited public comment on the revisions by December 28, 2015.

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, only well-capitalized banks, as defined by the prompt corrective action (PCA) regulations issued by the bank's federal bank regulator, may solicit and accept brokered deposits without restriction.[1] 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."[2] The term "deposit broker" is defined as "(A) 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 deposits with insured depository institutions for the purpose of selling interests in those deposits to third parties; and (B) An 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."[3]

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1 The prompt corrective action provisions require federal bank agencies to "tak[e] prompt corrective action" for the purpose of "resolv[ing] the problems of insured depository institutions at the least possible long-term loss to the Deposit Insurance Fund." *See* 12 U.S.C. §1831o.

2 12 C.F.R. §337.6(a)(2).

3 12 C.F.R. §337.6(a)(5)(i).

Beyond the statute and regulations, 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. Additionally, the FDIC published a July 2011 *Study on Core Deposits and Brokered Deposits*, as required by Section 1506 of the Dodd-Frank Wall Street Reform and Consumer Protection Act. The FDIC issued the January 2015 introductory letter and FAQs in an effort to "promote consistency by insured depository institutions in identifying, accepting, and reporting brokered deposits." The November revisions are intended to clarify several of the explanations provided in January and add some additional information.

Summary of Key Points

The revisions appear to be intended to achieve two primary objectives: (1) to emphasize that the FAQs are not new "guidance," but rather just a summary of the existing statute, regulation, advisory opinions and the *Study*; and (2) to provide clarification or explanation of certain issues contained in the January 2015 FAQs.

First, revisions made throughout the introductory letter and the FAQs appear intended to emphasize that the document should not be regarded as new guidance, but rather as a summary of the existing FDIC guidance. The January 2015 version was titled "Guidance on Identifying, Accepting, and Reporting Brokered Deposits," whereas the title to both the introductory letter and the November 2015 FAQs were revised to remove the word "guidance"; similar revisions were made to the text of the letter. A new statement was added to the introductory letter that references "the existence of the statute, regulations, advisory opinions, and the Study," and an existing reference in the letter to the January 2015 version as "guidance" was replaced instead with a description of the document as "a plain language summary of previously issued guidance that is conveniently located in one place." Citations to the statute, regulations, advisory opinions and *Study* were added throughout the November 2015 version as well.

Second, the November 2015 version includes substantive revisions that clarify statements in the January 2015 version (e.g., the responses to questions B6, E1, E3, E9 (*was E8 in January 2015 version*) and F5 have been revised) or add new explanations (e.g., questions B7, E4 and E12 and corresponding responses have been added).

- **B6. Are insurance agents, lawyers, or accountants that refer clients to a bank considered to be deposit brokers?** The FDIC changed the response from "Yes" to "It depends," and added an explanatory paragraph.
- **B7. What is an example of when the deposits in a programmatic arrangement to refer depositors are not brokered deposits?** The FDIC added a new question B7 and response to further clarify the revised response to B6. The response to B7 provides an example of a programmatic arrangement that would be deemed deposit brokering under the revised response to B6.
- **E1. What are the exceptions to the definition of deposit broker?** The response to question E1 was revised to clarify that advisory opinions do not provide distinct exceptions to the definition of deposit broker, but rather the advisory opinions apply the statutory exceptions.
- **E3. In regard to the exception for an "employee of an insured depository institution, with respect to funds placed with the employing depository institution," does the exception apply to a contractor or a dual employee (i.e., a person employed jointly by an insured depository institution and the institution's parent or affiliate)?** The reference to "affiliate" in the question replaced a reference to "subsidiary" in the January 2015 version. The response was clarified to emphasize that the exception is established in the statute.

- **E4. Do situations exist when contractors and dual employees are not considered to be deposit brokers?** The FDIC added a new question E4 and response to further clarify the response to E3 and provide examples of when a dual employee would and would not be considered a deposit broker.

- **E9 (*was E8 in January 2015 version*). Does the primary purpose exception apply to companies that sell or distribute general purpose prepaid cards?** The response was revised to recognize that the card company or other third party (rather than specifically a "retail store") may place funds into custodial accounts. The statement that the card company or third party was acting "as agent for the cardholders" was removed. The FDIC further added that "[t]he general purpose prepaid card and the deposit account are inseparable, in that the card is a device that provides access to the funds in the underlying deposit account. Because of this relationship, prepaid card companies are not covered by the primary purpose exception."

- **E12. How does FDIC treat federal or state agency funds disbursed to beneficiaries of government programs through debit cards or prepaid cards?** The FDIC added a new question E12 and response "based on several oral inquiries received in 2015 regarding federal and state benefits delivered via debit cards and prepaid cards." The response provides a description of the card program structures and addresses when the primary purpose exception might apply.

- **F5. If an insured depository institution ceases to be well capitalized for PCA purposes, how should an institution treat brokered deposit accounts that are not time deposits (such as demand deposit accounts)?** Both the question and the response were revised. The question had previously asked, "If an insured depository institution ceases to be well capitalized, must the institution immediately close brokered deposit accounts that never mature or renew (such as an interest checking or savings account)?" The question was revised to remove the presumption that certain accounts must be closed and to clarify that the term "well capitalized" is as defined for PCA purposes. The response had previously stated that institutions that cease to be well capitalized must close such accounts; the response has been revised to instead state that institutions should "establish an appropriate supervisory plan" with their primary federal regulator. Additionally, the response now notes that adequately capitalized institutions may request a waiver, and accounts at undercapitalized institutions will be considered on a case-by-case basis.

An additional revision to the introductory letter clarifies that brokered deposit determinations are "always" viewed by the FDIC on a "case-by-case basis," and that "[i]f an institution was unaware of brokered deposit treatment until the FAQs were released, the FDIC would generally not seek refiling of past Call Reports, although an insured depository institution's accounting and financial reporting personnel might make their own recommendations."

Conclusion

The new Financial Institution Letter (FIL) adds important clarifications and additional explanations to the FDIC's January 2015 brokered deposits resources. The revised documents should help to provide 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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