Andrew C. Svarre
Senior Vice President, General Counsel, Banking & Trust

730 Third Avenue
New York, NY 10017

T 212-916-4229
E ASvarre@tiaa.org

June 2, 2020

Robert E. Feldman
Executive Secretary
Attn: Comments
Federal Deposit Insurance Corporation
550 17th Street NW
Washington, DC 20429
Via Email to: comments@fdic.gov

Re: **Unsafe and Unsound Banking Practices: Brokered Deposits Restrictions, RIN 3064–AE94**

Dear Mr. Feldman:

As the leading provider of retirement and other financial services for those in academic, research, medical, and cultural fields, Teachers Insurance and Annuity Association of America ("TIAA") appreciates the opportunity to submit this letter in response to the notice of proposed rulemaking and request for comment on brokered deposits restrictions (the "NPR") issued by the Federal Deposit Insurance Corporation ("FDIC").[1] We commend the FDIC for reviewing its regulatory approach to brokered deposits restrictions to accommodate the significant changes to technology, business models, economic environment, and products that have taken place since the FDIC's regulations on brokered deposits were first adopted. However, we have significant concerns with certain aspects of the NPR. Most notably, we fundamentally disagree that the sharing of third-party information with an insured depository institution ("IDI") should be one of the activities that satisfies the "facilitation" prong of the NPR's proposed definition of "deposit broker." We also believe that the FDIC should work to codify certain long-standing, frequently relied-upon guidance and interpretations related to the regulation of brokered deposits, as well as repeal or update certain outdated interpretations and guidance, as part of any final rule it adopts. Codifying or repealing past guidance, as appropriate, will help ensure that IDIs' regulatory burdens do not increase unnecessarily as a result of any final rule the FDIC adopts, and will prevent an inappropriate overreliance on the FDIC's new primary purpose exception application process. We discuss these views, and our other comments on the NPR, below.

I. About TIAA.

Founded in 1918, TIAA is the leading provider of retirement services for those in academic, research, medical, and cultural fields. Since our founding in 1918, TIAA's mission has always been to aid and strengthen the institutions, retirement-plan participants, and individual and institutional customers we

[1] *Unsafe and Unsound Banking Practices: Brokered Deposits Restrictions*, 85 Fed. Reg. 7453 (Feb. 10, 2020), *available at*: https://www.govinfo.gov/content/pkg/FR-2020-02-10/pdf/2019-28275.pdf.

serve and to provide financial products that meet their needs. Our investment model and long-term approach aim to benefit the five million individual customers we serve across more than 15,000 institutions. To carry out this mission, we have evolved over time into a diversified financial services organization that operates through multiple affiliated entities to offer our customers a wide range of financial products and services, including asset management and banking services.

TIAA offers deposit and lending products, as well as fiduciary services, through its subsidiary federal savings bank, TIAA, FSB. TIAA, FSB is headquartered in Jacksonville, Florida and, as of year-end 2019, had total assets of approximately $42 billion and total deposits of $28 billion. TIAA-CREF Trust Company, FSB (the "Trust Company"), the predecessor to TIAA, FSB, was established by TIAA in 1998 and entered into the business of deposit-taking in 2010. In 2017, TIAA acquired EverBank and merged the Trust Company with EverBank to form TIAA, FSB. TIAA, FSB operates on a nationwide basis, primarily through web, mobile, and phone channels, with a limited branch network in the state of Florida. Over the years, both the Trust Company and EverBank have had significant first-hand experience with the challenges banks and diversified financial services organizations face in structuring their activities to avoid brokered deposit status for various types of deposits, and, in particular, for affiliate-connected deposit relationships.[2] As such, we feel we are well positioned to share our perspective on how the NPR might be modified to more effectively serve the FDIC's goal of strengthening the regulatory regime applicable to brokered deposits.

II. <u>TIAA urges the FDIC to make certain changes to the proposed "facilitation" prong of the "deposit broker" definition</u>.

In Question 3 of the NPR, the FDIC asks whether its list of activities that would determine whether a person meets the "facilitation" prong of the "deposit broker" definition is appropriate.[3] We believe that certain aspects of this list are not appropriate, as discussed in further detail below.

A. <u>*The sharing of third-party information with an IDI should not be sufficient to satisfy the "facilitation" prong*</u>*.*

Under the NPR, a person would meet the definition of a "deposit broker" under Section 29 of the Federal Deposit Insurance Act (the "FDI Act") if it is engaged in the business of placing deposits, or facilitating the placement of deposits, of third parties with IDIs or the business of placing deposits with IDIs for the purpose of selling interests in those deposits to third parties.[4] A person would meet the ''facilitation'' prong of the deposit broker definition by engaging in one or more of four listed activities, one of which is "directly or indirectly shar[ing] any third party information" with the IDI.[5] We are concerned that this revision will inappropriately expand the number of instances in which third-party arrangements will result in deposits being designated as brokered.

TIAA respectfully disagrees that sharing third-party information with an IDI should be included as one of the activities that satisfies the "facilitation" prong of the deposit broker definition. As a standard

---

[2] Based on its experience, TIAA provided comments in response to the FDIC's Financial Institutions Letter 51-2015. *See* letter of Andrew C. Svarre to Doreen R. Eberley (December 28, 2015), *available at*: https://www.fdic.gov/regulations/laws/publiccomments/brokered-deposit-faq/comment8.pdf.
[3] 85 Fed. Reg. at 7458.
[4] *Id.* at 456.
[5] *Id.* at 7457.

practice, customer account information is frequently shared between IDIs and both affiliated and unaffiliated parties for reasons entirely unrelated to facilitating the placement of brokered deposits (*e.g.*, for data processing, advertising, analytic, compliance, customer service, or web servicing purposes). Specifically with respect to affiliates, as noted in our comment (the "2019 TIAA Comment")[6] in response to the FDIC's Advance Notice of Proposed Rulemaking on this same topic (the "ANPR"),[7] one of the ways diversified financial organizations can best serve their customers is to share customer information across legal entities to facilitate the offering of a broad array of products to meet each customer's individual needs. TIAA believes that it is appropriate and in customers' best interests to allow affiliated entities to share customer information as necessary to provide customer services, without such activities causing the affiliates or their employees to be considered deposit brokers. Indeed, we believe such information sharing among affiliates should not only be permitted, but encouraged, as it does not implicate the FDIC's concerns that brokered deposits can facilitate an IDI's rapid growth through reliance on volatile sources of funding. On the contrary, affiliate deposit referrals tend to increase an IDI's franchise value by providing a source of stable, long-term deposit relationships.

If, however, the FDIC decides not to eliminate this activity from the list, we recommend that the FDIC at the very least specify in its final rulemaking that the sharing of third-party information is not sufficient *on its own* to satisfy the "facilitation" prong. Rather, the final rule should provide that the sharing of third-party information with an IDI must occur in concert with one of the other activities listed under the "facilitation" prong to constitute "facilitating the placement of deposits." Particularly in the case of affiliated entities that are part of the same corporate organization, sharing information about third parties is a common and continuous practice that, in the absence of other relevant factors, does not indicate that an entity is facilitating the placement of deposits with an IDI. If information sharing alone is enough to constitute facilitation of the placement of deposits, IDIs and their affiliates will be seriously hindered in their ability to share important customer information with one another, which could in turn prevent IDIs from fulfilling their basic legal and regulatory obligations and conducting their day-to-day business.

In addition to eliminating the sharing of third-party information as a listed activity under the "facilitation" prong, the FDIC should also repeal past guidance that restricts IDIs from sharing customer information with their affiliates for purposes of providing customer services. In a 1992 Advisory Opinion ("Advisory Opinion 92-69"), the FDIC took the position that a brokered certificate of deposit account can be reclassified as "nonbrokered" if and when the account is renewed or rolled over by the customer without any involvement by the deposit broker.[8] The FDIC further clarified this position in a 2014 Advisory Opinion ("Advisory Opinion 15-01"), responding to a bank that had asked whether deposits that were originally classified as "brokered" could convert to "nonbrokered" once the bank ceased making payments to the referring broker-dealer with respect to those deposits. The FDIC responded that even where the bank is no longer making payments to the broker-dealer for

[6] *See* Letter from John Douglas, Senior Executive Vice President of TIAA and Head of Oversight & Advocacy, to Robert E. Feldman regarding the ANPR (May 7, 2019), *available at*: https://www.fdic.gov/regulations/laws/federal/2019/2019-unsafe-and-unsound-banking-practices-3064-ae94-c-070.pdf.
[7] *Unsafe and Unsound Banking Practices: Brokered Deposits and Interest Rate Restrictions*, 84 Fed. Reg. 2366 (February 6, 2019), *available at*: https://www.fdic.gov/news/board/2018/2018-12-18-notice-sum-i-fr.pdf.
[8] FDIC Advisory Opinion 92-69 (Oct. 23, 1992), *available at*: https://www.fdic.gov/regulations/laws/rules/4000-7600.html.

referral of deposits in a particular customer account, if the broker-dealer "continue[s] to receive access to the customer's account information and. . .continue[s] to provide guidance to the customer as to the investment of the funds," such an arrangement will constitute "continued involvement by the deposit broker with the customer's deposit accounts" and the deposits will remain brokered.[9]

On its face, Advisory Opinion 15-01 would appear to mean that for as long as a bank shares customer account information with a referring broker – even one that is an affiliate of the bank and does not receive continuing payment from the bank for deposit referral – any brokered deposits in that account can never convert to nonbrokered status. We believe this position is inappropriate and runs counter to public interest. IDIs need to share customer account information with affiliates on a continuing basis for a variety of reasons, not the least of which is to fulfill their obligations to their customers and provide high levels of service, which activities often require the involvement of affiliated entities. The mere sharing of customer account information alone, unaccompanied by payments to a broker or adviser for deposit referral or other involvement by a broker or adviser, should not be sufficient to prevent brokered deposits from converting to nonbrokered under the conditions described in Advisory Opinion 92-69.

Additionally, broker-dealers and registered investment advisers ("RIAs") are required by law and/or regulation to take into account a customer's assets when they provide the customer with investment advice,[10] meaning they may need to engage in information-sharing with IDIs to get data about customer deposits. The FDIC's statement in Advisory Opinion 15-01 that "a broker's continuing access to account information and continuing guidance with respect to the customer's accounts. . .represent continued involvement" essentially means that a brokered deposit can never convert to nonbrokered status where an IDI shares any information about the deposit with the referring broker-dealer or RIA – even where the IDI pays no ongoing compensation for the referral. This is an illogical and unworkable outcome. We do not believe it was the FDIC's intent that this type of information-sharing, which may be necessary for broker-dealers and RIAs to do their jobs and meet their legal and regulatory obligations, would constitute "continued involvement with the customer's deposit accounts" by the broker-dealer or RIA. For this reason, and the additional reasons discussed above, we urge the FDIC to repeal Advisory Opinion 15-01.

B. *The FDIC should specify the types of activities that qualify as "administrative functions" for purposes of the "facilitation" prong, or give direction that the term should be construed broadly*.

The fourth activity listed in the NPR that would meet the ''facilitation'' prong of the ''deposit broker'' definition is "acting, directly or indirectly, with respect to the placement of deposits, as an intermediary between a third party that is placing deposits on behalf of a depositor and an insured depository institution, other than in a purely administrative capacity."[11] The NPR goes on to elaborate that "any assistance provided by such intermediaries, outside of providing purely administrative functions, would result in the intermediary meeting the 'deposit broker' definition and any deposits placed

---

[9] FDIC Advisory Opinion 15-01 (Apr. 16, 2014), *available at*: https://www.fdic.gov/regulations/laws/rules/4000-10351.html#fdic400015-01.
[10] *See* 17 CFR § 240.15l-1 ("Regulation Best Interest"); *Commission Interpretation Regarding Standard of Conduct for Investment Advisers*, 84 Fed. Reg. 33669 (July 12, 2019).
[11] 85 Fed. Reg. at 7457.

through the assistance of such intermediaries would be brokered deposits."[12] By way of example, the NPR provides that "administrative functions" include "any reporting or bookkeeping assistance provided to the person placing its customers' deposits with insured depository institutions," and do not include "assisting in decision-making or steering persons (including the underlying depositors) to particular insured depository institutions."[13]

The NPR's list of activities that qualify as "administrative functions" is far too short and provides almost no reliable guidance for institutions trying to determine whether they meet the "facilitation" prong. For example, IDIs are increasingly using technology to advertise to and acquire customers in a way that is far more interactive than legacy methods. These IDIs often engage in early interaction with potential depositors through various tools provided by social media platforms (*e.g.*, activity tracking through cookies, identity and demographic profile creation), and they may use the same tools to streamline the application process for new customer accounts. Use of these types of technological tools by an IDI should not raise issues of "facilitation." No public policy reason warrants preventing use of Facebook, Apple, Google, or other secure online IDs to, for example, prepopulate customer applications with identity information as an "administrative function." But the NPR does not make it clear that such activity would be carved out from the definition of "facilitation."

Without a more extensive list of examples than those in the NPR, or direction from the FDIC to construe the term "administrative functions" more broadly, IDIs and third parties will be left to guess which component of the "facilitation" definition will be met. To address this issue, the FDIC should either provide more examples of the types of activities that constitute "administrative functions," or specify that institutions should construe the term "administrative functions" broadly.

III. <u>Relevant FDIC interpretations and guidance regarding brokered deposits should be updated as necessary in light of the NPR and codified in a final rulemaking</u>.

Question 11 of the NPR asks whether there are particular FDIC staff opinions of general applicability that should or should not be codified as part of the final rule.[14] In addition to repealing Advisory Opinion 15-01, as we recommend above, we urge the FDIC to identify past interpretations and guidance on brokered deposits that are still relevant, update them as necessary in light of the changes proposed in the NPR, and codify them in a final rulemaking. Particularly given the potential changes to the "facilitation" prong (both those the FDIC have proposed and those we recommend above), we believe a good deal of past FDIC guidance that hinges on the old definition of "facilitation" will need to be modified, if not repealed altogether. Updating past guidance as necessary and incorporating it as part of a formal rulemaking will provide entities such as broker-dealers, investment advisers and IDIs with greater clarity and direction, and help ensure that the brokered deposits

[12] *Id*.
[13] *Id.*
[14] *Id.* at 7460-61.

regulatory regime is applied fairly and equally across institutions. Below, we provide examples of specific interpretations and guidance that we believe the FDIC should address in the final rule.

A. *FDIC Advisory Opinion 92-78.*

We believe that the FDIC should codify in a final rulemaking its opinion set forth in FDIC Advisory Opinion 92-78 ("Advisory Opinion 92-78").[15] In this opinion, the FDIC expressed the view that Federal Housing Administration ("FHA") trustees servicing FHA-related mortgage portfolios are not deposit brokers. While these trustees may send or receive payments from accounts at a depository bank as part of their work servicing mortgages, the FDIC concludes in Advisory Opinion 92-78 that this activity does not make them deposit brokers. Advisory Opinion 92-78 is a critical longstanding precedent that has allowed IDIs and others in the banking industry to know with certainty that FHA trustees and other mortgage servicers are not deposit brokers under Section 29. IDIs have long relied on this advisory opinion for the general proposition that deposits maintained related to securitization structures in the mortgaged backed securities ("MBS") market and other mortgage servicing related deposit accounts are not brokered. Given the importance of the MBS market and mortgage servicing generally, the FDIC should, as part of this rulemaking, update and codify this opinion.

B. *FDIC Advisory Opinion 94-39.*

We also recommend that the FDIC codify the determination made in FDIC Advisory Opinion 94-39 ("Advisory Opinion 94-39")[16] in a final rule. In this opinion, the FDIC determined that funds placed in special reserve bank accounts pursuant to Rule 15c3-3(e) under the Securities Exchange Act of 1934 are not brokered deposits. More specifically, the FDIC found that a company engaged in the business of depositing funds in a special reserve bank account will qualify for the primary purpose exception and will therefore be excluded from the definition of "deposit broker." The FDIC should formalize this well-established guidance to provide clarity to broker-dealers and IDIs with regard to deposits in special reserve bank accounts. Advisory Opinion 94-39 has guided the understanding of the industry for decades, and nothing in the NPR appears to change the FDIC's position on this matter. As such, we urge the FDIC to codify the opinion in the final rule.

C. *FAQ F3 of the FDIC's 2016 FAQs on Brokered Deposits.*

We would ask that the FDIC's response to FAQ F3 of the FDIC's 2016 FAQs on Identifying, Accepting and Reporting Brokered Deposits (the "2016 FAQs")[17] be maintained in its entirety and codified in the final rulemaking. FAQ F3 asks whether a brokered deposit that is not a time deposit can ever be reclassified as nonbrokered. In response, the FDIC states that "accounts holding brokered nonmaturity deposits, originally established with the involvement of a deposit broker, can be reclassified from brokered to nonbrokered after a 12-month period during which no third party (that is,

[15] FDIC Advisory Opinion 92-78 (Nov. 10, 1992), *available at*: https://www.fdic.gov/regulations/laws/rules/4000-7690.html#fdic400092-78.
[16] FDIC Advisory Opinion 94-39 (Aug. 17, 1994), *available at:* https://www.fdic.gov/regulations/laws/rules/4000-9110.html#fdic400094-39.
[17] *Frequently Asked Questions on Identifying, Accepting and Reporting Brokered Deposits, FIL-42-2016*, FDIC (June 30, 2016), *available at*: https://www.fdic.gov/news/news/financial/2016/fil16042b.pdf.

no party other than the insured depository institution and the depositor) is involved with the account."[18] Codifying this FAQ response in the final rulemaking would give IDIs a clear and certain framework for understanding when and how a brokered deposit can convert to nonbrokered status.[19]

D. *FAQ B6 of the FDIC's 2016 FAQs on Brokered Deposits.*

As discussed in the 2019 TIAA Comment, we recommend that the FDIC revisit its determination of the instances in which professionals, such as insurance agents, lawyers, and accountants, are considered deposit brokers, as discussed in the FDIC's response to FAQ B6 of the 2016 FAQs.[20] Under the current regulatory regime, if a professional receives any fees from a bank in exchange for referring customers to the bank, the professional is considered a deposit broker. TIAA agrees that a professional who receives fees from a bank based on the *volume of deposits* referred to the bank could be considered a deposit broker. However, the mere fact that a bank pays some kind of fee to a professional does not mean that all deposits of customers that were referred by the professional to the bank should automatically be classified as brokered. Banks may wish to establish relationships with professionals that refer customers to the bank (*e.g.*, enter into cross-referral arrangements), make payments for legal or accounting services, or offer donations to charitable organizations. So long as these arrangements are not directly tied to the volume of deposits referred by the professional to the bank, banks should not be required to treat all referrals from those professionals as brokered. Similarly, deposits by lawyers pursuant to court orders that require the opening of restricted FDIC insured accounts, such as guardianships, irrevocable trusts or escrow accounts, should not be considered brokered. We urge the FDIC to clarify these points in the final rulemaking. Further, we urge the FDIC to revisit FDIC Advisory Opinion 93-31[21] and FDIC Advisory Opinion 93-34[22] regarding the status of intermediaries such as lawyers, accountants, financial planners, and brokerage houses. Similarly, we recommend that the FDIC repeal FDIC Advisory Opinion 15-04[23] regarding business professionals, for the same reasons discussed above.

E. *Advisory opinions regarding affinity groups and marketing arrangements.*

Multiple advisory opinions regarding affinity group marketing arrangements should be revisited in light of the revised definition of "facilitation" proposed in the NPR. For example, Advisory Opinion 93-30[24] and Advisory Opinion 93-71[25] should be revisited to expand the instances in which third parties such as affinity groups that engage in limited, indirect endorsement of deposit products will not be

---

[18] *Id*.
[19] As discussed above, we do not believe information-sharing by an IDI with a third party regarding account balances should be a factor in determining a deposit's continuing brokered status.
[20] *Id.*
[21] FDIC Advisory Opinion 93-31 (June 17, 1993), *available at:* https://www.fdic.gov/regulations/laws/rules/4000-8200.html#fdic400093-31
[22] FDIC Advisory Opinion 93-34 (June 24, 1993), *available at:* https://www.fdic.gov/regulations/laws/rules/4000-8230.html#fdic400093-34
[23] FDIC Advisory Opinion 15-04 (Feb. 4, 2015), *available at:* https://www.fdic.gov/regulations/laws/rules/4000-10354.html#fdic400015-04
[24] FDIC Advisory Opinion 93-30 (June 15, 1993), *available at:* https://www.fdic.gov/regulations/laws/rules/4000-8190.html#fdic400093-30
[25] FDIC Advisory Opinion 93-71 (Oct. 1, 1993), *available at:* https://www.fdic.gov/regulations/laws/rules/4000-8600.html#fdic400093-71

considered deposit brokers. Similarly, FDIC Advisory Opinion 92-79[26] takes an extremely broad view of the meaning of "facilitation," and should be updated to correspond to the more focused definition of "facilitation" set forth in the NPR.

F. *Advisory opinions regarding listing services.*

The FDIC has published a number of advisory opinions regarding the factors used to determine whether a listing service should be deemed a deposit broker. In light of the proposed definition of "facilitation" in the NPR, FDIC Advisory Opinions 90-24,[27] 92-50,[28] 93-44,[29] 02-04,[30] and 04-04[31] should be codified in a final rule. This series of opinions provides clarity as to the status of listing services under Section 29, which have become increasingly important as banks seek to offer information regarding their deposit products online. Codifying the appropriate standards in a formal rule will provide helpful regulatory certainty.

IV. The FDIC should codify standardized criteria to qualify for the primary purpose exception and allow IDIs and others seeking to rely on codified exceptions to submit notice filings, rather than resource and time-consuming individual applications.

In NPR Question 14, the FDIC asks whether the application process proposed for the primary purpose exception is appropriate, and whether there are ways the application process could be modified to make it more effective or efficient.[32] Below we provide our thoughts as to how the application process might be improved.

A. *The FDIC should codify in general regulations any standardized criteria it utilizes or develops through the application process regarding instances where the primary purpose exception applies.*

Under the NPR, the FDIC is proposing to establish an application process "under which any agent or nominee that seeks to avail itself of the primary purpose exception, or an insured depository institution acting on behalf of an agent or nominee, could request that the FDIC consider certain deposits as nonbrokered as a result of the primary purpose exception."[33] If an application is approved, "deposits placed or facilitated by [the applicant] would be considered nonbrokered for a

---

[26] FDIC Advisory Opinion 92-79 (Nov. 10, 1992), *available at:* https://www.fdic.gov/regulations/laws/rules/4000-7700.html#fdic400092-79
[27] FDIC Advisory Opinion 90-24 (June 12, 1990), *available at*: https://www.fdic.gov/regulations/laws/rules/4000-5420.html#fdic400090-24.
[28] FDIC Advisory Opinion 92-50 (July 24, 1992), *available at*: https://www.fdic.gov/regulations/laws/rules/4000-7410.html#fdic400092-50.
[29] FDIC Advisory Opinion 93-44 (July 19, 1993), *available at*: https://www.fdic.gov/regulations/laws/rules/4000-8330.html#fdic400093-44.
[30] FDIC Advisory Opinion 02-04 (Nov. 13, 2002), *available at*: https://www.fdic.gov/regulations/laws/rules/4000-10160.html#fdic400002-04.
[31] FDIC Advisory Opinion 04-04 (July 24, 2004), *available at*: https://www.fdic.gov/regulations/laws/rules/4000-10280.html#fdic400004-04.
[32] 85 Fed. Reg. at 7461.
[33] *Id.*

particular business line."[34] The FDIC anticipates that applicants would receive a written determination from the FDIC within 120 days of application submission.

The NPR's reliance on the proposed individual application review regime will create unnecessary burdens for IDIs and the FDIC and significant delays in qualified applicants' ability to do business.[35] Unless a more efficient approach is adopted, we would expect that many IDIs and their affiliates would seek to file multiple applications to address their many interconnected lines of business. This would result in a tremendous number of applications being filed in a short period of time after the final rule becomes effective.[36] We do not believe the FDIC has sufficient existing resources to review such a large volume of applications in a timely manner, in which case applicants will have to wait many months, or perhaps longer, for approval to operating under the primary purpose exception, despite the FDIC's projection in the NPR that responses should be received within 120 days of application filing.[37] This outcome would be especially inappropriate for entities that have structured their activities to conform to existing FDIC guidance regarding situations where the primary purpose exception applies. TIAA believes that no public policy purpose would be served by requiring a new application

[34] *Id.*

[35] Based on our prior experience with banking regulatory applications, including our applications to the FDIC to obtain and revise our "brokerage sweep" primary purpose exception, we believe that the FDIC has significantly underestimated the costs involved in the application process proposed in the NPR. In terms of time, the FDIC's assessment that an application will only take a respondent 3 to 10 hours to prepare (depending on level of complexity) does not adequately account for the amount of time required to prepare such applications. In order to prepare and file an application of this nature, IDIs and other applicants will often need to gather cross functional teams consisting of subject-matter experts from across their organizations, including both internal legal assistance as well as business stakeholders. Given the potential implications of these applications, applicants are likely to engage outside counsel for additional assistance. The costs of obtaining such outside counsel, particularly where outside counsel has expertise in the applicable FDIC requirements, are significant, ranging from at least several hundred dollars per hour to well in excess of one thousand dollars per hour. We have learned that outside counsel is likely to spend multiple hours drafting, reviewing, and revising such applications. Prior to submitting an application, IDIs will need to obtain sign-off from senior leadership, and potentially from their boards of directors, in a manner consistent with their internal governance processes. IDIs are also likely to review these applications with their primary functional regulators, as a matter of standard course. Such sign-off processes alone will require more than 3 to 10 hours of employee involvement to complete. TIAA believes that a more realistic estimate of the minimum amount of effort involved in preparing a simple application is 50 hours of work, while more complex applications would involve at least twice that level of effort and cost. In fact, we question how an application of regulatory significance could be completed and submitted in a matter of hours and still comply with regulatory guidance on risk management and governance standards for IDIs.

[36] The FDIC itself acknowledges in the NPR that a large number of applications would likely be filed under the proposed regime. *See Id.* at 7465 ("However, in the absence of a more refined figure, the FDIC estimated that 1,203 firms will apply for an exception based on placing less than 25 percent of customer assets under management on average each year over three years.").

[37] We believe the FDIC's analysis of the likely costs associated with the proposed application regime may understate the regulatory burdens that would be imposed on both the FDIC and on IDIs and other organizations that submit applications. Our belief is informed by the report recently issued by the FDIC's Office of Inspector General ("OIG") in which the OIG determined that from January 1, 2016 to December 31, 2018, "the FDIC's cost benefit analysis process was not consistent with widely recognized best practices identified by the OIG." In particular, we highlight the OIG's finding that "without thorough cost benefit analyses, the FDIC could implement or continue to enforce poorly conceived or overly burdensome rules." *See* OIG's "Cost Benefit Analysis Process for Rulemaking," (Feb. 2020), *available at*: https://www.fdicoig.gov/sites/default/files/report-release/20-003EVAL_0.pdf.

and/or disrupting long-standing business arrangements. Accordingly, we recommend that the proposed process be streamlined, as described in more detail below.

As the FDIC makes policy determinations through the application process regarding the scope of the primary purpose exception, it should codify these positions in regulations of general applicability. As has been demonstrated by other regulators,[38] such an approach would allow banking organizations to efficiently take advantage of new opportunities created by agencies' policy determinations without both the banking organization and agency incurring the costs and delays of requiring pro forma individual applications. We would expect that the FDIC will initially need to make policy decisions regarding novel third-party/IDI relationships through the primary purpose exception application process, but that, over time, the FDIC will develop standardized criteria to review similar relationships and standardized conditions to impose on successful applicants. We urge the FDIC to codify in a formal rulemaking any set of standardized criteria and conditions it develops as a result of the application process, which will allow IDIs and entities entering into relationships with IDIs to understand the framework they must follow to qualify for the primary purpose exception.

Any IDI seeking to operate under a set of criteria that have been published in a formal rulemaking should be permitted to submit a notice filing to the FDIC (which the FDIC may question or reject, if appropriate), rather than undergoing the individual application process proposed in the NPR. This would mirror the approach the Federal Reserve has taken in 12 CFR 225.22(a), where a bank holding company may engage in permissible non-bank activities through a notice filing in which it agrees to abide by predefined regulatory conditions. Where, on the other hand, the proposed arrangement is not covered by a codified set of criteria, the IDI and others would still be able to apply individually to avail itself of the primary purpose exception. This approach would allow the FDIC to satisfy its statutory mandate by setting the criteria for relying on the primary purpose exception, while also lightening the regulatory burden on IDIs, entities entering into arrangements with IDIs, and the FDIC. We also recommend that the FDIC make all applications (with appropriate redactions) publicly available, which will give IDIs and the public a better understanding of the FDIC's views on the scope of the primary purpose exception.

B. *The FDIC should codify criteria for reliance on the primary purpose exception that have been established through past informal guidance.*

In addition to codifying requirements for the primary purpose exception that will be developed through the application process, the FDIC should codify certain criteria that have been formulated through past advisory opinions. In particular, the FDIC should codify in a formal rulemaking the criteria under which a broker participating in a brokerage sweep program will qualify for the primary purpose exception, as originally set forth in FDIC Advisory Opinion 05-02 ("Advisory Opinion 05-02)[39] and recently reiterated (and temporarily modified) in FDIC Advisory Opinion 20-01 ("Advisory Opinion 20-01").[40] Advisory Opinion 05-02 considers whether a broker-dealer qualifies for the primary purpose exception where funds held in accounts owned by the broker-dealer are swept to accounts at an

---

[38] *See* 12 CFR §7.1002(b) [interpretation of national bank acting as a finder] (OCC); 12 CFR Part 7, Subpart A [codified interpretations] (OCC); and 12 CFR §225.28 [list of permissible nonbanking activities] (Federal Reserve).
[39] FDIC Advisory Opinion 05-02 (Feb. 3, 2005), *available at*: https://www.fdic.gov/regulations/laws/rules/4000-10350.html.
[40] FDIC Advisory Opinion 20-01 (Mar. 19, 2020), *available at*: https://www.fdic.gov/regulations/laws/rules/4000-10420.html#fdic400020-01.

affiliated bank as part of a brokerage sweep program. FDIC staff ultimately concludes that the broker-dealer in question meets the primary purpose exception, and that the swept funds are not brokered deposits, subject to a number of criteria. In Advisory Opinion 20-01, the FDIC reiterates the same criteria set forth in Advisory Opinion 05-02, but temporarily modifies one of the criteria for a period of six months. Specifically, Advisory Opinion 20-01 raises the "permissible ratio," which is the percentage of funds that may be swept from the broker-dealer's account to a bank, from 10 percent of the total amount of assets handled by the broker-dealer for clients who have elected to participate in the brokerage sweep program to 25 percent.

Because the criteria set forth in Advisory Opinion 05-02 and the increased permissible ratio temporarily established in Advisory Opinion 20-01 were never codified in general regulation, IDIs and their affiliated broker-dealers seeking to operate under these same criteria are currently required to apply individually to the FDIC for approval. In our view, this is an inefficient and unnecessary process. We believe the FDIC should instead codify in the final rule the criteria set forth in Advisory Opinion 05-02, with an increased permissible ratio of 25 percent as established temporarily in Advisory Opinion 20-01. The FDIC should also specify in the final rule that any organization that previously received approval to operate under these criteria will automatically be approved under the final rule, and their approvals will be updated to reflect the new 25 percent permissible ratio. Moreover, the final rule should provide that going forward, any organization seeking to operate under these same criteria will not be required to formally apply for the primary purpose exception under the NPR's proposed application regime, but must instead submit a notice filing with the FDIC agreeing to operate under the relevant conditions. This approach will allow the 28 organizations already operating under the terms of Advisory Opinion 05-02, as identified in the ANPR,[41] as well as other organizations establishing sweep programs in the future, to avoid unnecessary regulatory burdens and costs imposed by the FDIC.

V. **The FDIC should revise the primary purpose exception to clarify that the 25 percent requirement refers to customer assets *under management and/or administration* by the third party.**

In Question 9 of the NPR, the FDIC asks whether they should provide more clarity regarding what is meant by customer assets under "management" by a broker dealer or third party.[42] We believe the reference to "assets under management" should be amended for greater accuracy. We strongly support the FDIC's proposal to raise the permissible ratio under the primary purpose exception from 10 percent to 25 percent of the total assets that the agent or nominee has under management for its customers. However, to make this provision consistent with existing FDIC guidance (*e.g.*, Advisory Opinion 05-02), we recommend that the FDIC modify the wording slightly. Broker-dealers technically hold customer assets "under administration," rather than "under management." As such, we recommend that the FDIC clarify in the NPR that the primary purpose of an agent's or nominee's business relationship with its customers will not be considered to be the placement of funds, subject

[41] *See* 84 Fed. Reg. at 2369: "As of September 30, 2018, 28 insured depository institutions have indicated to the FDIC that they receive funds swept from an affiliated broker dealer under conditions that FDIC staff have indicated would support the affiliate being viewed as meeting the 'primary purpose' exception to the 'deposit broker' definition."
[42] 85 Fed. Reg. at 7459.

to an application process, if less than 25 percent of the total assets that the agent or nominee has *under management and/or administration* for its customers is placed at depository institutions.

VI. **The FDIC should broaden and clarify the meaning of a "business line".**

Question 12 of the NPR asks whether the FDIC has provided sufficient clarity regarding what will be considered a "business line" for purposes of the primary purpose exception, and if not, how it can provide more clarity. Question 12 also asks whether there are other factors that should be considered in determining an agent's or nominee's business line(s).[43] The NPR describes the term "business line" to mean "the business relationships an agent or nominee has with a group of customers for whom the business places or facilitates the placement of deposits."[44] As an example, the FDIC notes that "a company that offered brokerage accounts to various types of customers that allowed customers to buy and sell assets, with a traditional cash sweep option, would be considered a business line."[45]

We find this description too vague to be helpful. It is unclear from the NPR who will ultimately have the authority to determine what qualifies as a business line, or what institutions should do if they are unclear whether a particular relationship is a business line or not. Moreover, we disagree with the NPR's suggestion that each individual product a broker-dealer offers (*e.g.*, brokerage accounts with a cash sweep option) should necessarily be its own business line. Particularly where a broker-dealer is providing recommendations meant to help a retail customer achieve holistic financial wellness, the broker-dealer is likely to offer multiple products or services as part of a single session with the customer. Rather than taking the view that each product or service is its own business line, we recommend that the FDIC base its definition of a "business line" on the type of customer interaction involved. Under this approach, all products and services a broker-dealer offers to retail customers would be part of the same "retail" business line. Products and services offered by a broker-dealer as part of its commercial activity would be under a separate "commercial" business line (and we anticipate that commercial products would likely be divided up into far more business lines than retail products are). This would reduce the number of primary purpose exception applications IDIs need to submit for various business lines and make it easier for IDIs to determine how many business lines they have.

VII. **The criteria for operating subsidiaries to be eligible for the IDI Exception should be broadened.**

Question 7 of the NPR asks whether the criteria for including an operating subsidiary in the IDI Exception (as defined below) are too broad or too narrow.[46] We believe the criteria are much too narrow. Section 29 of the FDI Act excludes from the definition of "deposit broker" an IDI or its employees "with respect to funds placed with that depository institution" (the "IDI Exception").[47] The IDI Exception under Section 29 does not explicitly apply to operating subsidiaries of the IDI. However, the FDIC has proposed in the NPR that an IDI operating subsidiary would be eligible for the IDI Exception, provided that: (a) the subsidiary is a wholly owned operating subsidiary of the IDI,

---

[43] *Id.* at 7461.
[44] *Id.*
[45] *Id*.
[46] *Id.* at 7458.
[47] 12 U.S.C. § 1831f(g)(2)(a).

meaning that the IDI owns 100% of the subsidiary's outstanding stock; (b) the subsidiary places deposits of retail customers exclusively with the parent IDI; and (c) the subsidiary engages only in activities permissible for the parent IDI.[48]

We believe it is unreasonable to restrict the IDI Exception to operating subsidiaries that place deposits of only retail customers with the parent IDI on an exclusive basis. We can identify no policy justification for excluding from the IDI Exception operating subsidiaries that place deposits of non-retail customers. Moreover, the exclusivity requirement fails to recognize the fact that a particular IDI may not offer the full range of services that an operating subsidiary's customer needs, and therefore placing the customer's deposits with more than one IDI may be in the customer's best interest and necessary for the operation of the operating subsidiary. We also believe it is unreasonable and unnecessary to restrict the IDI Exception to only those operating subsidiaries that are 100% owned by an IDI. There are many compelling reasons why a bank might not own 100% of the voting interests of an operating subsidiary (*e.g.*, tax considerations), and a number of primary bank regulators, including the Office of the Comptroller of the Currency ("OCC"), have adopted definitions of "operating subsidiary" that requires only a greater than 50% ownership interest by the parent bank.

We recommend that the FDIC revise the requirements for operating subsidiaries to be eligible for the IDI Exception to reflect the criteria under which a bank's operating subsidiary will be considered a "qualifying subsidiary" pursuant to OCC regulations.[49] Namely, an operating subsidiary should be eligible for the IDI Exception if (a) the parent IDI has the ability to control the management and operations of the subsidiary, (b) the parent IDI owns and controls more than 50 percent of the voting interest of the operating subsidiary, and (c) the operating subsidiary is consolidated with the bank for accounting purposes. We believe this approach will allow more operating subsidiaries to take advantage of the IDI Exception – as is appropriate, in our view – while remaining consistent with the existing regulatory framework for operating subsidiaries.

VIII. **<u>Conclusion</u>.**

TIAA appreciates the FDIC's focus on this important topic. We believe that the recommendations discussed in this letter, if adopted, would help the FDIC achieve its important goal of improving and modernizing the current regulatory framework for brokered deposits. We welcome the opportunity to engage further on any aspect of the foregoing.

Sincerely yours,

[redacted]

Andrew C. Svarre

---

[48] 85 Fed. Reg. at 7458.
[49] *See* 12 CFR §5.34.