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Updated Brokered Deposit Guidance

FDIC Revises Frequently Asked Questions on Identifying, Accepting and Reporting Brokered Deposits

SUMMARY

On June 30, 2016, the Federal Deposit Insurance Corporation (the "*FDIC*") issued a Financial Institutions Letter (FIL-42-2016) providing revised guidance regarding brokered deposits in the form of Frequently Asked Questions (the "*2016 FAQs*"). The 2016 FAQs followed the FDIC's issuance of brokered deposit FAQs in January 2015, which created substantial industry concerns regarding the breadth of the definition of "brokered deposits," and the issuance of "updated" FAQs in November 2015 combined with a request for comment. The 2016 FAQs retained all of the proposed FAQs issued for comment, but with some key clarifications and new FAQs regarding, among other matters, application of exceptions to the "deposit broker" definition, duration of brokered status and implications of Prompt Correction Action ("*PCA*") on retention of brokered deposits. These revisions should alleviate a number of the industry concerns with the January 2015 FAQs.

The 2016 FAQs amend the guidance regarding the scope and application of certain exceptions to the "brokered deposit" definition and should result in a more rational application of several statutory exceptions:

- Application of the "primary purpose exception" will no longer require a specific "determination" by the FDIC that the exception is applicable in a given instance;
- The "employee exception" is applicable to "dual-hatted" employees – *i.e.*, persons who are exclusively employed by an insured depository institution ("*IDI*") but who may be licensed to sell securities and financial products on behalf of affiliates;
- "Call center" personnel (including dual employees and contractors) will generally not be classified as "deposit brokers"; and

- Federal, state and local government agencies may receive a fee for administrative costs and still qualify for application of the primary purpose exception in connection with deposits that are part of a debit or prepaid card program.

The 2016 FAQs also provide that brokered deposits may be reclassified as non-brokered after a 12-month period during which no third party is involved with the account.

The addition of a single word in one FAQ, however, appears to require that IDIs that lose their status as "well capitalized" institutions for purposes of PCA are no longer allowed to retain indefinitely their existing brokered deposits without obtaining a waiver from the FDIC.

BACKGROUND

Section 29 of the Federal Deposit Insurance Act ("*Section 29*"), as implemented by the FDIC's regulations at 12 C.F.R. § 337.6, places restrictions on the acceptance by certain IDIs of deposits that are obtained through "deposit brokers"[1] and therefore are deemed to be "brokered deposits."[2] IDIs that are not well capitalized may not accept (which includes not only actual acceptance, but also solicitation, renewal or rollover of) brokered deposits. Although an IDI that is adequately capitalized may request a waiver of this prohibition, these waivers cannot be sought in advance, the waiver process itself can take considerable time, and the FDIC appears increasingly reluctant to grant such waivers. IDIs that are not well capitalized also are subject to restrictions under Section 29 on the interest rates they may offer on deposits.

The classification of deposits as brokered can have a significant adverse impact on IDIs—including those that are well capitalized—that extends well beyond these statutory disqualifications and limitations. First, the amount of an IDI's brokered deposits can affect the following components of its deposit insurance assessment rate:

- for a large or highly complex institution, its core deposits ratio;
- 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
- 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.

Second, for a banking organization subject to the federal banking agencies' proposed minimum Liquidity Coverage Ratio ("*LCR*") requirement (generally applicable to banking organizations with at least $50 billion in assets), the assumed outflow rate applied to many brokered deposits is higher than that applied to other deposits.[3] For example, brokered deposits that are not reciprocal brokered or brokered sweep deposits are assigned a 100% outflow rate if they have no maturity or mature within the LCR's 30-day window. Third, federal banking agency guidance indicates that IDIs that "rely upon" brokered deposits should incorporate PCA-related downgrade triggers into their contingency funding plans; an IDI may not be able to renew or roll over existing brokered deposits upon such a downgrade and, consequently, may

need to access other sources of funding.[4] Fourth, brokered deposits—as defined in the liquidity coverage ratio rule[5]—are included as a source of short-term wholesale funding in measuring a U.S. global systemically important bank's ("*G-SIB*") reliance on short-term wholesale funding for purposes of assessing a risk-based capital surcharge on a U.S. G-SIB's common equity under the U.S. implementation of the Basel Committee's G-SIB capital surcharge framework.

Section 29 generally defines a "deposit broker" as a person "engaged in the business of placing deposits, or facilitating the placement of deposits," of third parties with IDIs.[6] The FDIC does not appear to require a person to be "engaged in the business" of facilitating the placement of deposits to satisfy the second prong of this definition.[7] The statutory definition of "deposit broker" is subject to certain enumerated exceptions; among others, these exceptions apply to an IDI (with respect to funds placed with that IDI itself); an employee of an IDI, with respect to funds placed with the employing institution; and an agent or nominee whose primary purpose is not the placement of funds with depository institutions.[8]

The FDIC has sought to provide more clarity with respect to these definitions and the corresponding exceptions through its implementing regulations at 12 C.F.R. § 337.6, as well as through a number of staff advisory letters issued over the years. Particular areas of focus have included determining whether certain activities constituted "placing deposits" or "facilitating the placement of deposits," and determining whether a person or entity otherwise involved in facilitation comes within the primary purpose exception.[9]

In addition, in response to a Congressional mandate in the Dodd-Frank Wall Street Reform and Consumer Protection Act, the FDIC issued the Core and Brokered Deposit Study in July 2011 (the "*2011 Study*"). Although reiterating that "there should be no particular stigma attached to the acceptance by well-capitalized banks of brokered deposits per se and that the proper use of such deposits should not be discouraged," the 2011 Study also expressed concerns about brokered deposits and recommended that Congress neither amend nor repeal the brokered deposit statute.[10] The 2011 Study reviewed the FDIC's prior brokered deposit guidance and set forth its position with respect to certain interpretive issues. The FDIC staff had repeatedly advised, since the publication of the 2011 Study and prior to the January 2015 FAQs, that the study represented the FDIC's definitive positions on brokered deposits. The positions set forth in the 2016 FAQs now supersede those taken in the 2011 Study in certain respects.

DISCUSSION

The 2016 FAQs are attached as Appendix I to this memorandum, and our blackline showing changes from the November 2015 FAQs is attached as Appendix II. The revisions and/or clarifications from the November 2015 FAQs of particular significance include the following.

A. NEW GUIDANCE ON EXCEPTIONS TO THE DEFINITION OF DEPOSIT BROKER

The 2016 FAQs (i) expand the scope and practical application of the primary purpose exception; (ii) clarify the application of the employee exception to "dual-hatted" employees; (iii) provide factors under

which "call center" personnel (including dual employees and contractors) will not be classified as deposit brokers; and (iv) limit the circumstances under which federal, state and local government agencies will be classified as deposit brokers for using debit or prepaid cards to deliver funds to beneficiaries of government programs.

1. General Application of the Primary Purpose Exception

The 2016 FAQs provide that the "FDIC considers each request to review and interpret" the primary purpose exception "on a case-by-case basis," deleting language in the November 2015 FAQs stating that the primary purpose exception (i) "applies only infrequently" and (ii) "typically requires a specific request for a determination by the FDIC." As had been argued by industry participants, none of Section 29, the FDIC's brokered deposit regulations, its advisory opinions, or the 2011 Study had mentioned this stringent application of the exception. The 2016 FAQs are now consistent with Section 29 and previous advisory opinions, neither requiring a specific determination from the FDIC or its staff in order to apply the primary purpose exception nor stating that the exception will only apply on "rare occasions."

2. Application of the Primary Purpose Exception to Limited Referral Programs

The 2016 FAQs appear to expand application of the primary purpose exception to certain affiliated employees who have "ongoing involvement" with a deposit account opened through a referral program. The November 2015 FAQs established a framework for addressing application of the primary purpose exception to deposits resulting from customer interactions with certain dual or affiliated employees who may assist a customer in opening a deposit account at the affiliated IDI, including through a referral. In determining whether the program was sufficiently limited in scope so as not to be deemed a brokered deposit arrangement, the November 2015 FAQs stated that the FDIC would consider whether (i) the program is designed to significantly drive deposit growth at the IDI; (ii) the cost of the incentive package is relatively small and the fee to the recipient *de minimis*; (iii) the payments are capped in total or limited in frequency; and (iv) the employees involved, if employed by an affiliate or subsidiary of the IDI, have ongoing involvement with the deposit account after it is opened. This fourth factor raised the concern that the framework did not account for the possibility that ongoing involvement by an affiliated employee may be evidence of the provision of "one-stop" banking services, as opposed to evidence that the employee is engaged in the business of placing or facilitating the placement of deposits. In the 2016 FAQs, the fourth factor has been deleted, alleviating this concern and establishing a framework for when affiliated employees may participate in limited referral arrangements without the deposits placed under those arrangements being classified as brokered that is consistent with modern, "one-stop" banking services.

3. Application of the Employee Exception to "Dual-Hatted" Employees

The 2016 FAQs provide that "dual-hatted" employees (persons who are exclusively employed by an IDI but who may be licensed to sell securities and financial products on behalf of an affiliate) who open deposit accounts on behalf of the IDI are not considered deposit brokers solely because they are licensed

to sell securities or other financial products to bank customers. The relevant FAQ, FAQ E4, clarifies that "dual-hatted" employees generally qualify for the statutory exception for employees of the IDI set forth in Section 29, which provides that a person is not a "deposit broker": (i) who is employed exclusively by the IDI; (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 IDI that employs such person.

Notably, the 2016 FAQs do not address industry concerns that the fourth prong of the employee exception may be interpreted to exclude certain "dual-hatted" employees who share office space with employees of affiliates or other entities. In a comment letter to the FDIC submitted by a collection of industry groups, it was pointed out that employees of IDIs that share office space with affiliate or third-party employees should qualify for the statutory exception provided that, consistent with existing regulatory restrictions on shared space,[11] the space used by the employee for banking activities is used solely for the benefit of the IDI, while the portion of the space used to perform functions for a subsidiary or an affiliate of the IDI or a third-party entity, is used solely for the benefit of that entity.[12] Such "dual-hatted" IDI employees are no differently situated than IDI employees, such as tellers, with respect to sharing office space with employees of affiliates or other entities for purposes of the employee exception, and thus should also be able to satisfy this prong of the statutory test. Because the 2016 FAQs do not specifically address this issue, the concern remains that the FDIC could find "dual-hatted" employees who work in such shared spaces to be ineligible for the employee exception.

4. Factors for Determining Classification of "Call Center" Personnel

A new FAQ also addresses the classification of "call center" personnel who primarily provide customer service support on behalf of the IDI by answering questions about accounts or bank-provided services or by transferring callers to appropriate areas of the IDI. In cases where "call center" personnel are exclusively employed by the IDI, the statutory employee exception will likely apply, exempting them from classification as a deposit broker. Where such personnel are dual employees or contractors and thus ineligible under the employee exception, these employees will nevertheless not be considered deposit brokers if (i) they merely transfer callers or provide general information and do not participate in the placement of deposits and (ii) their compensation is not based on the number of accounts opened or amount of deposits placed or maintained as a result of their contact with callers.

5. Modified Factors for Classifying Government Agencies That Disburse Funds Through Pre-Paid Cards

The November 2015 FAQs created new factors for determining whether federal, state or local government agencies that use debit or prepaid cards to deliver funds to the beneficiaries of government programs would be classified as deposit brokers. Under that guidance, an agency disbursing funds through debit or prepaid cards would be eligible for application of the primary purpose exception only when the agency (i) was mandated by law to disburse the funds to the beneficiaries; (ii) was the sole

source of funding for the deposit accounts; and (iii) did not receive any fees from the IDI. Under that framework, if a government agency received *any* fee from an IDI (including to cover administrative costs) in connection with choosing an IDI or opening an account with an IDI as part of a debit or prepaid cards program, the primary purpose exception would not apply to the deposits placed at the IDI. Under the 2016 FAQs, this final factor has been qualified and allows for the collection of fees "necessary to help cover the agency's administrative costs."

B. RECLASSIFICATION OF DEPOSITS AS NON-BROKERED

Another new FAQ provides that a brokered deposit that is not a time deposit (that is, a demand deposit, also known as a non-maturity deposit) can be reclassified as non-brokered after a 12-month period during which no third party (*i.e.*, a party other than the IDI and the depositor) is involved with the account. The FDIC based the 12-month period on the term historically offered for a certificate of deposit. The FDIC notes that this treatment of non-maturity deposits will create parity with the reclassification of most brokered CDs when they are renewed without involvement of a third party.

"Third-party involvement" includes (i) holding the account in the name of the deposit broker as agent for one or more customers; (ii) the deposit broker continuing to receive account fees after the account is opened; (iii) the deposit broker having the authority to make withdrawals or additional deposits; or (iv) the deposit broker having continued access to the account information, *i.e.*, access to the customer's account information that has been provided for the purpose of offering guidance to the customer as to the investment of the funds in the account.

The FDIC notes that involvement in non-maturity accounts could cease and then restart after a 12-month period lapse in involvement had resulted in the deposits being reclassified as non-brokered, which would then result in the deposits being reclassified as brokered.

C. WAIVER FOR AN ADEQUATELY CAPITALIZED IDI HOLDING BROKERED DEPOSITS

A new word in the 2016 FAQs suggests that an IDI that holds brokered nonmaturity deposits and loses its PCA well-capitalized status will not be permitted to hold its existing nonmaturity deposits indefinitely without obtaining a waiver from the FDIC. Under the 2016 FAQs, "[i]f an [IDI] is adequately capitalized for PCA purposes, the [IDI] may request a waiver from the FDIC to *retain or* accept brokered deposits" (emphasis added). This sentence, with the new "retain or" language, appears in 2016 FAQ F6, which addresses the treatment of nonmaturity deposits by an IDI that ceases to be well capitalized. FAQ F6 also states, before the sentence with the new language, that an IDI that ceases to be well capitalized "should contact its primary federal regulator to establish an appropriate supervisory plan for addressing how brokered demand deposits can comply with Section 29." It is not clear how the FDIC intends to apply in practice the interplay between establishment of an appropriate supervisory plan addressing nonmaturity deposits after an IDI ceases to be well capitalized and the possible need for a waiver for the IDI to continue to hold such deposits indefinitely.

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ENDNOTES

[1] 12 U.S.C. § 1831f; 12 C.F.R. § 337.6. Deposit brokers formerly were required by Section 29A of the FDIA to provide written notification to the FDIC that they were acting as such, but Congress repealed this requirement through the Financial Regulatory Relief and Economic Efficiency Act of 2000. As a result, the primary importance of the statutory definition of "deposit broker" is to characterize the deposits obtained by an IDI through such a deposit broker as "brokered deposits."

[2] Certain high-interest-rate deposits offered by IDIs that are less than well capitalized are considered "brokered deposits" even without any third-party involvement, as in those situations where the offering IDI itself is considered the "deposit broker" under the statute. *See* 12 U.S.C. § 1831f(g)(3).

[3] *See* 78 Fed. Reg. 71,818, 71,840 (Nov. 29, 2013). Generally, the outflow rate applied to a particular deposit depends in part on whether that deposit is brokered and, if so, whether it is a reciprocal brokered deposit, brokered sweep deposit, or other type of brokered deposit. The outflow rate applied to a particular brokered deposit also may depend on whether the deposit is fully insured, as well as its maturity.

[4] *See Interagency Policy Statement on Funding and Liquidity Risk Management* (March 17, 2010), at 13, *available at* http://www.federalreserve.gov/boarddocs/srletters/2010/sr1006a1.pdf.

[5] 12 C.F.R. § 249.3.

[6] 12 U.S.C. § 1831f(g)(1). A "deposit broker" also includes a person engaged in the business of placing deposits with IDIs for the purpose of selling interests in those deposits to third parties, and an agent or trustee who establishes a deposit account to facilitate a business arrangement to use the proceeds of the account to fund a prearranged loan. *Id.*

[7] *Cf*. FDIC Advisory Opinion 93-30 (June 15, 1993) ("When considered together, we believe these facts tend to support the conclusion that the Affinity Groups are neither 'engaged in the business of placing deposits' nor 'facilitating the placement of deposits' with the Bank, as contemplated by section 29.").

[8] 12 U.S.C. § 1831f(g)(2).

[9] *See, e.g.*, FDIC Advisory Opinion 04-04 (July 28, 2004) (finding that an Internet listing service that met certain criteria was not "facilitating the placement of deposits"); FDIC Advisory Opinion 05-02 (Feb. 3, 2005) (finding the "primary purpose" exception to apply in the case of a brokerage firm that swept idle customer funds into transaction accounts at affiliated banks, provided certain conditions were met).

[10] 2011 Study at 3.

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

ENDNOTES (CONTINUED)

[12] *See* Letter from The Clearing House, American Bankers Association, the Financial Services Roundtable, the Independent Community Bankers of America and the Institute of International Bankers, regarding November 13, 2015 Financial Institutions Letter (FIL-51-2015) (Dec. 28, 2015).

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IDENTIFYING, ACCEPTING AND REPORTING BROKERED DEPOSITS
FREQUENTLY ASKED QUESTIONS
(Updated June 30, 2016)

A. BROKERED DEPOSITS AND DEPOSIT BROKERS

A1. What is a "brokered deposit"?

The term "brokered deposit" is defined in the FDIC's regulations as "any deposit that is obtained, directly or indirectly, from or through the mediation or assistance of a deposit broker."[1] Thus, the meaning of the term "brokered deposit" depends upon the meaning of the term "deposit broker."[2]

A2. What is a "deposit broker"?

Under Section 29 of the Federal Deposit Insurance (FDI) Act, a "deposit broker" is "[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."[3] As explained in the FDIC's *Study on Core Deposits and Brokered Deposits*, the definition of deposit broker is broad.[4] This definition is subject to certain exceptions (discussed in section E of this document). As a result of this broad definition, a brokered deposit may be any deposit accepted by an insured depository institution from or through a third party, such as a person or company or organization other than the owner of the deposit.[5]

A3. How does the FDIC view brokered deposits?

Brokered deposits can be a suitable funding source when properly managed as part of an overall, prudent funding strategy. However, some banks have used brokered deposits to fund unsound or rapid expansion of loan and investment portfolios, which has contributed to weakened financial and liquidity positions over successive economic cycles. The overuse of brokered deposits and the improper management of brokered deposits by problem institutions have contributed to bank failures and losses to the Deposit Insurance Fund.[6]

A4. What are the restrictions on brokered deposits?

Section 29 of the FDI Act includes restrictions on the acceptance of brokered deposits and certain restrictions on deposit interest rates. Under Section 29, an undercapitalized insured depository institution may not accept, renew, or roll over any brokered deposit.[7] An adequately capitalized insured depository institution may not accept, renew, or roll over any brokered deposit unless the institution has

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[1] *See* 12 C.F.R. § 337.6(a)(2).
[2] *See* FDIC's *Study on Core Deposits and Brokered Deposits*, issued in July 2011, Section II.
[3] *See* 12 U.S.C. § 1831f; *see also* 12 C.F.R. § 337.6(a)(5)(i)(A).
[4] *See Study on Core Deposits and Brokered Deposits*, Sections II & IV.
[5] *See Study on Core Deposits and Brokered Deposits*, Section II.
[6] *See Study on Core Deposits and Brokered Deposits*, Section V.A.
[7] Capital group assignments are made quarterly in accordance with the FDIC's Rules and Regulations, using the method agreed upon by the Federal Financial Institutions Examination Council Surveillance Task Force for calculating capital ratios. The method uses data reported in an institution's Consolidated Reports of Income and Condition (Call Reports), Report of Assets and Liabilities of U.S. Branches and Agencies of Foreign Banks, or Thrift Financial Report. *See* Capital Groups (available at: https://www.fdic.gov/deposit/insurance/risk/rrps_ovr.html).

applied for and been granted a waiver by the FDIC. A well-capitalized insured depository institution, for the purposes of Section 38 of the FDI Act, is not restricted by Section 29 in accepting or renewing brokered deposits.[8]

Deposit rate restrictions prevent a bank that is not well capitalized from circumventing the prohibition on brokered deposits by offering rates significantly above market in order to attract a large volume of deposits quickly. As a general rule, a bank that is not well capitalized may not offer deposit rates more than 75 basis points above average national rates for deposits of similar size and maturity. See section G of this document for additional information.

A5. What factors are considered when determining if a third party is a deposit broker?

The definition of deposit broker applies to third parties engaged in "placing deposits" and "facilitating the placement of deposits." The term "facilitating the placement of deposits" is interpreted broadly to include actions taken by third parties to connect insured depository institutions with potential depositors. As a result, a third party could be a deposit broker even when the third party does not open bank accounts on behalf of depositors or directly place funds into bank accounts.[9]

The third party may qualify as a deposit broker even if it receives no fees or other direct compensation from the depository institution where the funds are placed.[10] The fee structure is simply one factor used by the FDIC in determining whether a particular party is a deposit broker. Other factors include the nature of the fees (*i.e.,* whether the amount of the fees is connected to the amount of deposits placed at the insured depository institution), the purported purpose of the fees (*i.e.,* whether the fees are intended to reward the third party for placing deposits as opposed to rewarding the third party for providing some other service), and the degree of involvement by the third party in placing the deposits. Ultimately, brokered deposit and deposit broker classifications are fact specific, and each determination is considered on a case-by-case basis.

B. PLACING DEPOSITS AND FACILITATING THE PLACEMENT OF DEPOSITS

B1. What activity qualifies as "placing deposits?"

A third party "places deposits" for others when the third party actually delivers the funds to an insured depository institution.[11] In this situation, unless the third party is covered by one of the exceptions to the definition of deposit broker (discussed in section E of this document), the third party will be a deposit broker and the deposits will be brokered deposits.

B2. What activities qualify as "facilitating the placement of deposits?"

When 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.[12]

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[8] A bank under a formal agreement with a directive to meet or maintain a specific capital level is not considered to be well capitalized.
[9] *See* Advisory Opinion No. 92-79 (November 10, 1992); *see also Study on Core Deposits and Brokered Deposits*, Section IV.
[10] *See* Advisory Opinion No. 94-15 (March 16, 1994).
[11] *See id.*
[12] *See* Advisory Opinion No. 92-79 (November 10, 1992).

B3. Are there instances when facilitating the placement of deposits or placing deposits would not be considered the brokering of deposits?

Yes. For example, one of the exceptions to the definition of "deposit broker" is the "trustee of a pension or other employee benefit plan, with respect to funds of the plan."[13] Under this exception, the trustee is not classified as a deposit broker even if the trustee places the plan's deposits (or facilitates the placement of the plan's deposits) at an insured depository institution.[14]

B4. Do companies or organizations that provide marketing for an insured depository institution, in exchange for volume-based fees, qualify as deposit brokers because they are facilitating the placement of deposits?

Yes. Some insured depository institutions attempt to attract new depositors through advertising or referrals by third parties (such as nonprofit affinity groups as well as commercial enterprises), in exchange for volume-based fees. In these cases, the FDIC has taken the position that the third party is "facilitating the placement of deposits" by connecting the depository institution with new account holders. Hence, the third party is a deposit broker, and the deposits would be brokered.[15]

B5. Do third parties that design deposit products, such as deposit accounts with special features, qualify as deposit brokers?

Some third parties design deposit products with special features, such as deposit accounts that produce interest or rewards based on account activity. If a company merely designs deposit products or deposit accounts for one or more banks, without placing deposits or facilitating the placement of deposits at these banks, the company will not be classified as a deposit broker. However, as discussed in B4, if a company also markets the bank's deposit products in exchange for volume-based fees, then it would be a deposit broker, and the deposits would be brokered.[16]

B6. Are insurance agents, lawyers, or accountants that refer clients to a bank considered to be deposit brokers?

It depends. The FDIC recognizes that within a community, there are many business professionals that conduct banking business with a particular insured financial institution, and due to that banking allegiance, often refer their customers to a particular financial institution on an informal basis for deposit products. The deposits produced by those types of informal deposit referrals would generally not be considered brokered. The deposits would be brokered, however, in more formal, programmatic arrangements between the insured depository institution and the business professionals, such as where (1) the professional has entered into a written agreement with the bank for the referral of depositors; or (2) the professional receives fees from the bank. In these cases, the FDIC would generally consider the professional to have facilitated the placement of deposits in the bank, and therefore, the deposits received by the bank would be brokered.[17]

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[13] *See* 12 U.S.C. § 1831f(g)(2)(D).
[14] *See Study on Core Deposits and Brokered Deposits*, Section II.B.
[15] *See* Advisory Opinion No. 93-71 (October 1, 1993); Advisory Opinion No. 93-30 (June 15, 1993).
[16] *See* Advisory Opinion Nos. 15-02 (June 6, 2014) and 15-03 (December 18, 2014).
[17] *See* Advisory Opinion No. 15-04 (February 4, 2015).

B7. What is an example of when the deposits in a programmatic arrangement to refer depositors are not brokered deposits?

Some banks have programs where bank customers or employees of subsidiaries or affiliates of the bank can earn bonuses in the form of cash, merchandise, or a higher interest rate on a deposit for referring depositors. These programs are sometimes referred to as "friends and family" or loyalty programs. Although these arrangements may be formal and programmatic because they are both covered by a written agreement and the referring individual is paid a fee, the FDIC might determine that the program is sufficiently limited in scope so that it is not deemed to be a brokered deposit arrangement.[18] In this regard, the FDIC considers whether the program is designed to significantly drive deposit growth to the insured depository institution or is merely a small recognition of the customer's or employee's loyalty to the bank.

In making the determination, the FDIC considers whether the cost of the incentive package to the bank is relatively small, the fee is de minimis to the recipient, and payments are capped in total amount or limited in frequency per individual.

B8. What if a person or a group merely endorses a bank? Will the person or group be classified as a deposit broker?

If an individual or a group merely makes a general endorsement of a bank in exchange for a flat fee (*i.e.*, a fee unrelated to the number of accounts or amount of deposits generated by the endorsement), then that person or group will not be classified as a deposit broker. In such cases, the endorsements are not viewed as active marketing.[19] Note, however, that the endorsement cannot appear in promotional materials produced or distributed by the individual or the group. Rather, the endorsement must appear in promotional materials produced and distributed by the bank. Otherwise, the individual or group providing the endorsement will be a deposit broker, and the deposits would be brokered.[20]

C. BANK NETWORKS

C1. What is a bank network?

In a bank network, a participating bank places funds at other participating banks through the network in order for its customer to receive full insurance coverage. For example, if a customer deposits $1 million into his or her institution, the customer's bank retains the deposit insurance limit (that is, $250,000) and places the excess of $750,000 at three other institutions in insured increments of $250,000.

In more complex arrangements, the customer's bank may be part of a deposit placement network that is managed by a third-party network sponsor. In this situation, when the customer deposits $1 million, the customer's bank sends the uninsured portion to a settlement bank, which then places the funds at other banks within the network at the direction of the network sponsor.

At its most complex level, the network sponsor is facilitating the placement of millions of dollars in excess funds for all of the banks in the network. Often, these placements are made through reciprocal arrangements, in which institutions within the network are both sending and receiving identical amounts simultaneously (reciprocal deposits). This reciprocal arrangement allows the bank to maintain the same

[18] *See* Advisory Opinion No. 94-37 (July 19, 1994); *see also Study on Core Deposits and Brokered Deposits*, Section VIII.E.
[19] *See* Advisory Opinion No. 93-30 (June 15, 1993).
[20] *See* Advisory Opinion No. 93-71 (October 1, 1993).

amount of funds it had when the customer made his or her initial deposit, while ensuring that deposits in excess of the $250,000 deposit limit are fully insured.[21]

C2. When companies facilitate the placement of deposits through a bank network, are they acting as deposit brokers?

Yes. In sponsoring or operating a bank network, the company is facilitating the placement of deposits. Moreover, in acting as agents for customers in placing the customers' funds at other insured depository institutions, the banks themselves are placing deposits and thus serving as deposit brokers. The involvement of deposit brokers in these networks means that the deposits are brokered deposits.[22]

C3. When a bank only places deposits within a network of affiliated banks, is the bank acting as a deposit broker?

Yes. If a bank, or its parent company, places part or all of a depositor's funds with affiliated banks, then it is acting as a deposit broker. As a result, the deposits are brokered deposits.[23]

D. LISTING SERVICES

D1. What is a listing service?

A listing service is a company that compiles and publishes information about deposit accounts at many different banks for consideration by interested depositors. The information published by a listing service will include the interest rates offered by the various banks. Some listing services operate Internet sites open to the public, while others provide information solely to banks and institutional investors who are willing to pay subscription fees.[24]

D2. When does a listing service qualify as a deposit broker?

If the listing service places deposits or facilitates the placement of deposits (in addition to compiling and publishing information on interest rates and other features of deposit accounts), the listing service is a deposit broker, and the deposits would be brokered. In determining whether a particular listing service is facilitating the placement of deposits, the FDIC applies the criteria set forth in FDIC Advisory Opinion No. 04-04 (July 28, 2004).

The FDIC does *not* treat the listing service as a deposit broker if the company satisfies *each* of the following requirements:

> (A) The person or entity providing the listing service is compensated solely by means of subscription fees (*i.e.*, the fees paid by subscribers as payment for their opportunity to see the rates gathered by the listing service) and/or listing fees (*i.e.*, the fees paid by depository institutions as payment for their opportunity to list or "post" their rates). The listing service does not require a depository institution to pay for other services offered by the listing service or its affiliates as a condition precedent to being listed.

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[21] *See Study on Core Deposits and Brokered Deposits*, Section IV.E.
[22] *See Study on Core Deposits and Brokered Deposits*, Section IV.E.
[23] *See Study on Core Deposits and Brokered Deposits*, Sections IV.E. and VIII.E.
[24] *See* Advisory Opinion No. 90-24 (June 12, 1990); *see also Study on Core Deposits and Brokered Deposits*, Section IV.A.

(B) The fees paid by depository institutions are flat fees, not calculated on the basis of the number or dollar amount of deposits accepted by the depository institution as a result of the listing or posting of the depository institution's rates.

(C) In exchange for these fees, the listing service performs no services except: (1) the gathering and transmission of information concerning the availability of deposits; and/or (2) the transmission of messages between depositors and depository institutions including purchase orders and trade confirmations. In publishing or displaying information about depository institutions, the listing service must not attempt to steer funds toward particular institutions, except that the listing service may rank institutions according to interest rates and also may exclude institutions that do not pay the listing fee. Similarly, in any communications with depositors or potential depositors, the listing service must not attempt to steer funds toward particular institutions.

(D) The listing service is not involved in the physical placement of deposits. Any funds to be invested in deposit accounts are remitted directly by the depositor to the insured depository institution and not, directly or indirectly, by or through the listing service.[25]

D3. Why does the FDIC treat some listing services as deposit brokers, but not others?

The FDIC recognizes a distinction between providing information about deposit accounts and facilitating the placement of deposits. If a listing service or other company merely provides information, without attempting to steer potential depositors to particular insured depository institutions, the FDIC believes that the company is not facilitating the placement of deposits. In Advisory Opinion No. 92-50 (July 24, 1992), the FDIC staff explained the distinction as follows: "Where the only function of a deposit listing service is to provide information on the availability and terms of accounts, we believe that the listing service is not facilitating the placement of deposits. Rather, it facilitates the decision of the would-be buyer whether (and from whom) to buy a certificate of deposit; it is not facilitating the *placement* of deposits *per se.*"

A similar analysis applies to communications companies (such as radio or television stations or Internet Web sites) that run advertisements for insured depository institutions. If the advertising platform is operated in a neutral manner, so that any insured depository institution could run advertisements, the FDIC would not treat the communications company as a deposit broker.

E. EXCEPTIONS TO THE DEFINITION OF DEPOSIT BROKER

E1. What are the exceptions to the definition of deposit broker?

By statute, as implemented under the FDIC's regulations, the definition of deposit broker is subject to a list of exceptions.[26] The FDIC has applied these exceptions in a number of Advisory Opinions. Based on the list of exceptions, the FDIC does *not* treat any of the following parties as a deposit broker:

(A) An insured depository institution, with respect to funds placed with that depository institution;[27]

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[25] *See Study on Core Deposits and Brokered Deposits*, Section IV.A.
[26] *See* 12 U.S.C. § 1831f(g)(2); *see also* 12 C.F.R. § 337.6(a)(5)(ii).
[27] An insured depository institution that is not well capitalized is, however, subject to interest rate restrictions under Section 29 of the FDI Act and the implementing regulations. See section G of this document.

(B) An employee of an insured depository institution, with respect to funds placed with the employing depository institution;

(C) A trust department of an insured depository institution, if the trust or other fiduciary relationship in question has not been established for the primary purpose of placing funds with insured depository institutions;

(D) The trustee of a pension or other employee benefit plan, with respect to funds of the plan;

(E) A person acting as a plan administrator or an investment adviser in connection with a pension plan or other employee benefit plan provided that person is performing managerial functions with respect to the plan;

(F) The trustee of a testamentary account;

(G) The trustee of an irrevocable trust . . . as long as the trust in question has not been established for the primary purpose of placing funds with insured depository institutions;[28]

(H) A trustee or custodian of a pension or profit-sharing plan qualified under section 401(d) or 403(a) of the Internal Revenue Code of 1986;[29]

(I) An agent or nominee whose primary purpose is not the placement of funds with depository institutions; or

(J) An insured depository institution acting as an intermediary or agent of a U.S. government department or agency for a government sponsored minority or women-owned depository institution deposit program.

E2. In regard to the exception for an "insured depository institution, with respect to funds placed with that depository institution," does the exception apply to a company affiliated with that institution, including a parent or a subsidiary?

No. This exception only applies to the insured depository institution.[30] However, an affiliate, including a parent or a subsidiary, might not be a deposit broker for other reasons, as discussed in sections B and E of this document.

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)?

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[28] Note that the statutory definition of "deposit broker" includes "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." *See* 12 U.S.C. § 1831f(g)(1)(B).
[29] *See* 26 U.S.C. § 401(d) or § 403(a).
[30] *See* Advisory Opinion No. 92-68 (October 21, 1992); *see also Study on Core Deposits and Brokered Deposits*, Section VIII.E.

No. This statutory exception applies solely to an "employee" who satisfies the definition of an employee provided by the statute. The statute defines an "employee" as 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."[31] This exception will not apply to a contractor or dual employee because he/she will not be employed exclusively by the insured depository institution as set forth in the statute.[32]

As discussed in sections B and E of this document, even if the "employee" exception is not applicable, other reasons may exist for not considering a dual employee or contractor a deposit broker.

E4. A "dual-hatted" employee is a person employed exclusively by the bank but who may be licensed to sell securities or other financial products. Are these employees considered to be deposit brokers?

Generally no. Unlike dual employees, so-called "dual-hatted" employees are employed exclusively by the bank. These employees may open deposit accounts on behalf of the bank and would not be considered deposit brokers solely because they are licensed to sell securities or other financial products to bank customers. Whether "dual-hatted" employees meet each of the other statutory elements of "employee" depends on the facts and circumstances of the situation.

E5. Do situations exist when contractors and dual employees are not considered to be deposit brokers?

Yes. The FDIC does not believe that dual employees or contractors should be classified as deposit brokers in all situations. Although dual employees and contractors are not "employees" of the insured depository institution under the statute because they are not "employed exclusively by the insured institution," other exceptions may apply or they may not be considered to be engaged in the business of "placing deposits" or "facilitating the placement of deposits."

Consider a broker-dealer affiliate of an insured depository institution where employees of the affiliate are also employees of the insured depository institution. The fundamental role of some employees of this affiliated company may be to sell securities to clients, but they may also recommend deposit products. If a client wishes to invest in a deposit product, the dual employee refers the client to a bank employee or may open the account personally. The broker-dealer affiliate is paid a fee, part of which is paid to the dual employee as a sales commission for opening the account and part of which is paid for the employee's continual interaction with the client in order to monitor balance activity, address client inquiries about rates, and provide information regarding additional accounts or account services, such as wire services. The ongoing fee is based on the balance of the account. In this case, the dual employee would be considered to have facilitated the placement of deposits, and the deposits would be brokered.[33]

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[31] *See* 12 U.S.C. § 1831f(g)(4); *see also* 12 C.F.R. § 337.6(a)(6).
[32] *See id.*
[33] *See* Advisory Opinion No. 94-15 (March 16, 1994); *see also Study on Core Deposits and Brokered Deposits*, Section VIII.E.

On the other hand, dual employees or contractors who merely perform "back-office" administrative work (and who are not involved in facilitating the placement of deposits) would not qualify as deposit brokers.

E6. Are "call center" personnel considered to be deposit brokers?

Generally, no. For purposes of these FAQs, "call center" personnel primarily provide customer service support on behalf of the bank by answering questions about accounts or bank-provided services or by transferring callers to appropriate areas of the bank. Call center personnel may also answer questions about products and services provided by companies affiliated with the bank. Call center personnel may be employed exclusively by the bank, may be dual employees of the bank and its affiliates, or may be contractors. Most often, call center personnel transfer, or "hand off," a customer seeking to open a deposit account to a bank employee, although call center personnel may sometimes be empowered to open accounts.

In cases where "call center" personnel are exclusively employed by a bank, the employee will likely fall under the statutory exception of "employee," and therefore would not be considered a deposit broker, even if they are empowered to open accounts on behalf of the bank. Furthermore, call center personnel who are dual employees or contractors would not be considered a deposit broker if: (1) they merely transfer callers or provide general information and do not participate in the placement of deposits; and (2) compensation is not based on the number of accounts opened or amount of deposits placed or maintained at a bank as a result of call center personnel's contact with the caller.

Even if "call center" personnel are not deposit brokers, it would not necessarily mean that the deposits will not be brokered. If another party, other than "call center" personnel, is involved in the placement of the deposit, a separate analysis would be necessary to determine the status of that party.

E7. In regard to the exceptions for "insured depository institutions" and their "employees" (discussed above), would these exceptions apply to affiliates or independent agents located in foreign countries?

No exception exists for entities or persons who seek or gather deposits in foreign countries.[34] Unless the entity is an actual foreign branch of the insured depository institution that receives the funds, or the person is an actual "employee" as defined above, the deposits obtained by these entities or persons will be brokered deposits.

E8. Are deposits placed by the trust department of an insured depository institution classified as brokered deposits?

As stated above, the definition of deposit broker includes the following exception: "A trust department of an insured depository institution, if the trust or other fiduciary relationship in question has not been established for the primary purpose of placing funds with insured depository institutions."[35] Under this exception, a bank's trust department might or might not qualify as a deposit broker. For example, if the trust department is acting as a traditional trustee with fiduciary responsibilities and investment discretion over the assets of an irrevocable trust, the trust department will not be a deposit broker because the trust relationship will have been established for the primary purpose of administering the trust and not for the primary purpose of "placing funds with insured depository institutions."

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[34] *See* Advisory Opinion No. 96-4 (February 5, 1996).
[35] *See* 12 U.S.C. § 1831f(g)(2)(C); *see also* 12 C.F.R. § 337.6(a)(5)(ii)(C).

On the other hand, if the trust department is merely assisting customers in placing funds at insured depository institutions so that the customers may obtain total FDIC insurance coverage in excess of the $250,000 limit, the trust department will be a deposit broker and the deposits (at the receiving insured depository institution) will be brokered deposits. In Advisory Opinion No. 92-87 (December 9, 1992), the FDIC staff explained the distinction as follows: "The brokered deposit restrictions were not intended to curtail the normal activities of trust departments, but since a blanket exemption for all trust department activities might have led to circumvention of the statute through various trust-type mechanisms, the statute imposed a 'primary purpose' test. The primary purpose test serves to distinguish the normal activities of trust departments from arrangements that have the purpose and effect of circumventing the statute. The 'primary purpose' of an agreement with a trust department can only be determined on a case-by-case basis, in light of the particular facts and circumstances of each case."

E9. What is the "primary purpose" exception to the definition of a deposit broker?

This exception applies to the following: "An agent or nominee whose primary purpose is not the placement of funds with depository institutions."[36] This exception is applicable when the intent of the third party, in placing deposits or facilitating the placement of deposits, is to promote some other goal (*i.e.,* other than the goal of placing deposits for others).[37] The primary purpose exception is *not* applicable when the intent of the third party is to earn fees through the placement of the deposits. Also, the applicability of the primary purpose exception does not depend upon a comparison between the amount of revenue generated by the third party's deposit-placement activities and the amount of revenue generated by the third party's other activities.[38] Rather, as previously stated, the applicability of the primary purpose exception depends upon the intent of the third party in placing deposits (or facilitating the placement of deposits).

The next several FAQs will address the primary purpose exception. The FDIC considers each request to review and interpret this exception on a case-by-case basis. In interpreting the application of the primary purpose exception, the FDIC frequently relies upon information provided by the requesting party, and other available information. As a result, changes in the program or in the facts as they had been provided by the requesting party, may trigger a reassessment of the original determination.

E10. Does the primary purpose exception apply to companies that distribute financial products (such as prepaid cards) that provide access to funds at one or more insured depository institutions?

Whether such companies qualify as deposit brokers depends upon the circumstances. As illustrated by the FAQs below, the primary purpose exception generally does *not* apply to such companies, and consequently, they are classified as deposit brokers, and the deposits would be brokered.[39]

E11. Does the primary purpose exception apply to companies that sell or distribute general purpose prepaid cards?

No. Some companies operate general purpose prepaid card programs, in which prepaid cards are sold to members of the public at retail stores or other venues. After the funds are collected from the

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[36] *See* 12 U.S.C. § 1831f(g)(2)(I); *see also* 12 C.F.R. § 337.6(a)(5)(ii)(I).
[37] *See* Advisory Opinion No. 94-13 (March 11, 1994).
[38] *See* Advisory Opinion No. 90-21 (May 29, 1990).
[39] *See Study on Core Deposits and Brokered Deposits*, Section IV.F.

cardholders, the funds may be placed by the card company or other third party into a custodial account at an insured depository institution. The funds may be accessed by the cardholders through the use of their cards.

The selling or distributing of general purpose prepaid cards, accompanied by the placement of the cardholders' funds into a deposit account, is not secondary or incidental to the accomplishment of some other objective on the part of the prepaid card company. The 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. Therefore, prepaid card companies or other third parties, in selling or distributing prepaid cards, would qualify as deposit brokers, with the result that the deposits are classified as brokered deposits.[40]

E12. Does the primary purpose exception apply to companies or organizations that distribute debit cards or similar products that serve multiple purposes? For example, what if a debit card provides access to funds in a bank account but also serves as a college identification card?

In evaluating this scenario, the FDIC would consider the following factors: (1) the stated primary purpose of the third party in distributing or marketing the debit cards; (2) the features of the card (such as whether the card is reloadable and whether the card will provide access to a permanent account in the student's name at the insured depository institution); and (3) the compensation (if any) received by the third party from the bank for distributing or marketing the cards.

For example, in the case of a debit card distributed to students by a college, the stated primary purpose of the card might be to promote education. In making this argument, the college (or the insured depository institution) might rely upon the fact that the card will serve as the cardholder's student identification card and vehicle for access to student loan funds. Other factors such as the reloadability of the card and the permanency of the account, however, might indicate that the primary purpose of the card is to provide access to the account at the insured depository institution. This conclusion would be confirmed by the payment of fees or commissions to the college by the insured depository institution as compensation for distributing or marketing the cards. Under these facts, the primary purpose exception would be inapplicable. Therefore, the college would be a deposit broker, and the associated funds would be brokered deposits.

E13. What is an example of a company that distributes prepaid cards (providing access to funds at an insured depository institution) without being classified as a deposit broker?

An example is a corporation that distributes prepaid cards as part of a rebate program. In this scenario, the corporation places its own corporate funds (not the cardholders' funds) into an account at an insured depository institution. The cardholders collect their rebates by using the cards. Thus, the distribution of prepaid cards in this case is no different than the distribution of checks (payable against the corporation's checking account). The corporation is not a deposit broker.

Of course, if a third party (not the corporation) is involved in the placement of the corporation's funds into the account at the insured depository institution, the third party would be a deposit broker. As a result, the deposits would be brokered deposits.[41]

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[40] *See Study on Core Deposits and Brokered Deposits*, Section IV.F.
[41] *See Study on Core Deposits and Brokered Deposits*, Section IV.F.

E14. How does FDIC treat federal, state, or local agency ("agency") funds disbursed to beneficiaries of government programs through debit cards or prepaid cards?

Agencies sometimes use debit or prepaid cards to deliver funds to the beneficiaries of government programs. In some cases, the program is structured so that each beneficiary will own a separate deposit account at a particular insured depository institution (with the account being accessible by the beneficiary through the use of a debit card). Other programs may be structured so that multiple beneficiaries will own a commingled deposit account with "per beneficiary" or "pass-through" deposit insurance coverage (with the commingled account being accessible by the beneficiaries through the use of prepaid cards). In these scenarios, though the deposits will not belong to the government but instead will belong to the beneficiaries, the agency might be involved in choosing the insured depository institution or in opening the deposit accounts. Nevertheless, the agency would not be considered a deposit broker if it meets one of the exceptions to the definition of deposit broker.

The exception that might be applicable in this circumstance is the primary purpose exception. The FDIC would apply this exception when the agency:

1. Is mandated by law to disburse the funds to the beneficiaries;
2. Is the sole source of funding for the deposit accounts; and
3. Does not receive fees from the insured depository institution, other than those fees necessary to help cover the agency's administrative costs.

Satisfaction of these requirements would indicate that the primary purpose of the agency, in facilitating the placement of the beneficiaries' deposits, is not to provide the beneficiaries with a deposit-placement service or to assist the insured depository institution in expanding its deposit base. Rather, satisfaction of these requirements would indicate that the primary purpose of the agency is simply to discharge the government's legal obligations to the beneficiaries. Therefore, the agency would be covered by the primary purpose exception with the result that the deposits would *not* be classified as brokered deposits.[42] When a request is received for a primary purpose exception for a government program, this interpretation applies to programs involving (1) the agency, (2) the insured depository institution, and (3) the beneficiaries of the program. If another party is involved with operating the program, the FDIC will need to make a separate determination as to whether that third party is a deposit broker.

F. ACCEPTING DEPOSITS

F1. When does an insured depository institution "accept" a deposit?

A deposit is "accepted" when the insured depository institution receives the funds. Under Section 29 of the FDI Act, an insured depository institution may accept brokered deposits without restriction if the institution is well capitalized for the purposes of section 38 of the FDI Act. In contrast, if the insured depository institution is adequately capitalized, the institution cannot accept brokered deposits unless it has obtained a waiver from the FDIC. Finally, if the institution is undercapitalized, it may not accept brokered deposits under any circumstances.

F2. Does a renewal or rollover of an account qualify as an acceptance of a deposit?

[42] This response was based on several oral inquiries received in 2015 regarding federal and state benefits delivered via debit cards and prepaid cards.

Yes. The funds in a certificate of deposit (CD) account are accepted when the account is renewed or rolled over.[43] Of course, an acceptance of a deposit is not restricted under Section 29 of the FDI Act unless the deposit is accepted from or through a deposit broker. Therefore, if no third party is involved with the CD account at the time of renewal or rollover, the insured depository institution will be free to accept the deposit (*i.e.,* renew the account), even if the institution is not well capitalized at the time of the renewal or rollover and even if a third party (*i.e.*, a deposit broker) was involved with the original opening of the account.[44]

However, *any* type of involvement by the third party will be sufficient to qualify the renewed account as a brokered deposit. For example, the payment of a fee to the third party by the insured depository institution, such as a "renewal fee," would constitute involvement. A common example of involvement would be the actual holding of the account in the name of the third party (as agent or custodian for the owner or owners). Another example of involvement by the third party would be its continued access to account information that has been provided for the purpose of offering guidance to the customer as to the investment of the funds in the account.[45] As a result of these types of involvement, or any other types of involvement by the third party, the renewed account would be a brokered deposit subject to the restrictions in Section 29.

F3. Can a brokered deposit that is not a time deposit (such as a demand deposit account), also known as a nonmaturity deposit, ever be reclassified as nonbrokered?

Yes. 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, no party other than the insured depository institution and the depositor) is involved with the account. The 12-month period is considered appropriate since it is historically the most common term offered for a certificate of deposit,[46] and this treatment of nonmaturity deposits will create parity with the reclassification of most brokered CDs when they are renewed without involvement of a third party.

Involvement by a third party includes, for example: (1) holding the account in the name of the deposit broker as agent for one or more customers, (2) the deposit broker's continuing to receive account fees after the account is opened, (3) the deposit broker's having the authority to make withdrawals or additional deposits, or (4) the deposit broker's having continued access to the account.[47] Continued access means that a third party will continue to receive access to the customer's account information that has been provided for the purpose of offering guidance to the customer as to the investment of the funds in the account.

It is also possible that involvement in a nonmaturity deposit by a third party could cease and then restart. As an example, if a deposit broker connects a customer to a particular insured depository institution, and then there is a 12-month period of no involvement, the customer's account may be classified as nonbrokered. However, if after the 12-month period, the same broker or another third party becomes involved again with the account, then the account would again be reclassified as brokered. In addition, if during the 12-month period, the same broker or another third party becomes involved with the

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[43] *See* Advisory Opinion No. 89-51 (December 21, 1989).
[44] *See* Advisory Opinion No. 92-69 (October 23, 1992).
[45] *See* Advisory Opinion No. 15-01 (April 16, 2014).
[46] Data obtained from a 3rd party rate comparison service.
[47] *See* Advisory Opinion No. 15-01 (April 16, 2014).

account, the account remains brokered until no third party is involved for a consecutive 12-month period.

F4. When an institution is less than well capitalized, must it refuse to renew or roll over a brokered CD if the deposit broker (at the time of renewal or rollover) continues to be involved with the account?

Yes. Under Section 29 of the FDI Act, if an insured depository institution is not well capitalized, the institution will be prohibited from accepting (*i.e.*, renewing) the brokered CD account without a waiver from the FDIC.[48]

F5. If an insured depository institution ceases to be well capitalized after the opening of a brokered CD account but before the maturity of the account, must the institution close the account immediately (assuming the institution does not obtain a waiver to accept brokered deposits), or can the institution wait until the CD matures before closing the account?

For a maturing CD, the deposit is accepted when the CD rolls over. Therefore, assuming a third party would be involved with the renewal of the account, the insured depository institution can wait until the maturity of the CD before closing the account.[49]

F6. If an insured depository institution ceases to be well capitalized for Prompt Corrective Action (PCA) purposes, how should an institution treat brokered deposit accounts that are not time deposits (such as demand deposits)?

If an insured depository institution ceases to be well capitalized for PCA purposes, the brokered deposit restrictions of Section 29 of the FDI Act will apply. Therefore, the insured depository institution should contact its primary federal regulator to establish an appropriate supervisory plan for addressing how brokered demand deposit accounts can comply with Section 29. In determining a supervisory plan, the insured depository institution's primary federal regulator and FDIC will consider how brokered deposits could impact the institution's liquidity, bank operations, or other factors. The goal of any supervisory plan regarding brokered deposits would be to not disrupt an institution's operations as it attempts to improve its capital category.[50]

If the insured depository institution is adequately capitalized for PCA purposes, the insured depository institution may request a waiver from the FDIC to retain or accept brokered deposits. Even when the insured depository institution is undercapitalized for PCA purposes, the FDIC deals with each brokered deposit situation involving accounts that are not time deposits on a case-by-case basis.

G. INTEREST RATE RESTRICTIONS

G1. What are the interest rate restrictions?

Under the FDIC's regulation on interest rate restrictions,[51] a bank that is not well capitalized generally may not offer deposit rates more than 75 basis points above the "national rate" for deposits of similar size and maturity. The regulations define the national rate as "a simple average of rates paid by all

[48] *See* Advisory Opinion No. 89-51 (December 21, 1989).
[49] *See id.*
[50] *See Study on Core Deposits and Brokered Deposits*, Section V.A.
[51] *See* 12 C.F.R. § 337.6; *see also Study on Core Deposits and Brokered Deposits*, Section II.

insured depository institutions and branches for which data are available."[52] On a weekly basis, the FDIC posts the national rates and rate caps at National Rates.[53]

If a bank believes that the posted national rates do not represent the actual rates in the bank's local market area, the bank may seek a determination from the FDIC that the bank is operating in a high-rate area. Assuming that the FDIC makes such a determination, the bank may offer the prevailing market rates instead of the national rates within the local market area. In accepting deposits from outside the local market area, however, the bank must use the national rates. Further, under Section 29 of the FDI Act, interest rate restrictions may not be waived.[54]

G2. How is the prevailing rate calculated for a local market area?

As stated above, the national rate should be used to determine conformance with the interest rate restrictions unless the bank has requested and received a determination from the FDIC that it is operating in a high-rate area. The prevailing rate (effective yield) in a particular market area is the average of rates offered by other FDIC-insured depository institutions and branches in the geographic market area in which the deposits are being solicited. Rates offered by credit unions can be included in this calculation if an institution can support that it is competing directly with the credit unions for deposits.

Using a local market approach, the prevailing rate is calculated based on the maturity and size of the deposit as described below.

Maturity: For accounts with a maturity, calculate the prevailing rate by averaging competitors' rates based on the deposit term. For example, the bank's one-year certificate of deposit (CD) should be compared against the average rate for its competitors' one-year CDs. Separate rates may be calculated for savings accounts, NOW accounts and money market deposit accounts (MMDAs). However, further account bifurcation (for example, separate calculations for special-feature NOW accounts) is not consistent with the regulations and is therefore not allowed.

Size: For deposits of like maturity, calculate the prevailing rates for deposits under $100,000 (non-jumbo) and over $100,000 (jumbo).

For example, a bank's market area has seven other banks and branches offering these rates for a one-year CD under $100,000:

Bank A	1.15%
Branch of Bank A	1.15%
Your Bank	1.35%
Bank B	1.50%
Bank C	1.55%
Bank D	1.20%
Bank E	1.25%
Branch of Bank E	1.30%

The effective yield on a one-year CD for the subject bank's market area is:

[52] *See* 12 C.F.R. § 337.6(b)(2)(ii)(B).
[53] Available at: https://www.fdic.gov/regulations/resources/rates/.
[54] *See* 12 U.S.C. § 1831f(e-h); *see also* 12 C.F.R. § 337.6(c).

(1.15 + 1.15 + 1.50 + 1.55 + 1.20 + 1.25 + 1.30)/7 = 1.30%

Note: The average excludes the rate offered by the subject bank.

In this case, the maximum allowable rate, or rate cap, for the market area is:

1.30% + 0.75% = 2.05%

G3. Why are branches of other banks included in determining the prevailing rate in a geographic market area?

Individual branches of other institutions are considered to be competitors in soliciting deposits within a market area. As mentioned previously, the regulations define the national rate as "a simple average of rates paid by all insured depository institutions and branches for which data are available." Excluding branches in calculating the prevailing rate for a local market would be inconsistent with the methodology for calculating the national rate.

G4. Can a market area consist of a subset of banks with similar characteristics, such as asset size or a retail focus? Likewise, can a market area exclude branches of large institutions?

No. The market area must be a geographic area and include all FDIC-insured competitors and branches.

G5. Should the cost of gifts given for opening a deposit account be included in the calculation of the deposit rate?

Yes. The rate used should include incentives provided to the customer, including the value of any gifts or cash incentives.

G6. How are accounts with uncommon features or restrictions handled when determining the effective yield?

The regulations allow the segregation of savings accounts, NOW accounts and MMDAs for evaluation purposes. However, accounts cannot be segregated based on special features or restrictions.

G7. If an insured institution ceases to be well capitalized, should existing nonbrokered CDs that exceed the applicable rate caps be reported as brokered deposits in the Consolidated Reports of Condition and Income?

No. Above-market CDs, generated before a bank falls below well capitalized, should not be reported as brokered deposits; they also may continue to be held until their maturity dates. At renewal, the certificate of deposit cannot exceed the applicable market average by more than 75 basis points.

G8. If an insured depository institution ceases to be well capitalized, must the institution immediately meet the applicable rate caps on deposit accounts that never mature or renew, such as interest checking or savings accounts?

While Section 29 restricts institutions from paying above market rates on deposit accounts once they fall below well capitalized, it is critical that institution management contact its primary federal regulator

when the lowering of the deposit rates could have a significant impact on liquidity or other factors affecting bank operations.

G9. In applying the rate caps, should an insured depository institution use the all-in cost of a deposit? Or should the bank use the annual percentage yield (APY) received by a deposit broker's customers? For example, if a bank pays 2.75 percent APY but a deposit broker charges a 25 basis points fee on the deposit, should 2.75 percent or 2.50 percent be used to determine conformance with the interest rate restrictions?

In the above example, the rate restrictions would apply to the all-in cost of the deposit (the customer's effective APY plus the 25 basis points fee or 2.75 percent). This treatment is consistent with the treatment mandated by the Consolidated Reports of Condition and Income, which include the following instruction:

"Include as interest expense on the appropriate category of deposits finders' fees and brokers' fees that represent an adjustment to the interest rate paid on deposits the reporting bank acquires through brokers. If material, such fees should be capitalized and amortized over the term of the related deposits. However, exclude fees levied by brokers that are, in substance, retainer fees or that otherwise do not represent an adjustment to the interest rate paid on brokered deposits."

H. APPLICATIONS FOR WAIVERS

H1. How can an insured depository institution obtain a waiver from the FDIC to accept brokered deposits?

The brokered deposit waiver application procedures are set forth in the FDIC's regulations at 12 C.F.R. § 303.243. The FDIC may grant a waiver upon a finding that the acceptance of brokered deposits by the insured depository institution will not constitute an unsafe or unsound practice with respect to the institution. It is important to note that a waiver will not exempt a less than well capitalized institution from complying with the interest rate restrictions set forth in the FDIC's regulations at 12 C.F.R. § 337.6.

H2. What factors does the FDIC consider when assessing an application for a waiver?

Applications for waivers from brokered deposit restrictions are not automatically granted and are evaluated on a case-by-case basis. Further, brokered deposit waiver applications are usually not eligible for expedited processing. Brokered deposit waiver applications are evaluated for traditional safety-and-soundness concerns based on an institution's capital position, asset quality, liquidity, and earnings performance. Applications also should include the institution's plan for reducing its dependence on brokered deposits. The FDIC also considers the opinion of the institution's primary federal regulator and its Bank Secrecy Act/Anti-Money Laundering compliance. Other important factors considered include management's capability to manage the potential volatility of the brokered deposits, contingency funding plans (such as alternate funding sources under lines of credit with correspondent banks or government agencies), and the liquidity monitoring program. The FDIC also will assess the institution's current business plan, including any plans relating to expansion or growth, and management's strategy to return the institution to a sound financial condition, if applicable.

LINKS TO RESOURCES

FDIC Law, Regulations and Related Acts
https://www.fdic.gov/regulations/laws/rules/4000-100.html#brok – Advisory Opinions, see "Brokerage Activities"
Study on Core Deposits and Brokered Deposits

IDENTIFYING, ACCEPTING, AND REPORTING BROKERED DEPOSITS
FREQUENTLY ASKED QUESTIONS
(Updated June 30, 2016)

A. BROKERED DEPOSITS AND DEPOSIT BROKERS

A1. What is a "brokered deposit"?

The term "brokered deposit" is defined in the FDIC's regulations as "any deposit that is obtained, directly or indirectly, from or through the mediation or assistance of a deposit broker."[1] Thus, the meaning of the term "brokered deposit" depends upon the meaning of the term "deposit broker."[2]

A2. What is a "deposit broker"?

AUnder Section 29 of the Federal Deposit Insurance (FDI) Act, a "deposit broker" is "[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."[3] As explained in the FDIC's *Study on Core Deposits and Brokered Deposits*, the definition of deposit broker is broad.[4] This definition is very broad. Ssubject 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. (discussed in section E of this document). As a result of this broad definition, a brokered deposit may be any deposit accepted by an insured depository institution from or through a third party, such as a person or company or organization other than the owner of the deposit.[45]

A3. How does the FDIC view brokered deposits?

Brokered deposits can be a suitable funding source when properly managed as part of an overall, prudent funding strategy. However, some banks have used brokered deposits to fund unsound or rapid expansion of loan and investment portfolios, which has contributed to weakened financial and liquidity positions over successive economic cycles. The overuse of brokered deposits and the improper management of brokered deposits by problem institutions have contributed to bank failures and losses to the Deposit Insurance Fund.[56]

A4. What are the restrictions on brokered deposits?

Section 29 of the Federal Deposit Insurance (FDI) Act includes restrictions on the acceptance of brokered deposits and certain restrictions on deposit interest rates. Under Section 29, an undercapitalized insured depository institution may not accept, renew, or roll over any brokered

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[1] *See* 12 C.F.R. § 337.6(a)(2).
[2] *See* FDIC's *Study on Core Deposits and Brokered Deposits*, issued in July 2011, Section II.
[3] *See* 12 U.S.C. § 1831f; *see also* 12 C.F.R. § 337.6(a)(5)(i)(A).
[4] *See Study on Core Deposits and Brokered Deposits*, Sections II & IV.
[45] *See Study on Core Deposits and Brokered Deposits*, Section II.
[56] *See Study on Core Deposits and Brokered Deposits*, Section V.A.

deposit.[7] An adequately capitalized insured depository institution may not accept, renew, or roll over any brokered deposit unless the institution has applied for and been granted a waiver by the FDIC. A well-capitalized insured depository institution, for the purposes of Section 38 of the FDI Act, is not restricted by Section 29 in accepting or renewing brokered deposits.[8]

Deposit rate restrictions prevent a bank that is not well capitalized from circumventing the prohibition on brokered deposits by offering rates significantly above market in order to attract a large volume of deposits quickly. As a general rule, a bank that is not well capitalized may not offer deposit rates more than 75 basis points above average national rates for deposits of similar size and maturity. See section G of this document for additional information.

A5. What factors are considered when determining if a third party is a deposit broker?

The definition of deposit broker applies to third parties engaged in "placing deposits" and "facilitating the placement of deposits." The term "facilitating the placement of deposits" is interpreted broadly to include actions taken by third parties to connect insured depository institutions with potential depositors. As a result, a third party could be a deposit broker even when the third party does not open bank accounts on behalf of depositors or directly place funds into bank accounts.[9]

The third party may qualify as a deposit broker even if it receives no fees or other direct compensation from the depository institution where the funds are placed.[9][10] The fee structure is simply one factor used by the FDIC in determining whether a particular party is a deposit broker. Other factors include the nature of the fees (*i.e.*, whether the amount of the fees is connected to the amount of deposits placed at the insured depository institution), the purported purpose of the fees (*i.e.*, whether the fees are intended to reward the third party for placing deposits as opposed to rewarding the third party for providing some other service), and the degree of involvement by the third party in placing the deposits. Ultimately, brokered deposit and deposit broker classifications are fact specific, and each determination is considered on a case-by-case basis.

B. PLACING DEPOSITS AND FACILITATING THE PLACEMENT OF DEPOSITS

B1. What activity qualifies as "placing deposits?"

A third party "places deposits" for others when the third party actually delivers the funds to an insured depository institution.[10][11] In this situation, unless the third party is covered by one of the exceptions to the definition of deposit broker (discussed in section E of this document), the third party will be a deposit broker and the deposits will be brokered deposits.

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[7] Capital group assignments are made quarterly in accordance with the FDIC's Rules and Regulations, using the method agreed upon by the Federal Financial Institutions Examination Council Surveillance Task Force for calculating capital ratios. The method uses data reported in an institution's Consolidated Reports of Income and Condition (Call Reports), Report of Assets and Liabilities of U.S. Branches and Agencies of Foreign Banks, or Thrift Financial Report. *See* Capital Groups (available at: https://www.fdic.gov/deposit/insurance/risk/rrps_ovr.html).

[8] A bank under a formal agreement with a directive to meet or maintain a specific capital level is not considered to be well capitalized.

[9] *See* Advisory Opinion No. 92-79 (November 10, 1992); *See also Study on Core Deposits and Brokered Deposits*, Section IV.

[10] *See* Advisory Opinion No. 94-15 (March 16, 1994).

[11] *See id.*

B2. What activities qualify as "facilitating the placement of deposits?"

When 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.[11][12]

B3. Are there instances when facilitating the placement of deposits or placing deposits would not be considered the brokering of deposits?

Yes. For example, one of the exceptions to the definition of "deposit broker" is the "trustee of a pension or other employee benefit plan, with respect to funds of the plan."[12][13] Under this exception, the trustee is not classified as a deposit broker even if the trustee places the plan's deposits (or facilitates the placement of the plan's deposits) at an insured depository institution.[13][14]

B4. Do companies or organizations that provide marketing for an insured depository institution, in exchange for volume-based fees, qualify as deposit brokers because they are facilitating the placement of deposits?

Yes. Some insured depository institutions attempt to attract new depositors through advertising or referrals by third parties (such as nonprofit affinity groups as well as commercial enterprises), in exchange for volume-based fees. In these cases, the FDIC has taken the position that the third party is "facilitating the placement of deposits" by connecting the depository institution with new account holders. Hence, the third party is a deposit broker, and the deposits would be brokered.[14][15]

B5. Do third parties that design deposit products, such as deposit accounts with special features, qualify as deposit brokers?

Some third parties design deposit products with special features, such as deposit accounts that produce interest or rewards based on account activity. If a company merely designs deposit products or deposit accounts for one or more banks, without placing deposits or facilitating the placement of deposits at these banks, the company will not be classified as a deposit broker. However, as discussed in B4, if a company also markets the bank's deposit products in exchange for volume-based fees, then it would be a deposit broker, and the deposits would be brokered.[15][16]

B6. Are insurance agents, lawyers, or accountants that refer clients to a bank considered to be deposit brokers?

It depends. The FDIC recognizes that within a community, there are many business professionals that conduct banking business with a particular insured financial institution, and due to that banking allegiance, often refer their customers to a particular financial institution on an informal basis for deposit products. The deposits produced by those types of informal deposit referrals would generally not be considered brokered. The deposits would be brokered, however, in more formal, programmatic arrangements between the insured depository institution and the business professionals, such as where (1) the professional has entered into a written agreement with the bank for the referral of depositors;

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[11][12] *See* Advisory Opinion No. 92-79 (November 10, 1992).
[12][13] *See* 12 U.S.C. § 1831f(g)(2)(D).
[13][14] *See Study on Core Deposits and Brokered Deposits*, Section II.B.
[14][15] *See* Advisory Opinion No. 93-71 (October 1, 1993); Advisory Opinion No. 93-~~31~~30 (June ~~17~~15, 1993).
[15][16] *See* Advisory Opinion Nos. 15-02 (June 6, 2014) and 15-03 (December 18, 2014).

or
(2) the professional receives fees from the bank. In these cases, the FDIC would generally consider the professional to have facilitated the placement of deposits in the bank, and therefore, the deposits received by the bank would be brokered.[16][17]

B7. What is an example of when the deposits in a programmatic arrangement to refer depositors are not brokered deposits?

Some banks have programs where bank customers or employees of subsidiaries or affiliates of the bank can earn bonuses in the form of cash, merchandise, or a higher interest rate on a deposit for referring depositors. These programs are sometimes referred to as "friends and family" or loyalty programs. Although these arrangements ~~are~~may be formal and programmatic ~~in that~~because they are both covered by a written agreement and the referring individual is paid a fee~~. However~~, the FDIC might determine that the program is sufficiently limited in scope so that it is not deemed to be a brokered deposit arrangement.[17][18] In this regard, the FDIC considers whether the program is designed to significantly drive deposit growth to the insured depository institution or is merely a small recognition of the customer's or employee's loyalty to the bank.

In making the determination, the FDIC considers whether the cost of the incentive package to the bank is relatively small, the fee is de minimis to the recipient, and payments are capped in total amount or limited in frequency per individual. ~~If the referral involves employees of a subsidiary or of an affiliate of the bank, the FDIC would also consider whether the employee has ongoing involvement with the deposit account after it is opened.~~

B8. What if a person or a group merely endorses a bank? Will the person or group be classified as a deposit broker?

If an individual or a group merely makes a general endorsement of a bank in exchange for a flat fee (*i.e.*, a fee unrelated to the number of accounts or amount of deposits generated by the endorsement), then that person or group will not be classified as a deposit broker. In such cases, the endorsements are not viewed as active marketing.[18][19] Note, however, that the endorsement cannot appear in promotional materials produced or distributed by the individual or the group. Rather, the endorsement must appear in promotional materials produced and distributed by the bank. Otherwise, the individual or group providing the endorsement will be a deposit broker, and the deposits would be brokered.[19][20]

C. BANK NETWORKS

C1. What is a bank network?

In a bank network, a participating bank places funds at other participating banks through the network in order for its customer to receive full insurance coverage. For example, if a customer deposits $1 million into his or her institution, the customer's bank retains the deposit insurance limit (that is,

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[16][17] *See* ~~FDIC~~ Advisory Opinion No. 15-04 (February 4, 2015).
[17][18] *See* ~~FDIC~~ Advisory Opinion No. 94-37 (July 19, 1994); ~~S~~*see also Study on Core Deposits and Brokered Deposits*, Section VIII.E.
[18][19] *See* Advisory Opinion No. 93-30 (June 15, 1993).
[19][20] *See* Advisory Opinion No. 93-71 (October 1, 1993).

$250,000) and places the excess of $750,000 at three other institutions in insured increments of $250,000.

In more complex arrangements, the customer's bank may be part of a deposit placement network that is managed by a third-party network sponsor. In this situation, when the customer deposits $1 million, the customer's bank sends the uninsured portion to a settlement bank, which then places the funds at other banks within the network at the direction of the network sponsor.

At its most complex level, the network sponsor is facilitating the placement of millions of dollars in excess funds for all of the banks in the network. Often, these placements are made through reciprocal arrangements, in which institutions within the network are both sending and receiving identical amounts simultaneously (reciprocal deposits). This reciprocal arrangement allows the bank to maintain the same amount of funds it had when the customer made his or her initial deposit, while ensuring that deposits in excess of the $250,000 deposit limit are fully insured.[~~20~~21]

C2. When companies facilitate the placement of deposits through a bank network, are they acting as deposit brokers?

Yes. In sponsoring or operating a bank network, the company is facilitating the placement of deposits. Moreover, in acting as agents for customers in placing the customers' funds at other insured depository institutions, the banks themselves are placing deposits and thus serving as deposit brokers. The involvement of deposit brokers in these networks means that the deposits are brokered deposits.[~~21~~22]

C3. When a bank only places deposits within a network of affiliated banks, is the bank acting as a deposit broker?

Yes. If a bank, or its parent company, places part or all of a depositor's funds with affiliated banks, then it is acting as a deposit broker. As a result, the deposits are brokered deposits.[~~22~~23]

D. LISTING SERVICES

D1. What is a listing service?

A listing service is a company that compiles and publishes information about deposit accounts at many different banks for consideration by interested depositors. The information published by a listing service will include the interest rates offered by the various banks. Some listing services operate Internet sites open to the public, while others provide information solely to banks and institutional investors who are willing to pay subscription fees.[~~23~~24]

D2. When does a listing service qualify as a deposit broker?

If the listing service places deposits or facilitates the placement of deposits (in addition to compiling and publishing information on interest rates and other features of deposit accounts), the listing service

[~~20~~21] *See Study on Core Deposits and Brokered Deposits*, Section IV.E.
[~~21~~22] *See Study on Core Deposits and Brokered Deposits*, Section IV.E.
[~~22~~23] *See Study on Core Deposits and Brokered Deposits*, Sections IV.E. and VIII.E.
[~~23~~24] *See* Advisory Opinion No. 90-24 (June 12, 1990); ~~S~~*see also Study on Core Deposits and Brokered Deposits*, Section IV.A.

is a deposit broker, and the deposits would be brokered. In determining whether a particular listing service is facilitating the placement of deposits, the FDIC applies the criteria set forth in FDIC Advisory Opinion No. 04-04 (July 28, 2004).

The FDIC does *not* treat the listing service as a deposit broker if the company satisfies *each* of the following requirements:

(A) The person or entity providing the listing service is compensated solely by means of subscription fees (*i.e.*, the fees paid by subscribers as payment for their opportunity to see the rates gathered by the listing service) and/or listing fees (*i.e.*, the fees paid by depository institutions as payment for their opportunity to list or "post" their rates). The listing service does not require a depository institution to pay for other services offered by the listing service or its affiliates as a condition precedent to being listed.

(B) The fees paid by depository institutions are flat fees, not calculated on the basis of the number or dollar amount of deposits accepted by the depository institution as a result of the listing or posting of the depository institution's rates.

(C) In exchange for these fees, the listing service performs no services except: (1) the gathering and transmission of information concerning the availability of deposits; and/or (2) the transmission of messages between depositors and depository institutions including purchase orders and trade confirmations. In publishing or displaying information about depository institutions, the listing service must not attempt to steer funds toward particular institutions, except that the listing service may rank institutions according to interest rates and also may exclude institutions that do not pay the listing fee. Similarly, in any communications with depositors or potential depositors, the listing service must not attempt to steer funds toward particular institutions.

(D) The listing service is not involved in the physical placement of deposits. Any funds to be invested in deposit accounts are remitted directly by the depositor to the insured depository institution and not, directly or indirectly, by or through the listing service.[~~24~~35]

D3. Why does the FDIC treat some listing services as deposit brokers, but not others?

The FDIC recognizes a distinction between providing information about deposit accounts and facilitating the placement of deposits. If a listing service or other company merely provides information, without attempting to steer potential depositors to particular insured depository institutions, the FDIC believes that the company is not facilitating the placement of deposits. In Advisory Opinion No. 92-50 (July 24, 1992), the FDIC staff explained the distinction as follows: "Where the only function of a deposit listing service is to provide information on the availability and terms of accounts, we believe that the listing service is not facilitating the placement of deposits. Rather, it facilitates the decision of the would-be buyer whether (and from whom) to buy a certificate of deposit; it is not facilitating the *placement* of deposits *per se*."

[~~24~~35] *See Study on Core Deposits and Brokered Deposits*, Section IV.A.

A similar analysis applies to communications companies (such as radio or television stations or Internet Web sites) that run advertisements for insured depository institutions. If the advertising platform is operated in a neutral manner, so that any insured depository institution could run advertisements, the FDIC would not treat the communications company as a deposit broker.

E. EXCEPTIONS TO THE DEFINITION OF DEPOSIT BROKER

E1. What are the exceptions to the definition of deposit broker?

By statute, as implemented under the FDIC's regulations, the definition of deposit broker is subject to a list of exceptions.[25][26] The FDIC has applied these exceptions in a number of Advisory Opinions. Based on the list of exceptions, the FDIC does *not* treat any of the following parties as a deposit broker:

(A) An insured depository institution, with respect to funds placed with that depository institution;[26][27]

(B) An employee of an insured depository institution, with respect to funds placed with the employing depository institution;

(C) A trust department of an insured depository institution, if the trust or other fiduciary relationship in question has not been established for the primary purpose of placing funds with insured depository institutions;

(D) The trustee of a pension or other employee benefit plan, with respect to funds of the plan;

(E) A person acting as a plan administrator or an investment adviser in connection with a pension plan or other employee benefit plan provided that person is performing managerial functions with respect to the plan;

(F) The trustee of a testamentary account;

(G) The trustee of an irrevocable trust . . . as long as the trust in question has not been established for the primary purpose of placing funds with insured depository institutions;[28]

(H) A trustee or custodian of a pension or profit-sharing plan qualified under section 401(d) or 403(a) of the Internal Revenue Code of 1986;[27][29]

(I) An agent or nominee whose primary purpose is not the placement of funds

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[25][26] *See* 12 U.S.C. § 1831f(g)(2); ~~S~~*see also* 12 C.F.R. § 337.6(a)(5)(ii).

[26][27] An insured depository institution that is not well capitalized is, however, subject to interest rate restrictions under Section 29 of the FDI Act and the implementing regulations. See section G of this document.

[28] Note that the statutory definition of "deposit broker" includes "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." *See* 12 U.S.C. § 1831f(g)(1)(B).

[27][29] *See* 26 U.S.C. § 401(d) or § 403(a).

with depository institutions; or

(J) An insured depository institution acting as an intermediary or agent of a U.S. government department or agency for a government sponsored minority or women- owned depository institution deposit program.

E2. In regard to the exception for an "insured depository institution, with respect to funds placed with that depository institution," does the exception apply to a company affiliated with that institution, including a parent or a subsidiary?

No. ~~If an affiliated company places deposits or facilitates the placement of deposits at an~~ This exception only applies to the insured depository institution~~, the company will~~.[30] However, an affiliate, including a parent or a subsidiary, might not be a deposit broker ~~(assuming that the affiliated company is not the owner of the deposits and is not covered by any of the~~for other ~~exceptions to the definition of deposit broker). As a result, the deposits will be brokered deposits.~~[29] reasons, as discussed in sections B and E of this document.

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)?

No. This statutory exception applies solely to an "employee" who satisfies the ~~following~~ definition~~: Employee means~~ of an employee provided by the statute. The statute defines an "employee" as any employee: ~~(~~"(i) ~~W~~who is employed exclusively by the insured depository institution; (ii) ~~W~~whose compensation is primarily in the form of a salary; (iii) ~~W~~who does not share such employee's compensation with a deposit broker; and (iv) ~~W~~whose office space or place of business is used exclusively for the benefit of the insured depository institution which employs such individual."~~[29]~~[31] This exception will not apply to a contractor or dual employee because he/she will not be ~~"~~employed exclusively by the insured depository institution~~"~~ as set forth in the statute.~~[30]~~[32] ~~Therefore, the contractor or dual employee will be a deposit broker if he/she facilitates the placement of deposits at the insured depository institution.~~

As discussed in sections B and E of this document, even if the "employee" exception is not applicable, other reasons may exist for not considering a dual employee or contractor a deposit broker.

E4. A "dual-hatted" employee is a person employed exclusively by the bank but who may be licensed to sell securities or other financial products. Are these employees considered to be deposit brokers?

Generally no. Unlike dual employees, so-called "dual-hatted" employees are employed exclusively by the bank. These employees may open deposit accounts on behalf of the bank and would not be considered deposit brokers solely because they are licensed to sell securities or other financial

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[30] *See* Advisory Opinion No. 92-68 (October 21, 1992); *see also Study on Core Deposits and Brokered Deposits*, Section VIII.E.

~~[29] *See* Advisory Opinion No. 92-68 (October 21, 1992); *see also Study on Core Deposits and Brokered Deposits*, Section VIII.E.~~

~~[30]~~[31] *See* 12 U.S.C. § 1831f(g)(4); ~~*See*~~ *see also* 12 C.F.R. § 337.6(a)(6).

~~[31]~~[32] *See id.*

products to bank customers. Whether "dual-hatted" employees meet each of the other statutory elements of "employee" depends on the facts and circumstances of the situation.

~~E4~~E5. Do situations exist when contractors and dual employees are not considered to be deposit brokers?

Yes. The FDIC does not believe that dual employees or contractors should be classified as deposit brokers in all situations. Although dual employees and contractors are not "employees" of the insured depository institution under the statute because they are not "employed exclusively by the insured institution," other exceptions may apply or they may not be considered to be engaged in the business of "placing deposits" or "facilitating the placement of deposits."

Consider a broker-dealer affiliate of an insured depository institution where employees of the affiliate are also employees of the insured depository institution. The fundamental role of some employees of this affiliated company may be to sell securities to clients, but they may also recommend deposit products. If a client wishes to invest in a deposit product, the dual employee refers the client to a bank employee or may open the account personally. The broker-dealer affiliate is paid a fee, part of which is paid to the dual employee as a sales commission for opening the account and part of which is paid for the employee's continual interaction with the client in order to monitor balance activity, address client inquiries about rates, and provide information regarding additional accounts or account services, such as wire services. The ongoing fee is based on the balance of the account. In this case, the dual employee would be considered to have facilitated the placement of deposits, and the deposits would be brokered.~~31~~33

On the other hand, dual employees or contractors who merely perform "back-office" administrative work (and who are not involved in facilitating the placement of deposits) would not qualify as deposit brokers.

E6. Are "call center" personnel considered to be deposit brokers?

Generally, no. For purposes of these FAQs, "call center" personnel primarily provide customer service support on behalf of the bank by answering questions about accounts or bank-provided services or by transferring callers to appropriate areas of the bank. Call center personnel may also answer questions about products and services provided by companies affiliated with the bank. Call center personnel may be employed exclusively by the bank, may be dual employees of the bank and its affiliates, or may be contractors. Most often, call center personnel transfer, or "hand off," a customer seeking to open a deposit account to a bank employee, although call center personnel may sometimes be empowered to open accounts.

In cases where "call center" personnel are exclusively employed by a bank, the employee will likely fall under the statutory exception of "employee," and therefore would not be considered a deposit broker, even if they are empowered to open accounts on behalf of the bank. Furthermore, call center personnel who are dual employees or contractors would not be considered a deposit broker if: (1) they merely transfer callers or provide general information and do not participate in the placement of deposits; and (2) compensation is not based on the number of accounts opened or amount of deposits placed or maintained at a bank as a result of call center personnel's contact with the caller.

~~31~~33 *See* Advisory Opinion No. 94-15 (March 16, 1994); ~~*See*~~ *see also Study on Core Deposits and Brokered Deposits*, Section VIII.E.

Even if "call center" personnel are not deposit brokers, it would not necessarily mean that the deposits will not be brokered. If another party, other than "call center" personnel, is involved in the placement of the deposit, a separate analysis would be necessary to determine the status of that party.

~~E5~~E7. In regard to the exceptions for "insured depository institutions" and their "employees" (discussed above), would these exceptions apply to affiliates or independent agents located in foreign countries?

No exception exists for entities or persons who seek or gather deposits in foreign countries.[~~32~~34] Unless the entity is an actual foreign branch of the insured depository institution that receives the funds, or the person is an actual "employee" as defined above, the deposits obtained by these entities or persons will be brokered deposits.

~~E6~~E8. Are deposits placed by the trust department of an insured depository institution classified as brokered deposits?

As stated above, the definition of deposit broker includes the following exception: "A trust department of an insured depository institution, if the trust or other fiduciary relationship in question has not been established for the primary purpose of placing funds with insured depository institutions."[~~33~~35] Under this exception, a bank's trust department might or might not qualify as a deposit broker. For example, if the trust department is acting as a traditional trustee with fiduciary responsibilities and investment discretion over the assets of an irrevocable trust, the trust department will not be a deposit broker because the trust relationship will have been established for the primary purpose of administering the trust and not for the primary purpose of "placing funds with insured depository institutions."

On the other hand, if the trust department is merely assisting customers in placing funds at insured depository institutions so that the customers may obtain total FDIC insurance coverage in excess of the $250,000 limit, the trust department will be a deposit broker and the deposits (at the receiving insured depository institution) will be brokered deposits. In Advisory Opinion No. 92-87 (December 9, 1992), the FDIC staff explained the distinction as follows: "The brokered deposit restrictions were not intended to curtail the normal activities of trust departments, but since a blanket exemption for all trust department activities might have led to circumvention of the statute through various trust-type mechanisms, the statute imposed a 'primary purpose' test. The primary purpose test serves to distinguish the normal activities of trust departments from arrangements that have the purpose and effect of circumventing the statute. The 'primary purpose' of an agreement with a trust department can only be determined on a case-by-case basis, in light of the particular facts and circumstances of each case."

~~E7~~ E9. What is the "primary purpose" exception to the definition of a deposit broker?

This exception applies to the following: "An agent or nominee whose primary purpose is not the placement of funds with depository institutions."[~~34~~36] This exception is applicable when the intent of the third party, in placing deposits or facilitating the placement of deposits, is to promote some other goal

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[~~32~~34] *See* Advisory Opinion No. 96-4 (February 5, 1996).
[~~33~~35] *See* 12 U.S.C. § 1831f(g)(2)(C); ~~*See*~~ *see also* 12 C.F.R. § 337.6(a)(5)(ii)(C).
[~~34~~36] *See* 12 U.S.C. § 1831f(g)(2~~); *See*~~)(I); *see also* 12 C.F.R. § 337.6(a)(5)(ii)(I).

(*i.e.*, other than the goal of placing deposits for others).[35][37] The primary purpose exception is *not* applicable when the intent of the third party is to earn fees through the placement of the deposits. Also, the applicability of the primary purpose exception does not depend upon a comparison between the amount of revenue generated by the third party's deposit-placement activities and the amount of revenue generated by the third party's other activities.[36][38] Rather, as previously stated, the applicability of the primary purpose exception depends upon the intent of the third party in placing deposits (or facilitating the placement of deposits).

~~As a number of examples will illustrate in the~~ The next several FAQs~~.~~ will address the primary purpose exception ~~applies only infrequently and typically requires a specific~~. The FDIC considers each request ~~for a determination by the FDIC. On those rare occasions when~~ to review and interpret this exception ~~may apply, the FDIC also may impose restrictions~~ on ~~the activity involved, routine reporting requirements, and regular monitoring. These conditions may be critical to~~ a case-by-case basis. In interpreting the application of the primary purpose exception ~~determination~~, the FDIC frequently relies upon information provided by the requesting party, and other available information. As a result, ~~failure to comply with~~changes in the program or in the ~~conditions~~facts as they had been provided by the requesting party, may trigger a reassessment of the original determination.

~~E8~~E10. Does the primary purpose exception apply to companies that distribute financial products (such as prepaid cards) that provide access to funds at one or more insured depository institutions?

Whether such companies qualify as deposit brokers depends upon the circumstances. As illustrated by the FAQs below, the primary purpose exception generally does *not* apply to such companies, and consequently, they are classified as deposit brokers, and the deposits would be brokered.[37][39]

~~E9~~E11. Does the primary purpose exception apply to companies that sell or distribute general purpose prepaid cards?

No. Some companies operate general purpose prepaid card programs, in which prepaid cards are sold to members of the public at retail stores or other venues. After the funds are collected from the cardholders, the funds may be placed by the card company or other third party into a custodial account at an insured depository institution. The funds may be accessed by the cardholders through the use of their cards.

The selling or distributing of general purpose prepaid cards, accompanied by the placement of the cardholders' funds into a deposit account, is not secondary or incidental to the accomplishment of some other objective on the part of the prepaid card company. The 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. Therefore, prepaid card companies or other third parties, in selling or distributing prepaid cards, would qualify as deposit brokers, with the result that the deposits are classified as brokered deposits.[38][40]

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[35][37] *See* Advisory Opinion No. 94-13 (March 11, 1994).
[36][38] *See* Advisory Opinion No. 90-21 (May 29, 1990).
[37][39] *See Study on Core Deposits and Brokered Deposits*, Section IV.F.
[38][40] *See Study on Core Deposits and Brokered Deposits*, Section IV.F.

E1~~0~~2. Does the primary purpose exception apply to companies or organizations that distribute debit cards or similar products that serve multiple purposes? For example, what if a debit card provides access to funds in a bank account but also serves as a college identification card?

In evaluating this scenario, the FDIC would consider the following factors: (1) the stated primary purpose of the third party in distributing or marketing the debit cards; (2) the features of the card (such as whether the card is reloadable and whether the card will provide access to a permanent account in the student's name at the insured depository institution); and (3) the compensation (if any) received by the third party from the bank for distributing or marketing the cards.

For example, in the case of a debit card distributed to students by a college, the stated primary purpose of the card might be to promote education. In making this argument, the college (or the insured depository institution) might rely upon the fact that the card will serve as the cardholder's student identification card and vehicle for access to student loan funds. Other factors such as the reloadability of the card and the permanency of the account, however, might indicate that the primary purpose of the card is to provide access to the account at the insured depository institution. This conclusion would be confirmed by the payment of fees or commissions to the college by the insured depository institution as compensation for distributing or marketing the cards. Under these facts, the primary purpose exception would be inapplicable. Therefore, the college would be a deposit broker, and the associated funds would be brokered deposits.

E1~~1~~3. What is an example of a company that distributes prepaid cards (providing access to funds at an insured depository institution) without being classified as a deposit broker?

An example is a corporation that distributes prepaid cards as part of a rebate program. In this scenario, the corporation places its own corporate funds (not the cardholders' funds) into an account at an insured depository institution. The cardholders collect their rebates by using the cards. Thus, the distribution of prepaid cards in this case is no different than the distribution of checks (payable against the corporation's checking account). The corporation is not a deposit broker.

Of course, if a third party (not the corporation) is involved in the placement of the corporation's funds into the account at the insured depository institution, the third party would be a deposit broker. As a result, the deposits would be brokered deposits.[~~39~~41]

E1~~2~~4. How does FDIC treat federal ~~or~~, state, or local agency ("agency") funds disbursed to beneficiaries of government programs through debit cards or prepaid cards?

~~Federal and state agencies~~Agencies sometimes use debit ~~cards~~ or prepaid cards to deliver funds to the beneficiaries of government programs. In some cases, the program is structured so that each beneficiary will own a separate deposit account at a particular insured depository institution (with the account being accessible by the beneficiary through the use of a debit card). Other programs may be structured so that multiple beneficiaries will own a commingled deposit account with "per beneficiary" or "pass-through" deposit insurance coverage (with the commingled account being accessible by the beneficiaries through the use of prepaid cards). In these scenarios, though the deposits will not belong to the government but instead will belong to the beneficiaries, the ~~federal or state~~ agency might be involved in choosing the insured depository institution or in opening the deposit accounts. ~~In other words~~Nevertheless, the agency ~~might~~would not be ~~"facilitating the placement of deposits" that will~~

[~~39~~41] *See Study on Core Deposits and Brokered Deposits*, Section IV.F.

~~belong to third parties (*i.e.*, the beneficiaries). Assuming such facilitation, the agency will be~~considered a deposit broker ~~unless~~if it ~~is covered by~~meets one of the exceptions to the definition of deposit broker.

The exception that might be applicable in this circumstance is the primary purpose exception. The FDIC would apply this exception ~~under~~when the ~~following circumstances~~agency:

1. ~~The federal or state agency is~~Is mandated by law to disburse the funds to the beneficiaries;
2. ~~The federal or state agency is~~Is the sole source of funding for the deposit accounts; and
3. ~~The deposits owned by the beneficiaries do~~Does not ~~produce~~receive fees ~~payable to the federal or state agency by~~from the insured depository institution, other than those fees necessary to help cover the agency's administrative costs.

Satisfaction of these requirements would indicate that the primary purpose of the ~~federal or state~~ agency, in facilitating the placement of the beneficiaries' deposits, is not to provide the beneficiaries with a deposit-placement service or to assist the insured depository institution in expanding its deposit base. Rather, satisfaction of these requirements would indicate that the primary purpose of the ~~federal or state~~ agency is simply to discharge the government's legal obligations to the beneficiaries. Therefore, the ~~federal or state~~ agency would be covered by the primary purpose exception with the result that the deposits would *not* be classified as brokered deposits.[~~40~~42] When a request is received for a primary purpose exception for a government program, this interpretation applies to programs involving (1) the agency, (2) the insured depository institution, and (3) the beneficiaries of the program. If another party is involved with operating the program, the FDIC will need to make a separate determination as to whether that third party is a deposit broker.

F. ACCEPTING DEPOSITS

F1. When does an insured depository institution "accept" a deposit?

A deposit is "accepted" when the insured depository institution receives the funds. Under Section 29 of the FDI Act, an insured depository institution may accept brokered deposits without restriction if the institution is well capitalized for the purposes of section 38 of the FDI Act. In contrast, if the insured depository institution is adequately capitalized, the institution cannot accept brokered deposits unless it has obtained a waiver from the FDIC. Finally, if the institution is undercapitalized, it may not accept brokered deposits under any circumstances.

F2. Does a renewal or rollover of an account qualify as an acceptance of a deposit?

Yes. The funds in a certificate of deposit (CD) account are accepted when the account is renewed or rolled over.[~~41~~43] Of course, an acceptance of a deposit is not restricted under Section 29 of the FDI Act unless the deposit is accepted from or through a deposit broker. Therefore, if no third party is involved with the CD account at the time of renewal or rollover, the insured depository institution will be free to accept the deposit (*i.e.*, renew the account), even if the institution is not well capitalized at the time of the renewal or rollover and even if a third party (*i.e.*, a deposit broker) was involved with the original opening of the account.[~~42~~44]

[~~40~~42] This response was based on several oral inquiries received in 2015 regarding federal and state benefits delivered via debit cards and prepaid cards.

[~~41~~43] *See* Advisory Opinion No. 89-51 (December 21, 1989).

[~~42~~44] *See* Advisory Opinion No. 92-69 (October 23, 1992).

However, *any* type of involvement by the third party will be sufficient to qualify the renewed account as a brokered deposit. For example, the payment of a fee to the third party by the insured depository institution, such as a "renewal fee," would constitute involvement. A common example of involvement would be the actual holding of the account in the name of the third party (as agent or custodian for the owner or owners). Another example of involvement by the third party would be its continued access to account information ~~(such as~~ that has been provided for the ~~balance~~purpose of offering guidance to the ~~account).[43] As a result of these types of involvement, or~~customer as to the investment of the funds in the account.[45] As a result of these types of involvement, or any other types of involvement by the third party, the renewed account would be a brokered deposit subject to the restrictions in Section 29.

F3. Can a brokered deposit that is not a time deposit (such as a demand deposit account), also known as a nonmaturity deposit, ever be reclassified as nonbrokered?

Yes. 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, no party other than the insured depository institution and the depositor) is involved with the account. The 12-month period is considered appropriate since it is historically the most common term offered for a certificate of deposit,[46] and this treatment of nonmaturity deposits will create parity with the reclassification of most brokered CDs when they are renewed without involvement of a third party.

Involvement by a third party includes, for example: (1) holding the account in the name of the deposit broker as agent for one or more customers, (2) the deposit broker's continuing to receive account fees after the account is opened, (3) the deposit broker's having the authority to make withdrawals or additional deposits, or (4) the deposit broker's having continued access to the account.[47] Continued access means that a third party will continue to receive access to the customer's account information that has been provided for the purpose of offering guidance to the customer as to the investment of the funds in the account.

It is also possible that involvement in a nonmaturity deposit by a third party could cease and then restart. As an example, if a deposit broker connects a customer to a particular insured depository institution, and then there is a 12-month period of no involvement, the customer's account may be classified as nonbrokered. However, if after the 12-month period, the same broker or another third party becomes involved again with the account, then the account would again be reclassified as brokered. In addition, if during the 12-month period, the same broker or another third party becomes involved with the[47] account, the account remains brokered until no third party is involved for a consecutive 12-month period.

~~F3~~F4. When an institution is less than well capitalized, must it refuse to renew or roll over a brokered CD if the deposit broker (at the time of renewal or rollover) continues to be involved with the account?

Yes. Under Section 29 of the FDI Act, if an insured depository institution is not well capitalized, the

~~[43] See Advisory Opinion No. 15-01 (April 16, 2014).~~
[45] See Advisory Opinion No. 15-01 (April 16, 2014).
[46] Data obtained from a 3rd party rate comparison service.
[47] See Advisory Opinion No. 15-01 (April 16, 2014).

institution will be prohibited from accepting (*i.e.*, renewing) the brokered CD account without a waiver from the FDIC.[~~44~~48]

~~F4~~F5. If an insured depository institution ceases to be well capitalized after the opening of a brokered CD account but before the maturity of the account, must the institution close the account immediately (assuming the institution does not obtain a waiver to accept brokered deposits), or can the institution wait until the CD matures before closing the account?

For a maturing CD, the deposit is accepted when the CD rolls over. Therefore, assuming a third party would be involved with the renewal of the account, the insured depository institution can wait until the maturity of the CD before closing the account.[~~45~~49]

~~F5~~F6. If an insured depository institution ceases to be well capitalized for Prompt Corrective Action (PCA) purposes, how should an institution treat brokered deposit accounts that are not time deposits (such as demand ~~deposit accounts~~deposits)?

If an insured depository institution ceases to be well capitalized for PCA purposes, the brokered deposit restrictions of Section 29 of the FDI Act will apply. Therefore, the insured depository institution should contact its primary federal regulator to establish an appropriate supervisory plan for addressing how brokered demand deposit accounts can comply with Section 29. In determining a supervisory plan, the insured depository institution's primary federal regulator and FDIC will consider how brokered deposits could impact the institution's liquidity, bank operations, or other factors. The goal of any supervisory plan regarding brokered deposits would be to not disrupt an institution's operations as it attempts to improve its capital category.[~~46~~50]

If the insured depository institution is adequately capitalized for PCA purposes, the insured depository institution may request a waiver from the FDIC to retain or accept brokered deposits. Even when the insured depository institution is undercapitalized for PCA purposes, the FDIC deals with each ~~Section 29~~ brokered deposit situation ~~regarding~~involving accounts that are not time deposits on a case-by-case basis.

G. INTEREST RATE RESTRICTIONS

G1. What are the interest rate restrictions?

Under the FDIC's regulation on interest rate restrictions,[~~47~~51] a bank that is not well capitalized generally may not offer deposit rates more than 75 basis points above the "national rate" for deposits of similar size and maturity. The regulations define the national rate as "a simple average of rates paid by all insured depository institutions and branches for which data are available."[~~48~~52] On a weekly basis, the FDIC posts the national rates and rate caps at National Rates.[~~49~~53]

If a bank believes that the posted national rates do not represent the actual rates in the bank's local market area, the bank may seek a determination from the FDIC that the bank is operating in a high-rate area. Assuming that the FDIC makes such a determination, the bank may offer the prevailing market

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[~~44~~48] *See~~,~~* Advisory Opinion No. 89-51 (December 21, 1989).
[~~45~~49] *See id.*
[~~46~~50] *See Study on Core Deposits and Brokered Deposits*, Section V.A.
[~~47~~51] *See* 12 C.F.R. § 337.6; ~~S~~*see also Study on Core Deposits and Brokered Deposits*, Section II.
[~~48~~52] *See* 12 C.F.R. § 337.6(b)(2)(ii)(B).
[~~49~~53] Available at: https://www.fdic.gov/regulations/resources/rates/.

rates instead of the national rates within the local market area. In accepting deposits from outside the local market area, however, the bank must use the national rates. Further, under Section 29 of the FDI Act, interest rate restrictions may not be waived.[~~50~~54]

G2. How is the prevailing rate calculated for a local market area?

As stated above, the national rate should be used to determine conformance with the interest rate restrictions unless the bank has requested and received a determination from the FDIC that it is operating in a high-rate area. The prevailing rate (effective yield) in a particular market area is the average of rates offered by other FDIC-insured depository institutions and branches in the geographic market area in which the deposits are being solicited. Rates offered by credit unions can be included in this calculation if an institution can support that it is competing directly with the credit unions for deposits.

Using a local market approach, the prevailing rate is calculated based on the maturity and size of the deposit as described below.

Maturity: For accounts with a maturity, calculate the prevailing rate by averaging competitors' rates based on the deposit term. For example, the bank's one-year certificate of deposit (CD) should be compared against the average rate for its competitors' one-year CDs. Separate rates may be calculated for savings accounts, NOW accounts and money market deposit accounts (MMDAs). However, further account bifurcation (for example, separate calculations for special-feature NOW accounts) is not consistent with the regulations and is therefore not allowed.

Size: For deposits of like maturity, calculate the prevailing rates for deposits under $100,000 (non-jumbo) and over $100,000 (jumbo).

For example, a bank's market area has seven other banks and branches offering these rates for a one-year CD under $100,000:

Bank A	1.15%
Branch of Bank A	1.15%
Your Bank	1.35%
Bank B	1.50%
Bank C	1.55%
Bank D	1.20%
Bank E	1.25%
Branch of Bank E	1.30%

The effective yield on a one-year CD for the subject bank's market area is:

$$(1.15 + 1.15 + 1.50 + 1.55 + 1.20 + 1.25 + 1.30)/7 = 1.30\%$$

Note: The average excludes the rate offered by the subject bank.

In this case, the maximum allowable rate, or rate cap, for the market area is:

[~~50~~54] *See* 12 U.S.C. § 1831f(e-h); ~~See~~ *see also* 12 C.F.R. § 337.6(c).

1.30% + 0.75% = 2.05%

G3. Why are branches of other banks included in determining the prevailing rate in a geographic market area?

Individual branches of other institutions are considered to be competitors in soliciting deposits within a market area. As mentioned previously, the regulations define the national rate as "a simple average of rates paid by all insured depository institutions and branches for which data are available." Excluding branches in calculating the prevailing rate for a local market would be inconsistent with the methodology for calculating the national rate.

G4. Can a market area consist of a subset of banks with similar characteristics, such as asset size or a retail focus? Likewise, can a market area exclude branches of large institutions?

No. The market area must be a geographic area and include all FDIC-insured competitors and branches.

G5. Should the cost of gifts given for opening a deposit account be included in the calculation of the deposit rate?

Yes. The rate used should include incentives provided to the customer, including the value of any gifts or cash incentives.

G6. How are accounts with uncommon features or restrictions handled when determining the effective yield?

The regulations allow the segregation of savings accounts, NOW accounts and MMDAs for evaluation purposes. However, accounts cannot be segregated based on special features or restrictions.

G7. If an insured institution ceases to be well capitalized, should existing non-brokered CDs that exceed the applicable rate caps be reported as brokered deposits in the Consolidated Reports of Condition and Income?

No. Above-market CDs, generated before a bank falls below well capitalized, should not be reported as brokered deposits; they also may continue to be held until their maturity dates. At renewal, the certificate of deposit cannot exceed the applicable market average by more than 75 basis points.

G8. If an insured depository institution ceases to be well capitalized, must the institution immediately meet the applicable rate caps on deposit accounts that never mature or renew, such as interest checking or savings accounts?

While Section 29 restricts institutions from paying above market rates on deposit accounts once they fall below well capitalized, it is critical that institution management contact its primary federal regulator when the lowering of the deposit rates could have a significant impact on liquidity or other factors affecting bank operations.

G9. In applying the rate caps, should an insured depository institution use the all-in cost of a deposit? Or should the bank use the annual percentage yield (APY) received by a deposit broker's customers? For example, if a bank pays 2.75 percent APY but a deposit broker

charges a 25 basis points fee on the deposit, should 2.75 percent or 2.50 percent be used to determine conformance with the interest rate restrictions?

In the above example, the rate restrictions would apply to the all-in cost of the deposit (the customer's effective APY plus the 25 basis points fee or 2.75 percent). This treatment is consistent with the treatment mandated by the Consolidated Reports of Condition and Income, which include the following instruction:

"Include as interest expense on the appropriate category of deposits finders' fees and brokers' fees that represent an adjustment to the interest rate paid on deposits the reporting bank acquires through brokers. If material, such fees should be capitalized and amortized over the term of the related deposits. However, exclude fees levied by brokers that are, in substance, retainer fees or that otherwise do not represent an adjustment to the interest rate paid on brokered deposits."

H. APPLICATIONS FOR WAIVERS

H1. How can an insured depository institution obtain a waiver from the FDIC to accept brokered deposits?

The brokered deposit waiver application procedures are set forth in the FDIC's regulations at 12 C.F.R. § 303.243. The FDIC may grant a waiver upon a finding that the acceptance of brokered deposits by the insured depository institution will not constitute an unsafe or unsound practice with respect to the institution. It is important to note that a waiver will not exempt a less than well capitalized institution from complying with the interest rate restrictions set forth in the FDIC's regulations at 12 C.F.R. § 337.6.

H2. What factors does the FDIC consider when assessing an application for a waiver?

Applications for waivers from brokered deposit restrictions are not automatically granted and are evaluated on a case-by-case basis. Further, brokered deposit waiver applications are usually not eligible for expedited processing. ~~Waiver~~Brokered deposit waiver applications are evaluated for traditional safety-and-soundness concerns based on an institution's capital position, asset quality, liquidity, and earnings performance. Applications also should include the institution's plan for reducing its dependence on brokered deposits. The FDIC also considers the opinion of the institution's primary federal regulator and its Bank Secrecy Act/Anti-Money Laundering compliance. Other important factors considered include management's capability to manage the potential volatility of the brokered deposits, contingency funding plans (such as alternate funding sources under lines of credit with correspondent banks or government agencies), and the liquidity monitoring program. The FDIC also will assess the institution's current business plan, including any plans relating to expansion or growth, and management's strategy to return the institution to a sound financial condition, if applicable.

LINKS TO RESOURCES

FDIC Law, Regulations and Related Acts
https://www.fdic.gov/regulations/laws/rules/4000-100.html#brok – ~~See~~Advisory Opinions, see "Brokerage Activities"
Study on Core Deposits and Brokered Deposits