

# Insights

## Brokered Deposits Restrictions Proposed Rulemaking Update

---

December 23, 2019

On December 12, 2019, the Federal Deposit Insurance Corporation ("FDIC") issued a notice of proposed rulemaking and a request for comment (collectively, the "Proposed Rule") with proposed updates to their brokered deposit regulations.<sup>1</sup> While the Proposed Rule doesn't alter the scope of those subject to brokered deposits restrictions in general,<sup>2</sup> it does provide a degree of certainty to financial institutions on certain aspects of the brokered deposit rules that have been until now, largely subject to interpretation based on earlier FDIC legal opinions.

The Proposed Rule seeks to modernize the existing brokered deposit regulations by proposing new language to (1) define certain prongs of the deposit broker definition; and (2) amend two existing exceptions to the definition of a deposit broker.

### Clarifying Who is a Deposit Broker

The Proposed Rule clarifies that the definition of a deposit broker as someone who is engaged in the business of placing deposits means a person who has a *"business relationship with its customers, and as part of that relationship, places deposits on behalf of the customer."* The Proposed Rule also clarifies who meets the "facilitation" prong of the deposit broker definition as someone, who while engaged in business, engages in any one or more of the following activities:

- directly or indirectly shares any third party information with the insured depository institution;
- has legal authority, contractual or otherwise, to close the account or move the third party's funds to another insured depository institution;
- provides assistance or is involved in setting rates, fees, terms, or conditions for the deposit account; or,
- is acting, directly or indirectly, with respect to the placement of deposits, as an intermediary between a third party that is placing deposits on behalf of a depositor and an insured depository institution, other than in a purely administrative capacity.



## Expanded Exceptions to Who is a Deposit Broker

The Proposed Rule expands the current exception from the definition of a deposit broker to include all wholly owned subsidiaries of an insured depository institution ("IDI") who place deposits of retail customers exclusively with a parent IDI, and who only engage in activities permissible by the IDI.

The Proposed Rule also amends the "primary purpose exception" from the definition of a deposit broker under existing law to expand the number of entities that meet the exception under Section 29 of the Federal Deposit Insurance Act. The FDIC is proposing the establishment of an application process to assist those attempting to qualify under the "primary purpose exception."

**Comments to the proposal must be submitted within 60 days of the publication of the proposed rule in the Federal Register. Krieg DeVault's Financial Institutions attorneys are monitoring the rulemaking process, and will provide further information in the coming months as commentary from the various stakeholders in this issue is filed.**

**1** The Proposed Rule amends brokered deposit provisions of both 12 CFR § 303.243 and 12 CFR § 337.6.

**2** Section 29 of the Federal Deposit Insurance Act, 12 U.S.C. § 1831f, as implemented by Section 337.6 of the FDIC's regulations, prohibits any IDI that is not "well capitalized" from accepting any deposit obtained, directly or indirectly, by or through any "deposit broker." IDIs who are "adequately capitalized" may request a waiver from this prohibition.