



December 18, 2018

MEMORANDUM TO: The Board of Directors

FROM: Doreen R. Eberley
Director, Division Risk Management Supervision

Diane Ellis
Director, Division of Insurance and Research

SUBJECT: Final Rulemaking Regarding Limited Exception for a Capped Amount of Reciprocal Deposits from Treatment as Brokered Deposits

RECOMMENDATION AND SUMMARY

Staff recommends that the FDIC Board of Directors (the Board) adopt the attached final rule and authorize its publication. The final rule would conform the FDIC's current regulations that implement brokered deposits and interest rate restrictions with recent changes to Section 29 of the Federal Deposit Insurance Act (FDI Act) made by Section 202 of the Economic Growth, Regulatory Relief, and Consumer Protection Act (the Act) related to reciprocal deposits, which took effect on May 24, 2018. The final rule would also make conforming amendments to the FDIC's regulations governing deposit insurance assessments.

DISCUSSION

Background

Under Section 29 of the FDI Act, well capitalized institutions are not restricted from accepting deposits by or through a deposit broker and have no restrictions on the rates they pay on deposits. However, less than well capitalized institutions may not accept or solicit brokered deposits and may not offer rates on any deposits that are significantly higher than the prevailing rates in the institution's normal market area. The FDIC may waive the restriction on accepting brokered deposits for adequately capitalized IDIs; however, the restriction to accept brokered deposits cannot be waived if the institution is less than adequately capitalized. Moreover, the interest rate restrictions cannot be waived for institutions that are less than well capitalized.

Concur:

Charles Yi
General Counsel

Section 202 of the Economic Growth, Regulatory Relief, and Consumer Protection Act

Section 202 of the Act amends Section 29 of the FDI Act to except a capped amount of reciprocal deposits from treatment as brokered deposits for certain IDIs.

Section 202 defines “reciprocal deposits” as “deposits received by an agent institution through a deposit placement network with the same maturity (if any) and in the same aggregate amount as covered deposits placed by the agent institution in other network member banks.”

Conversely, reciprocal deposits do not include deposits received by other network member banks through a network, such as (1) deposits received without the institution placing into the network a deposit of the same maturity and same aggregate amount (sometimes referred to as “one-way network deposits”) and (2) deposits placed by the institution into the network where the deposits were obtained, directly or indirectly, by or through a deposit broker. Such other network deposits meet the definition of brokered deposits but would not meet the definition of reciprocal deposits and thus would not be eligible to be excepted from an institution’s brokered deposits under Section 202.

As amended by Section 202, Section 29 now allows qualifying IDIs to except a certain amount of reciprocal deposits from a brokered deposit designation. To qualify, the institution must meet the definition of “agent institution,” which requires that it meet one of the following criteria:

- when most recently examined under Section 10(d) of the FDI Act was found to have a composite condition of outstanding or good; and is well capitalized;
- the institution has obtained a waiver pursuant to Section 29(c) of the FDI Act; or
- the institution does not receive an amount of reciprocal deposits that causes the total amount of reciprocal deposits held by the agent institution to be greater than the average of the total amount of reciprocal deposits held by the agent institution on the last day of each of the 4 calendar quarters preceding the calendar quarter in which the agent institution was found not to have a composite condition of outstanding or good or was determined to be not well capitalized.

In addition, the Act defines the following terms that are used in the definition of “reciprocal deposits:”

- The term “covered deposit” means “a deposit that (i) is submitted for placement through a deposit placement network by an agent institution; and (ii) does not consist of funds that were obtained for the agent institution, directly or indirectly, by or through a deposit broker before submission for placement through a deposit placement network.”
- The term “deposit placement network” means “a network in which an insured institution participates, together with other insured depository institutions, for the processing and receipt of reciprocal deposits.”
- The term “network member bank” means “an insured depository institution that is a member of a deposit placement network.”

Limited Exception for Reciprocal Deposits

If the definitional framework set forth above is satisfied, a well-capitalized and well-rated “agent institution” can classify the lesser of the following amounts as non-brokered (referred to as the *general cap*):

- \$5 billion, or
- an amount equal to 20 percent of its total liabilities.

Agent institutions that are either not well rated or not well capitalized could receive non-brokered reciprocal deposits up to the lesser of the *general cap* or a *special cap*, which is the average amount of reciprocal deposits held at quarter-end during the last four quarters preceding the quarter that the institution fell below well capitalized or well rated.

Reciprocal deposits that do not meet the Section 202 exception remain brokered deposits under Section 29.

Importantly, Section 202 confirms that the current statutory rate restrictions for less than well capitalized institutions continue to apply to any deposit, including a reciprocal deposit that is a covered deposit.

The Proposal

On September 12, 2018, the Board authorized the publication of a notice of proposed rulemaking (NPR), which was published in the Federal Register on September 26, 2018 with a 30-day comment period.¹ The NPR would amend the brokered deposit regulations by adding Section 202’s limited exception and its corresponding defined terms (as described above) into a new section 337.6(e). The NPR also would make conforming amendments to section 337.6(b)(2)(ii) related to the interest rate restrictions under Section 202. Finally, the NPR included amendments that would align the FDIC’s assessments regulations with the Act’s definition of “reciprocal deposit.” The proposal sought comment on all aspects of the proposed rulemaking.

Final Rule

After careful consideration of all comments received, staff recommends that the Board adopt as proposed the amendments to 12 CFR Part 337, which incorporate section 202 of the Act, and the conforming amendments to the assessment regulations in 12 CFR part 327.

Comments

The FDIC received twelve comments from insured depository institutions, banking associations, bank service providers, and law firms writing on behalf of institutions. The commenters generally supported the proposed rule. Commenters focused on a number of topics, including

¹ 83 FR 48562 (Sept. 26, 2018).

the application of the special cap and the treatment of *de novo* banks for purposes of the limited exception.

Application of Special Cap

Two commenters discussed the proposed rule's application of the special cap when an institution falls below well capitalized or is no longer well rated. They noted that while section 202 limits the amount an agent institution can "receive," it does not limit amounts an agent institution can maintain, retain, or hold. Thus, according to these commenters, an institution that falls below well capitalized or well rated should be able to retain reciprocal deposits, even if above the special cap, so long as when those reciprocal deposits mature or roll off, the institution does not receive additional reciprocal deposits that cause its total to exceed the special cap (i.e., the previous four-quarter average).

The preamble to the final rule recognizes that the statute only limits the amount of reciprocal deposits an institution may "receive" in order to be considered an agent institution. Thus, an institution that is less than well capitalized or not well rated will still qualify as an agent institution if it holds a level of reciprocal deposits above the special cap, as long as (1) such deposits were received before the institution became less than well capitalized or not well rated, (2) such deposits are time deposits, and (3) the institution satisfies all other qualifications necessary to be an agent institution.

De Novo Institutions

A few commenters stated that the regulation would not allow *de novo* institutions to benefit from the limited exception for reciprocal deposits because they would not have a composite condition rating for 12 to 14 months after being in operation and would not be eligible for the special cap because they would not have a prior four quarter average of reciprocal deposits. Commenters therefore proposed that the FDIC allow *de novo* institutions to be treated as agent institutions subject to the general cap. Some commenters suggested that the FDIC treat a *de novo* institution's pre-opening activities and approval of its business plan from both the FDIC and the chartering authority as substitute for a composite condition rating of outstanding or good.

In response to commenters, the preamble explains that *de novo* institutions may be eligible for the limited exception for reciprocal deposits once they meet the definition of agent institution under the statute and Final Rule, which adopts the language of section 202. Section 202 specifically requires that an institution "when most recently examined under section 10(d) was found to have a composite condition of outstanding or good."

Although *de novo* institutions may not be eligible for the limited exception for reporting reciprocal deposits as non-brokered until they receive their first rating under section 10(d) of the FDI Act, the FDIC staff proposes to accelerate the timing of a *de novo* state nonmember bank's first examination for FDIC-supervised examinations for those institutions that might benefit from the limited exception. FDIC staff will work with the other federal banking agencies to encourage similar supervisory treatment.

Conclusion

FDIC staff recommends that the Board approve the attached Final Rule for publication in the Federal Register.

Staff contacts:

RMS

Thomas F. Lyons, Chief, Policy and Program Development, (202) 898-6850
Judy Gross, Senior Policy Analyst, (202) 898-7047

DIR

Ashley Mihalik, Chief, Banking and Regulatory Policy, (202)898-3793

Legal Division

Vivek Khare, Counsel, (202) 898-6847
Thomas Hearn, Counsel, (202) 898-6967