December 14, 2020

MEMORANDUM TO: The Board of Directors

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

SUBJECT: Final Rule—Brokered Deposits and Interest Rate Restrictions

RECOMMENDATION

Staff is presenting for consideration by the FDIC Board of Directors ("Board") the attached final rule addressing brokered deposits and interest rate restrictions. The final rule would take effect on April 1, 2021; full compliance with the brokered deposit regulation would be extended to January 1, 2022.

SUMMARY

Brokered Deposits

For brokered deposits, the final rule establishes a new framework for analyzing certain provisions of the "deposit broker" definition, including "facilitating" and "primary purpose." In the final rule, the FDIC designates certain business relationships as meeting the primary purpose exception and allows insured depository institutions and third parties that wish to utilize the primary purpose exception but that do not meet one of the designated exceptions to apply for a primary purpose exception.

Interest Rate Restrictions

The final rule's revisions relate to interest rate restrictions that apply to less than well capitalized insured depository institutions. Under the final rule, the FDIC would amend the methodology for calculating the national rate and national rate cap for specific deposit products. The national rate would be the weighted average of rates paid by all insured depository institutions on a given deposit product, for which data are available, where the weights are each institution's market share of domestic deposits.

The national rate cap for particular products would be set at the higher of: (1) the national rate plus 75 basis points; or (2) for maturity deposits, 120 percent of the current yield on similar maturity U.S. Treasury obligations and, for nonmaturity deposits, the federal funds rate, plus 75

Concur:

Nicholas J. Podsiadly
General Counsel

basis points. The local market rate cap will be 90 percent of the highest offered rate in the institution's local market area for a specific deposit product.

Treatment of Nonmaturity Deposits

The final rule addresses, for nonmaturity deposits, how "accept" and "solicit" are applied for the brokered deposit and interest rate restrictions.

I. BROKERED DEPOSITS

1. Historical Statutory Framework

Section 29 of the Federal Deposit Insurance Act ("FDI Act")[1] restricts the acceptance of deposits by certain insured depository institutions from a "deposit broker." Under the law, a "well capitalized" insured depository institution is not restricted from accepting deposits from a deposit broker. An "adequately capitalized" insured depository institution may accept deposits from a deposit broker only if it has received a waiver from the FDIC.[2] An "undercapitalized" depository institution is prohibited from accepting deposits from a deposit broker.[3]

2. Current Regulations

Section 337.6 of the FDIC's Rules and Regulations implements and closely tracks the statutory text of Section 29, particularly with respect to the definition of "deposit broker" and its exceptions.[4] Section 29 of the FDI Act does not directly define a "brokered deposit;" rather, it defines a "deposit broker" for purposes of the restrictions.[5]

Section 29 and the FDIC's implementing regulation define the term "deposit broker" to include: 1) any person engaged in the business of placing deposits, or facilitating the placement of deposits, of third parties with insured depository institutions or the business of placing deposits with insured depository institutions for the purpose of selling interests in those deposits to third parties; and 2) 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.

This definition is subject to the following nine statutory exceptions:

1. an insured depository institution, with respect to funds placed with that depository institution;
2. an employee of an insured depository institution, with respect to funds placed with the employing depository institution;
3. a trust department of an insured depository institution, if the trust in question has not been established for the primary purpose of placing funds with insured depository institutions;

[1] 12 U.S.C. 1831f (also referred to herein as "Section 29").
[2] *See* 12 U.S.C. 1831f. A waiver may be granted by the FDIC "upon a finding that the acceptance of such deposits does not constitute an unsafe or unsound practice" with respect to that institution.
[3] *See id.*
[4] *See* 12 CFR 337.6.
[5] *See* 12 U.S.C. 1831f.

4. the trustee of a pension or other employee benefit plan, with respect to funds of the plan;
5. a person acting as a plan administrator or an investment adviser in connection with a pension plan or other employee benefit plan provided that that person is performing managerial functions with respect to the plan;
6. the trustee of a testamentary account;
7. the trustee of an irrevocable trust (other than one described in paragraph (1)(B)), as long as the trust in question has not been established for the primary purpose of placing funds with insured depository institutions;
8. a trustee or custodian of a pension or profit sharing plan qualified under section 401(d) or 430(a) of the Internal Revenue Code of 1986; or
9. an agent or nominee whose primary purpose is not the placement of funds with depository institutions.

The statute and regulation also define an "employee" to mean any employee: (1) who is employed exclusively by the insured depository institution; (2) whose compensation is primarily in the form of a salary; (3) who does not share such employee's compensation with a deposit broker; and (4) whose office space or place of business is used exclusively for the benefit of the insured depository institution which employs such individual.[6]

3. Final Rule

A. Definition of Deposit Broker

1. Exclusive Deposit Placement Arrangements

Section 29 provides that *a person* meets the "deposit broker" definition when it is "*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" (emphasis added). The FDIC recognizes that a number of entities, including some financial technology companies, partner with one insured depository institution to establish exclusive deposit placement arrangements. Under these arrangements, the third party has developed an exclusive business relationship with the IDI and, as a result, is less likely to move its customer funds to other IDIs in a way that makes the deposits less stable.

As such, in an effort to clarify the types of persons that meet the "deposit broker" definition, under this final rule, any person that has an exclusive deposit placement arrangement with one IDI, and is not placing or facilitating the placement of deposits at any other IDI, will not be "engaged in the business" of placing, or facilitating the placement of, deposits and therefore will not meet the "deposit broker" definition.

2. Engaged in the Business of Placing Deposits

The statute provides that a person meets the definition of "deposit broker" if the person is "engaged in the business of placing deposits" on behalf of a third party (i.e., a depositor) at

[6] 12 U.S.C. 1831f(g)(4).

insured depository institutions. The FDIC is amending this part of the "deposit broker" definition in the final rule by providing that the person must receive customer funds before placing deposits to satisfy this part of the definition.

3. Engaged in the Business of Facilitating the Placement of Deposits

The final rule provides that if a person engages in any one of the following activities, while engaged in business, the person will be a deposit broker, and any deposits placed by the person will be brokered:

- The person has legal authority, contractual or otherwise, to close the account or move the third party's funds to another insured depository institution;
- The person is involved in negotiating or setting rates, fees, terms, or conditions for the deposit account; or
- The person engages in "matchmaking services," as defined in the rule.

The FDIC is not retaining the first proposed prong of the "facilitation" definition, which would have included a person who directly or indirectly shares any third party information with the insured depository institution. The FDIC agrees with commenters that the "direct or indirect sharing of customer information" is overly broad and could have the unintended effect of capturing persons that do not have influence or control over the placement of deposits. The proposed first prong was generally intended to capture activities where the person shares information in an effort to match prospective depositors with particular banks, and that specific activity, as part of the final rule, will now be included in the matchmaking services prong of the facilitation definition.

The FDIC is finalizing the proposed prong relating to legal control over the account as part of the "facilitation" definition. The FDIC believes that the activity demonstrates that a third party has meaningful, substantial influence or control over an account and, therefore, is acting as a deposit broker.

With respect to the second prong, the FDIC is revising this prong from the proposal to clarify that it only includes activities where a third party is negotiating or setting rates, terms, or conditions for a particular deposit product (on behalf of a particular depositor or particular depositors). By striking the "providing assistance" criteria from the proposal, this revised prong will appropriately capture third parties that influence or control the placement of deposits by negotiating deposit terms between depositors and insured depository institutions.

Finally, the third prong in the final rule will capture persons that engage in matchmaking. The final rule will define "matchmaking" as follows:

- A person is engaged in matchmaking if the person proposes deposit allocations at, or between, more than one bank based upon both (a) the particular deposit objectives of a specific depositor or depositor's agent, and (b) the particular deposit objectives of specific banks, except in the case of deposits placed by a depositor's agent at a bank affiliated with the depositor's agent. A proposed deposit allocation is based on the particular objectives of:

- a depositor or depositor's agent when the person has access to specific financial information of the depositor or depositor's agents and the proposed deposit allocation is based upon such information; and
- a bank when the person has access to specific information of the deposit-balance objectives of the bank and the proposed deposit allocation is based upon such information.

Specifically, this prong captures certain entities that utilize their relationships with prospective depositors or depositor's agents and banks to propose deposit allocations at particular banks. These activities indicate that the person has influence over the movement of deposits between insured depository institutions. These activities also indicate that the person is not only satisfying the deposit objectives of the depositor or its agent but also of the insured depository institution. Such a relationship could allow less than well capitalized institutions to utilize a third party to bid for considerable volumes of funding, quickly, which could present heightened risks to the Deposit Insurance Fund. Additionally, such a relationship could increase the likelihood of a third party withdrawing funds from a less than well capitalized institution (or under other circumstances, such as in the event an institution is the subject of an enforcement action), which could present sudden liquidity concerns.

This prong would not include persons that engage in activities that would otherwise satisfy the matchmaking prong if, and to the extent that, these activities are conducted between a bank and an affiliated depositor's agent. With respect to this specific function, the FDIC views such services by an intermediary as administrative in nature due to the direct relationship between the person placing the deposits and the bank.[7] However, deposits placed at banks with the assistance of persons engaging in matchmaking activities, by an affiliated depositor or depositor's agent that meets the deposit broker definition, would be brokered.

This prong will include third parties that engage in matchmaking as part of an unaffiliated deposit sweep program between a depositor, its broker dealer, and various unaffiliated banks. These third parties propose deposit allocations by matching the deposit obligations of either the depositor(s) or the broker dealers with the target deposit balances of various unaffiliated banks.

4. Engaged in the Business of Placing Deposits with IDIs for the Purpose of Selling Interests

The third part of the "deposit broker" definition includes a person "engaged in the business of placing deposits with insured depository institutions for the purpose of selling interests in those deposits to third parties." As provided in the proposed rule, this part of the definition specifically captures brokered CDs.

Under the final rule, without exception, and as further explained below in the section discussing the primary purpose exception, brokered CDs continue to be classified as brokered. In response to a commenter, the FDIC is revising the proposed definition of a brokered CD in Part 303 to

[7] This view aligns with the FDIC's intent not to disrupt business arrangements that have existed for a number of years in reliance on prior staff guidance related to affiliate sweep arrangements, when the resulting adjustments to business operations would be solely for the purpose of complying with regulatory changes.

more accurately reflect the current marketplace.

B. Exceptions to the Deposit Broker Definition

1. IDI Exception

The final rule is not adopting the proposed changes to the IDI exception. Under this final rule, the deposit broker definition does not include third parties that have an exclusive deposit placement arrangement with one insured depository institution. As a result, the proposed expansion of the IDI exception to wholly owned subsidiaries is no longer necessary.

2. Primary Purpose Exception

Under the final rule, the primary purpose exception applies when, with respect to a particular business line, the primary purpose of the agent's or nominee's business relationship with its customers is not the placement of funds with depository institutions, and whether an agent or nominee qualifies for the primary purpose exception will be based on analysis of the agent's or nominee's relationship with those customers.

i. Designated Exceptions

In the final rule, the FDIC recognizes a number of business relationships, known as "designated business exceptions," listed below, as meeting the primary purpose exception. Two of these relationships are the two relationships described in the proposal as business relationships deemed to meet the primary purpose exception – the "25 percent" business relationship and the "enabling transactions" business relationship. The "enabling transactions" business relationship would apply when all customer deposits placed at depository institutions are placed into transaction accounts and no fees, interest or remuneration are being paid to the depositor. Unlike in the proposal, these two relationships will not be required to go through the application process, and instead will only require a notice.

The final rule also adds a number of additional designated exceptions that will neither require a notice nor an application. The additional designated exceptions include some business relationships that have previously been viewed by staff as meeting the primary purpose exception, and have been evaluated as part of this rulemaking process to meet the primary purpose exception under the interpretation of the exception adopted in this final rule. The following business relationships are identified as designated business exceptions under the final rule:

> Business relationships where the agent or nominee, with respect to a particular business line, places, or facilitates the placement of, deposits at depository institutions comprised of:

(1) less than 25 percent of the total "assets under administration" for its customers;
(2) 100 percent of depositors' funds are placed into transactional accounts for the purpose

of enabling transactions (if no interest, fees, or remuneration is being paid);
(3) customer funds for the primary purpose of providing property management services;
(4) customer funds for the primary purpose of providing cross-border clearing services to its customers;
(5) customer funds for the primary purpose of providing mortgage servicing;
(6) customer funds for the primary purpose of facilitating a real estate transaction;
(7) customer funds for the purpose of facilitating the exchange of properties under section 1031 of the Internal Revenue Code;
(8) customer funds in compliance with 17 CFR 240.15c3-3(e) or 17 CFR 1.20(a);
(9) customer funds for the primary purpose of posting as collateral to obtain a credit-card loan;
(10) customer funds for the primary purpose of paying for or reimbursing qualified medical expenses under section 223 of the Internal Revenue Code;
(11) customer funds the primary purpose of investing in qualified tuition programs under section 529 of the Internal Revenue Code;
(12) customer funds to enable participation in certain tax-advantaged retirement programs;
(13) customer funds to deliver funds to the beneficiaries of government programs; and
(14) customer funds placed pursuant to such other relationship that the FDIC identifies as a designated business relationship that meets the primary purpose exception.

ii. Other Business Relationships

Under the final rule, agents or nominees that meet the "deposit broker" definition, but do not qualify for a designated exception, may submit an application to the FDIC. The FDIC will review whether the applicant sufficiently demonstrated that the primary purpose of the agent or nominee is something other than the placement, or facilitating the placement, of funds at insured depository institutions. In conducting this review, the FDIC will specifically look at the primary purpose of the business relationship between the agent or nominee and customers, with respect to a particular business line. As part of its review, the FDIC will, as proposed, consider the following factors: (1) the revenue structure for the agent or nominee; (2) whether the agent's or nominee's marketing activities to prospective depositors are aimed at opening a deposit account or providing some other service, and if there is some other service, whether the opening of the deposit account is incidental to that other service; and (3) the fees, and type of fees, received by an agent or nominee for any deposit placement service it offers.

The FDIC expects to make publicly available on its website (1) redacted summaries of certain approved applications, as soon as practicable, and (2) a list of additional designated exceptions that the FDIC identifies as meeting the primary purpose exception without requiring an application.

iii. Placement of Brokered CD's Not Eligible for Primary Purpose Exception

In the Brokered Deposits NPR, the FDIC stated that it would continue to consider a person's placement of brokered CDs (as described in the third prong to the deposit broker definition and as discussed above) as deposit brokering. Under the proposal, for purposes of establishing the person's primary purpose, the person's placement of brokered CDs would be considered a

discrete and independent business line from other deposit placement businesses. Thus, the primary purpose for that particular business line would always be the placement of deposits at depository institutions, even if the person may not be considered a deposit broker for other deposits that it places (or for which it facilitates the placement), which would be evaluated as a separate business line.

Accordingly, consistent with the intent of Section 29 (and Part 337 of the FDIC's regulations), brokered CDs, as has been the case since 1989, will be considered brokered, without exception. Deposits related to brokered CDs will not be considered for purposes of determining whether a person's other business lines meet the primary purpose exception.

3. Involvement of Other Third Party Intermediaries

If an agent or nominee qualifies for a statutory exception from the deposit broker definition, it is possible that one or more additional third parties that is engaged in the business of placing, or facilitating the placement of, customer deposits may qualify as a deposit broker. The FDIC understands that, in certain deposit placement arrangements, agents or nominees may use third party intermediaries to provide administrative functions. To the extent that these third party intermediaries do not meet the deposit broker definition, then deposits placed at IDIs via an agent or nominee that meet an exception to the definition of deposit broker (for example, the primary purpose exception), will be nonbrokered. If, however, the third party intermediary is, for example, providing matchmaking functions to the agent or nominee and insured depository institution, as defined in this final rule, then it would meet the "facilitation" part of the deposit broker definition, and the deposits placed through the assistance of the intermediary are brokered deposits, regardless of the status of the agent or nominee.

4. Notice and Application Process for the Primary Purpose Exception

Under the proposal, entities that place deposits at IDIs under the business relationships that were deemed to meet the primary purpose exception would have been subject to expedited application processing. The FDIC is revising this part of the proposed application process and, under the final rule, will no longer require applications for either those business relationships or for the additional designated business relationships described in this final rule.

a. Notice Requirement

For two of the designated exceptions – the "25 percent" and the "enabling transactions" business relationships – the FDIC is requiring that third parties submit a written notice to the FDIC that the third party will rely upon one of the designated exceptions.[8] The notice may also be submitted by an IDI that is receiving deposits from the third party. Upon the FDIC's receipt of the notice, the third party that is the subject of the notice may rely upon the applicable designated exception.

b. Application Process

[8] Entities that qualify for other designated exceptions detailed above are not subject to a notice, application, or reporting process.

The FDIC is finalizing the proposed application process for entities that seek to qualify for the primary purpose exception but that do not meet a designated exception. An applicant may be an IDI that applies to the FDIC on behalf of a third party seeking a determination that the third party meets the primary purpose exception. The rule sets forth certain information to be included in an application, to the extent applicable.

The FDIC will approve applications submitted under this process if the application demonstrates to the FDIC's satisfaction, with respect to the particular business line under which the third party places or facilitates the placement of deposits, that the primary purpose of the third party, for that business line, is a purpose other than the placement or facilitation of placement of deposits. Approved applicants may be subject to periodic reporting requirements to enable the FDIC to ensure that the applicant continues to meet the exception.

II. INTEREST RATE RESTRICTIONS

1. Background

Under Section 29 of the Federal Deposit Insurance Act (FDI Act), well capitalized institutions are not subject to any interest rate restrictions. However, the statute imposes interest rate restrictions on insured depository institutions that are less than well capitalized, as defined in Section 38 of the FDI Act.[9] The statutory interest rate restrictions generally limit a less than well capitalized institution from offering rates on deposits that significantly exceed rates in its prevailing market.

The Current Interest Rate Cap

Under the FDIC's current regulations, 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.[10]

The national rate is currently defined as a simple average of rates paid by all insured depository institutions and branches that offer and publish rates for specific products. If an institution believes that the posted national rates do not represent the actual rates in the bank's local market area, the bank may present evidence to the FDIC that the prevailing rate in a particular market is higher than the national rate. If the FDIC agrees with this evidence, the institution would be permitted to pay as much as 75 basis points above the local prevailing rate for deposits solicited in its local market area.

The Need to Revise the Current Regulation

The current interest rate cap regulations became effective in 2010 and were adopted to modify the previous national rate cap (based on U.S. Treasury securities) that had become overly restrictive.

[9] 12 U.S.C. 1831f.
[10] 12 CFR 337.6.

Between 2010 and approximately the second quarter of 2015, rates on deposits were quite low, even for the top rate payers. For this period, the current regulation's methodology for calculating the national rate, to which 75 basis points is added to arrive at the national rate cap, resulted in a national rate cap that allowed less than well capitalized institutions to easily compete with even the highest rates paid on the 12-month CD during this timeframe.

However, from about July 2015 through February 2020, interest rates increased, but the current national rate methodology resulted in a national rate for various deposit products that, when 75 basis points were added, resulted in national rate caps that remained relatively unchanged. During this period, the FDIC observed that the relatively unchanged national rate could restrict less than well-capitalized banks from competing for market-rate funding.

Due to the spread of the COVID-19 and the resulting effect on the economy beginning in March 2020, deposit rates in general, including the national rate and the rates paid by the top rate payers, dropped, so that less than well-capitalized institutions may again easily compete with even the highest rates paid on the 12-month CD under the current national rate cap.

Through approximately March of 2020, the majority of the institutions subject to the interest rate caps sought determinations from the FDIC to use the local rate cap for deposits obtained locally as the prevailing rate. The national rate cap, however, remained applicable to deposits that these institutions obtained from outside their respective normal market area, including through the internet.

Setting the national rate cap at too low of a level could prohibit less than well capitalized banks from competing for deposits and create an unintentional liquidity strain on those banks competing in national markets. For example, a national rate cap that is too low could destabilize a less than well capitalized bank that gathers deposits outside its local market area just as it is working on improving its financial condition. Preventing such institutions from being competitive for deposits, when they are most in need of predictable liquidity, can create severe funding problems.

Additionally, a rate cap that is too low may be inconsistent with the statutory requirement that an insured depository institution is only prohibited from offering a rate that "significantly exceeds" or is "significantly higher" than the prevailing rate. This could unnecessarily harm the institution, especially when liquidity planning is essential for safety and soundness.

2. The Final Rule

The final rule would amend the FDIC's methodology for calculating the national rate, the national rate cap, and the local rate cap. The final rule would also provide a new simplified process for institutions that seek to offer a competitive rate when the prevailing rate in an institution's local market area exceeds the national rate cap.

National Rate

The final rule would adopt the national rate methodology generally as proposed, but revise it to include the rates offered by credit unions. After considering the comments that indicated that

credit unions compete with banks on a national scale, staff believes that the proposed national rate definition, replacing the interest rate average weighted by branches with an average where each institution's interest rate is weighted by its share of deposits, with the addition of insured credit union rates, is appropriate.

National Rate Cap

In the final rule, the national rate cap would be the higher of: (1) the national rate, as revised to be based on weighting by deposits rather than branches (and including credit unions), plus 75 basis points; or (2) 120 percent of the current yield on similar maturity U.S. Treasury obligations, plus 75 basis points. The Treasury-based second prong would also provide that, for non-maturity deposits, the prong would be the federal funds rate, plus 75 basis points.

Staff recommends replacing the proposed 95th percentile prong with a cap based on Treasury yields or federal funds, because, as noted in the Interest Rate Restrictions NPR, there are certain data limitations with the proposed methodology. Specifically, the data gathered from third party sources is based upon information provided directly by institutions or made available via public sources. As such, some rates being offered for certain products are left unreported or unpublished and therefore may not be captured as part of the data set used to determine the proposed 95th percentile prong.

Staff recommends that the FDIC retain the first proposed prong for the national rate cap (national rate + 75 basis points) because (1) based upon review of the historical information, the first prong will be substantially similar to the branch-based methodology that the FDIC has used for over a decade, (2) the 75 basis point buffer ameliorates, though does not eliminate, some of the potential data concerns,[11] and (3) including a second prong not based on deposit data ensures the FDIC is not fully relying on deposit data in calculating the national rate cap.[12]

Local Market Rate Cap in the Final Rule.

In the final rule, the FDIC would adopt the proposed local market rate cap of 90 percent of the highest offered rate in the institution's local market geographic area. Specifically, a less than well capitalized institution would be permitted to provide evidence that any bank or credit union with a physical presence in its local market area offers a rate on a particular deposit product in excess of the national rate cap. The local market area could include the State, county or metropolitan statistical area, in which the insured depository institution accepts or solicits deposits.

The final rule would also eliminate the current two-step process where less than well capitalized institutions request a high rate determination from the FDIC and, if approved, calculate the

[11] As shown in the appendices, for the period of low interest rates during 2010 to 2015, and from March 2020 to the present, the 75 basis points added to the national rate did not restrict less than well capitalized institutions from competing for market-rate deposits when U.S. Treasury yields were near zero.

[12] As shown in the appendices, for the periods of 1992 and 2008 and 2015 to early 2020, during periods of more normal interest rate environments, the national rate cap based on Treasuries is more reactive to increases in deposit rates than the first prong.

prevailing rate within local markets. Instead, a less than well capitalized institution would be required to notify the FDIC that it intends to offer a rate that is above the national rate cap and provide evidence that an insured depository institution or credit union with a physical presence in the less than well capitalized institution's normal market area is offering a rate on a particular deposit product in its local market area in excess of the national rate cap.

III. TREATMENT OF NONMATURITY DEPOSITS

1. Background

Section 29 provides that an "insured depository institution that is not well capitalized may not *accept* funds obtained, directly or indirectly, by or through any deposit broker for deposit into 1 or more deposit accounts" (emphasis added).[13]

Section 29 also contains two interest rate restrictions, one based on when funds are accepted by an institution, the other on when an institution solicits deposits. One restriction provides that an adequately capitalized institution accepting reciprocal deposits, or brokered deposits pursuant to a waiver granted under section 29(c) of the FDI Act may not pay a rate of interest that, at the time the funds are *accepted*, significantly exceeds the prevailing rate.[14] The other interest rate restriction prohibits a less than well capitalized institution from *soliciting* any deposits by offering a rate of interest that is significantly higher than the prevailing rate.[15]

For CDs and other maturity deposits, the timing of when funds for such deposits is accepted is straightforward, and section 29 directs that such funds are accepted when the maturity deposit is renewed or rolled over.[16] For deposits credited to a nonmaturity account, however, section 29 does not provide express direction or guidance on when such a deposit is *accepted* or *solicited.*

2. Final Rule

The final rule would adopt a new interpretation for the solicitation and acceptance of nonmaturity deposits. In adopting the interpretation described below, the FDIC would be relying on the plain meaning of the terms "solicit" and "accept" in a way that it is intended to be operationally workable for institutions and the FDIC.

A. Solicitation of Funds by Offering Rates of Interest

Under the final rule, generally, an institution has *solicited* a deposit when a new account is opened or when the institution increases the rate of interest on an existing account. For a nonmaturity account opened after an institution has fallen below well capitalized, an institution would be considered to have solicited the deposit when the account is opened.

For a nonmaturity account opened prior to an institution's PCA status falling below well capitalized, funds already credited to the account at that time have not been solicited by the institution. In addition, an institution would not be considered to have solicited deposits when new funds are added to a nonmaturity account that was opened before the institution fell below well capitalized unless it has increased the interest rate on the account.

For a nonmaturity account held by a party as agent or nominee of one or more persons, under the final rule, funds would be considered solicited each time the funds of a new beneficial owner are added to, for example, an omnibus account. As a result, a less than well capitalized institution is

restricted from soliciting funds of a new beneficial owner at a rate that exceeds its applicable rate caps.

B. Acceptance of Brokered Deposits

Under the final rule, the FDIC would adopt an interpretation for when a nonmaturity brokered deposit is considered accepted and therefore subject to the brokered deposits restrictions. Generally, the funds would be accepted whenever (1) a depositor, or underlying beneficial owner of a deposit in the case of an agent or nominee account, adds funds to a newly opened nonmaturity account (or similarly, when funds for a new underlying depositor are credited to an omnibus account in the case of an agent or nominee), or (2) for existing nonmaturity accounts, when the aggregate amount of nonmaturity funds accepted by or through a particular deposit broker increases, based on a specified point in time.

More specifically, under the final rule, for nonmaturity brokered deposits opened prior to an institution's PCA status falling below well capitalized, funds that were already credited to the nonmaturity accounts at that time, by a particular deposit broker, would not be treated as being accepted. Nonmaturity brokered deposits would be considered accepted in instances when, after an institution becomes less than well capitalized:

- a nonmaturity brokered account is opened;
- the amount of nonmaturity brokered deposits, by or through a particular deposit broker, increases above the balance of nonmaturity brokered deposits existing at the bank, with respect to that particular deposit broker, at the time of downgrade to less than well capitalized; or
- for agent or nominee accounts, new funds of a new beneficial owner are added to the account.

C. Acceptance of Brokered Deposits Subject to a Waiver into a Nonmaturity Account

As noted above, for the purposes of Section 29's interest rate restrictions, in addition to the restrictions on *soliciting* deposits by offering a rate of interest that is significantly higher than the prevailing rate, an adequately capitalized institution is also subject to interest rate restrictions when it *accepts* nonmaturity brokered deposits subject to a waiver.

As a result, nonmaturity brokered deposits that are accepted pursuant to a waiver, as described above, would be subject to the applicable rate cap. More specifically, for a nonmaturity account opened prior to an institution's PCA status falling below well capitalized, with respect to a particular deposit broker, brokered funds that were already credited to the nonmaturity account at that time would not be treated as being accepted for purposes of the interest rate restrictions.

Funds added to the account after the institution falls below well capitalized, with respect to a particular deposit broker, would be subject to the interest rate restriction to the extent they exceeded the balance of nonmaturity brokered deposits existing at the bank, with respect to that particular deposit broker, at the time of downgrade to less than well capitalized, if the institution has received a waiver to accept brokered deposits.

In addition, with respect to a particular deposit broker, for a nonmaturity account opened after an institution has fallen below well capitalized, the brokered funds would be treated as accepted when the nonmaturity account is opened. For a nonmaturity account held by a party as agent or nominee of one or more persons, with respect to a particular deposit broker, funds would be considered accepted each time funds of a new depositor are added to the omnibus account.

EFFECTIVE DATE AND EXTENDED COMPLIANCE DATE

The final rule would take effect on April 1, 2021. Full compliance, with respect to the revisions to the brokered deposit regulations, is extended to January 1, 2022. The extended compliance date is intended to provide sufficient time for financial institutions to put in place systems to implement the new regulatory regime and to allow the FDIC to develop internal processes and systems to ensure a consistent and robust review process. Accordingly, beginning April 1, 2021, entities may begin relying upon the provisions of this final rule, and will have to comply with any applicable reporting requirements. The full compliance date of January 1, 2022, permits entities to continue to rely on existing staff advisory opinions or other interpretations until that date.

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