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EDITOR'S NOTE: ADMINISTRATIVE LAW

Victoria Prussen Spears

A PRIMER ON THE ADMINISTRATIVE LAW OF BANK REGULATION

Jeremy Newell, Beth Brinkmann, Henry Liu, and Conrad Scott

**BANKING MERGERS: THE CASE TO REPLACE THE 1995 BANKING MERGER
GUIDELINES – PART I: A CHANGED INDUSTRY**

Michael D. Noel

**AGENCIES REQUIRE DEDUCTION OF TLAC DEBT HELD BY CATEGORY I AND II
BANKING ORGANIZATIONS**

Hugh C. Conroy, Jr., Allison H. Breault, and Wankun Wang

FDIC'S NEW BROKERED DEPOSIT RULE BENEFITS BANK-FINTECH PARTNERSHIPS

Dustin N. Nofziger

MUNICIPAL VRDO CLASS ACTION SURVIVES BANKS' REQUEST FOR DISMISSAL

Les Jacobowitz, Mohammed T. Farooqui, and D. Austin Rettew



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VOLUME 138

NUMBER 3

March 2021

Editor's Note: Administrative Law

Victoria Prussen Spears 137

A Primer on the Administrative Law of Bank Regulation

Jeremy Newell, Beth Brinkmann, Henry Liu, and Conrad Scott 140

**Banking Mergers: The Case to Replace the 1995 Banking Merger
Guidelines—Part I: A Changed Industry**

Michael D. Noel 150

**Agencies Require Deduction of TLAC Debt Held by
Category I and II Banking Organizations**

Hugh C. Conroy, Jr., Allison H. Breault, and Wankun Wang 165

**FDIC's New Brokered Deposit Rule Benefits Bank-FinTech
Partnerships**

Dustin N. Nofziger 178

**Municipal VRDO Class Action Survives Banks' Request for
Dismissal**

Les Jacobowitz, Mohammed T. Farooqui, and D. Austin Rettew 182

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FDIC's New Brokered Deposit Rule Benefits Bank-FinTech Partnerships

*Dustin N. Nofziger**

The author reviews a new rule that will allow banks and FinTechs to structure consumer savings account partnerships that avoid triggering brokered deposit designations.

The Federal Deposit Insurance Corporation (“FDIC”) has issued a final rule that will be helpful to app-based FinTech services that facilitate consumer savings accounts.¹ This rule will allow banks and FinTechs to structure consumer savings account partnerships that avoid triggering brokered deposit designations. The new rule, which becomes effective April 1, 2021, achieves this result through modifications to the regulatory definition of “deposit broker” and to the “primary purpose” exception to that definition.

BACKGROUND

A brokered deposit is any deposit that an FDIC-insured bank obtains, directly or indirectly, from or through the mediation or assistance of a “deposit broker.”² The definition of “deposit broker” is broad and includes “[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

There are several exceptions to this definition. Most notably, under the “primary purpose” exception, “[a]n agent or nominee whose primary purpose is not the placement of funds with depository institutions” is not a deposit broker.⁴

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¹ See Unsafe and Unsound Banking Practices: Brokered Deposits and Interest Rate Restrictions (Dec. 15, 2020) (to be codified at 12 C.F.R. Parts 303 and 337), *available at* <https://www.fdic.gov/news/press-releases/2020/pr20136.html> (follow link to “Final Rule on Brokered Deposit and Interest Rate Restrictions Applicable to Less Than Well Capitalized Banks”).

² 12 C.F.R. § 337.6(a)(2).

³ See 12 C.F.R. § 337.6(a)(5)(i)(A).

⁴ 12 C.F.R. § 337.6(a)(5)(ii)(I).

The designation of a deposit as “brokered” can have important implications for an FDIC-insured bank, depending on the FDIC’s categorization of the bank’s capitalization. Banks that are less than adequately capitalized may not accept brokered deposits, and adequately capitalized banks may only accept brokered deposits if permitted by an FDIC waiver.⁵ Banks that are less than well-capitalized are subject to interest rate restrictions, including, for adequately capitalized banks, restrictions on the interest rates that they can pay for brokered deposits pursuant to a waiver.⁶

MODIFICATION OF THE DEFINITION OF “DEPOSIT BROKER” BENEFITS FINTECHS

As noted above, there are several avenues through which a FinTech can constitute a deposit broker, such that deposits a bank obtains from or through the FinTech’s mediation or assistance would be considered brokered.

One avenue is when the FinTech is “engaged in the business of placing deposits of third parties” with banks. The final rule clarifies that a FinTech will be engaged in the business of placing deposits of third parties with banks if it deposits third-party funds at more than one bank. A FinTech that places third-party deposits at a single bank with which it has an exclusive relationship will therefore not be engaged in the business of placing deposits of third parties with banks, and will not be treated as a deposit broker on that basis.

Another avenue by which a FinTech can constitute a deposit broker is when it is “engaged in the business of facilitating the placement of deposits of third parties” with banks. The final rule clarifies that a FinTech will be treated as engaged in the business of facilitating the placement of deposits of third parties with banks if the FinTech is engaged in certain activities with respect to deposits placed at more than one bank. For example, a FinTech will be engaged in the business of facilitating the placement of deposits of third parties with banks when it places third-party deposits at more than one bank and has the legal authority to close an account or to move a third party’s funds between depository institutions.

By providing increased specificity as to when a FinTech will constitute a deposit broker, the FDIC has provided banks and FinTechs with the opportunity to structure partnerships that do not trigger the new definition of “deposit broker.”

⁵ See 12 C.F.R. § 337.6(b)(2)(i), (b)(3)(i).

⁶ See 12 C.F.R. § 337.6(b)(2)(ii).

MODIFICATION OF THE “PRIMARY PURPOSE” EXCEPTION BENEFITS FINTECHS

The FDIC historically has provided guidance in the form of fact-specific advisory opinions on the application of the “primary purpose” exception, under which an agent or nominee whose primary purpose is not the placement of funds with banks is not a deposit broker. The final rule codifies many of these advisory opinions by specifying business relationships to which the primary purpose exception will apply upon the final rule’s effective date. The final rule also goes beyond the FDIC’s prior advisory opinions by codifying new business relationships to which the primary purpose exception will apply.

Of particular note, the primary purpose exception will apply under the final rule where, with respect to a particular business line, less than 25 percent of a FinTech’s assets under management are placed at depository institutions (the “25 percent” test). The primary purpose exception will also apply when 100 percent of the funds a FinTech places or assists in placing are placed into transactional accounts that do not pay fees, interest, or other remuneration to the depositor (the “enabling transactions” test). FinTechs (or banks on behalf of FinTechs) will be required to submit a written notice to the FDIC detailing certain specific information in order to rely upon the 25 percent test or the enabling transactions test.

If a FinTech does not qualify for the primary purpose exception under one of final rule’s enumerated business relationships, such as the 25 percent test or the enabling transaction test, the FinTech (or a bank on its behalf) may submit an application to the FDIC seeking the application of the primary purpose exception. The FDIC’s commentary to the final rule explains: “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 [FinTech] places or facilitates the placement of deposits, that the primary purpose of the [FinTech], for that business line, is a purpose other than the placement or facilitation of placement of deposits.”⁷

EFFECTIVE DATE

While the final rule is effective April 1, 2021, the FDIC has extended the deadline for full compliance with the final rule to January 1, 2022. In other words, entities can choose to operate under the framework of the final rule starting on April 1, 2021 or can (if they wish) continue until December 31,

⁷ *Id.* at 62.

2021 to rely on the FDIC's existing staff advisory opinions and other interpretations concerning the deposit broker definition and the primary purpose exception.

On January 1, 2022, the FDIC's advisory opinions and other publicly available interpretations will be moved to inactive status, and entities will no longer be permitted to rely on upon them.

CONCLUDING THOUGHTS

The FDIC's final rule is a boon to app-based FinTech services that facilitate consumer savings accounts and their bank partners. As former Acting OCC Comptroller and FDIC Board member Brian Brooks recently described it, the FDIC's current, "broad definition of brokered deposits discourage[s] bank and fintech partnerships by imposing unnecessary burden and costs—specifically, by deeming app-based fintech services that facilitate consumer savings accounts potential deposit-brokering activity."⁸ In contrast, the FDIC's final rule promises to "promote innovation between commercial banks and the financial technology industry."⁹

⁸ *New Brokered Deposits Rule Promotes Bank-Fintech Partnerships* (Dec. 15, 2020), <https://www2.occ.gov/news-issuances/news-releases/2020/nr-occ-2020-170.html>.

⁹ *Id.*

