The Federal Deposit Insurance Corporation's Final Brokered Deposits Rule: Six Things To Know

On December 15, 2020, the Board of Directors of the Federal Deposit Insurance Corporation ("FDIC") voted 3–1 to approve a final rule that significantly revises and clarifies the regulatory framework applicable to brokered deposits, under which less-than-well-capitalized insured depository institutions ("IDIs") are generally prohibited from accepting funds obtained, directly or indirectly, from a deposit broker. The final rule represents the culmination of a long process, including an advance notice of proposed rulemaking ("ANPR") issued in December 2018 and a notice of proposed rulemaking (the "proposal" or the "proposed rule") issued in December 2019, to modernize the FDIC's brokered deposit regulations, and adopts a number of significant changes relative to the proposal. The final rule becomes effective April 1, 2021, but the full compliance date is delayed until January 1, 2022. A comparison of the final rule text against the proposed rule text is available here.

1 The final rule simplifies and streamlines the proposed rule's application process for deposit-placement arrangements that meet the primary purpose exception, and removes the need for FDIC approval in certain key cases.

The cornerstone of the proposal was a new framework by which IDIs or third parties could apply for a written determination from the FDIC that a specific deposit-placement arrangement qualifies for the so-called primary purpose exception – the statutory exception to the definition of "deposit broker" for an agent or nominee whose primary purpose is not the placement of funds with depository institutions. The final rule generally retains this application framework for some deposit-placement arrangements, but also creates a subset of "designated exceptions" for which only a streamlined notice filing, rather than a full application, is required. These designated exceptions include deposit-placement arrangements where (i) the agent or nominee places less than 25 percent of the assets it has under administration with respect to a particular business line for its customers with IDIs, and (ii) the agent or nominee places 100 percent of depositors' funds into transactional accounts that do not pay fees, interest, or other remuneration to the depositor. (In the latter case, if fees, interest, or other remuneration are paid to depositors, a full application is required.)

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2 The final rule identifies eleven specific types of deposit-placement arrangements that are deemed to meet the primary purpose exception and do not require an application or notice filing.

Under the final rule, no application or notice is required to engage in eleven specific types of deposit-placement arrangements that are categorically excluded from brokered deposit treatment under the primary purpose exception. Many of these exceptions involve deposit-placement arrangements in connection with certain tax-advantaged savings programs under the Internal Revenue Code, such as health savings accounts, qualified tuition programs (*i.e.*, section 529 plans), and individual retirement accounts. Other excepted deposit-placement arrangements include broker-dealers or futures commission merchants who place, or assist in placing, customer funds in deposit accounts in compliance with Securities Exchange Act Rule 15c3-3(e) or 17 C.F.R. § 1.20(a).

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3 In a change that may impact many types of bank/fintech partnerships, the final rule clarifies that third parties that have an exclusive deposit-placement arrangement with only a single IDI do not meet the "deposit broker" definition.

Under existing law, "deposit broker" includes, among other parties, (i) any person engaged in the business of placing deposits of third parties with IDIs, and (ii) any person engaged in the business of facilitating the placement of deposits of third parties with IDIs. The final rule clarifies that under both of these prongs of the "deposit broker" definition, the third party must place or facilitate the placement of deposits at *more than one* IDI in order to be classified as a deposit broker. This change, which was not included in the proposal, means that deposits held by an IDI through a bank/fintech partnership where the fintech company has only one bank partner will not be considered brokered. This change also eliminated the need for the FDIC to adopt the proposed rule's narrower exception for operating subsidiaries of an IDI that place deposits exclusively with the parent IDI.

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4 The final rule eliminates certain other provisions of the proposal relating to the facilitation prong of the "deposit broker" definition that would have limited IDIs' abilities to partner with service providers and other third parties.

The final rule provides additional clarity on what constitutes facilitating the placement of deposits for purposes of the "deposit broker" definition, but does not adopt two controversial aspects of the proposal. First, the proposed rule would have provided that any person that directly or indirectly shares any third-party information with an IDI is facilitating the placement of deposits, and is therefore classified as a deposit broker (the "information-sharing prong"). Second, the proposed rule would have provided that any person acting directly or indirectly, with respect to the placement of deposits, as an intermediary between a deposit broker and an IDI is itself facilitating the placement of deposits, and is therefore classified as a deposit broker (the "intermediary prong"). Both the information-sharing prong and the intermediary prong were criticized by numerous commenters, who argued that both prongs were imprecise and overly broad. The final rule does not include either provision; instead, it replaces these prongs with a new provision that states that persons engaged in matchmaking activities (as defined in the final rule) are facilitating the placement of deposits.

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5 The final rule will supersede existing FDIC staff advisory opinions related to brokered deposits.

The preamble to the proposed rule indicated that the FDIC would revisit existing staff advisory opinions related to brokered deposits to identify those that are no longer relevant or applicable based on any revisions made to its brokered deposit regulations. The final rule's preamble states that over 75 publicly-available advisory opinions and financial institution letters relating to brokered deposits will be moved to inactive status on the FDIC's website following the full compliance date of the final rule, which is January 1, 2022. The preamble also states that the FDIC expects that most existing deposit-placement arrangements that rely on staff opinions to satisfy the primary purpose exception should be able to avoid brokered deposit treatment under the final rule.

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6 In addition to the brokered deposit proposal, the final rule finalizes a September 2019 proposal related to interest rate restrictions under section 29 of the Federal Deposit Insurance Act.

Section 29 of the Federal Deposit Insurance Act generally prohibits a less-than-well-capitalized IDI from offering rates on deposits that significantly exceed rates in the IDI's prevailing market. The final rule finalizes a September 2019 notice of proposed rulemaking related to the section 29 interest rate restrictions by amending the FDIC's methodology for calculating the national rate, the national rate cap, and the local rate cap. The final rule also provides a new simplified process for IDIs that seek to offer a competitive rate when the prevailing rate in the IDI's local market area exceeds the national rate cap.

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