

FDIC Issues Guidance Taking a Very Broad View of What Are Considered “Brokered Deposits”

January 12, 2015

The Federal Deposit Insurance Corporation ("FDIC") has issued guidance in the form of "Frequently Asked Questions" for identifying, accepting, and reporting brokered deposits (the "Guidance"). While the Guidance is not intended to change any existing requirements or impose any new requirements on banks, the Guidance makes clear that the FDIC takes a very broad view of what is considered a brokered deposit. This can have important implications for a bank, both for determining whether a bank may accept a particular deposit, and determining what to report as brokered deposits on the Consolidated Reports of Condition and Income ("Call Reports").

A "brokered deposit" is a deposit that is obtained, directly or indirectly, from or through the mediation or assistance of a deposit broker. The term "deposit broker" is defined as 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.

In order to accept brokered deposits, a bank must either be: (1) well capitalized, or (2) adequately capitalized and have received a waiver from the FDIC to accept such deposits. An undercapitalized bank may not accept brokered deposits under any circumstances. The capital categories are determined under the FDIC's Prompt Corrective Action standards. A bank must also report the amount of brokered deposits it holds on its Call Reports.

The key take-away from this new Guidance is how broadly the FDIC views the definition of "deposit broker," and how narrowly the FDIC views certain exceptions to this definition. According to the Guidance, the term "facilitating the placement of deposits" is interpreted broadly to include "actions taken by third parties to connect insured depository institutions with potential depositors. As a result, a third party could be a deposit broker even when the third party does not open bank accounts on behalf of depositors or directly place funds into bank accounts." In addition, the third party does not have to receive any fees or other direct compensation from a bank in order to be deemed a deposit broker.

The Guidance sets forth the following examples of parties who would be considered deposit brokers:

- Insurance agents, lawyers, or accountants that refer clients to banks;
- Companies that provide marketing for banks in exchange for volume-based fees (such as affinity groups);

- Companies that design deposit products with certain special features, such as rewards based on activity, if the company facilitates the placement of deposits in the bank or receives volume-based fees for marketing the deposit products;
- Bank networks that spread deposits over a number of participating banks to provide customers with full deposit insurance coverage;
- Certain types of listing services that place deposits or facilitate the placement of deposits with banks (as opposed to a listing service which merely lists interest rates for a flat fee and does not require a bank to pay for other services); and
- Third parties that endorse a bank through promotional materials produced or distributed by the third party (as opposed to promotional materials produced or distributed by the bank).

The Guidance also discusses the statutory exceptions to the definition of deposit broker. Such exceptions include: a bank, with respect to funds placed with itself; an employee of a bank, with respect to funds placed with the employing bank; a trust department of bank, if the trust or other fiduciary relationship in question has not been established for the primary purpose of placing funds with banks; trustees of certain pension, profit-sharing and employee benefit plans; and trustees of certain trusts.

An additional exception to the definition of deposit broker, and one under which banks have often sought refuge, is the exception for an agent or nominee whose primary purpose is not the placement of funds with depository institutions. The Guidance makes clear that the FDIC views this “primary purpose” exception as a *very limited* exception. According to the Guidance:

“...the primary purpose exception is *not* applicable when the intent of the third party is to earn fees through the placement of the deposits. Also, the applicability of the primary purpose exception does not depend upon a comparison between the amount of revenue generated by the third party’s deposit-placement activities and the amount of revenue generated by the third party’s other activities. Rather...the applicability of the primary purpose exception depends upon the intent of the third party in placing deposits (or facilitating the placement of deposits)... [T]he primary purpose exception applies only infrequently and typically requires a specific request for a determination by the FDIC.”

As a result of this Guidance, banks should carefully review their deposits to determine whether any will likely be viewed as brokered deposits. Banks should then confirm that they are permitted to accept brokered deposits and ensure that they report all such deposits on their Call Reports.

A copy of the Guidance may be accessed [here](#). If you have any questions regarding the Guidance or brokered deposit issues in general, please feel free to contact Joseph D. Simon at 516-357-3710 or via email at jsimon@cullenanddykman.com.

Practices

- Banking and Financial Services
- Regulatory and Compliance

Industries

- Financial Institutions

Attorneys

- Joseph D. Simon