

**Decision of the
Supervision Appeals Review Committee**

In the Matter of * * *

Case No. 2018-03

I. Summary

After consideration of the timely filed written submissions of the parties and the record of this case, and following the parties' presentations and the deliberative meetings of the Supervision Appeals Review Committee ("Committee"), the Committee upholds the determination of the Director of the Division of Risk Management Supervision ("RMS") that * * * ("Bank") should report certain deposits as brokered deposits on its Reports of Condition and Income. This instruction is consistent with the FDIC's existing interpretation of Section 29 of the Federal Deposit Insurance Act and the FDIC's implementing regulations governing brokered deposits. Any alternative finding would create confusion in this area of the law at this time and would be inconsistent with the FDIC's existing approach to brokered deposits.

Recognizing that the brokered deposit rules are ripe for review, on December 18, 2018, the FDIC published an advance notice of proposed rulemaking requesting comment on the brokered deposit regulations. The FDIC is committed to advancing a regulatory approach to brokered deposits that appropriately reflects changes in the marketplace and the intent of the underlying statute. Nonetheless, any and all rulings on the Bank's appeal have to be considered under the existing regulatory regime.

II. Background and Procedural History

The Bank obtained the deposits at issue through a relationship with [Third Party]. [Third Party promotes a budgeting software product.] *** [Third Party] gives its customers the option of placing funds with [Third Party] and receiving prepaid cards to access these funds. Generally, [Third Party] customers' funds are then placed in omnibus deposit accounts at the Bank ("[Third Party] deposits"), and [Third Party] maintains records of each customer's balance. Customers may use the [Third Party software] to track spending from an account at another institution, but the use of an account at the Bank enables them to take full advantage of [Third Party's] features ***.

Following discussions between the Bank and FDIC staff, the Regional Director of the FDIC's * * * Office directed the Bank to report the [Third Party] deposits as brokered deposits in a letter dated May 22, 2018. The Bank submitted a request for review of this determination to the Director of RMS pursuant to the FDIC's *Guidelines for Appeals of Material Supervisory*

Determinations (“Guidelines”).¹ On July 10, 2018, the Director of RMS issued a decision concurring in the determination that the [Third Party] deposits should be reported as brokered deposits.

The Bank filed an appeal with the Supervision Appeals Review Committee by letter dated August 8, 2018. In accordance with the Guidelines, the Committee has reviewed the appeal for consistency with the policies, practices, and mission of the FDIC, and the reasonableness of, and the support offered for, the positions of the parties. The Committee met to hear oral presentations from the parties on November 6, 2018, and subsequently met to consider the appeal.

III. Analysis

“Brokered deposits” include any deposits obtained, directly or indirectly, from or through the mediation or assistance of a “deposit broker.”² The Federal Deposit Insurance Act defines “deposit broker” to include:

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....³

The statute provides several exclusions from the definition of “deposit broker.” One of these exclusions states that the term “deposit broker” does not include “an agent or nominee whose primary purpose is not the placement of funds with depository institutions.”⁴

In its appeal, the Bank argues that the [Third Party] deposits are not brokered deposits because [Third Party] does not satisfy the statutory definition of “deposit broker,” or alternatively, because the primary purpose exclusion applies.

A. “Deposit Broker” Definition

The Bank’s Position

¹ 82 Fed. Reg. 34,522 (July 25, 2017) (available at <https://www.fdic.gov/regulations/laws/sarc/sarcguidelines.html>).

² 12 C.F.R. § 337.6(a)(2).

³ 12 U.S.C. § 1831f(g)(1)(A).

⁴ 12 U.S.C. § 1831f(g)(2)(I); *see also* 12 C.F.R. § 337.6(a)(5)(ii)(I).

The Bank asserts that FDIC staff's interpretation of the term "deposit broker" is overly broad and inconsistent with congressional intent. In the Bank's view, the purpose of the brokered deposit statute was to restrain the business of placing "hot money" deposits, and therefore, application of the statute should be limited to such deposits. The Bank argues that the [Third Party] deposits are not volatile and, therefore, should not be covered by the statute.

In addition, the Bank notes that the FDIC and the Federal Home Loan Bank Board attempted to address brokered deposits through rulemaking prior to the enactment of statutory restrictions on the acceptance of brokered deposits.⁵ As part of that effort, the agencies published an advance notice of proposed rulemaking expressing concern regarding three types of brokering activities: simple money brokering, CD participations, and deposit listing services. The Bank argues that the definition of "deposit broker" should be limited to entities engaged in those activities. The Bank also asserts that the three cited activities are similar in that they contemplate the generation of interest income from deposits; the [Third Party] deposits, by contrast, are not interest bearing.

RMS's Position

RMS asserts that [Third Party] falls within the statutory definition of a "deposit broker" because it places customers' funds in deposit accounts at the Bank. RMS argues that the risks associated with brokered deposits may have helped to frame the discussion of the brokered deposit legislation, but these risks were not incorporated into the statutory definition of "deposit broker."

The Committee's Findings

The statutory definition of "deposit broker" is not limited to entities engaged in specific types of deposit gathering activities, and deposits are not exempt from being brokered deposits simply because they do not bear interest. By placing its customers' funds in deposit accounts at the Bank, [Third Party] falls within this definition, unless it meets one of the statutory exclusions. Classification of the [Third Party] deposits as brokered is also consistent with the FDIC's treatment of prepaid card programs in general.⁶

B. Primary Purpose Exclusion

The Bank's Position

⁵ See 48 Fed. Reg. 50,339 (Nov. 1, 1983)

⁶ See FDIC's *Study on Core Deposits and Brokered Deposits*, issued July 2011, at 32 (stating that where non-bank issuers of prepaid cards act as agents or custodians for cardholders in placing deposits at a bank, deposits would be brokered deposits unless the agent satisfies one of the exclusions to the definition of "deposit broker," such as the primary purpose exclusion).

The Bank argues that the primary purpose exclusion applies to [Third Party], and therefore, [Third Party] is not a “deposit broker.” The Bank asserts that [Third Party’s] primary purpose is the promotion of its [software], *** and the placement of customers’ funds in deposit accounts at the Bank is incidental to that purpose. The Bank supports this point by noting that some [software] tools are available without a requirement that a customer make a deposit with the Bank.

The Bank also points to the fee structure under its agreement with [Third Party] as additional evidence that [Third Party’s] primary purpose is not the placement of deposits. [Third Party] collects no fee when deposits are placed at the Bank. Rather, [Third Party] obtains a portion of the interchange fees that apply when customers use their prepaid cards. The Bank also argues that the [Third Party] [software] is intended to help customers limit their spending, and this would reduce [Third Party’s] interchange fees.

The Bank further points to the FDIC’s Frequently Asked Questions (“FAQs”) on brokered deposits, which state that the primary purpose exclusion would apply in certain cases where government agencies disburse benefits through prepaid cards.⁷ The Bank asserts that [Third Party’s] prepaid cards, like government-issued prepaid cards, serve as a means to another end – in [Third Party’s] case, promotion of its [software]. The Bank argues that government agencies are permitted to collect fees to cover a portion of their operating costs without being considered deposit brokers, and the FDIC mistakenly concludes that [Third Party] is a deposit broker because it receives compensation from the Bank.

RMS’s Position

RMS argues that [Third Party’s] primary purpose is to provide its customers with convenient access to transaction accounts. These accounts, in turn, allow customers to make payments, enabling the *** [software] to track spending. RMS asserts that the primary purpose of [Third Party’s] arrangement with the Bank cannot be separated from the intent to provide customers with deposit accounts that offer core banking functions.

RMS argues that the fee structure of the [Third Party] program supports the determination that the primary purpose exclusion does not apply. While [Third Party] does not collect fees when deposits are placed at the Bank, RMS contends that [Third Party] is incentivized to connect customers with the Bank because [Third Party’s] fee income increases as more customers conduct transactions.

⁷ See FIL 42-2016, *Frequently Asked Questions on Identifying, Accepting and Reporting Brokered Deposits* (June 30, 2016), at E14.

RMS asserts that the FAQs relating to government-issued prepaid cards explain why the primary purpose exclusion would apply to government agencies in certain circumstances, and the same reasoning is not applicable to [Third Party]. The FAQs state that the primary purpose exclusion would apply where a government agency: (1) is mandated by law to disburse funds to beneficiaries of government programs; (2) is the sole source of funding for the deposit accounts; and (3) receives no fees from the insured depository institution, other than those necessary to help cover the agency's administrative costs. The FAQs explain that satisfaction of these requirements indicates that the agency's primary purpose is to discharge the government's legal obligations to beneficiaries, and not to provide beneficiaries with a deposit-placement service or to assist the depository institution in expanding its deposit base.⁸

The Committee's Findings

Through its relationship with the Bank, [Third Party] provides customers who place funds at [Third Party] with features of a deposit account, including card-based access to deposited funds. Real-time tracking of spending (the full functionality of the [software]) is available only if customers' funds are placed at the Bank. In addition, [Third Party] is compensated by the Bank through interchange fees after placing customers' funds at the Bank, although [Third Party] does not collect fees until customers' funds are spent.

Classification of the [Third Party] deposits as brokered deposits is consistent with the FDIC's existing interpretation of the primary purpose exclusion with respect to prepaid card programs, including programs administered by government agencies. The FAQs highlighted by the Bank relating to government-issued prepaid cards limit application of the primary purpose exclusion to cases where the agency: (1) is mandated by law to disburse funds to beneficiaries; (2) is the sole source of funding for the deposit accounts; and (3) receives no fees other than those necessary to help cover administrative costs. In such circumstances, FDIC staff has concluded that the agency's primary purpose is to discharge the government's legal obligation to beneficiaries. [Third Party] has no similar independent obligation to its customers. [Third Party] also is not the source of funding for the deposits; the funds are obtained from [Third Party's] customers. Further, [Third Party's] fees are based on interchange fees that apply when customers use their prepaid cards, rather than the program's administrative costs.

IV. Conclusion

Having considered the parties' views and the record of this appeal, the Committee concludes that existing interpretations of the brokered deposit statute and regulations support the determination that the [Third Party] deposits are "brokered deposits" and should be reported accordingly on the

⁸ See FIL 42-2016, *Frequently Asked Questions on Identifying, Accepting and Reporting Brokered Deposits* (June 30, 2016), at E14.

Bank's Reports of Condition and Income. We therefore uphold the decision of the Director of RMS.

Going forward, the FDIC recognizes the need for a fresh review of the brokered deposit regulations implementing section 29 of the Federal Deposit Insurance Act. The FDIC seeks to encourage innovation by banks, especially in ways that improve customers' experience, lower transaction costs, and expand access to the banking system. At the same time, the FDIC must protect the Deposit Insurance Fund. Revisiting the brokered deposit regulation may provide the opportunity to make adjustments to the FDIC's treatment of innovative deposit products to the extent permitted by the statute.

The Committee notes that the FDIC has published an advance notice of proposed rulemaking requesting comment on the brokered deposit regulations. The Committee encourages the Bank to participate in that process and share its views on these important issues.

By direction of the Supervision Appeals Review Committee of the FDIC, dated January 18th, 2019.