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MEMORANDUM

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To Our Clients and Friends

Re: FDIC Adopts Amendments to Brokered Deposit Rule

The Federal Deposit Insurance Corporation has adopted changes to its brokered deposit rule in order to update and modernize the rule. The changes are effective April 1, 2021. However, affected parties may continue to rely on existing interpretations to determine whether deposits placed by or through an agent are brokered deposits until January 1, 2022.

The final rule includes the following provisions:

- Any person that places deposits at depository institutions on behalf of a depositor as part of its business relationship with that depositor and receives customer funds before placing deposits will be regarded a deposit broker.
- Any person that has an exclusive deposit placement arrangement with one depository institution and is not placing or facilitating the placement of deposits with other depository institutions is not a deposit broker.
- A person facilitates the placement of deposits by engaging in any of the following activities:
 - The person has legal authority, contractual or otherwise, to close the account or move the third party's funds to another 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," (as defined in the rule).

The FDIC determined not to treat the sharing of customer information as "facilitating the placement of deposits."

The rule provides that a person is engaged in "matchmaking" if the person proposes deposit allocations at or between more than one bank based on both (1) the particular deposit objectives of a specific depositor or depositor's agent, and (2) the particular deposit objectives of specific banks, except in the case of deposits placed by a depositor's agent with a bank affiliated with the depositor's agent.¹

¹ A proposed deposit allocation is based on the particular objectives of (a) a depositor or depositor's agent when the person has access to specific financial information of the depositor or depositor's agent and

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The rule does not alter the definition of “employee” for purposes of the exception from deposit broker.² Accordingly, a dual-hatted employee is exempt only if the person satisfies all of the requirements of the statutory definition.

Entities such as listing services, marketing firms, or companies that design deposit products will need to review the new criteria developed under the rule to determine whether their current arrangements meet the deposit broker definition. Whether a listing service that posts information about bank rates is a deposit broker will depend on whether the service meets the new criteria under the “facilitation” part of the deposit broker definition. A listing service that passively posts rate information and sends trade confirmations between the depositor and the depository institution is unlikely to be a deposit broker. However, if a listing service provides services that meet one of the three prongs of the “facilitation” definition, then it would be considered a deposit broker.

Primary Purpose Exceptions

The FDIC’s rule adopts several changes to the “primary purpose” exception to the definition of deposit broker. The rule provides that the primary purpose exception applies when, with respect to a particular business line, the primary purpose of the business relationship between the person and its customers is not the placement of funds with depository institutions. Under the rule, a person satisfies the primary purpose test if it places funds at a depository institution for the purpose of “enabling transactions.” Additionally, the primary purpose exception applies for entities placing less than 25 percent of customer assets under its administration with depository institutions. To rely upon these two exceptions, the entity is required to provide a notice to the FDIC. Twelve additional business relationships are designated as meeting the primary purpose exception.³ Entities that do not come within the designated exceptions may apply to the FDIC for a primary purpose exception. Business relationships that qualify for a designated exception are not required to go through the application process. The FDIC will determine whether an applicant sufficiently demonstrates that the primary purpose is something other than the placement, or facilitating the placement, of funds.

In connection with determining whether certain activities constitute a separate business line for purposes of meeting the principal purpose exception, the rule states the determination will

the proposed deposit allocation is based upon such information; and (b) a depository institution when the person has access to specific information of the deposit balance objectives of the depository institution and the proposed deposit allocation is based upon such information.

² The Federal Deposit Insurance Act defines an “employee” as any employee: (i) who is employed exclusively by the depository institution; (ii) whose compensation is primarily in the form of a salary; (iii) who does not share such employee’s compensation with a deposit broker; and (iv) whose office space or place of business is used exclusively for the benefit of the insured depository institution, which employs such individual.

³ These include an entity that: places 100 percent of the funds into transaction accounts that do not pay fees, interest or other remuneration to depositors; places funds for the primary purpose of providing property management services or mortgage servicing; or is a broker-dealer or futures commission merchant placing customer funds in accordance with SEC Rule 15c3-3 or CFTC Rule 1.20(a);

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depend upon the facts and circumstances of a particular arrangement; however, the FDIC will generally defer to the description of business lines provided by the applicant.

The rule also provides that if an entity that qualifies for an exception from the deposit broker definition uses an additional third party to assist in placing, or facilitating the placement of, customer deposits, that additional third party may be determined to be a deposit broker if it does not meet an exception to the definition of deposit broker; accordingly, deposits subject to such arrangements will be regarded as brokered. For example, if the third party is providing matchmaking functions, deposits made through the intermediary would be brokered deposits regardless of the status of the entity who engaged the additional third party.

A copy of the FDIC's final rule is available on our website at <http://schwartzandballen.com/news.html>.

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