ICBA
One Mission. Community Banks.

Lucas White, Chairman
Jack E. Hopkins, Chairman-Elect
Alice P. Frazier, Vice Chairman
Quentin Leighty, Treasurer
James H. Sills, III, Secretary
Derek B. Williams, Immediate Past Chairman
Rebeca Romero Rainey, President and CEO

November 21, 2024

Mr. James P. Sheesley
Assistant Executive Secretary
Attention: Comments—RIN 3064-AF99
Federal Deposit Insurance Corporation
550 17th Street NW
Washington, DC 20429

RE: Unsafe and Unsound Banking Practices: Brokered Deposits Restrictions [RIN 3064-AF99]

Dear Mr. Sheesley:

The Independent Community Bankers of America ("ICBA")[1] respectfully requests the Federal Deposit Insurance Corporation ("FDIC" or "the agency") withdraw its Notice of Proposed Rulemaking concerning Unsafe and Unsound Banking Practices: Brokered Deposits Restrictions ("Proposal" or "Proposed Rule").[2] The FDIC last revised its brokered deposits framework on December 15, 2020 ("the 2020 Final Rule") with full compliance effective only two and half years ago.[3] The FDIC now proposes to undo significant aspects of the 2020 Final Rule. If finalized, the Proposal will be the agency's third brokered deposits framework since 2019.

The FDIC claims the Proposal will "help ensure uniform and consistent reporting," "reduce operational challenges," and "simplify" the definition of a "deposit broker." But none of these claims align with the reality that by creating three vastly different brokered deposit frameworks in under four years, the FDIC is forcing the banking industry to ride a roller coaster of rapidly changing deposit regulations and pay the accompanying price of steep compliance costs.

The latest iteration of a brokered deposits framework injects a high degree of regulatory uncertainty into the banking system. For example, the agency's proposal to immediately and retroactively rescind previously approved primary purpose exception ("PPE") applications and notices provides clear evidence of the sudden uncertainties this Proposal introduces for banks, third-party partners, and customers that have relied on these approvals. ICBA is deeply concerned by the proposed PPE rescissions because of the impact to bank business models, balance sheets, and access to diverse sources of funding. The FDIC inexplicably believes all its prior approvals are – across the board, and without specific explanation – inadequate, and that banks, rather than

---

[1] The Independent Community Bankers of America® has one mission: to create promote an environment where community banks flourish. We power the potential of the nation's community banks through effective advocacy, education, and innovation. As local and trusted sources of credit, America's community banks leverage their relationship-based business model and innovative offerings to channel deposits into the neighborhoods they serve, creating jobs, fostering economic prosperity, and fueling their customers' financial goals and dreams.
[2] Unsafe and Unsound Banking Practices: Brokered Deposits Restrictions, 89 Fed. Reg. 68244 (proposed Aug. 23, 2024) (to be codified at 12 C.F.R. pts. 303, 337).
[3] 12 C.F.R. § 303, 337 (2024).

their third-party partners, must reapply.

PPE rescissions and reapplications are not *pro forma* exercises. PPE rescissions will materially disrupt, and in some cases, effectively end partnerships and arrangements the FDIC approved less than three years ago. Some community banks will be forced to immediately reclassify large quantities of core deposits as brokered, meaning these institutions will pay more in FDIC deposit insurance assessments, experience significant disruptions to their balance sheet strategies, face liquidity constraints (and in some cases restrictions on newly classified brokered deposits), and experience material disruptions to their bank operations and partnerships.[4] Additionally, impacted community banks will bear the significant costs of reapplying for PPE on behalf of their third-party partners, including the costs paid to external counsel to draft new applications, amend existing agreements, and draft new contracts – none of which are fully or adequately acknowledged in the agency's cost-benefit analysis.

While the agency intends to target certain relationship models by rescinding approved PPE notices, the Proposal captures every approved PPE application and notice regardless of model or demonstrated risk. If the FDIC believes specific banks and/or its third parties pose unnecessary risks, the agency should enhance its supervision of those institutions rather than rewrite the brokered deposit rules for the entire industry.

Unfortunately, rescission of PPE applications and notices is not the Proposal's only flaw. Other reasons the FDIC should withdraw the Proposed Rule include:

- The revised definition of "deposit broker" is overly broad and will force banks to reclassify stable, sticky core deposits—ones that do not pose "hot money" risks and are protected by contractual terms against deposit flight— as "brokered."
- More third-parties will be considered deposit brokers simply because they collect a fee for their services, even if they have no influence over depositor behavior or the terms of a deposit placement.
- By increasing the amounts of core deposits that must be reclassified as brokered, the Proposal will restrain liquidity and force community banks to shed stable deposits to comply with brokered deposit restrictions.
- Reclassifying deposits and reapplying for PPE imposes significant and unnecessary compliance and operational costs on community banks, requiring them to expend more time and money to qualify for exceptions to the "deposit broker" definition.
- The Proposal is flawed under the Administrative Procedure Act because the FDIC relied upon insufficient data, flawed rationale, and a deficient cost-benefit analysis to advance its rulemaking.

---

[4] The negative effects of this Proposal are not merely hypothetical, as the Proposed Rule has already caused documented uncertainty. Shortly after the FDIC announced the Proposal, some institutions reported moving banking-as-a-service deposits off balance sheet "due to uncertainty of the existing regulatory framework for brokered deposits" and "potential reclassification of certain deposits as brokered."

I. The FDIC Should Protect, Not Constrain, Community Bank Access to Liquidity.

Community banks use brokered deposits to access diverse sources of liquidity. Few community banks accept high concentrations of brokered deposits, are wholly reliant on brokered deposits for funding, or depend on brokered deposits for rapid growth.[5] When managed properly, brokered deposits are a stable source of funding and a cost-effective way for community banks to meet the funding and borrowing needs of their communities. For example, brokered deposits help community banks manage seasonal agricultural lending and instances when loan demand temporarily exceeds a bank's ability to generate new core deposits. Reciprocal deposits, which can be characterized as non-brokered or brokered depending on the levels a bank holds, ensure community banks and its customers can maximize deposit insurance coverage. And prudent use of brokered deposits is an important component of Asset Liability Committee ("ALCO") management.

These current practices sharply contrast with those of the 1980s and early 1990s, when some banks became overly reliant on gathering certain types of brokered deposits, such as brokered CDs, that were not sticky and posed "hot money" risks of deposit flight.[6] Brokered deposit restrictions were initially put in place to address concerns that (1) brokered deposits could facilitate a bank's rapid growth in risky assets without adequate controls; (2) banks tried to use brokered deposits to "grow out" of problems; and (3) brokered deposits were volatile because deposit brokers were drawn to high rates and were prone to leave the bank when they found a better rate.[7]

Holding excessive quantities of brokered deposits is problematic for banks. But that is precisely why the FDIC's Proposal is flawed: the Proposed Rule will upset banks' deliberate mix of core and brokered deposits by forcing the reclassification of large quantities of stable, core deposits as brokered, without regard to the underlying risk of those deposits. As a result, the Proposal will force community banks to report higher levels of brokered deposits than is necessary, and subject community banks to brokered deposits restrictions when the underlying, reclassified deposits are demonstrably "core-like" and stable.

Three of the FDIC's Directors commented on the fact that the Proposal fails to properly differentiate the deposits captured by the proposed "deposit broker" based on risk. According to Director McKernan, ""This proposal does a good job of marshalling evidence of the risks posed by brokered deposits. *The proposal does not, however, offer any evidence that some of the deposits that this proposal would re-classify as brokered deposits actually present the same or similar risks."*[8]

Similarly, Director Hsu observed "Not all deposits are created equal. From a bank liquidity perspective, some are riskier than others. Our regulations need to better differentiate between them."[9]

---

[5] The FDIC acknowledged in its 2019 advance notice of proposed rulemaking to the 2020 final rule that "historically, most institutions that use brokered and higher-rate deposits have done so in a prudent manner and appropriately measure, monitor, and control risks associated with brokered deposits." Unsafe and Unsound Banking Practices: Brokered Deposits and Interest Rate Restrictions, 84 Fed. Reg. 2366, 2366 (proposed Feb. 6, 2019) (to be codified at 12 C.F.R. pt. 337).

[6] *History of the Eighties—Lessons for the Future,* p. 119, Federal Deposit Insurance Corporation December 1997 *https://www.fdic.gov/bank/historical/history/.*

[7] *See* Unsafe and Unsound Banking Practices: Brokered Deposits and Interest Rate Restrictions, *supra* note 5 at 2366.

[8] *Statement by Jonathan McKernan, Director, FDIC, Board of Directors, on the Proposed Brokered Deposit Restrictions*, https://www.fdic.gov/news/speeches/2024/statement-jonathan-mckernan-director-fdic-board-directors-proposed-brokered (last visited Nov. 20, 2024).

[9] Acting Comptroller of the Currency Michael J. Hsu, Statement at the FDIC Board Meeting, NPR on Brokered Deposit Restrictions and RFI on Deposits (July 30, 2024), https://www.occ.gov/news-issuances/news-releases/2024/nr-occ-2024-

And Vice-Chair Hill noted "The term 'brokered deposits' encompasses many different types of deposits with very different characteristics and risks. The deposit landscape has become too complex to continually decide which arrangements are brokered and which are not in a fair and risk sensitive way. And I am generally skeptical of sweeping rules that cut banks off from certain types of funding as their condition deteriorates, as is the case with brokered deposits."[10]

Community banks face higher deposit insurance premiums for brokered deposits compared to core deposits, along with other significant costs. These include the potential for lower CAMELS ratings, increased supervisory scrutiny, and restrictions on the amounts of brokered deposits a bank can accept. In some cases, restrictions on brokered deposits may force community banks to entirely forgo their relationships with third parties and terminate programs and services that benefit their customers, as well as limit access to financial services for unbanked and underbanked consumers.

Reclassification of deposits from core to brokered can impact even well-capitalized community banks' core deposit ratios, liquidity coverage ratios and capital planning. Once core deposits are reclassified as brokered, community banks may be forced to shed some of these stable deposits to reduce brokered deposit volumes. As a result, community banks can be restricted from accessing necessary and stable liquidity sources. Further, reclassifications and restrictions on brokered deposits can operate in tandem to constrain community banks' access to liquidity at times they need it most.

i. The FDIC's proposed changes to the 25% test will negatively impact community banks that hold, place or invest large quantities of municipal deposits.

Many state laws require state and local governments to bank within the state – meaning community banks receive and manage a substantial volume of public deposits. Under the current rules, entities that help administer these funds and investments are excepted from the definition of a deposit broker if they place less than 25% of customer assets under administration, for a particular business line, at more than one bank. However, under the Proposal, this exception will only be available if less than 10% of the total assets under management, in a particular business line, is placed into non-maturity accounts at one or more IDIs.

The proposed changes to the 25% test are a significant change that will negatively impact community banks that manage large quantities of public funds. These deposits are an important and stable source of funding for community banks that should not be considered brokered.

ii. The proposed fee-based criteria are overly broad and capture numerous third-party deposit relationships as "brokered" while ignoring the realities of modern, digital banking.

Community banks often leverage the operational services provided by third-party partners to effectively market deposit products and services. These critical services support internet banking, debit cards, credit cards, loan software, deposit software, reward checking, check system, and the list goes on. Without these third-party partnerships, community banks would be left with fewer options to compete with large banks. This is true

---

86a.pdf.

[10] *Statement by Vice Chairman Travis Hill on the Notice of Proposed Rulemaking on Brokered Deposits Restrictions*, https://www.fdic.gov/news/speeches/2024/statement-vice-chairman-travis-hill-notice-proposed-rulemaking-brokered-deposit#:~:text=And%20I%20am%20generally%20skeptical,of%20our%20time%20and%20resources (last visited Nov. 20, 2024).

especially in the post-pandemic environment, where consumers expect community banks to provide online banking services. As former Chairman McWilliams noted in a 2019 keynote address, "the cost to innovate is in many cases prohibitively high for community banks. They often lack the expertise, the information technology, and research and development budgets to independently develop and deploy their own technology. That is why partnering with a fintech that has already developed, tested, and rolled out new technology is often a critical mechanism for a community [bank]."[11]

Despite the many acceptable uses for, and benefits that flow from, community bank partnerships with third-parties, the FDIC proposes a third party will be a "deposit broker" in instances where the third party simply receives a fee (even an administrative fee) for their services related to the placement of deposits. Accepting a fee for services is a basic condition of doing business – not a determinative factor for whether a person is a deposit broker. The proposed fee criteria capture virtually all third-party relationships related to deposit placement, even those that do not pose traditional brokered deposit "hot money" risks. As a result, more third parties will be deemed "deposit brokers," fewer third parties will qualify for exceptions to the definition of a "deposit broker," and a larger percentage of deposits will be deemed "brokered."

The proposal states "the FDIC often found that fees paid to a third-party intermediary would play a key role in incentivizing referral volume of third-party deposits to IDI" and "such third-party deposits may be more likely to leave the IDI if another IDI were to offer more favorable terms or pay a higher fee."[12] But this correlation does not support the proposed fee criteria, which captures all fees paid to third parties irrespective of whether these fees are reasonable or commission-driven, aggressively variable, and based on incentives or volume or conduct that influences either depositor behavior or deposit pricing.

iii. The FDIC proposes to constrain community bank liquidity while other agencies are also pressuring community bank access to liquidity.

In addition to brokered deposits, Federal Home Loan Bank ("FHLB") advances are an important source of liquidity for community banks. The Federal Housing Finance Agency ("FHFA") is currently reviewing initiatives that could impact community bank liquidity at the same time the FDIC is engaged in its brokered deposits rulemaking. ICBA strongly urges the FDIC to ensure the negative effects of this Proposal are not exacerbated by further proposed restraints on community bank liquidity from other agencies.

II. The Proposal is Flawed Under the APA and Should be Withdrawn.

Under the Administrative Procedure Act, courts can invalidate and set aside final agency actions that are "arbitrary and capricious."[13] To ensure rulemaking is not "arbitrary and capricious," agencies "must examine the relevant data and articulate a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made.'"[14] Additionally, if the agency is "changing its course by rescinding a rule" it must "supply a reasoned analysis for the change" and must evaluate "the costs as well as the benefits" of the

---

[11] Keynote Remarks by FDIC Chairman Jelena McWilliams on the "Future of Banking" at the Federal Reserve Bank of St. Louis; St. Louis, Missouri, https://www.fdic.gov/news/speeches/2019/spoct0119.html (last visited Nov. 20, 2024).

[12] Unsafe and Unsound Banking Practices: Brokered Deposits Restrictions, *supra* note 2 at 68252.

[13] 5 U.S.C. § 706(2)(A).

[14] Motor Vehicle Mfrs. Ass'n of the U.S., Inc. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983) (quoting Burlington Truck Lines v. United States, 371 U.S. 156, 168 (1962)).

action.[15] Although agencies may change their policies, they must "provide a reasoned explanation for the change" and "show that there are good reasons for the new policy."[16]

There are three reasons finalizing this Proposal would be "arbitrary and capricious" under the Administrative Procedure Act. First, the FDIC has not published any recent, comprehensive deposit data postdating the 2020 rule that demonstrates a need to revise the brokered deposits framework again. Second, the FDIC's explanation for its proposed rulemaking (lessons learned from 2023 large bank failures) that does not provide a rational or satisfactory explanation for its action (the material loss reviews for the 2023 large bank failures do not mention brokered deposit risks). Third, the Proposal's deficient cost-benefit analysis grossly underestimates the actual costs banks, and their third-party partners, will incur if the Proposal is finalized.

i. The Proposal lacks supporting data to show changes to the 2020 final rule are necessary.

On the same day the FDIC board approved the Proposal, the Board also approved a separate request for information on deposits ("the deposits RFI").[17] Notably, the deposits RFI requests detailed information about deposits held by insured depository institutions – the same type of information the FDIC should provide as support for this Proposal. This includes information on deposit data not currently reported in regulatory reports, evaluations of how different types of deposits may behave differently from each other, how changes in deposit reporting may help the FDIC carry out its responsibilities, analysis of potential deposit insurance reforms, improvements in risk sensitivity for deposit insurance pricing, and enhanced data available to analysts and the public.

By requesting deposit data from the public concurrently with the Proposal, the FDIC puts the cart before the horse. The FDIC proposes changes to the brokered deposits framework while simultaneously collecting deposit data that is highly relevant to the rulemaking. The FDIC should withdraw this Proposal until it can collect, analyze, and provide the public with deposit data to support its proposed revisions.

The Proposal lacks data in other respects. Namely, the FDIC has not offered any new and comprehensive core and brokered deposits data to support revisions to the brokered deposits framework that the agency did not already consider when it finalized the 2020 rule. Instead, the FDIC relies on its decades-old 2011 Study on Core Deposits and Brokered Deposits, and its "updated" 2017 Study on Core Deposits and Brokered Deposits to conclude "the use of brokered deposits by IDIs is correlated with (1) higher levels of asset growth; (2) higher levels of nonperforming loans; and (3) a lower proportion of core deposit funding.[18] The FDIC's reliance on the 2011 and 2017 studies is misplaced not only because the FDIC already considered this data when it finalized the 2020 rule, but also because the FDIC has not conducted any recent, similar studies since the 2020 rule became effective. Stale data that pre-dates the 2020 final rule does not provide sufficient justification for proposed changes to the 2020 brokered deposits framework, and the agency should not finalize a rule until it can analyze and make public more recent deposit data.

---

[15] *Id.* at 42, 54.
[16] Encino Motorcars, LLC v. Navarro, 579 U.S. 211, 221 (2016).
[17] Request for Information on Deposits, 89 Fed. Reg. 63946 (Aug. 6, 2024).
[18] *See* Federal Deposit Insurance Corporation (FDIC), Study on Core Deposits and Brokered Deposits (July 8, 2011), https://archive.fdic.gov/view/fdic/6706; *See also* 2017 Study on Core Deposits and Brokered Deposits.

ii. The Proposal does not include sufficient rationale for amending the 2020 final rule.

According to the FDIC, changes to the brokered deposits framework are necessary "based on the FDIC's experience since the adoption of the 2020 final rule and the large bank failures in 2023."[19] But the FDIC has not explained why the failures of Silicon Valley Bank, Signature Bank of New York or First Republic Bank ("the 2023 large bank failures") necessitate major revisions to the entire brokered deposits framework.

The 2023 large bank failures were isolated events that were not caused by community banks, and did not result in findings that community banks posed similar risk of failure. Each of the material loss reviews for the 2023 large bank failures attributes the sources of failure to large concentrations of uninsured deposits, and reliance on uninsured deposits for rapid growth.[20] Importantly, the material loss reviews for the 2023 large bank failures do not even mention the term "brokered deposits" in their findings.[21] The only material loss review from a 2023 bank failure that discusses brokered deposits is the report issued for Republic First Bank – but this report was published in November 2024, *after* the FDIC published the Proposed Rule.

ICBA is concerned the Proposal's rationale conflates brokered deposit risk with uninsured deposit risk. Without additional, publicly available data from the 2023 large bank failures, the data that is publicly available (the material loss reviews) does not provide sufficient information on brokered deposit risks to justify rewriting the 2020 final rule for all banks. Accordingly, because the FDIC has not provided a satisfactory explanation for its proposed policy changes, the FDIC should withdraw the Proposal.

iii. The Proposal underestimates and does not specifically consider the costs of the Proposed Rule.

The FDIC readily admits it "does not have the data to estimate the amount of deposits that would be reclassified as brokered by the proposed rule."[22] While the agency vaguely acknowledges the proposed rule "may lead some IDIs to restructure their liabilities . . . [and] be incentivized to make changes to their organizational structure . . . [and] make changes to internal systems, policies, or procedures that pertain to brokered deposits," the agency does not provide any specificity about the extent to which those costs will impact individual institutions or the industry at large.[23]

---

[19] FDIC Board Approves Proposed Rule to Revise Brokered Deposit Regulations, https://www.fdic.gov/news/press-releases/2024/fdic-board-approves-proposed-rule-revise-brokered-deposit-regulations (last visited Nov. 20, 2024).

[20] As of year-end 2022, over 94% of SVB's total deposits were uninsured. As of September 30, 2022, the uninsured deposit concentration at Signature Bank of New York was 82% of total deposits. And as of December 31, 2022, uninsured deposits comprised 68% of First Republic's total deposits. *See* Material Loss Review of First Republic Bank, Report No. EVAL-24-03 (Nov. 28, 2023), https://www.fdicoig.gov/reports-publications/bank-failures/material-loss-review-first-republic-bank; *See also* Material Loss Review of Signature Bank of New York, Report No. EVAL-24-2 (Oct. 23, 2023), https://www.fdicoig.gov/reports-publications/bank-failures/material-loss-review-signature-bank-new-york; Material Loss Review of Silicon Valley Bank, Evaluation Report 2023-SR-B-013 (Sept. 25, 2023), https://oig.federalreserve.gov/reports/board-material-loss-review-silicon-valley-bank-sep2023.pdf.

[21] *See* Material Loss Review of First Republic Bank, Report No. EVAL-24-03 (Nov. 28, 2023), https://www.fdicoig.gov/reports-publications/bank-failures/material-loss-review-first-republic-bank; *See also* Material Loss Review of Signature Bank of New York, Report No. EVAL-24-2 (Oct. 23, 2023), https://www.fdicoig.gov/reports-publications/bank-failures/material-loss-review-signature-bank-new-york; Material Loss Review of Silicon Valley Bank, Evaluation Report 2023-SR-B-013 (Sept. 25, 2023), https://oig.federalreserve.gov/reports/board-material-loss-review-silicon-valley-bank-sep2023.pdf.

[22] Unsafe and Unsound Banking Practices: Brokered Deposits Restrictions, *supra* note 2 at 68260.

[23] *Id.* at 68259.

Contrary to the FDIC's speculation that the Proposal "may" lead to increased costs, ICBA believes the Proposal will, in fact, increase deposit insurance assessments and require a substantial investment of time and resources across multiple departments at every bank that currently has brokered deposits, that must reclassify core deposits as brokered, as well as every bank that has relationships with third-parties that will be reclassified as "deposit brokers." Bank Presidents, Chief Legal and/or Compliance Officers, Chief Financial Officers, Treasurers, and Finance and Operations Departments are just some of the personnel and departments that will be called upon to invest time and resources to determine whether, and to what extent, their institution might be impacted by the Proposal.

Community banks expect some of the additional costs and compliance burdens under the Proposal to include: (1) reassessing third-party relationships; (2) amending third-party contracts; (3) engaging outside counsel to evaluate impacts to deposits; (4) resubmitting PPE applications; (5) communicating with bank clients; (6) reassessing balance sheet strategy; (7) modeling increases to FDIC insurance premiums; and (8) reviewing bank policies for liquidity ratios and other limits. More specifically, the Proposal will require banks to:

1. Reassess third-party relationships by reviewing accounts, contracts, and business models to determine how the proposed changes may impact deposits.

2. Develop new contractual language to amend existing third-party agreements and incorporate language into future contracts to address potential restrictions and brokered deposit related costs.

3. Retain external firms and/or counsel to evaluate how changes to the brokered deposits framework will impact the banks' business model, partnerships, and policies based on changes to the bank's deposit base and client relationships.

4. Determine the number of client and partner PPE applications and notices that will be rescinded under the proposal, prepare new PPE applications that third-party partners previously submitted, and navigate the reapplication process.

5. Participate in and develop communications with clients to address concerns about the Proposal's effects.

6. Reassess on-balance/off-balance sheet strategies for all deposits, which may also necessitate renegotiations of existing agreements. Additionally, finance teams will have to devote significant resources to model scenarios and assess impact to income statements to understand and prepare for the full financial implications of the Proposal.

7. Model anticipated increases to FDIC assessments as a result of core deposit reclassifications.

8. Review policies to identify necessary adjustments to liquidity ratios and other limits. These reviews will not result in one-time costs, but will instead present ongoing resource burdens, as ALCOs will need to receive regular updates.

III. Conclusion.

In sum, the FDIC is proposing sweeping changes to the brokered deposit framework without reasonable justification or data. If finalized, the Proposal will unnecessarily constrain community bank liquidity, disrupt third-party relationships that provide valued online banking and deposit services to customers, and force community banks to incur costs the FDIC did not adequately recognize in its Proposal. Given the Proposed Rule's numerous deficiencies, the FDIC should withdraw the Proposal.

ICBA appreciates the opportunity to comment on the Proposal. Should you wish to discuss our positions in further detail, please contact Jenna Burke at jenna.burke@icba.org.

Sincerely,

/s/ Jenna Burke
Executive Vice President
General Counsel, Government Relations & Public Policy
Independent Community Bankers of America