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FDIC's Final Rule on Brokered Deposits Adds Clarity to Fintech Partnerships and Other Common Arrangements

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On December 15, the Federal Deposit Insurance Corporation (FDIC) issued a final rule (Final Rule) establishing a new framework for analyzing whether bank deposits obtained through third-party arrangements are brokered deposits. The Final Rule adds clarity to one of the murkier areas of bank regulations, while modernizing the rules for better application to deposit arrangements, including partnerships between banks and fintech companies.

Under Section 29 of the Federal Deposit Insurance Act, a person is a "deposit broker" if it is "engaged in the business of placing deposits, or facilitating the placement of deposits, of third parties with insured depository institutions or the business of placement deposits with insured depository institutions for the purpose of selling interests in those deposits to third parties." For decades, the FDIC broadly defined "deposit broker" by analyzing a number of factors, while narrowly applied exemptions to the definition and a confusing, dated body of regulatory interpretations have made it difficult for banks to determine whether deposits should be considered brokered deposits.

The Final Rule seeks to clarify and modernize this issue by more narrowly defining what it means to be in the business of placing deposits and facilitating the placement of deposits for purposes of the deposit broker definition in Section 29. In addition, the Final Rule provides that a person with an exclusive deposit placement arrangement with one insured depository institution (IDI) will not be considered a deposit broker because it is not in the business of placing deposits or facilitating the placement of deposits.

As a result of the Final Rule's specific exclusion for exclusive deposit placement arrangements, fintech companies that have an exclusive partnership with an IDI will not be considered a "deposit broker" under the Final Rule. Acting Comptroller of the Currency Brian Brooks said with regard to this important change that "[t]he rule modernizes the concept of brokered deposits in a way that supports consumer choice and access to financial services by supporting responsible fintech-bank partnerships."

The FDIC also seeks to clarify and modernize this issue by improving upon the "primary purpose exception" to Section 29. The Final Rule identifies a number of common business relationships described as "designated exceptions" as meeting the primary purpose exception. Many of these designated exceptions are arrangements previously addressed in advisory opinions, and they include, among others, certain investment-related deposits; property management service deposits; deposits for cross-border clearing services; deposits related to real estate and mortgage servicing activities; retirement and 529 deposits; deposits related to employee benefits programs; deposits held to secure credit card loans; and deposits placed by agencies to disburse government benefits.

Additionally, the Final Rule establishes a streamlined application process for other persons seeking a primary purpose exception.

Key observations:

- The Final Rule is a positive step forward and achieves the FDIC's goal of adding clarity to this issue and modernizing the framework to better align with today's business arrangements.

- The Final Rule appropriately considers the growing number of bank/fintech partnerships by providing a clear exclusion for exclusive deposit placement arrangements that banks and fintech companies can rely on when structuring their contractual arrangements.

- The Final Rule gives definitive guidance to many of the more common business relationships involving the placement of deposits with IDIs with the designated exceptions that satisfy the primary purpose exception.

The Final Rule will become effective April 1, 2021, with full compliance extended to January 1, 2022.

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