November 20, 2024

Via Electronic Mail

Federal Deposit Insurance Corporation
550 17th Street, N.W.
Washington, D.C. 20429
Attention: James P. Sheesley, Secretary

Re: Unsafe and Unsound Banking Practices: Brokered Deposits Restrictions (Federal Deposit Insurance Corporation Docket No. RIN 3064-AF99)

Ladies and Gentlemen:

The American Bankers Association, Bank Policy Institute, United States Chamber of Commerce, Financial Services Forum, Financial Technology Association, Independent Community Bankers of America, and Securities Industry and Financial Markets Association (collectively, "the Associations") are filing this comment on the notice of proposed rulemaking issued by the Federal Deposit Insurance Corporation concerning brokered deposits. *See Unsafe and Unsound Banking Practices: Brokered Deposits Restrictions*, 89 Fed. Reg. 68,244 (Aug. 23, 2024).[1]

As described in detail below, any final rule adopted based on this proposal would violate the Administrative Procedure Act in multiple ways. Among other flaws, the proposal is inconsistent with the statutory definition of a "deposit broker," which, as relevant here, requires a deposit broker to be "engaged in the business of placing deposits[] or facilitating the placement of deposits," and excludes any person "whose primary purpose is not the placement of funds with depository institutions." 12 U.S.C. § 1831f(g)(1), (g)(2)(*I*). The proposed rule would sweep in entities that are not "engaged in the business of placing deposits" at all, let alone as their "primary purpose."

[1] The Appendix to this letter provides information about each of the Associations.

The proposed rule, if adopted without significant changes, would also be arbitrary and capricious on several grounds. Among others, the proposal fails to justify the agency's change in position since 2021, consider the reliance interests created by the existing rules, or explore obvious alternatives. The FDIC also fails to assess the economic or legal effects of the proposal. And, without justification, the proposal lumps together different types of deposits as "brokered" without any meaningful analysis of the very different underlying business models of third parties who place their customers' deposits with banks.

Each of these flaws, on its own, suffices to render the proposal unlawful. Accordingly, the FDIC should either withdraw the proposed rule or re-propose a new rule that adheres to the text of Section 1831f and otherwise complies with the APA.[2]

I. Background

A traditional deposit broker is in the business of collecting deposits from third parties and then placing them with banks. For example, a deposit broker might collect deposits from customers and allocate those deposits to banks for a fee. Customers may opt to use these services to obtain the best interest rates, and banks may opt to use these services to raise deposits at a lower customer-acquisition cost.

Brokered deposits are governed primarily by Section 29 of the Federal Deposit Insurance Act, codified at 12 U.S.C. § 1831f. Congress enacted Section 1831f in response to the savings and loan crisis of the 1980s, and out of a concern that financially troubled institutions were relying too heavily on "hot money" deposit brokers who would place short-term deposits at banks with higher-than-market interest rates in order to turn a profit. *See* Senate Congressional Record, Proceedings and Debates of the 101st Congress, First Session, 135 Cong. Rec. S4238-01, 1989 WL 191889 (Apr. 19, 1989). The statute provides that "[a]n insured depository institution that is not well capitalized may not accept funds obtained, directly or indirectly, by or through any deposit broker." 12 U.S.C. § 1831f(a).

In regulating banks' ability to rely on brokered deposits for funding, Congress did not intend the statute to apply to just any entity that places third-party deposits at a bank. Instead, as relevant here, Congress expressly defined the phrase "deposit broker" to mean:

> 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.

[2] Other commenters, including the Associations, explain in further detail why the proposed rule raises serious legal and policy problems and should be withdrawn or re-proposed. Each of the Associations incorporates by reference its individual comment letter.

§ 1831f(g)(1)(A) (emphasis added).

Congress further clarified that the phrase "deposit broker" does *not* include nine specific kinds of entities, including a broad category excluding:

> agent[s] or nominee[s] whose primary purpose is not the placement of funds with depository institutions.

§ 1831f(g)(2)(*I*).

Congress did not delegate to the FDIC authority to define the phrase "deposit broker" (or any other phrase or term in Section 1831f), nor did Congress grant the FDIC authority to supplement the statutory definitions with the agency's own views of who should be treated as a "deposit broker." But Congress did provide the FDIC authority to provide "such additional restrictions on the acceptance of brokered deposits as the Corporation may determine to be appropriate." 12 U.S.C. § 1831f.

For most banks, the costs of re-defining the phrase "deposit broker" stem from requirements other than the statutory limitations on the use of brokered deposits by banks that are not well capitalized. For instance, brokered deposits receive more punitive treatment under the rules governing bank liquidity and make it more difficult for banks to maintain their liquidity ratios. They also result in higher deposit-insurance assessments. And, as a prudential matter, brokered deposits tend to be viewed by regulators as less stable than non-brokered deposits, thus causing increased examination scrutiny.

By 2018, "[s]ignificant technological changes ha[d] affected many aspects of the banking industry, including the manner in which banks source deposits." *Unsafe and Unsound Banking Practices: Brokered Deposits and Interest Rate Restrictions*, 86 Fed. Reg. 6,742, 6,742/3 (Jan. 22, 2021). The FDIC "recognize[d] that its regulations governing brokered deposits"—which at that point were governed by a patchwork of decades-old interpretive letters—had become "outdated" and failed to "reflect current industry practices and the marketplace." *Id.* Thus, the FDIC undertook an extensive rulemaking effort intended to modernize the framework for brokered deposits. The agency spent two years gathering data, updating analyses, engaging with the industry, and reviewing comments on its proposed rule. It then finalized the new rule in late 2020 and published it in the Federal Register in early 2021. At a high level, the 2021 Rule resulted in fewer deposits being classified as brokered under the FDIC's rules, reflecting the FDIC's view that certain modern forms of deposit arrangements exhibit lower levels of risk than traditional brokered deposits. *See* 86 Fed. Reg. at 6,744/1, 6,745/1, 6,784/2.

The proposed rule now seeks to undo many of the changes that the FDIC adopted in the 2021 Rule. The proposal would significantly expand the definition of deposit broker, significantly narrow the primary purpose exclusion, and rescind the agency's approval of existing deposit arrangements that are currently treated as non-brokered.

II. Legal requirements under the Administrative Procedure Act

The APA sets forth the general requirements for rulemaking at federal agencies, including the FDIC. Any rule must be consistent with the statutory framework that governs the agency's rule; otherwise, a rule is not "in accordance with law" and is unlawful under the APA. 5 U.S.C. § 706(2)(A). Agency action will also be set aside if it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." *Id.*

In adopting a rule, an agency 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." *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). Agency action is "arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *Id.*

Among other things, an agency acts arbitrarily if it fails to sufficiently justify a change in agency policy. 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." *Encino Motorcars, LLC v. Navarro*, 579 U.S. 211, 221 (2016). The agency must show "that the new policy is permissible under the statute, that there are good reasons for it, and that the agency believes it to be better." *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009). The agency must take into account any "serious reliance interests" engendered by its prior policies, *Encino Motorcars*, 579 U.S. at 222, and consider whether there are "alternatives . . . within the ambit of the existing policy" that would better protect such interests, *Dep't of Homeland Sec. v. Regents of the Univ. of Cal.*, 140 S. Ct. 1891, 1913 (2020) (alterations omitted). An agency must also consider economic impacts and "costs and benefits." *Mexican Gulf Fishing Co. v. Dep't of Commerce*, 60 F.4th 956, 973 (5th Cir. 2023) (citing *Michigan v. EPA*, 576 U.S. 743, 751 (2015)).

III. The proposed rule is inconsistent with Section 1831f and therefore contrary to law.

Here, the proposed rule is unlawful because it conflicts with 12 U.S.C. § 1831f—the statute governing brokered deposits—in at least four ways. First, the proposed rule would adopt a definition of "deposit broker" that is far too broad. Second, it would adopt an interpretation of the primary purpose exclusion that is far too narrow. Third, it would impermissibly require banks to request the FDIC's permission to treat deposits as non-brokered. Fourth, it would impermissibly treat entities as deposit brokers even if they place deposits only with a single bank through an exclusive-placement arrangement. Each of these mistakes pushes the proposed rule in the same direction—a dramatically expanded category of "deposit brokers"—that goes beyond the definition that Congress enacted.

In many respects the statutory errors in the proposal are the result of attempts to reverse decisions that the agency made in the 2021 Rule, which hewed closer to Section 1831f's text. As

explained below, however, the 2021 Rule itself may still treat more deposits as "brokered" than the statute permits. A court reviewing the scope of the statutory definition would likely find that Section 1831f classifies even *fewer* deposits as brokered than under the current framework.

A. The FDIC's interpretation of Section 1831f is entitled to no deference.

As a threshold matter, the FDIC's interpretation of Section 1831f will be entitled to no deference in litigation challenging a final rule. *See Loper Bright Enterprises v. Raimondo*, 144 S. Ct. 2244 (2024). An agency's interpretation of statutory text is entitled to deference only in two narrow circumstances: (1) if Congress has "expressly delegate[d] to [the] agency the authority to give meaning to a particular statutory term"; or (2) if Congress has empowered the agency "to prescribe rules to fill up the details of a statutory scheme, or to regulate subject to the limits imposed by a term or phrase that leaves agencies with flexibility." *Id.* at 2263 (quotations and citations omitted). Neither exception applies here, where Congress declined to delegate authority permitting the FDIC to define the key language in Section 1831f and expressly enacted its own detailed definition of the phrase "deposit broker."[3]

B. The proposed definition of deposit broker is too broad.

Congress defined the phrase "deposit broker" to mean "any person engaged in the business of placing deposits, or facilitating the placement of deposits, of third parties with insured depository institutions." 12 U.S.C. § 1831f(g)(1). This language unambiguously requires deposit brokers to be *in the business* of placing or facilitating the placement of deposits, thus excluding persons who place deposits as part of a different business or activity.

The proposal purports to replace the statutory test with a multi-prong definition of deposit broker. Several of the proposed prongs are inconsistent with the requirement that a deposit broker be "engaged in the business of" placing or facilitating the placement of deposits.

For example, under the proposed rule, similarly to the current rule, an entity would qualify as a deposit broker if it "receives third-party funds and deposits those funds at one or more insured depository institutions." 89 Fed. Reg. at 68,251/1–2. Thus, based on this threshold language, the FDIC would evidently treat *any* entity that places third-party deposits at banks as a deposit broker unless an exclusion applies. That interpretation of Section 1831f ignores the crucial statutory requirement that an entity be "engaged in the business" of placing or facilitating the placement of deposits.

---

[3] Moreover, even if Section 1831f did somehow delegate interpretive authority to the FDIC under one of *Loper Bright*'s narrow exceptions, that authority would violate the non-delegation doctrine because the statute provides no intelligible principle governing the agency's exercise of its discretion. *See Indus. Union Dep't, AFL-CIO v. Am. Petroleum Inst.*, 448 U.S. 607, 646 (1980) (plurality opinion) (explaining that the agency's interpretation of an unlimited, "open-ended grant" of authority would be "such a 'sweeping delegation of legislative power' that it might be unconstitutional").

Similarly, the proposal would deem an entity to be a deposit broker if the entity receives "a fee or . . . other remuneration in exchange for deposits being placed," 89 Fed. Reg. at 68,271/2 (proposed 12 C.F.R. § 337.6(a)(5)(ii)(E)), which purportedly would include "fees for administrative services," *id.* at 68,252/2. The mere fact that an entity receives a fee does not mean that it is "in the business of" placing deposits, particularly given that the FDIC purports to make receipt of *administrative* fees sufficient to make an entity a deposit broker. That would be like saying a law firm is "engaged in the business of" mailing packages because it mails packages for its clients and seeks to recover its postage fees. Plainly, more is necessary for an entity to be engaged in the business of placing or facilitating the placement of deposits.

Next, the proposal would deem an entity to be a deposit broker if the entity "proposes or determines deposit allocations at one or more IDIs (including through operating or using an algorithm, or any other program or technology that is functionally similar)." 89 Fed. Reg. at 68,251/1–2.[4] This proposed definition once again omits the critical limiting statutory language—that the entity be "engaged in the business of" placing or facilitating the placement of deposits. If an entity "proposes or determines deposit allocations" but is not "in the business of" placing or facilitating the placement of deposits, then it is not a deposit broker under Section 1831f. The entity does not become a deposit broker simply because it provides services that *could* be provided by a deposit broker. For example, a technology service provider might help a bank or third party, such as a broker-dealer, use an algorithm to determine deposit allocations, but the provider would be "engaged in the business of" providing technology services to the bank or broker-dealer, not brokering deposits on behalf of depositors with whom the service provider has its own independent relationship.[5]

---

[4] This prong replaces the "matchmaking" test adopted in the 2021 Rule as a method for determining who qualifies as a deposit broker. Under that test, a person engaged in matchmaking is a deposit broker, and "[a] person is engaged in matchmaking if the person proposes deposit allocations at, or between, more than one bank based upon both (a) the particular deposit objectives of a specific depositor or depositor's agent, and (b) the particular deposit objectives of specific banks." 86 Fed. Reg. at 6,747/1. The proposal would expand the matchmaking test by classifying a person as a deposit broker without regard to the person's strategy and objectives in placing deposits.

[5] In addition to the prongs above, the proposal would also retain two additional paths to qualifying as a deposit broker from the 2021 Rule: A person who has "legal authority, contractual or otherwise, to close the account or move the third party's funds to another IDI," or who participates in "negotiating or setting rates, fees, terms, or conditions for the deposit account." 89 Fed. Reg. at 68,251/2. To the extent those prongs would include entities who are not "engaged in the business of" placing or facilitating the placement of deposits, then they, too, would exceed the bounds of statutory definition.

In sum, the proposed rule impermissibly treats all entities who place or facilitate the placement of third-party deposits at banks as "deposit brokers" even if they are not "engaged in the business of" brokering deposits. This exceeds the bounds of the FDIC's authority.

C. The proposed test for the primary purpose exclusion is too narrow.

Primary Purpose Exclusion. The problems created by the proposal's overbroad interpretation of subsection (g)(1)(A) are exacerbated by the proposal's improper narrowing of the primary purpose exclusion in subsection (g)(2)(*I*). The primary-purpose exclusion makes clear that the statutory definition of a "deposit broker" excludes "an agent or nominee whose primary purpose is not the placement of funds with depository institutions." 12 U.S.C. § 1831f(g)(2)(*I*). That language is unambiguous and bars the FDIC from treating an entity as a deposit broker if the entity has any "primary purpose" *other than* placing deposits at banks.

The statutory primary purpose exclusion maintains Section 1831f's focus on "hot money" deposit brokers who exist primarily to place (and move) bank deposits that belong to third parties. In particular, the exclusion differentiates deposit brokers from other third parties with different primary businesses that might, incidentally to that primary business, place customer deposits with banks. If an entity's primary purpose is anything other than the placement of deposits—say, managing investments, or facilitating consumer transactions—then the entity's deposits are not brokered under the statute, period.

In contrast, the FDIC's new test would ignore the primary purpose of an entity that places deposits at banks and instead assess whether the agent's "primary purpose *in placing customer deposits at IDIs* is for a substantial purpose other than to provide a deposit-placement service or FDIC deposit insurance." 89 Fed. Reg. at 68,253/3 (emphasis added). That language would essentially render the statutory primary purpose exclusion nugatory—it is difficult even to imagine a situation where an entity's "primary purpose" "in placing customer deposits" is something other than "deposit-placement." Congress adopted a far broader exclusion that asks whether the entity's *overall* purpose is something other than placing deposits with banks. 12 U.S.C. § 1831f(g)(2)(*I*).

Enabling Transactions Test and 25 Percent Test. Relatedly, the proposal would impermissibly reverse the agency's position on two specific paths to qualify for the primary purpose exclusion under the 2020 Rule: (1) the "enabling transactions test," and (2) the "25 percent test." 89 Fed. Reg. at 68,248/1.

The enabling transactions test ensures that an entity is not treated as a deposit broker if it "places depositors' funds into transactional accounts for the purpose of enabling transactions." 86 Fed. Reg. at 6,751/1. Specifically, under the 2021 Rule, an entity has a primary purpose other than placing deposits if it places depositors' funds "into transactional accounts that do not pay any fees, interest, or other remuneration to the depositor." 89 Fed. Reg. at 68,248/1; *see also* 86 Fed. Reg. at 6,751/1–2. The proposal would eliminate this exclusion altogether. 89 Fed. Reg. at 68,257/1–3.

This change cannot be reconciled with the statute. If an entity's primary purpose is enabling transactions—for example, by providing consumers and small businesses a convenient way to pay for goods and services using a smartphone—then the entity's primary purpose is not "the placement of funds with depository institutions." 12 U.S.C. § 1831f(g)(2)(I). Thus, the entity is not a deposit broker under the statute, regardless of whether (and how) it places its customers' deposits with banks. In fact, the enabling transactions test in the current rules is already too narrow to the extent it limits the exclusion to entities that place deposits in transaction accounts that do not pay fees or interest.

As for the 25 percent test, the 2021 Rule provided that an entity is not a deposit broker if it places "[l]ess than 25 percent of the total assets . . . under administration for its customers" at depository institutions. 89 Fed. Reg. at 68,248/1. This bright-line exclusion reflects the judgment that an entity which holds most of its customers' assets somewhere *other than banks* can hardly be said to have the primary purpose of placing customer deposits *with banks*.[6] (Indeed, the 25 percent test itself is subject to question; any entity that places less than 50% of its customers' assets with banks obviously has a different "primary purpose" because a majority of its business necessarily involves providing some other kind of service.) The proposed rule would replace the 25 percent test with a new "Broker-Dealer Sweep Exception" that is applicable "only to a broker-dealer or investment adviser registered with the Securities and Exchange Commission" with "less than 10 percent of the total assets . . . under management" in non-maturity accounts at banks. *Id.* at 68,255/3–56/1.

In other words, the proposal expressly targets broker-dealers' and investment advisers' sweep accounts and offers them only a narrowed version of the statutory exclusion. Broker-dealers registered with the SEC, by definition, are in the business of buying or selling securities and therefore have a "primary purpose other than" placing deposits at banks. 12 U.S.C. § 1831f(g)(2)(*I*). Thus, they are not deposit brokers under the plain language of the statute, period, regardless of whether they use sweep accounts to place their customers' deposits with banks. Their sweep deposits fall outside the scope of Section 1831f, regardless of whether they constitute 10 percent or 25 percent of the broker-dealer's assets under management (or more). The same is true for investment advisers. For the primary purpose exclusion, it makes no difference whether either broker-dealers or investment advisers are registered with the SEC. Instead, it is enough that they have a primary purpose other than placing or facilitating the placement of deposits. And surely, the fact that an entity *is* registered to engage in securities brokerage, advisory activity, or similar activities regulated by the SEC demonstrates that the entity has a primary purpose that is unrelated to placing deposits at banks.

---

[6] *Statement by Vice Chairman Travis Hill on the Notice of Proposed Rulemaking on Brokered Deposit Restrictions*, https://www.fdic.gov/news/speeches/2024/statement-vice-chairman-travis-hill-notice-proposed-rulemaking-brokered-deposit (July 30, 2024) ("I do not think it is accurate to conclude that the primary purpose of a company that collects funds from customers and, for example, places 12 percent of those funds at banks is the placement of deposits, given that 88 percent of those funds are placed elsewhere.").

D. The proposed rule impermissibly requires banks to submit applications for deposits to be eligible for the primary purpose exclusion.

The proposal's approach to the primary purpose exclusion is inconsistent with Section 1831f in another way: Nothing in the statute permits the FDIC to require banks (or third parties) to seek the agency's permission simply to take advantage of the statutory definition of a "deposit broker," including the statutory exclusion for businesses with a primary purpose other than placing deposits at banks. As some commenters explained during the rulemaking for the 2021 Rule, this process is unnecessary and inconsistent with the statutory text and with how the FDIC treats other enumerated exclusions in Section 1831f(g)(2).[7]

The proposed rule continues to require banks or third parties to submit formal applications with the FDIC for the third parties' deposits to be treated as non-brokered. *See* 89 Fed. Reg. at 68,254, 68,256–57. The proposed rule makes this process even more burdensome by requiring banks themselves to submit applications containing a broad range of information about third parties' activities and business, followed in many cases by a subjective balancing exercise in which the FDIC determines whether to approve the application. *See id.*[8]

The statute grants the FDIC no authority to require any of this. If an entity is not a deposit broker as defined in Section 1831f(g), then the FDIC lacks authority to treat it as a deposit broker, with or without the entity or a bank filing a notice or the FDIC granting an application. Put differently, the FDIC cannot demand that banks or third parties ask the agency's permission to do what the statute expressly allows. Instead, banks (and third-party entities placing funds with banks) are entitled to rely on the statute itself.

E. The proposal impermissibly defines "deposit broker" to include entities that place deposits with a single bank.

The proposed rule is also inconsistent with Section 1831f by impermissibly treating deposits placed through exclusive deposit-placement arrangements as brokered deposits. By its terms, the statute makes an entity a "deposit broker" only if it engages in the business of placing deposits at "insured depository *institutions*." 12 U.S.C. § 1831f(g)(1) (emphasis added). As the 2021 Rule recognized, the statute's use of the plural form of "institutions" excludes entities that place deposits only at a single institution. 86 Fed. Reg. at 6,746/1–2. This interpretation is consistent with the ordinary meaning of "broker," which typically refers to a person who connects multiple buyers and sellers on both sides of a market.

In reversing the approach in the 2021 Rule, the proposal points to the Dictionary Act and the canon that "words importing the plural include the singular." 89 Fed. Reg. at 68,253/1; *see* 1

---

[7] *See, e.g.*, BPI comment letter to FDIC re: Brokered Deposits (RIN 3064-AE94) (June 5, 2020); SIFMA comment letter to FDIC on Proposal Revising Brokered Deposits Restrictions (RIN 3064-AE94) (April 10, 2020).

[8] For the proposed Broker-Dealer Sweep Exception, the proposal would allow notice filing if the arrangement at issue involves only a single third party. *Id.* at 68,256/1–2.

U.S.C. § 1. But that interpretive canon can be overcome by "statutory context." *Friends of the Inyo v. United States Forest Serv.*, 103 F.4th 543, 554 (9th Cir. 2024). Indeed, the Supreme Court has applied the Dictionary Act in treating the plural or singular as interchangeable only on "rare occasions" when doing so was "necessary to carry out the evident intent of the statute." *United States v. Hayes*, 555 U.S. 415, 422 n.5 (2009) (quotations omitted); *see also Niz-Chavez v. Garland*, 593 U.S. 155, 164 (2021) ("The Dictionary Act does not transform every use of the singular 'a' into the plural 'several.' Instead, it tells us only that a statute using the singular 'a' *can* apply to multiple persons, parties, or things." (emphasis added)).

Here, the statutory context makes clear that the Section 1831f(g)(1) means what it says and does not include entities that place funds with a single bank within the statutory definition of a "deposit broker." As explained above, Section 1831f is focused on traditional deposit brokers who might quickly move "hot money" from bank to bank as part of their primary business model. Deposits placed at a single bank pursuant to an exclusive business arrangement are generally more stable because "the third party . . . is less likely to move its customer funds to other IDIs." *See* 86 Fed. Reg. at 6,745/1.

IV. The proposed rule is arbitrary and capricious in violation of the APA.

The serious statutory flaws detailed above are reason enough to abandon the proposed rule. But if that were not enough, the proposal is also arbitrary and capricious on several grounds. Given these multiple deficiencies in the agency's reasoning, the proposal has little hope of surviving judicial review under the APA without major changes (which would necessitate a new proposal and a new opportunity for the public to comment).

A. The proposal insufficiently explains its reversal of the 2021 Rule.

In many respects, the proposal seeks to reverse the interpretation of Section 1831f adopted by the FDIC in the 2021 Rule. Although the proposal acknowledges that it is departing from the 2021 Rule, it fails to meaningfully engage with the reasoning in that rule. Instead, it often justifies a change by saying that the FDIC is returning to the historical, pre-2021 standard without explaining why "the agency believes [that standard] to be better." *Fox Television*, 556 U.S. at 515 (emphasis deleted); *see, e.g.*, 89 Fed. Reg. at 68,253/1 (discussion of exclusive deposit placement arrangements); *id.* at 68,255/1 (sweep deposits).

In a few places, the proposal vaguely cites the FDIC's "recent experience" and a handful of real-world anecdotes. *See, e.g.*, 89 Fed. Reg. at 68,252/1 (matchmaking test). It fails, however, to analyze whether those anecdotes are representative of the industry as a whole or explain properly how those anecdotes are relevant to deposits that the proposed rule would treat as "brokered"—or to acknowledge other anecdotes that undermine its narrative.

This falls far short of the reasoned justification that the APA requires. An agency can "rel[y] on its own experience as factual support for its decision to promulgate a rule," but only if the agency "adequately record[s] and explain[s] that experience on the record." *Nat'l Tour Brokers Ass'n v. ICC*, 671 F.2d 528, 533 (D.C. Cir. 1982); *see also Sierra Club v. EPA*, 972 F.3d 290, 305 (3d Cir. 2020)

("We would have hoped (and the law requires) that the agency would rely upon its technical expertise to justify and explain [its] decision, not to simply adopt it by *ipse dixit* authority."). The FDIC's experience does not excuse its obligation to gather data and analyze all available evidence that would have informed a reasoned decision, and then to make that data and analysis available to the public.

Moreover, by attempting to rely on vague references to "experience" without elaboration, the FDIC is failing "to provide a meaningful opportunity to participate in the notice-and-comment process." *District of Columbia v. Dep't of Agriculture*, 496 F. Supp. 3d 213, 235 (D.D.C. 2020). Accordingly, the FDIC's attempt to justify the shift from the 2021 Rule violates the procedural requirements of the APA, in addition to being arbitrary and capricious.

B. The proposal ignores reliance interests.

The agency's reversal of the 2021 Rule will impose significant costs on regulated parties that have structured their businesses and relationships in reliance on that Rule. This, too, runs afoul of the agency's obligations under the APA. *See Regents of the Univ. of California*, 140 S. Ct. at 1913–14. Even where an agency is not amending an existing regulation it adopted just a few years previously, agencies always have an obligation to consider reasonable reliance interests on the status quo and the extent to which a new rule upsets those interests. Where the agency affirmatively induced reliance interests through its prior actions, the need to consider reliance interests is even more acute. *Id.* at 1913 ("When an agency changes course . . . it must be cognizant that longstanding policies may have engendered serious reliance interests that must be taken into account." (quotations omitted)).

Here, the proposal acknowledges that it "may lead some IDIs to restructure their liabilities," "make changes to their organizational structure," and "make changes to internal systems, policies, or procedures that pertain to brokered deposits." 89 Fed. Reg. at 68,259/3. It admits that third parties who are "currently not designated as brokered, but would be if the proposed rule was adopted, . . . may incur costs associated with making changes to systems, policies, and procedures" and "may experience costs associated with transitioning their business models." *Id.* at 68,261/2. And it states that the new rule "may affect consumers," including by raising costs or causing consumers to switch third-party providers. *Id.* at 68,261/1. In the agency's curt and undeveloped analysis of the purported benefits and costs of the proposal, however, the FDIC fails to give any meaningful weight to these serious and obvious problems created by the proposed rule.[9]

The proposal's approach to the primary purpose exclusion illustrates the FDIC's failure to give sufficient weight to reliance interests. The proposed rule would immediately revoke any prior approvals that the FDIC granted under the 2021 Rule. "As a result, IDIs and third parties relying

[9] The proposal's failure to consider reliance interests stands in stark contrast to the 2021 Rule, which attempted where possible "not to disrupt business arrangements that have existed for a number of years in reliance on prior staff guidance." 86 Fed. Reg. at 6,747/2 n.23.

on previously approved applications would no longer be able to do so"; instead, they would need to "submit a new application to seek a primary purpose exception and report the associated deposits as brokered until and unless an application is approved." 89 Fed. Reg. at 68,254/3–68,255/1.

This will obviously cause serious and unnecessary disruptions to entities that are relying on exclusions that they are entitled to under the statute itself and were approved under the 2021 Rule. Yet the proposal fails to acknowledge these disruptions, and it drastically underestimates the FDIC's ability to process the resulting applications in a timely manner. As FDIC Vice Chairman Travis Hill observed, "[g]iven (1) the number of deposit arrangements that may be newly scoped in by the rule, (2) the more subjective standard by which the FDIC will judge applications, and (3) the lack of grandfathering of existing arrangements, . . . an enormous avalanche of applications may hit the FDIC on day 1, which the agency is completely unequipped to process in any sort of timely or efficient manner."[10]

Similarly, the proposal's dramatic attempt to expand the definition of "deposit broker" and narrow the primary purpose exclusion will make it far more costly for banks to accept deposits from third parties who previously relied on the 2021 Rule. For example, third parties who entered exclusive-placement arrangements in reliance on the 2021 Rule may now have their deposits treated as brokered. The FDIC fails to give any meaningful weight to the cost of applying the proposal to these existing arrangements, which renders the proposal arbitrary and capricious.

C. The proposal fails to consider obvious alternatives.

Before rescinding a prior policy and disrupting the industry's reliance on that policy, the agency must "consider the 'alternatives' that are 'within the ambit of the existing policy.'" *Regents of the Univ. of California*, 140 S. Ct. at 1913 (quoting *State Farm*, 463 U.S. at 51). More generally, "[a]n agency is required to consider responsible alternatives to its chosen policy and to give a reasoned explanation for its rejection of such alternatives." *Spirit Airlines, Inc. v. Dep't of Transportation*, 997 F.3d 1247, 1255 (D.C. Cir. 2021) (quotations omitted). "This principle goes to the heart of reasoned decisionmaking." *Id.* Here, other than two alternative approaches to the proposed Broker-Dealer Sweep Exception, the proposed rule fails to identify *any* alternatives to the changes in the proposed rule, including the broad new proposed definition of a "deposit broker" and the agency's proposed curtailing of the primary purpose exclusion. 89 Fed. Reg. at 68,258/2–3.

Many more reasonable alternatives are apparent if the FDIC is determined to rewrite the 2021 Rule—which it should not do, for the reasons explained here and in other comment letters. For example, the FDIC could make more targeted changes to the current rules to minimize the costs and disruption experienced by regulated parties. This could include, by way of example, omitting certain kinds of deposits from the scope of the rule based on their unique characteristics; considering only certain kinds of fees paid to third parties (*e.g.*, excluding administrative or marketing

---

[10] *Remarks by Vice Chairman Travis Hill*, *supra* at 8.

fees); grandfathering in existing deposit arrangements that relied on the 2021 Rule; or providing a reasonable grace period (*e.g.*, 3–5 years) for the industry to adjust to the new rule. To the extent the proposed rule is intended to address inaccurate reporting, *e.g.*, 89 Fed. Reg. at 68,250/3, the FDIC could simply clarify how it expects banks to report under the existing rules. To be clear, this is not an exhaustive list—the Associations have provided other alternatives in their individual comment letters, and other commenters are likely to identify reasonable alternatives. And of course, the most reasonable alternative would be to stick with the current rules, which the FDIC adopted just a few years ago.

Further, even for broker-dealer sweep deposits, the FDIC has failed to adequately consider a number of obvious alternatives. For example, the proposal notes an alternative that would treat "*all* sweep deposits as brokered because the broker-deal[er] or investment adviser would meet the 'deposit broker' definition [in the proposed rule]." 89 Fed. Reg. at 68,258/2 (emphasis added). But the agency appears not to have considered the more obvious (and statutorily permissible) alternative of treating all sweep deposits from broker-dealers as *non*-brokered under the primary purpose exclusion.

Under longstanding precedent, the FDIC is required to explain why the blunt and overbroad approach in the proposed rule is necessary despite less burdensome alternatives. The agency's failure to do so far is arbitrary and capricious.

D. The proposal does not consider the wide-ranging and significant consequences of the proposed rule.

Remarkably, the FDIC does not appear to have considered the practical and legal effects of its proposal, which the agency admits implicates hundreds of billions of dollars in deposits and multiple industries that could be adversely impacted. *See* 89 Fed. Reg. at 68,259/1. Indeed, the FDIC readily admits that it has not even estimated "the amount of deposits that would be reclassified as brokered under the proposed rule." *Id.* The proposal further explains that the FDIC does not know how many banks will be affected by the proposal, the compliance costs those banks will incur, the resulting increase in deposit-insurance assessments, or the compliance costs that third parties will incur. *Id.* at 68,259–60, 68,261/1–2. The proposal also fails to seriously consider the cost to the economy of disrupting the ability of financial-technology providers and other businesses to place customer deposits at banks. And the proposal fails to consider the harm to underbanked customers who access financial services through non-banks, *i.e.*, through bank partnerships that expand services to new geographies and markets.

The FDIC has an obligation to base its rules on a reasonable evidentiary basis and to consider the costs of its proposal, as well as the broader impact on the economy. *State Farm*, 463 U.S. at 43; *see also Mexican Gulf Fishing Co.*, 60 F.4th at 973 (agency must "consider[] the costs and benefits associated with the regulation"); *Ariz. Public Serv. Co. v. EPA*, 562 F.3d 1116, 1124 (10th Cir. 2009) ("Because the EPA failed to address the area's air problems and did not examine the relevant data or articulate a rational basis for its decision, the federal plan is arbitrary and capricious."). "Agencies have long treated cost as a centrally relevant factor when deciding whether to regulate" because "reasonable regulation ordinarily requires paying attention to the advantages and

the disadvantages of agency decisions." *Michigan v. EPA*, 576 U.S. at 752–53; *see also id.* at 769 (Kagan, J., dissenting) ("Unless Congress provides otherwise, an agency acts unreasonably in establishing a standard-setting process that ignore[s] economic considerations." (quotations omitted)).

Yet the FDIC has not considered costs here. This omission is particularly remarkable considering the potential economic consequences of the proposal—the FDIC acknowledges that insured depository institutions currently report holding $1.34 trillion in brokered deposits, and that this figure does not include the approximately $350 billion in deposits that were reclassified as non-brokered by the 2021 Rule. *See* 89 Fed. Reg. at 68,259/1.

Nor is the FDIC without the ability to gather information necessary to gauge its rule's serious adverse effects. On the contrary, after the 2021 Rule, the FDIC (together with other banking agencies) amended the requirements for banks' call reports to obtain more data on sweep deposits. The agency's goal was to "evaluate funding stability of sweep deposits over time to determine their appropriate treatment under liquidity regulations" and "assess the risk factors associated with sweep deposits for determining their deposit insurance assessment implications."[11] But the agency appears not to have used this information to analyze whether sweep deposits should be treated as brokered deposits or even how many sweep deposits would become "brokered" under the proposed rule. In addition, as discussed below, the FDIC is currently engaged in an information request that should help it better assess some (though not all) of the rule's consequences.

The proposal also fails to consider the interaction between the proposed rule and the broader statutory and regulatory scheme. For example, the FDIC fails to estimate or consider the cost of increases in deposit-insurance assessments or the potential effect on banks' ability to maintain their liquidity ratios (and broader impacts on liquidity risk management), or how banks will respond to both of those new burdens for deposits that are currently treated as non-brokered. The agency's failure to evaluate and consider these collateral consequences of the proposal is arbitrary and capricious. *See Portland Cement Ass'n v. EPA*, 665 F.3d 177, 187 (D.C. Cir. 2011) ("It is not absurd to require that an agency's right hand take account of what its left hand is doing."). If the FDIC did evaluate the effects of these collateral regulatory consequences, then it would need to consider whether those consequences are independently justified and, relatedly, whether they warrant corresponding changes to the agency's other rules to account for the new overbroad definition of brokered deposits. The FDIC's failure to take even the first step—assessing and evaluating the consequences—is a major blind spot in the proposed rule.

---

[11] Federal Financial Institutions Examination Council, *Proposed Revisions to the Report of Assets and Liabilities of U.S. Branches and Agencies of Foreign Banks (FFIEC 002) Related to Sweep Deposits and Brokered Deposits* (May 26, 2021), https://www.ffiec.gov/pdf/FFIEC_forms/FFIEC002_202105_letter.pdf.

E. The proposal fails to distinguish between different kinds of deposits.

Finally, the proposal unreasonably fails to distinguish between various types of deposits and their different characteristics and levels of risk. *See, e.g.*, *Window Covering Manufacturers Ass'n v. CPSC*, 82 F.4th 1273, 1288 (D.C. Cir. 2023) (agency's cost estimate was arbitrary and capricious because it failed to account for differences between different kinds of products). Instead, the agency defines a vast array of different businesses to be "deposit brokers," assumes that their deposits are therefore "brokered deposits," and then points to a single outdated study assessing the effects of *traditional* brokered deposits.

This approach makes little sense. As Vice Chairman Hill put it, "the deposit landscape now encompasses a broad range of deposit arrangements," and different types of deposits "present, in certain respects, diametrically opposite characteristics."[12] Director McKernan similarly explained that "[t]he proposal does not . . . offer any evidence that some of the deposits that this proposal would re-classify as brokered deposits actually present the same or similar risks."[13] Rather than lumping together all deposits covered by the proposed rule and assuming they are identical both to each other and to traditional brokered deposits, the FDIC is required to consider the relevant differences and justify its assertions that particular kinds of deposits pose risks to banks.

The failure to distinguish between different kinds of deposits undermines the agency's reasoning throughout the proposal. As just one example among many, the proposal would eliminate the enabling transactions test because there is supposedly "no relevant difference between an agent or nominee's purpose in placing deposits to enable transactions and placing deposits to access a deposit account and deposit insurance." 89 Fed. Reg. at 68,257/2. That is nonsense—there are obviously "relevant difference[s]" between a "hot money" deposit broker sending money from bank-to-bank in pursuit of higher interest rates, on the one hand, and a payment-services provider using deposits to facilitate consumer transactions, on the other. Yet elsewhere in the proposal, the FDIC seems to acknowledge these differences for a narrow category of deposits asking whether the enabling transactions test should be narrowed (as opposed to eliminated) "to include only non-reloadable prepaid card programs, such as gift cards." 89 Fed. Reg. at 68,267/3. Similarly, the proposal fails to consider the altogether different characteristics of broker-dealer sweep deposits as compared to traditional brokered deposits.

Moreover, even assuming that some of the categories of deposits implicated by the proposed rule pose risks that the current rules fail to adequately address, the proper solution would not be an overbroad interpretation of the statutory phrase "deposit broker." Instead, the FDIC and the other federal banking agencies have numerous other regulatory and supervisory tools at their disposal that they can use to address risks that particular kinds of deposits pose to banks, brokered or otherwise—assuming, unlike in the proposed rule, that an agency had an adequate

[12] *See Remarks by Vice Chairman Travis Hill*, *supra* at 8.

[13] *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 (July 30, 2024).

evidentiary basis for doing so.

V. Any data collected by the FDIC cannot support the final rule unless it is first made available for public comment.

At the same time as this rulemaking, FDIC is collecting "deposit data that is not currently reported in the Call Report or other regulatory reports, including for uninsured deposits." 89 Fed. Reg. 63,946 (Aug. 6, 2024). The agency's request for information explains that it seeks to "gather information on the characteristics that affect the stability and franchise value of different types of deposits . . .; inform analysis of the benefits and costs associated with additional deposit insurance coverage for certain types of deposits; improve risk sensitivity in deposit insurance pricing; and provide analysts and the general public with accurate and transparent data." *Id.* at 63,947/1. The deadline for providing this information is December 6, 2024—two weeks after comments on the proposed rule are due.

For the reasons explained in this comment and the Associations' companion letters, this data is necessary for the agency to develop a well-reasoned framework for brokered deposits. But because the agency proposed its new brokered deposits rule before it even began gathering this information, the agency is denying itself the opportunity to consider it in any final rule. The FDIC's failure to adopt a rule *without* considering this available evidence would be arbitrary and capricious, especially given the absence of meaningful evidence in the proposal itself. *State Farm*, 463 U.S. at 43.

Yet the FDIC *cannot* base any parts of the final rule on the data it is currently collecting, or other data it already has, without first providing the public an opportunity to comment on it and any related analyses. The APA requires an agency to "identify and make available technical studies and data that it has employed in reaching the decisions to propose particular rules." *Owner-Operator Independent Drivers Association v. FMCSA*, 494 F.3d 188, 199 (D.C. Cir. 2007) (quotations omitted). And where an agency omits some of the "critical factual material" and analysis from a proposed rule, it must disclose the material and then provide "further opportunity to comment." *Chamber of Commerce v. SEC*, 443 F.3d 890, 900–01 (D.C. Cir. 2006). The FDIC's ongoing information request therefore compels reformulation and re-publication of a proposed rule—even though, without more substantial changes to the proposal, the additional data alone could not cure the legal flaws explained above.

* * * * *

In short, the proposed rule fails to comply with the basic standards that govern rulemaking under the APA. The proposal should be withdrawn or, at minimum, re-proposed in a manner more consistent with the text of Section 1831f and reasoned decisionmaking.

The Associations appreciate the opportunity to comment on the Proposal. If you have any questions, please contact the undersigned at the email addresses below.

Respectfully submitted,

Tom Pinder
General Counsel
American Bankers Association
tpinder@aba.com

John Court
Executive Vice President, General Counsel
and Chief Operating Officer
Bank Policy Institute
John.court@bpi.com

Bill Hulse
Senior Vice President
Center for Capital Markets Competitiveness
U.S. Chamber of Commerce
bhulse@uschamber.com

Sean Campbell
Chief Economist, Head of Policy Research
Financial Services Forum
scampbell@fsforum.com

Angelena Bradfield
Head of Policy
Financial Technology Association
angelena@ftassociation.org

Jenna Burke
EVP, General Counsel, Government Relations
and Public Policy
Independent Community Bankers of America
Jenna.burke@icba.org

Saima S. Ahmed
Executive Vice President and General Counsel
Securities Industry and Financial Markets
Association
sahmed@sifma.org

Appendix

The **American Bankers Association** is the voice of the nation's $23.7 trillion banking industry, which is composed of small, regional and large banks that together employ more than 2.1 million people, safeguard $18.8 trillion in deposits and extend $12.5 trillion in loans.

The **Bank Policy Institute** is a nonpartisan public policy, research and advocacy group that represents universal banks, regional banks, and the major foreign banks doing business in the United States. The Institute produces academic research and analysis on regulatory and monetary policy topics, analyzes and comments on proposed regulations, and represents the financial services industry with respect to cybersecurity, fraud, and other information security issues.

The **United States Chamber of Commerce** is the world's largest business federation. It represents approximately 300,000 members and indirectly represents the interests of more than three million businesses and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts.

The **Financial Services Forum** is an economic policy and advocacy organization whose members are the eight largest and most diversified financial institutions headquartered in the United States. The Forum promotes policies that support savings and investment, financial inclusion, deep and liquid capital markets, a competitive global marketplace, and a sound financial system.

The **Financial Technology Association** (FTA) represents industry leaders shaping the future of finance. We champion the power of technology-centered financial services and advocate for the modernization of financial regulation to support inclusion and responsible innovation.

The **Independent Community Bankers of America®** has one mission: to create and 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.

The **Securities Industry and Financial Markets Association** is the leading trade association for broker-dealers, investment banks and asset managers operating in the U.S. and global capital markets. On behalf of our industry's one million employees, we advocate on legislation, regulation and business policy affecting retail and institutional investors, equity and fixed income markets and related products and services. We serve as an industry coordinating body to promote fair and orderly markets, informed regulatory compliance, and efficient market operations and resiliency. We also provide a forum for industry policy and professional development. SIFMA, with offices in New York and Washington, D.C., is the U.S. regional member of the Global Financial Markets Association (GFMA). For more information, visit http://www.sifma.org.