

# An Update on Deposit Issues

Patricia Cantu, Managing Senior Counsel  
Bank of the West

Bryan Handlos, Partner  
Kutak Rock, LLP

# If it ain't brokered, why fix it?

- 12 U.S.C. § 1831f (1989)
- 12 CFR §337.6
- July 8, 2011- FDIC Study on Core Deposits and Brokered Deposits (pursuant to the Dodd-Frank Wall Street Reform and Consumer Protection Act)
- FIL-2-2015 – Guidance on Identifying, Accepting and Reporting Brokered Deposits – Frequently Asked Questions

# Definitions

A brokered deposit is as “any deposit that is obtained, directly or indirectly, from or through the mediation or assistance of a deposit broker.”

A deposit broker means: (A) 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; and

# Definitions (Con't)

## Deposit Broker (con't)

(B) An agent or trustee who establishes a deposit account to facilitate a business arrangement with an insured depository institution to use the proceeds of the account to fund a prearranged loan.

# Definitions (con't)

“Employee” means any employee:

- (A)** who is employed exclusively by the insured depository institution;
- (B)** whose compensation is primarily in the form of a salary;
- (C)** who does not share such employee's compensation with a deposit broker; and
- (D)** whose office space or place of business is used exclusively for the benefit of the insured depository institution which employs such individual

# Restrictions on Brokered Deposits

- An “undercapitalized” bank may NOT accept, renew or roll over any brokered deposit.
- An “adequately capitalized” bank may not accept, renew or roll over any brokered deposit absent a waiver from the FDIC. If a bank is not well-capitalized, the bank is prevented from offering rates that are more than 75 basis points above average national rates for deposits of similar size and maturity.

# Restrictions on Brokered Deposits (con't)

- a “well-capitalized” bank may accept or renew brokered deposits but its insurance premiums may increase.

If a bank's ratio of brokered deposits exceeds 10% of its core deposits, the bank is subject to a 10-basis point increase in its FDIC insurance premiums.

# Issues Highlighted in the FAQ

- Can insurance agents, lawyers, or accountants be considered deposit brokers?
- If a bank (or its parent company) places all or part of a depositor's funds with affiliated banks, can it be acting as a deposit broker?
- Can a dual employee be a deposit broker?
- Can a contract employee be a deposit broker?



# More Issues from the FAQ

- Can an employee that earns a substantial commission be considered a deposit broker?
- What is the effect of having an on-site broker dealer or a third party vendor located in the same premises?
- Are pre-paid cards brokered deposits?
- Can a listing service be a deposit broker?

# What's New in Regulation E?

- Subpart A
  - Supervisory Highlights (Fall 2015)
    - [Not yet released when this outline was prepared]
  - Supervisory Highlights (Summer 2015)
    - 4/28/15 overdraft enforcement action (addressed below)

# What's New in Regulation E? (con't)

## – Supervisory Highlights (Winter 2015)

- Switching from ledger balance method to available balance method not disclosed
- Overdraft fees on authorized transactions caused by intervening overdrafts
- Deceptive practices relating to overdraft processing logic and “misimpression”

# What's New in Regulation E? (con't)

## – Supervisory Highlights (Fall 2014)

- Error resolution – delayed investigation, requests for additional information and requirements to contact merchant first
- Liability for unauthorized use – consumer inability to explain PIN compromise
- Error resolution – notice of right to obtain documentation and references to provisional credit when not relevant
- 10/9/14 free checking enforcement action (addressed below)

# What's New in Regulation E? (con't)

## – Spring 2015 Rulemaking Agenda

- New prepaid rules expected in early 2016
- “Continuing to analyze” overdraft rulemaking;  
additional pre-rule activities possible in October 2015

# What's New in Regulation E? (con't)

- International Remittances
  - Final Rule (effective November 2014)
    - Extension of temporary exception regarding estimated amount to be received
    - Technical amendments:
      - transfers involving US military installations abroad
      - business purpose transfers from consumer accounts, from business purpose accounts and from trust accounts
      - fax disclosures
      - web site on receipts
      - oral responses to written or electronic inquires
      - error resolution for suspicious or blocked transfers
      - error resolution for consumer-caused errors

# What's New in Regulation E? (con't)

- Prepaid
  - December 2014 – proposed new prepaid rules; final rule expected in 2016
  - March 2015 46-page ABA Comment Letter
  - June 2015 Pew Report “Banking on Prepaid”

# The CFPB & Deposits – Enforcement Activity

- “Free Checking”
  - 10/9/2014 Consent Order M&T Bank
    - Deceptive advertising – failure to disclose strings attached, i.e. minimum level of account activity required to keep free status
    - Accounts without activity converted to accounts with a fee (no longer “free”)
    - Inadequate notice of account conversion
    - \$2.9 million refund, update credit reports, stop deceptive advertising, \$200,000 fine



# The CFPB & Deposits – Enforcement Activity (con't)

- Overdrafts
  - 4/29/2015 Consent Order Regions Bank
    - Failure to obtain opt-ins with respect to linked accounts
    - Delayed fix after discovering it
    - Misrepresentation regarding overdraft and NSF fees
    - \$49 million in refunds, correct credit reports, \$7.5 million fine

# The CFPB & Deposits – Enforcement Activity (con't)

- Crediting Deposits
  - 8/11/15 Consent Order Citizens Bank
    - Failure to credit the full amount of deposits (discrepancy between deposit slip and amount deposited)
    - False claim that deposits would be verified – deposits subject to verification, but not below a certain threshold
    - \$11 million restitution, end violations, \$20.5 million penalties

# MISCELLANEOUS NEW DEVELOPMENTS

- Regulation CC Update
  - NPRM 3/25/11, 76 Fed. Reg. 16862
    - Depository bank entitled to expeditious returns only if it agrees to receive them electronically
    - Paying Bank may require same-day settlement checks to be presented electronically
    - Application of Regulation CC provisions to check images
    - Exception holds shortened to four business days
    - Elimination of “nonlocal” checks
    - New model forms
  - Final Rule estimated in December 2015

# MISCELLANEOUS NEW DEVELOPMENTS (con't)

- Preemption for State Banks
  - *Pereira v. Regions Bank* 11<sup>th</sup> Cir. 2014
    - Florida par check settlement statute preempted. Such statutes had previously been considered preempted as to national banks. See *Baptista v. Chase* 640 F3d 1194 (11<sup>th</sup> Cir. 2011)
    - This case extended preemption to out-of-state state banks based on 12 USC 1831a(j).
      - The laws of a host state shall apply to any branch in the host state of an out-of-state state bank to the same extent as such state laws apply to a branch in the host state of an out-of-state bank. To the extent host state law is inapplicable to a branch of an out-of-state state bank in such host state pursuant to the preceding sentence, home state law shall apply to such branch.

# MISCELLANEOUS NEW DEVELOPMENTS (con't)

- Account Takeover
  - *Choice Escrow and Land Title v. Bancorp South Bank* 754 F3d 897 (8<sup>th</sup> Cir. 2014)
    - Thieves stole \$440,000 based on phishing scam and subsequent account takeover. Customer had rejected dual control and challenged commercial reasonableness of UCC 4A security procedure.
    - Bank prevailed in this case.
      - Customer's rejection of dual control helped bank establish commercial reasonableness

# MISCELLANEOUS NEW DEVELOPMENTS (con't)

- “Established by agreement” does not necessarily require written contract
- Human transactional analysis not required
- Bank acted in good faith
- Bank recovered attorneys’ fees based on contractual indemnity provision

# MISCELLANEOUS NEW DEVELOPMENTS (con't)

- Shortening the Deadline for Reporting Customer Reporting of Check Fraud
  - *Clemente Bros. Contracting v. Hafner-Milazzo*, 14 NE3d 367 (NY 2014)
    - Upheld contractual cut-down of 4-406 reporting period; this is not really a new development and is consistent with the weight of existing precedent
    - Potential Concern: 14 days not “manifestly unreasonable” for a commercial customer, *but left open whether that would be the case for consumers*