Regulatory Bulletin

Handbook: Thrift Activities
Subject: Deposits/Borrowed Funds

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Prohibition on Brokered Deposits Held at Undercapitalized Thrifts

Summary: This bulletin describes the key provisions of the prohibition on brokered deposits held at undercapitalized thrift institutions (thrifts not meeting their minimum capital requirements) and provides guidance regarding how these provisions are to be applied.

For Further Information Contact: Your District Office or the Thrift Programs Division of the Office of Thrift Supervision, Washington, D.C.

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Background

Section 224 of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 prohibits the acceptance or renewal of brokered deposits by undercapitalized insured depository institutions after December 7, 1989, except on specific application and waiver of the prohibition by the Federal Deposit Insurance Corporation (FDIC).

On December 5, 1989, the FDIC Board of Directors adopted an interim rule (§ 337.6 of the FDIC regulations - attached) to provide guidance and further detail regarding when an institution is considered undercapitalized, when deposits are considered "brokered", and when a waiver from the prohibition may be granted by the FDIC.

Policy

Office of Thrift Supervision (OTS) staff should refer to the definitions and provisions of 12 C.F.R. § 337.6 to determine compliance with this Part.

- An institution is considered undercapitalized if it does not meet its minimum capital requirements, as set forth by the OTS in 12 C.F.R. § 567.5 or as individually mandated. It is subject to the prohibition on brokered deposits whether or not it has a capital plan approved by the OTS.

- "Brokered deposits" are defined as (a) deposits obtained directly or indirectly through a deposit broker, or (b) any deposit for which a thrift has agreed to pay (at acceptance, renewal, or rollover) a rate of interest (including any fees paid directly or indirectly to any third party) that is more than 50 basis points higher than the prevailing rate of interest on deposits with comparable terms, including amount and maturity, offered by other thrifts in its normal market area. No distinction is made between deposits obtained locally and deposits obtained out-of-territory.

- Undercapitalized thrifts wishing to accept, renew, or roll-over brokered deposits have been instructed by the FDIC to submit a waiver application to the FDIC regional director for supervision and a copy to the OTS District Office.

The FDIC has stated that it will not grant a waiver to permit an institution to grow. In the event an application is denied by the FDIC, the thrift will no longer be permitted to accept brokered deposits. Thrift institutions in an FDIC or Resolution Trust Corporation (RTC) conservatorship or receivership are excluded by the FDIC from the prohibition on brokered deposits and need not apply to the FDIC for a waiver.

District staff should monitor their caseload of undercapitalized thrifts to identify violations of the prohibition on brokered deposits. If a thrift is in violation of the prohibition, staff should communicate this fact to the FDIC, request progress reports from the thrift regarding its disposition of brokered deposits, and initiate corrective action to ensure that the thrift ceases its violation.

Attachment

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— Darrel W. Dochow
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PART 337—UNSAFE AND UNSOUND BANKING PRACTICES

1. The authority citation for part 337 is revised to read as follows:

Authority: 12 U.S.C. 1818, 1818(a), 1818(b), 1819, 1828(j)(2), 1821(f); Pub. L. No. 101-73, § 224, 103 Stat. 183, 273-75 (1989) (to be codified at 12 U.S.C. 1831f).

2. A new section 337.6 is added to read as follows:

§ 337.6 Brokered deposits in undercapitalized depository institutions.

(a) *Definitions.* For purposes of this section, the following definitions apply:

(1) *Brokered deposit.* The term "brokered deposit" means any deposit, as that term is defined in section 3(1) of the Federal Deposit Insurance Act (18 U.S.C. 1813(1)), that is obtained from or through the mediation or assistance of a deposit broker or by offering a rate of interest (with respect to such deposit) which is significantly higher than the prevailing rate of interest on a deposit with similar terms and conditions, including maturity, offered by other insured depository institutions having the same type of charter (bank or thrift) in the institution's normal market area. For this purpose, a rate of interest is deemed "significantly higher" if, when including any fees paid directly or indirectly to any third-party, it is more than 50 basis points higher than the prevailing rate offered or agreed to at the time for deposits of comparable amount, maturity and other terms by other insured depository institutions with the same type of charter (bank or thrift) in the institution's market area. A rate of interest on a deposit with an odd maturity is "significantly higher" if it is more than 50 basis points higher than the rate interpolated between the prevailing rates offered or paid by other depository institutions with the same charter on deposits of the next longer and shorter maturities offered in the market.

(2) *Deposit broker.* (i) The term "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

(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.

(ii) The term does not include:

(A) An insured depository institution, with respect to funds placed with that depository institution;

(B) An employee of an insured depository institution, with respect to funds placed with the employing depository institution;

(C) A trust department of an insured depository institution, if the trust in question has not been established for the primary purpose of placing funds with insured depository institutions;

(D) The trustee of a pension or other employee benefit plan, with respect to funds of the plan;

(E) A person acting as a plan administrator or an investment adviser in connection with a pension plan or other employee benefit plan provided that that person is performing managerial functions with respect to the plan;

(F) The trustee of a testamentary account;

(G) The trustee of an irrevocable trust (other than one described in paragraph (a)(2)(i)(B) of this section, as long as the trust in question has not been established for the primary purpose of placing funds with insured depository institutions;

(H) A trustee or custodian of a pension or profit-sharing plan qualified under section 401(d) or 403(a) of the Internal Revenue Code of 1986; or

(I) An agent or nominee whose primary purpose is not the placement of funds with depository institutions.

(3) *Employee.* The term "employee" means any employee:

(i) Who is employed exclusively by the insured depository institution;

(ii) Whose compensation is primarily in the form of a salary;

(iii) Who does not share such employee's compensation with a deposit broker; and

(iv) Whose office space or place of business is used exclusively for the benefit of the insured depository institution which employs such individual.

(4) *Insured depository institution.* The term "insured depository institution"

means any bank or savings association insured under the provisions of the Federal Deposit Insurance Act (12 U.S.C. 1811 *et seq.*).

(5) *Undercapitalized insured depository institution.* The term "undercapitalized insured depository institution" means any insured depository institution that fails to meet the minimum capital requirements applicable to it at the time and includes any insured depository institution which—

(i) After giving effect to any charge-offs or other capital reductions directed by its principal federal or state regulator, fails to meet any applicable capital standard (e.g., tangible, core, primary, total, risk-based, or leverage) established by law or regulation promulgated by its principal federal or state regulator, as applicable; or

(ii) Has been directed by a formal administrative order or advised in writing by its principal federal or state regulator as part of the supervisory process to achieve a higher level of capital, for example, to margin additional risk inherent in its activities and assets, balance sheet structure, or off-balance sheet liabilities, and has failed to meet that higher capital level.

For purposes of this section, the determination of whether an insured depository institution is undercapitalized shall be made without regard to whether it has been granted any forbearance or other relief from any statutory, regulatory, or other capital requirements by any federal or state regulator, whether the institution has submitted to any such regulator a plan to meet applicable capital requirements or standards over time, or whether any such capital plan has been approved by a federal or state regulator.

(b) *Prohibition.* No undercapitalized insured depository institution may accept, renew or rollover, whether on the same or differing terms and conditions, any brokered deposit unless it has applied for and been granted a waiver of this prohibition by the FDIC in accordance with the provisions of this section.

(c) *Waiver.* The FDIC may, on a case-by-case basis and upon application by an undercapitalized insured depository institution, waive the prohibition on the acceptance, renewal or rollover of brokered deposits upon a finding that such acceptance, renewal or rollover does not constitute an unsafe or unsound practice with respect to the particular institution. The FDIC may conclude that it is not unsafe and unsound and may grant a waiver when the acceptance, renewal or rollover of brokered deposits is necessary to maintain the institution's short-term liquidity or to facilitate a restructuring of its liabilities to reduce costs with no significant increase in total assets. A waiver will not be granted to permit an institution to grow in size.

(d) *Application.* An undercapitalized insured depository institution wishing to accept, renew or rollover brokered deposits may apply to the appropriate FDIC regional director for supervision for the region in which the head office of the institution is located. The application may be in letter form and shall be accompanied by a resolution of the board of directors or trustees of the institution authorizing the filing of the application. A copy of the application should be submitted to the institution's primary federal regulator and any state regulator, as appropriate. Any application filed shall address the following elements:

(1) The institution's plans to meet applicable capital requirements within a reasonable time period;

(2) The volume, rates and maturities on brokered deposits currently held;

(3) The scope of the waiver sought in terms of the volume and cost of brokered deposits to be obtained or retained and the time period for which a waiver may be needed;

(4) Alternative funding sources available to the institution; and

(5) Reasons the institution believes the acceptance, renewal or rollover of brokered deposits does not constitute an unsafe or unsound practice in its particular circumstances. In this regard, the institution should seek to demonstrate that its acceptance, renewal or rollover of brokered deposits would not likely increase materially the credit, interest-rate or operating risk of the institution.

(e) *Decision.* The FDIC Director, Division of Supervision, and when confirmed in writing by the Director, an associate director or the appropriate regional director or deputy regional director shall have the authority to approve or deny any waiver application properly filed. An application is properly filed when complete and accurate information addressing each of the elements listed in paragraph (d) of this section has been provided to the appropriate regional director. Any waiver granted will be for a fixed period, generally no longer than one year, but may be extended upon re-application.

(f) *Exclusion for institutions in FDIC or RTC conservatorship or receivership.* No insured depository institutions for which the FDIC or the Resolution Trust Corporation has been appointed conservator or receiver shall be subject to this § 337.6 or to section 29 of the Federal Deposit Insurance Act.

(g) *Sunset.* This § 337.6 shall remain in effect until June 12, 1990, unless sooner terminated, amended, modified, or replaced by the FDIC.

(h) *Sixty-day transition period.* Anything in this section to the contrary notwithstanding, an undercapitalized insured depository institution may accept, renew or rollover brokered deposits during the 60-day period commencing on December 6, 1989 and ending on February 6, 1990, provided that such insured undercapitalized depository institution:

(1) Does not extend the average maturity of its brokered deposits by more than three months; and

(2) Either does not significantly increase its total volume of brokered deposits, or if it does significantly increase its total volume of brokered deposits, it does so only to replace existing funding, provides prior notice to the appropriate FDIC regional director for supervision by telephone or letter and, within 10 days after such notification, files a waiver application in accordance with paragraph (d) of this section.

By order of the Board of Directors.

Dated at Washington, DC this 5th day of December, 1989.

Federal Deposit Insurance Corporation.

Hoyle L. Robinson,

Executive Secretary.

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