

FDIC Proposal on Foreign Branch Deposits: Dual Payability, Depositor Preference and Deposit Insurance

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The FDIC has proposed a new regulation that would construe the statutory term “insured deposit” to exclude all deposits maintained by a foreign branch of a U.S. bank, even if they are expressly payable at both the foreign branch and one of the bank’s U.S. offices. At the same time, in its release accompanying the proposed rule, the FDIC cited an uncodified 1994 advisory opinion by the then Acting General Counsel of the FDIC for the proposition that the term “deposit liability,” as used in the depositor preference regime in Section 11(d)(11) of the Federal Deposit Insurance Act, only includes a foreign branch deposit if it is a dually payable deposit.

The approach chosen by the FDIC could force U.S. banks to make their foreign branch deposits dually payable in order to avoid the subordination of such deposits to domestic branch deposits in a resolution proceeding and thereby address concerns of foreign regulators such as the UK Financial Services Authority. Making foreign branch deposits dually payable would expose U.S. banks to greater U.S. reserve requirements, foreign sovereign risk, foreign customer confusion, documentation costs and potentially new foreign regulatory requirements. We believe that the FDIC should adopt an alternative approach.

If you have any questions regarding the matters covered in this publication, please reach out to any of the lawyers listed below or your usual Davis Polk contact.

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