



1120 Connecticut Avenue, NW
Washington, DC 20036

1-800-BANKERS
www.aba.com

*World-Class Solutions,
Leadership & Advocacy
Since 1875*

**Kathleen P.
McTighe**
Senior Counsel
Office of Regulatory
Policy
Phone: 202-663-5331
Fax: 202-828-5047
kmctighe@aba.com

April 6, 2009

Submitted Via E-Mail

Mr. Robert E. Feldman
Executive Secretary
Attention: Comments
Federal Deposit Insurance Corporation
550 17th Street, NW
Washington, DC 20429

Re: 12 CFR Part 337 - Interest Rate Restrictions on Institutions That Are Less Than Well-Capitalized; 74 Federal Register 5904; February 3, 2009; FDIC: RIN 3064-AD41

Ladies and Gentlemen:

The American Bankers Association (ABA)¹ appreciates the opportunity to comment on the Federal Deposit Insurance Corporation's (FDIC) proposed amendments to the 12 CFR Part 337 regulations relating to the interest rate restrictions applicable to brokered deposits of insured depository institutions that are less than well-capitalized.² The proposed changes to 12 CFR § 337.6 would: (1) create a presumption that the newly defined "national rate" is the prevailing rate in an institution's normal market area unless the FDIC determines, based on available evidence, that the prevailing rate differs from the national rate; (2) redefine "national rate" as "a simple average of rates paid by all insured depository institutions and branches for which data are available" for deposits of similar size and maturity; and (3) permit such insured depository institutions to offer the newly defined "national rate" provided by the FDIC, plus 75 basis points, to determine the permissible rate on brokered deposits. The FDIC would monitor rates paid by insured depository institutions and use these data to calculate the "national rate," which it would post on its website updated on a weekly basis, along with the permissible "rate cap" for various deposit sizes and maturities. When the national rate does not reflect the prevailing rate in a market, based on available evidence, then the proposal would permit the depository institution to offer the prevailing rate, plus 75 basis points.

¹*The American Bankers Association brings together banks of all sizes and charters into one association. ABA works to enhance the competitiveness of the nation's banking industry and strengthen America's economy and communities. Its members – the majority of which are banks with less than \$125 million in assets – represent over 95 percent of the industry's \$14 trillion in assets and employ more than two million men and women.*

² 74 *Fed. Reg.* 5904 (February 3, 2009).

The ABA supports the FDIC's efforts to create a simple and certain methodology for determining the rates that insured depository institutions and examiners can use in accordance with section 337.6. The ABA strongly supports the intent of the proposal, to establish a simple and workable system that limits the interest rates that undercapitalized institutions can pay. Troubled banks overpricing deposits to fund uneconomic lending is highly disruptive to local markets. The current index, rates on U.S. Treasury securities, is clearly no longer appropriate. Moreover, a complex system can lead to unintended violations by affected institutions. The goals of simplicity and effectiveness should be preserved in the final rule.

However, while the proposed method of a simple national average of rates paid by all insured depository institutions and branches for which data are available and the 75 basis point rate cap would be easy to calculate and use, we are concerned that the proposed method may not sufficiently capture and accurately reflect the prevailing interest rates in many depository institutions' normal market areas where they must comply with section 337.6 while competing for deposits. Rather, it is likely that this proposed average national rate will understate the prevailing rates in many market areas, with negative unintended consequences for institutions' liquidity and safety and soundness.

The risk of setting inappropriate rate caps for less than well-capitalized banks can be severe. Such limits can destabilize otherwise healthy institutions undergoing temporary problems. Preventing such institutions from being competitive for deposits, when they are most in need of predictable liquidity, can disrupt deposit retention and create severe funding problems. This could harm the institution and its customers, especially during the current environment when liquidity planning is so important for safety and soundness.

Consequently, the ABA recommends that the FDIC adopt an alternative, yet still simple, methodology to determine a "national rate" and local rates of interest, as well as rate caps for brokered deposits of insured depository institutions that are less than "well-capitalized." We recommend that the FDIC develop a methodology for both a national rate and specified local rates. An institution would select the prevailing rate that most accurately matches rates in its market area. We also recommend that the methodology take into account important aspects of the current marketplace, including: multiple channels for offering brokered deposits – *e.g.*, the Internet and brick and mortar depository institutions; credit unions; time deposit attributes and variables; odd maturities; and non-maturity deposit products.

The ABA believes the rule could most benefit from the following changes to achieve the dual goals of simplicity and meaningful guidance to insured depository institutions subject to section 337.6, when determining the permissible interest rates in their market area, without adversely impacting bank liquidity or capital.

- **Market Area:** The ABA recommends that the FDIC define "market area" to include options of **a national rate, key local rates that would include state rates and rates based on the Metropolitan Statistical Area (MSA), and rates applicable to Internet-based banks.** The last category is intended to apply to non-traditional banks that primarily or exclusively rely on the Internet to acquire depositors and have few or no brick and mortar locations. These market areas would be easy for the FDIC to identify

and quantify the prevailing rates in each such area. If none of these areas reflects an institution's local market area, the institution should be allowed to determine and justify to the FDIC an alternative market area and rate. The institution would need to document how it calculates the rate. Depository institutions that are subject to the requirements of section 337.6 could then choose the option that best reflects their respective market area to determine the maximum interest rate they could pay on brokered deposits and apply the rates that correspond to this option when a deposit is made or renewed. We agree with the FDIC's proposal that it would determine and post the rates, revised on a weekly basis. However, we recommend that the rates and permissible rate caps be posted on *FDICconnect*, rather than the FDIC Website.

- **Interest Rate Methodology:** We recommend that the FDIC include in its methodology for determining an average interest rate for each normal market area the many components that would impact the prevailing rate, including rates offered by “brick and mortar” insured depository institutions and by means of electronic commerce (Internet), including credit unions that compete in each normal market. For simplicity, we recommend that for rates offered through electronic commerce, the FDIC determine only a national average rate that would be applied for all normal market areas, including local markets, since the customer would be able to deposit funds with any insured depository institution nationwide. We also urge the FDIC to take into account, when establishing its interest rate methodology, other variables that could affect the average rate, such as odd maturities; types of non-maturity deposits; varying time deposit attributes; and weighting of the sample, such as including only one rate per institution for deposits of similar size and maturity.
- **Permissible Rate Cap:** The amount of the rate cap should depend on the accuracy of the FDIC's calculation of the rate. If the FDIC's proposed methodology is used to determine the rate based upon a simple average of rates paid by all insured institutions and branches for which data is available, this may skew downward the rate for a particular market area, especially when it includes rates that are not relevant to a smaller market area. Consequently, the current 75 basis point rate cap may be too low in some market areas. Adjusting the rate cap to a higher level would not create safety and soundness issues. Thus, we recommend that the FDIC have the flexibility to adjust the current 75 basis point standard in section 337.6 for determining whether the interest rate cap “significantly exceeds” or is “significantly higher” than another rate. We also recommend that the FDIC consider using more targeted subsets of rates within normal market areas which would be closer to the prevailing market rate – *e.g.* top 50%.

These points, as well as additional suggestions for improving the rule, are set forth below.

Discussion

We recommend that the FDIC create separate categories for certain deposit products that have grown over time and are widely used in today's markets, including non-maturity deposits, time deposits, and odd-term maturities. This would allow the FDIC to determine more accurately rates and rate caps that represent the prevailing rate that insured depository institutions pay for these deposit products where the attributes of these products are considered.

Non-maturity deposits. The FDIC's proposed matrix (page 5907, column 1), includes a consolidated "non-maturity" deposit product category. We urge the FDIC to make further refinements within the "non-maturity" deposit category when determining rates and rate caps for varying deposit products such as savings accounts, money market accounts, NOW accounts, interest-bearing non-maturity deposits, and on-line channels for such non-maturity accounts. Refinement of rates by grouping these types of non-maturity deposit products with products of similar attributes and limitations will more accurately determine prevailing rates and rate caps.

Time deposits. Time deposits in the current market place often include complex and varying attributes which may include variable rates, step-rates, and ready access time deposits, to name a few. In these cases, use of a simple average to determine rates would not truly reflect the prevailing rate of these deposit products, which may vary from the more traditional time deposits of similar size and maturity. We urge the FDIC to take these varying attributes of time deposits into account when determining an average rate for a market area. Bankers must be able to demonstrate that the rates being offered in a given market are different in practice than what is being advertised.

Odd-term maturities. In today's market place, odd-term maturity time deposits or odd maturity special products are often offered to depositors at rates that would not be the same as rates on standard term/maturity deposits. Rate differences for odd-term maturity products or "special" products reflect an institution's liquidity needs. Thus, we urge the FDIC to take this category into account, since simple averages for standard term/maturity time deposits would not indicate the prevailing rates for this category of deposits. This could be done by the FDIC providing rates for every advertised maturity.

The ABA offers the following responses to the ten specific questions on which the FDIC requested comments.

Amending the definition of "market area"

The ABA recommends that the FDIC revise its definition of an insured depository institution's "market area" to encompass four options: (1) national, (2) state, (3) Metropolitan Statistical Area (MSA), and (4) Internet-only. In addition, if an insured depository institution does not fit within a MSA and is not an Internet-based bank, we urge the FDIC to allow the institution to determine and justify to the FDIC its local market area and the average rate utilized within this area. To compute an applicable rate, an Internet-only bank would use the Internet-only rate, while other banks would first select the appropriate market rate (*i.e.*, national, state, MSA, or other local rate) and average that rate with the Internet-only rate. This would ensure

that the applicable rate most accurately reflects the rates that will affect a given bank's pricing decisions.

The affected depository institution should be permitted to choose the option that most accurately reflects its "market area" and apply the average rates supplied by the FDIC for that market at the time the bank accepts or renews a deposit that is subject to the restrictions of 12 CFR § 337.6.

Since the national, state, and MSA markets are identifiable, the FDIC could readily determine the rate for any of these market areas using the average national rate methodology it proposes, subject to the refinements that we recommend below, and comparable methodologies to determine state and MSA rates. We recommend that the FDIC establish the rates for each of these market areas on a weekly basis.

The ABA recommends as necessary refinements to the definition of "market area" that the FDIC include rates offered by all insured depository institutions, *including credit unions*, that compete for deposits in the "market areas", *as well as all Internet-based or electronic commerce-based institutions* that compete for deposits in each of these types of "market areas." This would more realistically reflect the market in which these institutions compete and would consequently be a more accurate measure of the prevailing interest rates payable for deposits in the institution's market area.

Presumption that the prevailing rate in any "market area" is the national rate

The ABA opposes a presumption that the prevailing rate in any "market area" is the national rate, as proposed. Rather, we recommend the more refined and specific national, state, Internet, and MSA (or alternative local) market areas outlined above that would more accurately determine the prevailing rate for an insured depository institution in its market area, taking into account all other institutions and channels used by institutions that seek deposits within the institution's market area. A national rate for all electronic commerce deposits could be reasonable for each market area.

Insured depository institutions that seek deposits do so using differing business models to access varying market areas. Thus, a one-size-fits-all method of determining the prevailing rate in the multitude of market areas by creating a presumption that some "national rate" is the prevailing rate would disadvantage institutions that do not compete across market areas – *e.g.*, in smaller local markets that operate independently from metropolitan markets. Consequently, the national rate may be lower than the true prevailing rate in the local market.

As mentioned above, the ABA believes that such a one-size-fits-all method does not take into account banks with different operating models, such as Internet-based banks. Non-traditional banks that primarily or exclusively rely on the Internet to acquire deposits and have few or no brick and mortar locations operate in a different market from banks that rely on the branch banking model. The unique deposit pricing strategies of such banks warrant a distinct definition of "market area" and corresponding rates of interest. Restricting Internet-based banks to a national rate would significantly impede their ability to attract deposits in the market in which they operate in a manner that is beyond the stated intention of the proposed rule.

Providing prevailing rates

We urge the FDIC to publish the national, state, Internet, and MSA rates recommended above. As mentioned above, we recommend that the FDIC include in its published schedule of rates for each of these “market areas” rates paid by all insured depository institutions, *including credit unions and Internet-based or electronic commerce-based institutions*, that compete for deposits in the same market area as the insured depository institution.

We also recommend that the published schedule of rates be limited to one rate – the highest rate – paid by each insured depository institution for deposits of similar size and maturity, not one for each branch of such institution. This is important to minimize a skewing effect on average interest rates and would provide a more precise weighted average interest rate for each market area.

Redefining “national rate”

The ABA supports the FDIC’s efforts to redefine the current “national rate.” However, we do not support creating a presumption that the proposed redefinition of “national rate” is the appropriate rate for all banks. While this method would be simple, we do not believe it would be a meaningful or accurate measure of prevailing rates paid in the market areas of many banks that would be affected by the interest rate restrictions when they become less than “well-capitalized,” and may have the unintended consequence of creating liquidity issues for some banks. Instead, we recommend that the FDIC adopt a definition of “market area” that includes all four relevant options in the methodology for determining the rate for each such area, and have the flexibility to adjust the rate cap to determine the permissible rate payable in each market area.

Additional flexibility for the definition of “national rate”

We do not recommend that the FDIC have the discretion to add or remove a multiplier to the national rate or any of the other rates we recommend (*e.g.*, state, MSA, or alternative local rate), as it is unnecessary. Instead, we suggest that the FDIC consider the rate cap adjustment or data subset alternatives we suggest below in response to the FDIC’s question #9 relating to determining whether a rate of interest “significantly exceeds” or is “significantly higher” than another rate. The rule, both currently and as proposed, contains inherent flexibility by tying maximum rates to prevailing market conditions. As market conditions (*i.e.*, rates) change, so should the applicable rate cap. It is unclear what additional flexibility would be needed. However, if the proposal would permit significant changes by the FDIC that are not tied to rate movements, then the industry should have the opportunity to provide comment on the advisability of any such change prior to its adoption.

If the FDIC were to change, add, alter or remove a multiplier to the rate that institutions may pay when markets change, this may create liquidity problems, disrupt liquidity planning due to subsequent regulatory changes, and adversely affect deposit retention for banks that are most in need of predictable liquidity, especially at the time of renewing a deposit at maturity. When setting interest rates on deposits, the insured depository institution plans for its liquidity. A subsequent FDIC change to add a multiplier after an institution has taken action based upon the

current multiplier would change the rules of the game for determining the rate payable on deposits. This would not be beneficial for the institution and retention of its customers, especially in the current environment when liquidity planning is so important for safety and soundness of insured depository institutions.

If the FDIC decides to impose a multiplier on the interest rate in the event of market changes, it is important that no such change be made without at least 6 months, and preferably 12 months, advance notice so affected institutions can adequately plan for the impact on their liquidity. We stress the need to maintain reasonable, accurate, and predictable regulatory rules for interest rate restrictions in section 337.6 to insure liquidity and a strong deposit base in an institution's market area, which should not be jeopardized by regulatory changes that may adversely impact deposits, especially renewals at maturity.

Determining average or prevailing rates

The ABA believes that it would be helpful for the FDIC to establish a specific procedure for determining average or prevailing rates, including specifying that data may be obtained from private companies on rates paid by insured depository institutions. However, published rates by private companies may or may not be helpful. The key is to have a methodology used by the FDIC that will accurately capture the prevailing rates in the market area in which an insured depository institution competes. Otherwise, the FDIC should allow the institution to justify an alternative methodology that accurately reflects the prevailing rate for its market area. Merely using published rates on a national basis will not likely reflect true prevailing rates in all market areas of affected institutions.

If the FDIC uses rate data provided by private companies that are accurate and easy to obtain and administer for the national, state, Internet, and MSA market areas, then this may be a reasonable procedure for the FDIC to use. This may be most useful in comparing standard term maturity deposit information, including those of credit unions and national institutions that compete for deposits in each of the key market areas. We recommend using the highest rate per institution for deposits of similar size and maturity.

Another option would be to take only the highest rates for a specified percent of the published rates per institution in the national, state, Internet, and MSA market areas as a measure of the prevailing rates in each market area – *e.g.* eliminate a specific percentage of published rates for institutions in each market area.

There is no easy solution to developing a specific procedure for determining average or prevailing rates when the data base includes odd term maturities on deposits, which may skew the average rate for a market area. In this case, flexibility for the FDIC to increase the rate cap would also be critical.

FDIC procedure for disseminating information about average rates or rate caps

The ABA recommends that the FDIC post information about average rates and rate caps updated on a weekly basis on *FDICconnect*, rather than the FDIC website. This would make this information readily available for use by the FDIC's target audience -- insured depository

institutions and their examiners -- as stated in the proposed rulemaking (*see* page 5907, column 2). Placement would be more appropriate on *FDICconnect*, which is limited to access by insured financial institutions and examiners but not the general public. If posted rates and rate caps are publicly available on the FDIC Website, consumers may be led to believe that the posted rates and caps are what banks should pay, rather than the maximum amount legally allowable. This may unintentionally create confusion in the market place if a bank provides a rate or rate cap less than the maximum rate allowed in its market area.

FDIC procedure for a bank to present evidence about rates in a particular market

We urge the FDIC to establish a procedure for an insured depository institution to use to present evidence about the prevailing or average rates in a particular market, particularly if the FDIC chooses to adopt a methodology that varies from the methodology we recommend. This would provide predictability and uniformity for both institutions and examiners. If an institution has a legitimate claim then there should be an established way for this to be presented to the FDIC.

Rate cap of 75 basis points

Revising the 75 basis point standard that the FDIC currently uses to determine whether a rate of interest for brokered deposits used by a less than well-capitalized bank “significantly exceeds” or is “significantly higher” than another rate depends on the methodology the FDIC decides it will use to determine the rates. The justification for either increasing or decreasing the basis point standard would depend on how accurately the FDIC’s national and local rates reflect the prevailing market rates in the depository institution’s market area.

If the FDIC will use its proposed new methodology for determining a national rate, using “a simple average of rates paid by all insured depository institutions and branches for which data are available” as the average national rate, it may be appropriate for the FDIC to adjust the current 75 basis point standard to determine the rate cap. This may be particularly useful to reflect more accurately the true market rate when the average rate is significantly lower than prevailing market rates, because it contains all rates, many of which are not relevant to smaller market areas. Alternatively, if the FDIC uses a more targeted subset (*i.e.*, top 25% or 50%) of the insured depository institutions offering a rate for deposits of similar size and maturity that more accurately reflects the prevailing market rates in a market area, it may be appropriate for the FDIC to adjust the rate cap downward or retain the current 75 basis point rate cap.

An example for illustrative purposes only may include:

Simple Average of Deposit Rates	Rate Cap Adjustment
All Financial Institutions	+100 basis points
Top 50% of Depository Institution Rates	+ 75 basis points
Top 25% of Depository Institution Rates	+ 50 basis points

We urge the FDIC to consider these alternatives to determine if a rate “significantly exceeds” or is “significantly higher” than another rate for our recommended national, local, and Internet rate structures for each deposit category. We also urge the FDIC to compare the final

rate caps to actual market conditions to make sure they reflect actual market conditions, and the rate caps should be back-tested with historical data to determine the viability of the FDIC's proposed methodology over time.

FDIC additional restrictions based on a depository institution's capital category

The FDIC should not adopt restrictions in addition to current restrictions on a depository institution's capital category - well-capitalized banks should not be subject to the proposed restrictions. Current FDIC restrictions under section 337.6 are adequate to insure safety and soundness, and the FDIC has the ability to impose those restrictions through a written agreement, when it deems necessary, with an institution even when the institution's capital structure is well-capitalized.

We urge the FDIC to consider revising its regulations to address the situation when an otherwise well-capitalized financial institution is subject to section 337.6 limitations because of a written agreement with a capital maintenance provision. We recommend that the FDIC provide a limited safe harbor for such an insured depository institution, as long as it maintains the minimum capital ratios for a "well-capitalized bank."

We urge the FDIC to grant an automatic waiver for any institution to accept and renew reciprocal deposits – *i.e.*, where banks participate in a network of banks that swap deposits on a dollar-for-dollar basis, with interest rates on the deposits set by the bank that is placing them in the network – if it drops from "well capitalized" to "adequately capitalized," unless the FDIC shows good cause why the acceptance of reciprocal deposits would be an unsafe and unsound banking practice for the institution. This automatic waiver would address a specific limited situation for such insured depository institutions and would help these institutions maintain liquidity with these safer reciprocal deposits. This would minimize the possibility of a downward cycle for the institution that could arise if the order creates liquidity issues for the institution that trigger additional negative consequences.

Delayed Effective Date

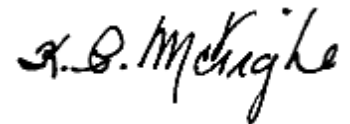
The ABA recommends a 90-day delayed effective date of the final rule to allow affected depository institutions to comply with any revisions to the requirements of section 337.6.

Conclusion

The ABA appreciates the opportunity to comment on the FDIC's proposed revisions to 12 CFR § 337.6. We also appreciate the Agency's consideration of our recommendations, which we believe will improve the rule's precision in determining permissible rates in multiple market areas while still providing a simple methodology that will bring more certainty to depository institutions and examiners that use the methodology.

We invite you to contact Kathleen P. McTighe at (202) 663-5331 or kmctighe@aba.com, if you have any questions. Thank you for considering our comments and recommendations.

Sincerely,

A handwritten signature in black ink that reads "K.P. McTighe". The signature is written in a cursive style with a large, looped initial "K".

Kathleen P. McTighe
Senior Counsel
Officer of Regulatory Policy