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April 9, 2020

Robert E. Feldman
Executive Secretary
Federal Deposit Insurance Corporation
550 17th Street, N.W.
Washington, D.C. 20429

Attention: Comments

Re: RIN 3064-AE94 – Brokered Deposits Restrictions

Dear Mr. Feldman:

Schwartz & Ballen LLP is pleased to provide comments to the Federal Deposit Insurance Corporation (the “FDIC”) in response to its notice of proposed rulemaking and request for public comment regarding brokered deposit restrictions (the “Proposal”).¹ Schwartz & Ballen LLP is a Washington D.C. law firm specializing in banking and financial services law. We advise insured depository institutions, technology and securities firms and financial industry service providers on matters that affect or may affect their ability to develop and provide financial products and services to consumers and commercial enterprises. Many of our clients have a keen interest in the FDIC’s Proposal and its impact on their existing and future products and services under development. Accordingly, we provide the following comments after consultation with certain of our clients who are affected by the Proposal.

INTRODUCTION

We commend the FDIC for its willingness to modernize its brokered deposit regulations to reflect technological changes and innovations in the banking industry since the FDIC’s brokered deposit rules were first promulgated. However, as we discuss below, the FDIC’s notice of proposed rulemaking does not address whether and to what extent the Proposal applies to listing services, which the FDIC has long held are not deposit brokers. As a result, we are concerned the Proposal could have the unintended consequence of reversing the FDIC’s long-standing position that listing services that meet the current FDIC guidance are not deposit brokers. We believe that the FDIC should expressly state that the Proposal does not affect the FDIC’s outstanding guidance regarding listing services and reaffirm that deposit listing services that satisfy the criteria set out in current FDIC guidance will continue not to be deposit brokers.

¹ 85 *Fed. Reg.* 7453 (February 10, 2020).

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In the event it is the FDIC's intent that the Proposal supersede its prior listing service rulings, we believe the agency should not consider listing services to be deposit brokers if (i) the choice of depository institutions is that of the depositor, (ii) the depositor holds the accounts directly in his/her own name, and (iii) the fees the service provider receives from depository institutions are unrelated to deposit volume or the number of accounts opened by depositors.

Finally, in order to facilitate the growth of product innovation and avoid undue effects on small entities, we also urge the FDIC to consider establishing a small business exception from the definition of deposit broker.

DEPOSIT LISTING SERVICES

The FDIC has long recognized that deposit listing services that satisfy the FDIC's guidance for listing services are not deposit brokers. Although FDIC guidance on what requirements listing services must meet to be exempt has evolved over the years, the FDIC and the staff have consistently maintained the exemption for listing services that meet the criteria set out in the agency's guidance. When the FDIC first promulgated its brokered deposit rule in 1984, it stated that it would be "infeasible" to identify deposits placed through listing services that did not actually facilitate the placement of funds with insured institutions.² Accordingly, the FDIC specifically excluded from the definition of deposit broker any deposit-listing service where:

- (1) The person or entity listing the deposit is compensated only by means of a subscription fee which is not calculated on the basis of the number or dollar amount of deposits placed as the result of information provided by such service;
- (2) the service provided is limited to the gathering and transmission of information concerning the availability of deposits; and
- (3) any funds to be invested in deposit accounts are remitted directly by the depositor to the insured bank and not, directly or indirectly, through the person or entity providing the listing service.³

In its 2011 study of core and brokered deposits, the FDIC recognized the important role listing services provide in communicating information between consumers and depository institutions:

Listing services come in different forms, but all connect those seeking to place a deposit with those seeking a deposit by listing the deposit rates of financial institutions. Depositors use listing services to find the best rate available for a given deposit type⁴

² 49 *Fed. Reg.* 13003, 13009 (April 2, 1984)

³ *Id.* at 13011.

⁴ "Study on Core Deposits and Brokered Deposits" - Submitted to Congress pursuant to the Dodd-Frank Wall Street Reform and Consumer Protection Act at 19 (July 8, 2011) ("Brokered Deposit Study"). Available at <https://www.fdic.gov/regulations/reform/coredeposit-study.pdf>

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The FDIC has made the following distinction between listing services and deposit brokers:

In sum, a “listing service” is a company that compiles information about the interest rates offered by banks on deposit products, especially CDs. A “deposit broker,” on the other hand, is “any person engaged in the business of placing deposits, or facilitating the placement of deposits, of third parties with insured depository institutions. . . .” A “listing service” is thus a compiler of information about deposits, whereas a “deposit broker” is a facilitator in the placement of deposits.⁵

Over the years, the FDIC and the staff have provided additional guidance for determining when a service will be regarded as a listing service and not a deposit broker. The development of these criteria began in 1990 in which the FDIC staff stated the following:

In our opinion, [the Company] is engaged in providing information on current interest rates to its subscribers, be they individuals considering whether to purchase jumbo CD’s, or depository institutions attempting to set a competitive rate of interest for such CD’s. What [the Company] facilitates is the decision of the would-be buyer whether (and from whom) to buy a CD, or the decision of the depository institution as to what rate to set; it is not facilitating the placement of deposits per se.⁶

In 2002, the FDIC further revised the criteria for determining whether a service constitutes a listing service rather than a deposit broker.⁷ In presenting the following criteria, the FDIC stated that to be a listing service, the company must not provide assistance to the depositor in placing the deposit or communicating with the depository institution:

- (1) The listing service is compensated solely by means of subscription fees paid by subscribers as payment for their opportunity to see the rates gathered by the listing service and/or listing fees paid by depository institutions as payment for their opportunity to post their rates. The listing service does not require a depository institution to pay for other services offered by the listing service or its affiliates as a condition precedent to being listed;
- (2) Fees paid by depository institutions are flat fees and are not calculated on the basis of the number or dollar amount of deposits accepted by the depository institution as a result of the listing service’s posting of the institution’s rates;
- (3) In exchange for these fees, the listing service performs no service except the gathering and transmission of information concerning the availability of deposits. which may include the institution’s name, address, telephone number

⁵ *Id.*

⁶ Advisory Opinion No. 90-24 (June 12, 1990); *See also* Advisory Opinion No. 92-50 (July 24, 1992).

⁷ Advisory Opinion No. 02-04 (November 13, 2002).

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and interest rates. Except for providing this information, the listing service does not serve as a liaison between depositors and depository institutions and does not pass information about a depositor (or potential depositor) to a depository institution; and

- (4) The listing service is not involved in placing deposits or confirming the placement of deposits. Any funds to be invested in deposit accounts are remitted directly by the depositor to the institution and not, directly or indirectly, by or through the listing service.⁸

These criteria, however, were subsequently revised by the FDIC in 2004 to permit listing services to serve as a communications link between depositors and depository institutions. In a letter of April 21, 2004, FDIC staff considered whether a listing service is a deposit broker when it serves as a liaison between depositors and depository institutions. The FDIC staff agreed that the FDIC's listing service criteria should be changed and advised:

[T]he mere fact that a "listing service" transmits messages between depositors and depository institutions will not result in the classification of the "listing service" as a "deposit broker." Such a classification will not occur unless the "listing service" takes an active role in promoting particular insured depository institutions or steering funds toward particular insured depository institutions. . . . We are persuaded that [listing interest rates and transmitting messages between depositors and depository institutions (including trade confirmations)] will *not* constitute "placing deposits, or facilitating the placement of deposits" so long as the Internet-based "listing service" is a passive mechanism for "posting" rates and transmitting messages and not an active agent in steering funds toward particular insured institutions.⁹ (Italics in original.)

In its Advisory Opinion No. 04-04 (July 28, 2004), the FDIC reviewed the evolution of the changes to the criteria it applied to qualify as a listing service, stating the following:¹⁰

The FDIC revised its criteria in 2002 through Advisory Opinion No. 02-04 (November 13, 2002). We made additional revisions in our letter to you dated April 21, 2004. In that letter, we recognized that, through advances in technology, an Internet-based "listing service" can transmit messages (including trade confirmations) between depositors and depository institutions so long as the Internet-based "listing service" is a passive mechanism for "posting" rates and transmitting messages. (Emphasis added.)

The 2004 Advisory Opinion underscored the types of communications that under the revised criteria, the listing service was permitted to provide:

⁸ *Id.*

⁹ Letter of April 21, 2004 from Christopher L. Hencke, Counsel, FDIC.

¹⁰ Advisory Opinion No. 04-04 (July 28, 2004).

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In exchange for these fees, the listing service performs no services except (A) the gathering and transmission of information concerning the availability of deposits; and/or (B) the transmission of messages between depositors and depository institutions (including purchase orders and trade confirmations).¹¹ (Emphasis added.)

The FDIC's listing service criteria were confirmed on several occasions over the following years. For example, in 2009, the FDIC advised a listing service that if the company satisfies the criteria set forth in Advisory Opinion No. 04-04, it would not be regarded as a deposit broker.¹² The FDIC's 2011 Brokered Deposit Study again confirmed these criteria continue to apply to the determination of whether an entity qualifies as a listing service:

At present, the FDIC applies these criteria [*i.e.*, those set forth in Advisory Opinion No. 04-04] to Internet companies that assist banks in attracting deposits. Assuming these criteria are satisfied, the FDIC takes the position that the Internet company is not "facilitating the placement of deposits," and is therefore not a deposit broker, even if the company provides a platform for the execution of trades. Consequently, the deposits themselves are not classified as brokered deposits.¹³

The FDIC continues to apply the 2004 criteria without change to listing services that assist banks in attracting deposits via the Internet. In its 2016 "Frequently Asked Questions on Identifying, Accepting and Reporting Brokered Deposits," the FDIC states that "[i]n determining whether a particular listing service is facilitating the placement of deposits, the FDIC applies the criteria set forth in FDIC Advisory Opinion No. 04-04 (July 28, 2004)."¹⁴ Accordingly, the FDIC's longstanding and current position is that listing services do not facilitate the placement of

¹¹ *Id.* The four requirements for listing service status set forth in Advisory Opinion No. 04-04 are:

1. The person or entity providing the listing service is compensated solely by means of subscription fees (*i.e.*, the fees paid by subscribers as payment for their opportunity to see the rates gathered by the listing service) and/or listing fees (*i.e.*, the fees paid by depository institutions as payment for their opportunity to list or "post" their rates). The listing service does not require a depository institution to pay for other services offered by the listing service or its affiliates as a condition precedent to being listed;
2. The fees paid by depository institutions are flat fees: they are not calculated on the basis of the number of dollar amount of deposits accepted by the depository institution as a result of the listing or "posting" of the depository institution's rates;
3. In exchange for these fees, the listing service performs no services except (A) the gathering and transmission of information concerning the availability of deposits; and/or (B) the transmission of messages between depositors and depository institutions (including purchase orders and trade confirmations). In publishing or displaying information about depository institutions, the listing service must not attempt to steer funds toward particular institutions (except that the listing service may rank institutions according to interest rates and also may exclude institutions that do not pay the listing fee). Similarly, in any communications with depositors or potential depositors, the listing service must not attempt to steer funds toward particular institutions;
4. The listing service is not involved in placing deposits. Any funds to be invested in deposit accounts are remitted directly by the depositor to the insured depository institution and not, directly or indirectly, by or through the listing service.

¹² See letter of April 3, 2009 from Christopher L. Hencke, Counsel, FDIC to Debbie Walker, QwickRate.

¹³ Brokered Deposit Study at 21.

¹⁴ FIL 42-2016 (June 30, 2016), Question D.2, Listing Services.

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deposits even when they provide an Internet platform for the execution of trades or transmit messages between depositors and depository institutions if they do not attempt to steer deposits into particular banks. Rather, they provide depositors with the means to select a listed bank.¹⁵ As a result, the FDIC concluded the following:

The FDIC can and has recognized that certain kinds of deposits should not be treated as brokered, for example, by recognizing the applicability of the primary purpose exception to limited amounts of certain kinds of affiliate sweeps and by recognizing that certain kinds of listing services are not brokered.¹⁶

THE PROPOSAL

In its December 2019 Proposal, the FDIC noted that commenters on its December 2018 advance notice of proposed rulemaking (“ANPR”)¹⁷ indicated that the use of listing services benefits the Deposit Insurance Fund (“DIF”) by allowing bank customers to source multiple depository relationships, thereby minimizing losses to either the DIF or to the customer if deposits were placed at a single institution.¹⁸ Another commenter urged the FDIC to preserve its longstanding position regarding online listing services and stated that the position should remain even if a fee is paid for preferential placement on the listing service website.¹⁹ Notwithstanding these comments, the Proposal says nothing more about deposit listing services, nor does it indicate whether or how the FDIC’s longstanding position that deposit listing services that satisfy the conditions set out in the FDIC’s guidance would be affected by the Proposal.

To the contrary, the Proposal adds confusion and uncertainty into the status of existing deposit listing services by proposing new criteria for determining whether an entity is engaged in the business of facilitating the placement of deposits that on their face conflict with the longstanding criteria the FDIC has established apply to listing services. The Proposal provides that a person facilitates the placement of deposits by engaging in any of the following activities:

- The person directly or indirectly shares any third-party information with the insured depository institution;
- The person has legal authority, contractual or otherwise, to close the account or move the third party's funds to another depository institution;
- The person provides assistance or is involved in setting rates, fees, terms, or conditions for the deposit account; or
- The person is acting, directly or indirectly, with respect to the placement of deposits, as an intermediary between a third party that is placing deposits on behalf of a depositor and a depository institution, other than in a purely administrative capacity.²⁰

¹⁵ See *Brokered Deposit Study* at 22-23.

¹⁶ *Brokered Deposit Study* at 60.

¹⁷ The ANPR is available at 84 *Fed. Reg.* 2366 (February 6, 2019).

¹⁸ 85 *Fed. Reg.* at 7456.

¹⁹ *Id.*

²⁰ *Id.* at 7457.

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The first condition that the person directly or indirectly shares any third-party information with the insured depository institution directly conflicts with the FDIC's position that a deposit listing service is not facilitating the placement of deposits, and is therefore not a deposit broker, even if the company provides a platform for the execution of trades. That is, a listing service that transmits messages between depositors and depository institutions (including purchase orders and trade confirmations) is not a deposit broker.²¹

It is necessary and appropriate for a listing service to share information about depositors (*i.e.*, name, address, social security number, email address etc.) with insured depository institutions in order for it to fulfill its obligation to transmit purchase orders and trade confirmations between depositors and depository institutions. We cannot envision how listing services could perform these permissible functions in connection with acting as a communications link without the ability to share information between depositors and depository institutions. Providing this information to depository institutions is integral to the listing service's ability to serve as a communications link between depositors and depository institutions. Moreover, sharing such information is critically important to authenticate the identities of the depositor and the depository institution. Similarly, the second condition could lead to confusion since a purchase order involves, by definition, the request to move a party's funds to another depository institution. Thus, the existence of a purchase order in and of itself should not cause a deposit to be considered brokered.

Indeed, it is readily apparent that when the FDIC modified its previous guidance in 2004 by permitting listing services to transmit messages between depositors and depository institutions (including purchase orders and trade confirmations), it by necessity authorized listing services to share third party information with depository institutions. This is further confirmed by comparing the language of criterion 3 as set forth in Advisory Opinion No. 02-04 with the language of criterion 3 as set forth in Advisory Opinion No. 04-04 and subsequent FDIC guidance. Criterion 3 in Advisory Opinion No. 02-04 stated "[f]or example, the listing service does not pass information about a depositor (or potential depositor) to a depository institution." By deleting this criterion in Advisory Opinion No. 04-04, the FDIC implicitly indicated that such information may be communicated by the listing service to depository institutions. By resurrecting this criterion in the Proposal without otherwise addressing how the Proposal would affect listing services, the FDIC is creating confusion among listing services regarding what communications are permissible.

We also urge the FDIC to clarify the fourth condition above by expressly stating that listing services that transmit messages between depositors and depository institutions (including purchase orders and trade confirmations) are acting in a purely administrative capacity and are not acting, directly or indirectly, with respect to the placement of deposits, as an intermediary between a third party that is placing deposits on behalf of a depositor and a depository institution. The FDIC's failure to clarify the Proposal and continue its longstanding carve out for listing services from the definition of deposit broker will have the unintended consequence of

²¹ Advisory Opinion No. 04-04.

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eliminating the critical function listing services currently provide to depositors and depository institutions.

The FDIC states in the Proposal that the primary purpose exception will apply when the primary purpose of the third party's business relationship with its customers is not the placement of funds with depository institutions. In order to qualify for the exemption, the entity must apply to the FDIC for a determination of whether the primary purpose exception is warranted. The Proposal states that the FDIC would not grant a primary purpose exception if the third party's primary purpose for its business relationship with its customers is to place (or assist in the placement of) funds into deposit accounts to "encourage savings," "maximize yield," "provide deposit insurance," or any similar purpose.²² Given the long history of how listing services have been and are currently viewed by the FDIC (*i.e.*, not regarded as deposit brokers), we see little reason why listing services should be forced to apply to seek a ruling from the FDIC. Moreover, based on the language of the Proposal, if adopted as currently proposed, listing services generally, and listing services that transmit messages between depositors and depository institutions specifically run the risk that when they apply to the FDIC, they may be regarded as deposit brokers. This represents a step back in time and is contrary to achieving the FDIC's stated goal for the Proposal "to modernize its brokered deposit regulations to reflect recent technological changes and innovations that have occurred."²³

THE FDIC SHOULD REAFFIRM ITS CURRENT LISTING SERVICE CRITERIA

The FDIC's has a long history of regarding listing services as outside the scope of its brokered deposit regulations in recognition of the important function listing services play in serving as a communications link between consumers and depository institutions. The FDIC recognizes this significant role by permitting listing services to serve as a communication link by transmitting messages between depositors and depository institutions. The Proposal threatens to disrupt the existing balance established in the market and destroy existing and future business relationships among listing services, consumers and depository institutions.

The importance of and extent to which consumers and depository institutions rely on listing services is reflected in figures reported in the FDIC's ANPR. The FDIC reported that as of September 30, 2018, insured depository institutions reported holding \$69.6 billion in listing service deposits that are not reported as brokered deposits and that 25 percent of insured depository institutions (approximately 1,369) held non-brokered listing service deposits. The share of non-brokered listing service deposits to domestic deposits for these institutions was 2.9 percent as of September 30, 2018.²⁴

²² 85 *Fed. Reg.* at 7460.

²³ *Id.* See also Statement by FDIC Chairman Jelena McWilliams on the Notice of Proposed Rulemaking on Revisions to the Brokered Deposits Regulations ("The framework reflects the transformative changes both in the banking industry and in how consumers interact with banks and access banking services while remaining faithful to the statute.") Available at <https://www.fdic.gov/news/news/speeches/spdec1219.html>

²⁴ 84 *Fed. Reg.* at 2369.

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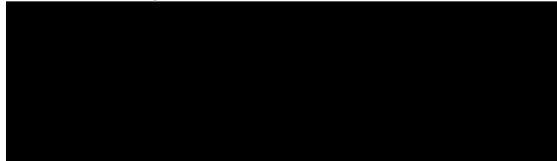
Accordingly, we urge the FDIC at the time it considers the Proposal to expressly state that the existing guidance applied to listing services is not affected by the FDIC's final rule.²⁵

ADDITIONAL CONSIDERATIONS

The Proposal states that the FDIC "intends to modernize its brokered deposit regulations to reflect recent technological changes and innovations that have occurred."²⁶ One approach we believe the FDIC should consider is to recognize that companies that provide services to depositors over the Internet should not be regarded as deposit brokers if (i) the choice of depository institutions is that of the depositor, (ii) the depositor holds the accounts directly in his/her own name, and (iii) the fees the service provider receives from depository institutions are unrelated to deposit volume or the number of deposit accounts opened by depositors. This approach would ensure that such companies remain a passive mechanism when providing services to depositors and are not incentivized to steer funds to particular depository institutions. The fee limitations will serve to ensure further that the companies do not have a stake in the transaction.

Additionally, in view of the significant burden the Proposal will have on small businesses, we suggest the FDIC create an exception for small businesses that provide communication services to depositors and depository institutions. Such an exception should not have a material effect on the amount of brokered deposits maintained by depository institutions. For these purposes, the FDIC could look to the definition of small business set forth in regulations of the U.S. Small Business Administration.²⁷

Sincerely,



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²⁵ In view of the potential disruptive effect a final rule could have on current relationships, in the event the FDIC does not affirm that its existing guidance continues to apply to listing services, we believe the FDIC should grandfather existing entities that currently are engaged in the listing service business and which qualify as listing services under the FDIC's existing guidance.

²⁶ 85 *Fed. Reg.* at 7453.

²⁷ 13 CFR § 121.201.