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June 9, 2020

VIA E-MAIL

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

**RE: Unsafe and Unsound Banking Practices: Brokered Deposits
Restrictions, RIN 3064-AE94**

Dear Mr. Feldman:

In response to the request by the Federal Deposit Insurance Corporation (“FDIC”) for comments on its proposed revisions to regulations relating to brokered deposits,¹ including Questions Three, Four, Five and Eleven set forth therein,² we offer this public submission on behalf of one of our clients.

¹ Unsafe and Unsound Banking Practices: Brokered Deposits Restrictions, 85 Fed. Reg. 7453 (Feb. 10, 2020) (“NPRM”).

² Question 3: “Is the FDIC’s list of activities that would determine whether a person meets the ‘facilitation’ prong of the ‘deposit broker’ definition appropriate?”

Question 4: “Has the FDIC provided sufficient clarity surrounding whether a third party intermediary would meet the ‘facilitation’ prong of the ‘deposit broker’ definition?”

Question 5: “Should the FDIC provide more clarity regarding whether any specific types of deposit placement arrangements would or would not meet the ‘facilitation’ prong of the ‘deposit broker’ definition? If so, please describe any such deposit placement arrangements.”

Question 11: “Are there particular FDIC staff opinions of general applicability that should or should not be codified as part of the final rule? If so, which ones, and why?”

The FDIC should treat listing services as deposit brokers because (1) the Federal Deposit Insurance Act warrants such treatment, (2) such treatment would promote safety and soundness by placing limits on deposits that, according to the FDIC’s own analyses, increase the likelihood of bank failures and loss rates, and (3) listing services have evolved in ways that make inapplicable the FDIC’s past guidance that allowed some listing service deposits to be treated as non-brokered.

The FDIC should adopt the criteria discussed below for treatment of listing services as deposit brokers. These criteria focus on the role that listing services play in steering depositors to particular depository institutions and accounts on the basis of high depositor interest rates. The FDIC should also rescind all past inconsistent FDIC advisory opinions.

Separately, to avoid potential confusion in the industry, the FDIC should reaffirm that so-called “custodial deposits” are brokered if they are not eligible for a specific statutory exception to brokered treatment.

I. Listing-Service Deposits Behave Like Traditional Brokered Deposits

A. The FDIC Has Recognized That Traditional Brokered Deposits Are Not a Stable Source of Funding

As the FDIC has stated, traditional “brokered deposits are considered volatile, interest rate sensitive deposits from customers in search of yield.”³ Traditional brokered deposits do not serve as a stable source of funding because rate-sensitive customers remove their funds from an institution if a better rate becomes available elsewhere.⁴

Moreover, if an institution holding significant amounts of brokered deposits becomes troubled, it may be forced to continue paying high interest rates it cannot afford or otherwise risk losing the deposits, leading to a downward spiral.⁵ These facts have led the FDIC to conclude that the “overuse” of traditional brokered deposits has “contributed to bank failures and losses to the deposit insurance fund.”⁶

³ FDIC Study on Core Deposits and Brokered Deposits (Jul. 8, 2011) (“2011 Study”), p.32.

⁴ At least one federal appellate court acknowledged the agency’s concerns. In 2012, the Tenth Circuit Court of Appeals opined that “the FDIC’s problem with brokered deposits is not merely the possibility of withdrawals; rather, it is their overall volatility. Brokered deposits impair the institution’s liquidity [because] most ... are short term. This means the institution must sell investments in order to obtain the money to pay off the maturing deposits.” Frontier State Bank Okla. City v. Fed. Deposit Ins. Corp., 702 F.3d 588, 603 (10th Cir. 2012) (citations and internal quotations omitted); see Fed. Deposit Ins. Corp. v. Arrillaga-Torrens, 212 F.Supp.3d 312 n. 17 (D. P.R. 2016) (citing authorities).

⁵ See 2011 Study, p.35 (noting as a common theme among banks that failed from 2008 through 2010 that “[f]or those banks most reliant on noncore funding, a liquidity crisis developed and accelerated failure.”).

⁶ FDIC Risk Management Manual of Examination Policies, Section 6.1; see 2011 Study, p.47 (“[B]rokered deposits tend to increase the FDIC’s losses when a bank fails.”).

B. Modern Listing Services Produce Rate-Sensitive Deposits and Steer Depositors to Particular Insured Depository Institutions

In recent years, listing services have evolved well beyond the “rate boards” of the past. In 2016, the FDIC described a listing service as “a company that compiles and publishes information about deposit accounts at many different banks for consideration by interested depositors.”⁷ However, rather than simply compiling and publishing such information, modern listing services typically steer depositors to banks offering high interest rates, facilitating the placement of rate-sensitive deposits.

Today’s internet-based listing services occupy a unique position of influence in the market for sourcing deposits. These services can reach retail and institutional depositors from across the country. Few of these depositors have the resources to survey hundreds or thousands of banks to determine the best available rates and terms, and even institutional investors are unlikely to recreate their own, proprietary deposit account marketplace.

Listing services emphasize or promote banks that offer the highest interest rates or pay additional fees, reducing the likelihood that depositors will invest funds locally or enter into, or maintain, a relationship with any particular bank. Instead, depositors are encouraged to pursue maximum yields without regard for where the bank may be located or what other services it may offer. By attracting such “hot money” for certain institutions, listing services have an undeniable role in reducing customer loyalty and eroding the stability that comes with “sticky” relationships between institutions and depositors.

Functionally, listing services engage in the business of facilitating the placement of deposits that have many of the same characteristics as traditional brokered CDs. They connect rate-sensitive depositors with banks that need funding – funding that may quickly seek better options if another bank offers higher interest rates. By creating a ready source of “hot money” for banks, listing services *are* the traditional deposit brokers of the 2020s.

C. The FDIC Has Recognized the Active Role of Modern Listing Services

The FDIC’s Advance Notice of Proposed Rulemaking regarding brokered deposits and interest rate restrictions acknowledged that these services have moved beyond the limited role they played in the early 2000s:⁸

In 2004, when staff last provided its views on listing services . . . listing service sites did not provide any advice to prospective depositors, and there was only a flat subscription fee paid by both the banks and those

⁷ Identifying, Accepting and Reporting Brokered Deposits Frequently Asked Questions, FIL-42-2016 (updated June 30, 2016) (“2016 FAQ”), p.5, D1; *see* Question regarding FDIC’s criteria for determining when a ‘listing service’ is a ‘deposit broker’, FDIC Advisory Opinion No. 04-04 (July 28, 2004).

⁸ FDIC, Unsafe and Unsound Banking Practices: Brokered Deposits and Interest Rate Restrictions, 84 Fed. Reg. 2366 (Feb. 6, 2019) (“ANPRM”).

seeking to view the posted rates. Today, the FDIC has observed that certain listing service websites provide additional services. . . . [T]he FDIC notes that some listing services appear to:

- Offer advice to banks on liability and funds management and regulatory compliance screening for subscribing banks.
- Send customer information (on behalf of the prospective depositors) directly to the banks that are listing rates.
- Charge a fee to banks based upon the asset size of the bank, rather than a flat subscription fee.
- Post rates of “featured” or “preferred” vendors at the very top of its rate board.”

The FDIC notes the ambiguity over how these new listing service features could be applied in light of the 2004 criteria. The features above seem to indicate that some listing services are no longer acting in a passive capacity but are instead steering deposits to particular institutions or are otherwise providing services that meet the definition of “deposit broker.”⁹

Even a cursory review of the listing services marketplace demonstrates that such services no longer simply compile and publish rates.

D. Several Major Listing Services Offer an Extensive Set of Services that Steer Depositors to Particular Insured Depository Institutions

Bankrate. According to its website, Bankrate.com (“BR”) is “an independent, advertising-supported publisher and comparison service. Bankrate is compensated in exchange for featured placement of sponsored products and services, or [a visitor] clicking on links posted on this website. This compensation may impact how, where and in what order products appear.”

“Featured” listings for which banks pay a premium appear prominently in search results (*e.g.*, on top in default search results, on top when viewing “All Products”). All

⁹ ANPRM at 2373. In the NPRM, the FDIC, referring to a comment to the *ANPRM*, noted that “[a]nother 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.” NPRM at 7456. It is unclear whether the FDIC has had a “longstanding position,” as evidenced by the issuance of over a dozen non-binding interpretive letters pertaining to listing services during that period, but even if it did, the way in which listing services operate has changed significantly, as discussed above. As for fees paid for preferential placement, it is understandable that the commenter (presumably a listing service or a bank that sources deposits from listing services) would have no objection to collecting or even paying a premium if it meant both preferential placement of listings and non-brokered treatment of the resulting deposits. Yet the commenter ignores the result of such preferentially-placed listings – actively steering investors to higher rates – and the associated risks.

search results emphasize the APY term (usually the first column after institution name), and include a link to a disclosure that “[t]he listings that appear on this page are from companies from which this website receives compensation” Clicking on a “Featured” listing takes the visitor directly to a page on the featured bank’s website that permits the depositor to begin the process of opening an account.

BR clearly markets itself as a platform on which depositors can find the highest rates from across the country. The following phrases or statements appear on BR:

- “Maximize Your Money”
- “Bankrate’s rate tables are amongst the most efficient ways to connect directly with in-market consumers.”
- “Bankrate covers over 650 markets in all 50 states.”
- “With a hyperlink on Bankrate’s tables, millions of in-market consumers will have direct and immediate access to you.”

BR also has a quality control program and accepts and publishes consumer reviews on BR and other sites. The website also includes a variety of “news, advice and tools to help you maximize your investments.”

By offering preferential placement to certain banks and providing a variety of tools to aid investors, BR actively steers depositors to particular banks on the basis of high interest rates, facilitating rate-based placement.

BR asserts, in its comments on the NPRM, that, even if listing services present information in a way that “could potentially influence the customer toward one depository institution over another,” this influencing should not be treated as facilitating because “the depositor controls the placement of the funds, not the listing service.”

Such an approach not only has no justification in the plain language of the FDI Act, but also would provide listing services with a huge loophole through which to steer deposits to particular insured depository institutions.¹⁰ Under the Act, the relevant question is not whether the depositor can choose whether to have funds placed, which depositors always can, but whether a third party is facilitating the placement of deposits. Steering customers to high rate institutions does exactly that.

QwickRate. QwickRate.com (“QR”) offers its “premier CD Marketplace [that] makes getting the highest returns easy and convenient. Just connect direct, online, with thousands of institutions across the county.” QR is intended for institutional depositors,

¹⁰ Bankrate’s comments to the NPRM (June 5, 2020), available at <https://www.fdic.gov/regulations/laws/federal/2020/2020-unsafe-unsound-banking-practices-brokered-deposits-3064-ae94-c-070.pdf>.

including banks. QR's focus on high-yield deposits is shown by the main tagline on its home page, which asserts that it has "YOUR BEST INTERESTS ONLINE."

QR pre-screens institutions that use its "closed marketplace." The site offers "automated notifications" when high rates enter the Marketplace, and a variety of other automated tools "to make your transactions fast and easy." As with BR, QR's service prioritizes high returns, quickly accessible from institutions across the country:

- "Accessing this marketplace, you can quickly connect to excellent CD funding and investment opportunities."
- "We never want to leave a question unanswered. Or even the smallest percentage point unearned."
- "Connect with banks that are motivated to work with you!"
- "Greatest returns on CD investments"
- "Nation's best CD rates"

QR's tools aid institutions in sourcing new deposits and identifying optimal investment opportunities, automate offers and acceptances, and expedite maturities processing. QR also offers rate positioning tools to help determine rate settings, portfolio management and reporting capabilities, and a "Risk Management Workbook." Additionally, QR actively screens institutions before granting access to its Marketplace.

With its host of tools, QR is no passive actor, but an active participant in the market for deposits that (like BR) actively steers depositors to particular banks on the basis of high interest rates, facilitating rate-based placement.

Kasasa. Kasasa, LTD. ("Kasasa") does not provide a traditional listing service, but in key respects operates as a listing service. Kasasa offers a website (www.kasasa.com) through which depositors may search for insured depository institutions or credit unions that offer a Kasasa rewards checking account.

Kasasa, in its letter to the FDIC regarding the NPRM, represents that it operates "behind the scenes."¹¹ In fact, however, Kasasa's public website, headlined "Banking that breaks the rules," features a prominent link for consumers to "Discover an account near you." Clicking the "Discover an account near you" link takes the consumer to Kasasa's "partner website," www.depositaccounts.com by Lending Tree, which specifically advertises interest rates for Kasasa accounts. Kasasa even has its own

¹¹ Kasasa comment letter to NPR (May 27, 2020), available at <https://www.fdic.gov/regulations/laws/federal/2020/2020-unsafe-unsound-banking-practices-brokered-deposits-3064-ae94-c-057.pdf>, p.1, footnote 2.

YouTube channel to which consumers can subscribe. These are not the actions of someone who remains “behind the scenes,” but those of an actor taking center stage.

Kasasa also asserts in its letter to the FDIC that it has “no ability to influence, facilitate, place or move any consumer funds with or between any insured depository institutions.”¹² In addition to the features mentioned above, the Kasasa partner site contains a prominent search function to “Find Your [Kasasa] Account Now.” When a depositor clicks on that function, the depositor arrives at a page touting the Kasasa accounts as offering a “high rate — typically much higher than traditional checking accounts.” The page contains a list of banks and interest rates, sorted from highest APR to low. Kasasa, of course, does influence consumers through this site, explicitly directing them to institutions and accounts that offer “high rate” Kasasa accounts.

Like BR and QR, Kasasa thus actively steers depositors to particular banks on the basis of high interest rates, facilitating rate-based placement.

II. The FDIC Has Recognized the Instability of Listing-Service Deposits

In the 2011 Study, the FDIC evaluated various types of deposits to determine whether and to what extent they have the potential to fuel rapid growth, create liquidity problems, or increase losses to the FDIC in the event of failure.¹³ Its analysis “suggests that high rate deposits and non-brokered listing services appeared likely to pose problems similar to most brokered deposits.”¹⁴

Indeed, the 2011 Study stated that “[s]ome weak banks have used listing service deposits to fund liquidity shortfalls caused by their inability to roll over maturing brokered deposits due to regulatory restrictions.”¹⁵ Consequently, with respect to the examination process, the 2011 Study notes “the FDIC views listing service deposits as potentially more volatile than traditional, locally generated deposits.”¹⁶ Generally speaking, the FDIC concluded that “listing service deposits can pose all of the problems that a [brokered] deposit can pose.”¹⁷

In the 2011 Study, the FDIC said that, although “the FDIC has the authority under the brokered deposit statute to impose greater restrictions on listing service deposits, the FDIC is inclined to wait until sufficient data on these deposits accumulate to allow statistical conclusions.”¹⁸ Now, such data are available. Recently, the FDIC updated its analysis with data through the end of 2017, which it included in an appendix to the ANPRM.¹⁹ The results reinforce and expand on the previous findings of the 2011 Study:

¹² Id.

¹³ 2011 Study, p.4.

¹⁴ Id.

¹⁵ Id., p.58.

¹⁶ Id.

¹⁷ Id.

¹⁸ Id.

¹⁹ ANPRM at 2384.

- The data suggest a number of consistent patterns. Somewhere between 60 and 65 percent of failed banks used listing service deposits for at least 8 quarters before they failed. Evidence also suggests that some of these failed banks increased use of listing service deposits in the quarters leading up to their failure.²⁰
- Analysis of data from April 8, 2011 through December 15, 2017... suggests that the use of listing service deposits is, on average, associated with higher loss rates.²¹

The FDIC’s most recent analysis addresses a period in which there were relatively few bank failures. In a more volatile market in which depositors are simultaneously seeking yield and the safety of FDIC-insured deposits, the identified adverse effects are likely to be even greater. These data, coupled with the increasingly active role of listing services in the market, make a compelling argument for treating listing services as entities that engage in the business of facilitating the placement of deposits.

III. Under Existing Statutory Law, Listing Services Are Deposit Brokers

Under the Federal Deposit Insurance Act, as amended (“FDI Act”), and its implementing regulations, listing services that engage in the kind of activities discussed above are deposit brokers because they are persons that are “engaged in the business of placing deposits, or *facilitating the placement of deposits*, of third parties with insured depository institutions.”²²

In common parlance, “facilitate” means to “make easier or less difficult; help forward (an action, process, etc.).”²³ The activities of listing services in steering depositors to particular banks on the basis of high interest rates make the placement of deposits at such institutions easier or less difficult and helps it forward.²⁴

Legislative history supports this view. In 1989, Senator Frank Murkowski offered an amendment on the Senate floor to exclude listing services from the definition of “deposit broker” contained in the Financial Institutions Reform, Recovery and Enforcement Act (“FIRREA”), but the amendment was *modified to reject such an exclusion*.²⁵ This outcome came as a result of negotiations between Senator Murkowski and the Chairman and Ranking Member of the Senate Banking committee.

²⁰ Id. at 2396.

²¹ Id. at 2399-400. The analysis also suggests that, holding the non-listing, non-brokered deposits ratios constant, increasing listing services deposits and decreasing other bank liabilities and possibly equity increased the failure loss rate. Id. at 2400.

²² 12 U.S.C 1831f(g)(1)(A); 12 C.F.R. §337.6 (a)(5)(i)(A) (emphasis added).

²³ Dictionary.com, available at <https://www.dictionary.com/browse/facilitate> (based on the Random House Unabridged Dictionary).

²⁴ As indicated above, the FDIC has acknowledged that the FDI Act permits it to impose greater restrictions on listing services. See note 18 above.

²⁵ See 135 CONG. REC. S4238, S4266-9 (daily ed. Apr. 19, 1989) (Amendment No. 58 to S.774, the Financial Institutions Reform, Recovery and Enforcement Act).

Senator Murkowski stated the *modified* amendment “basically includes more people in the definition of deposit broker, now it includes listing services, specifically hot money houses in which we share the same concern.”²⁶ The history of this revised amendment clearly demonstrates congressional intent not to exempt listing services from the definition of “deposit broker,” but rather to include them in it.

IV. The Final Rule Should Make Clear That Listing Services Are Deposit Brokers, and the FDIC Should Rescind Contrary Past Opinions

To help provide clarity to market actors and innovators, the FDIC should address listing services in its final rule. To date, the FDIC’s views regarding listing services have been largely set forth in non-binding and often non-published advisory opinions. However, more than fifteen years have passed since the FDIC publicly issued an advisory opinion directly relating to listing services.²⁷ And, with one exception (a letter from 2002), Adv. Op 04-04 is the only published interpretive letter the FDIC has issued regarding listing services since the internet became widely accessible to and used by the general public.

One unintended result of this approach is that listing services may provide a non-published advisory opinion to banks, and the banks may rely on such an opinion, even if the service has evolved significantly since the advisory opinion was issued and no longer meets the stated criteria. If, by contrast, the FDIC includes its criteria for determining whether a listing service is a deposit broker in the final rule, customers and other industry participants may conduct their own diligence to determine whether the listing service acts as a deposit broker.

In the final rule, the FDIC should treat deposits facilitated by a listing service or similar service (whether or not called a listing service) as brokered whenever:

1. The service acts as agent or nominee for depositors or otherwise has custody of depositor funds and remits them, directly or indirectly, to insured depository institutions; or
2. The service (a) directly or indirectly receives compensation from one or more insured depository institutions and (b) publishes, displays, or otherwise provides to current or prospective depositors a listing of insured depository institutions, or deposit accounts at such institutions, that (i) shows depositor interest rates and sorts, or allows the sorting of, institutions or accounts by depositor interest rate, (ii) features particular institutions or accounts, or (iii) otherwise has the purpose or effect of steering depositors to particular institutions or accounts on the basis of depositor interest rates; or

²⁶ Id. at 4267-69 (emphasis added).

²⁷ Question regarding FDIC’s criteria for determining when a ‘listing service’ is a ‘deposit broker’, FDIC Advisory Opinion No. 04-04 (July 28, 2004) (“Adv. Op. 04-04”). We understand that the FDIC has issued opinions since 2004, but because they have not been published, they are unavailable to guide market actors.

3. The service (a) directly or indirectly receives compensation from one or more insured depository institutions and (b) provides a search function, whether on its own website, a partner website, or any other website or database with which it is associated, that (i) enables current or prospective depositors to search for insured depository institutions, or deposit accounts at such institutions, on the basis of depositor interest rates, (ii) features particular institutions or accounts, or (iii) otherwise has the purpose or effect of steering depositors to particular institutions or accounts on the basis of depositor interest rates.

To provide clarity, the FDIC should rescind all past inconsistent advisory opinions. For example, although the FDIC in the past may have permitted listing services to sort lists of depository institutions by interest rate, it has recognized in recent opinions that listings of institutions and listing of account details, and a search function for accounts, in an arrangement that involves trying to attract depositors with interest rates, can make a company a deposit broker.²⁸ Indeed, sorting and search features that lead depositors to the highest interest rate banks and accounts are the essence of what makes listing services a source of “hot money” for banks, regardless of how banks compensate the services.

V. The FDIC Should Reaffirm That So-Called “Custodial Deposits” Are Brokered Deposits Unless a Statutory Exception Applies.

In its comments on the ANPRM, one industry participant (“Commenter”) suggested that the FDIC should “clarify” that so-called “custodial deposits” are non-brokered deposits.²⁹ There is no basis for such a “clarification” under the FDI Act, because custodial deposits are brokered under the Act unless a statutory exception applies.³⁰

A custodial bank cannot be used to “launder” otherwise brokered deposits and make them non-brokered. Commenter’s suggested approach, which has no statutory basis, would render meaningless the distinction between brokered and non-brokered deposits, allowing third parties to make almost any deposit non-brokered simply by inserting a custodial bank into the process. This result would be directly contrary to the policy objective of the NPRM and the FDI Act itself of promoting safety and soundness.

²⁸ See Question regarding whether a Company that Designs Deposit Products is Considered a Deposit Broker--Part I, FDIC Advisory Opinion No. 15-02 (June 6, 2014) (“[The Company] will remove any listing of participating FDIC-insured depository institutions (‘IDIs’) from [the Company’s website]. Also, [the Company] will remove any details about accounts at particular IDIs.”); Question regarding whether a Company that Designs Deposit Products is Considered a Deposit Broker--Part II, FDIC Advisory Opinion No. 15-03 (Dec. 18, 2014) (“Change the website’s search function so that searches must be conducted through an external source not associated with [the Company] or [its website] ...”).

²⁹ StoneCastle Cash Management, LLC’s comment letter to the ANPRM, available at <https://www.fdic.gov/regulations/laws/federal/2019/2019-unsafe-and-unsound-banking-practices-3064-ae94-c-035.pdf> (May 2, 2019).

³⁰ While Commenter notes that reciprocal deposits are not treated as brokered, that treatment for certain reciprocal deposits results directly from a statutory exception added by a 2018 amendment to the FDI Act, not a regulatory clarification. See 12 U.S.C. § 1831f(i).

Although the application of the FDI Act in this context remains clear and should not require clarification, the FDIC should reaffirm that “custodial deposits” of the kind Commenter says it handles in its own service are brokered so that banks are not misled regarding the treatment of such deposits. Commenter suggests that “it is unclear whether such deposits” are treated as brokered because of the presence of a custodian and states that “the FDIC has not received guidance from Congress on how to categorize these custodial deposits.”³¹ In fact, the applicable law and the FDIC’s interpretation of it in this context have been clear for more than a decade.

Conclusion

The FDIC should treat listing services as deposit brokers because the FDI Act warrants doing so, such treatment is necessary to promote safety and soundness, and listing services have evolved so as to make inapplicable past guidance that allowed some listing service deposits to be treated as non-brokered. The final rule should treat listing services or similar services as deposit brokers whenever they meet any of the criteria discussed above. In addition, the FDIC should rescind all past inconsistent FDIC advisory opinions.

Separately, the FDIC should reaffirm that so-called “custodial deposits” are brokered if they do not qualify for a statutory exception.

Thank you for providing the opportunity to comment on the NPRM.

Sincerely,

TEEPLE LEONARD & ERDMAN

By:

A solid black rectangular box redacting the signature of Michael H. Erdman.

Michael H. Erdman

³¹ Commenter’s Letter, note 29 above, pp. 2-3.