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May 2, 2019

Via E-mail (comments@fdic.gov)

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

Re: Federal Deposit Insurance Corporation
Comments of Bankrate, LLC. in Response to Advance Notice of Proposed Rulemaking and Request for Comment dated December 19, 2018
RIN-3064-AE94

Dear Mr. Feldman:

This comment letter is submitted on behalf of Bankrate, LLC, a subsidiary of Red Ventures, Inc. ("Bankrate") in response to the Federal Deposit Insurance Corporation (the "FDIC") Advance Notice of Proposed Rulemaking and Request for Comment on December 19, 2018[1] (the "ANPR") regarding aspects of the FDIC's regulatory approach to brokered deposit and interest rate regulations. The ANPR seeks comments on all facets of the FDIC's regulatory approach to brokered deposits, including on the definition of the terms "brokered deposit" and "deposit broker" and on industry changes that have occurred in the financial services industry since brokered deposit and interest rate regulations were adopted that affect the application of the regulations today.

The purpose of this comment letter is to provide input on the application of the FDIC's regulations generally, and with respect to deposit listing services. This letter also discusses the market rate restrictions of 12 U.S.C. § 1831f(e). In particular, we request

[1] FDIC, FIL-87-2018, Reciprocal Deposit Rulemaking and Request for Comments on Brokered Deposit and Interest Rate Restriction Issues, Advanced Notice of Proposed Rulemaking Related to Brokered Deposits (Dec. 19, 2018), https://www.fdic.gov/news/news/financial/2018/fil18087.html [hereinafter FDIC, ANPR].

(1) that the FDIC clarify the role of deposit listing services; and (2) that the scope of activities that may be conducted by a deposit listing service that would not be considered "brokered deposits" be clarified so the industry may approach the same in a consistent manner. Further, Bankrate requests consideration of future offerings by deposit listing services for exclusion from the restrictions imposed by brokered deposit regulations.

Background on Bankrate

Bankrate delivers online deposit listing services through its primary website, bankrate.com. It provides consumers with information on financial products like mortgages, credit cards, car loans, checking and ATM fees, home equity loans, savings accounts and certificates of deposit.[2] Within the Bankrate website, customers can read content, get advice, and compare rates across depository products. Depository institutions currently pay per click to be featured on the rate table, and the fee paid is not related to the amount of deposits generated by the website for the institution. The Bankrate website contains links to the websites of depository institutions, where a consumer may choose whether to purchase such institution's depository product.

As described in more detail below, deposit listing services such as Bankrate should be explicitly excluded from the definition of "deposit broker" because such services are not engaged in the business of placing deposits, or facilitating the placement of deposits of third parties with insured depository institutions.[3] Further, deposit listing services serve a helpful purpose to consumers and should not be stifled. With clarification from the FDIC, deposit listing services may also expand the variety of services offered to consumers.

Deposit Listing Services like Bankrate Should Be Excluded from the Definition of Deposit Broker

Bankrate respectfully requests that the definition of "brokered deposits" expressly exclude deposits derived from deposit listing services like Bankrate and that the definition of "deposit broker" expressly exclude companies like Bankrate. Such clarification is necessary because (1) it is consistent with the history and purpose of the brokered deposit regulations; (2) it is consistent with historical interpretation and application of the regulations, as service providers such as Bankrate do not meet the existing definition of "deposit broker"; and (3) clarification of this topic will allow deposit listing services to continue to provide innovative services to address a genuine consumer need.

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[2] Bankrate, *About Us*, https://www.bankrate.com/about/ (last visited Apr. 1, 2019).

[3] 12 U.S.C. § 1831f(g)(1)(A); 12 C.F.R. § 337.6(a)(5)(A).

History and Purpose of Brokered Deposit Regulations

As stated in the ANPR, the FDIC began imposing restrictions on brokered deposits in the mid-to late- 1980s in response to the increased use of brokered deposits and correlative data suggesting that such use invoked negative consequences for the safety and soundness of financial institutions.[4] Even as early as the 1970s, the FDIC noted concerns about brokered deposits—"The use of brokered deposits has been responsible for abuses in banking and has contributed to some bank failures, with consequent losses to the larger depositors, other creditors, and shareholders."[5] Following the failure of Penn Square Bank in 1982, the FDIC and the Federal Home Loan Bank Board proposed that brokered deposits be insured only up to $100,000 per broker per institution.[6] The proposal was met with great debate and litigation, but was ultimately abandoned, and from 1984 to 1985, brokered deposits in financial institutions dropped significantly.[7] Section 29 of the Federal Deposit Insurance Act ("FDI Act"), which addresses brokered deposits, was added to the FDI Act pursuant to the Financial Institutions Reform, Recovery, and Enforcement Act of 1989. The law placed restrictions on under-capitalized institutions from (1) accepting deposits from a broker without a waiver and (2) soliciting deposit by offering rates of interest on deposits that were significantly higher than similarly-situated depository institutions in the institution's market area.[8]

It is not disputed that brokered deposit regulations were established to prevent bank failures, and that correlative data exists linking institutions with heavy concentrations of brokered deposits to bank failure. That said, correlation is not causation. It is arguable that the use of brokered deposits caused no failure. Instead, institutions utilized brokered deposits to fund rapid loan growth. Rapid loan growth, which can create a non-diverse portfolio, can stress a financial institution, and in periods of economic distress (such as in the agricultural crisis of the late 1980's or the housing crisis of the late 2000's) can stress the capital of insured depository institutions and lead to failures.

[4] FDIC, ANPR, *supra* note 1, at 12.

[5] FDIC, ANPR *supra* note 1, at 12 (quoting 1 FDIC, *History of the Eighties: Lessons for the Future* 122 (1997) https://www.fdic.gov/bank/historical/history).

[6] *See* 49 Fed. Reg. 13003 (Apr. 2, 1984)

[7] 1 FDIC, *History of the Eighties: Lessons for the Future* 122 (1997) https://www.fdic.gov/bank/historical/history.

[8] FDIC, ANPR *supra* note 1, at 8 (citing Act of Aug. 9, 1989, Pub. L. No. 101-73, 103 Stat. 183).

Restrictions on the amount of and use of brokered deposits have been utilized as a proxy to regulate against rapid growth, but the FDIC through the examination process and through Call Report review is able to efficiently regulate insured depository institutions without the restriction of any kind on brokered deposits. Further, the brokered deposit restrictions do not prevent institutions from using other products to promote rapid growth, including internet and mobile banking products and advertisements locally of deposit campaigns at above-market rates.

The FDIC has also utilized limits on brokered deposits to prevent an institution from suffering a liquidity crisis. If a deposit broker was able to quickly move deposits from an institution, an institution may be unable to meet depositor's demands, leading to a "run on the bank," placing the FDIC in the role of receiver and increasing the cost of the Deposit Insurance Fund ("DIF").

Even in the example above, the tool of brokered deposit restrictions is not necessary to accomplish the desired objective. First, liquidity failures have been rare. Second, the objective of avoiding liquidity shortfalls can be accomplished not just by limiting the use of brokered deposits, but by limiting the concentration of deposits from a single broker. Further, limits on brokered deposits or non-core funding stress unduly smaller financial institutions that may lack the technical resources of systemically important financial institutions ("SIFIs"), super-regional institutions and large regional banks, and which pay more to acquire deposit customers than do SIFIs or larger institutions. Added to this, restrictions on the use of brokered deposits (even non-callable brokered deposits) and limits for certain institutions on the paying of above-market rates actually threatens the liquidity of insured depository institutions.

The FDIC's data demonstrates that during the period from 2007 to 2018, institutions that relied heavily on brokered deposits accounted for less than 10 percent of all bank failures, but accounted for 38 percent of the loss to the DIF.[9] Even so, that does not mean brokered deposits caused the failures or that brokered deposits led to greater losses. Yet, even if that was assumed to be true, it should be noted that deposits whose placement is facilitated by a deposit listing service have only been reported on banks' Call Reports since 2011,[10] so from the data available it is not possible to ascertain what percentage, if any, of the failed banks' deposits were derived with the aid of deposit listing services.

Although a correlation between deposit listing services and bank failures cannot be precisely determined, we suggest the correlation is non-existent. A deposit listing service functions for the banks that utilize it no different than if a bank generated customer leads by

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[9] FDIC, ANPR, *supra* note 1, at 21.

[10] *Id.* at 18.

email, newspaper or other electronic media. Further, by allowing a potential customer to in one place review and compare deposit products of several institutions, the use of a listing service is pro-consumer. Consumers also benefit by being able to easily establish deposit relationships at or below deposit insurance caps with several institutions so as to avoid the maintenance of uninsured deposits. The use of deposit listing services even benefits the 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 in amounts that exceed deposit insurance caps (after all, although not required to do so, the FDIC has made whole in failures depositors whose deposits exceeded the $250,000 insurance cap).

The ANPR notes that as of September 30, 2018, insured depository institutions held $69.6 billion in listing service deposits that are not reported as brokered deposits, and such deposits accounted for only 0.6 percent of industry domestic deposits.[11] The ANPR further notes that as of September 30, 2018 the ratio of non-brokered listing service deposits to domestic deposits for the 22 not-well capitalized institutions was 3.6 percent, while the same ratio for the 1,356 well-rated institutions was not significantly lower, at 2.9 percent.[12] This data illustrates that restricting or limiting deposits from deposit listing services may have no material effect on the safety and soundness of insured depository institutions.

Historical Interpretation Supports Excluding Deposit Listing Services as "Deposit Brokers"

The treatment of deposits derived from listing services has been analyzed by the FDIC throughout the past two decades. The FDIC has developed criteria for analyzing whether a "listing service" is a "deposit broker" through a series of advisory letters on the topic.[13] Although a company can be both a "listing service" and a "deposit broker," the FDIC noted in a 2004 advisory opinion letter (the "2004 Letter") that the term "deposit broker" "should not be construed so broadly as to encompass all companies that perform any type of service for depositors or depository institutions."[14] The 2004 Letter went on to distinguish listing services from deposit brokers, noting that a "listing service" is a compiler

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11 *Id.*

12 *Id.*

13 FDIC, ANPR, *supra* note 1 at 33; *see generally* FDIC Adv. Op. Nos. 90-24 (June 12, 1990); 92-50 (July 24, 1992); 02-04 (November 13, 2002); 04-04 (July 28, 2004).

14 FDIC Adv. Op. No. 04-04 (July 28, 2004).

of information about deposits whereas a "deposit broker" is a facilitator in the placement of deposits.[15]

FDIC interpretations of deposit listing services in light of the brokered deposit regulations appear to rely on the same general concept: that a listing service is not a deposit broker if it merely facilitates the decision of the consumer whether and from whom to purchase depository products.[16] More specifically, the 2004 Letter set forth the following revised criteria to determine whether a deposit listing service is a "deposit broker" for purposes of the brokered deposit regulations:

> 1. The person or entity providing the listing service is compensated solely by means of subscription fees...and/or listing fees....
>
> 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....
>
> 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.[17]

Based on the criteria set forth in the 2004 Letter and its predecessors, services like Bankrate are not "deposit brokers" and thus deposits derived with the assistance of depository listing services are not brokered deposits. Bankrate is compensated by the means of subscription fees (cost-per-click) from depository institutions, which are not related to the dollar amount of deposits derived from the service. In such instances, Bankrate performs no services except the gathering and transmission of information concerning the availability of deposits and is not involved in placing deposits. Consumers may click a link from the

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[15] FDIC Adv. Op. No. 04-04 (July 28, 2004).

[16] *See generally* FDIC Adv. Op. Nos. 02-04 (November 13, 2002); 04-04 (July 28, 2004).

[17] FDIC Adv. Op. No. 04-04 (July 28, 2004).

Bankrate website to directly access a depository institution's website to learn more about the institution's product and to invest the consumer's funds in such institution. The FDIC has laid out the framework to exclude deposits derived from deposit listing services from the definition of "brokered deposits" and a corresponding regulatory change would be welcomed and appropriate in light of the modernization of the brokered deposit regulations.

Although it is clear that Bankrate is not a deposit broker, Bankrate questions whether the criteria in the 2004 Letter should be considered exclusive. Bankrate sees no justification for the prohibition on other forms of compensation to the listing service. There is no reason that Bankrate should be limited to flat fee pricing, per-click pricing or subscription services. Like any other media or technology company, it should be able to charge a bank a greater fee for a higher ranking on its list of depositors or offer variable pricing based on the amount of deposits generated. An inability to do so stifles innovation. Further, the net effect of charging an institution more for a premium placement or based on deposits generated is no different than if an institution spent more on advertising to reach potential customers.

Clarification on the Treatment of Deposit Listing Services can Provide Guidance for Future Growth of Deposit Listing Services

Deposit listing services serve a genuine need in the market. Consumers have a desire and a right to research depository institutions and depository products when deciding how to invest their money. Further, seventy-seven percent of American adults own smartphones[18] and undoubtedly look to their phones and the internet for research and guidance in making investment decisions. Services like Bankrate allow consumers to quickly compare which depository institutions offer products and rates that are best for the consumer's needs while simultaneously providing an entry point for the consumer to connect with the institution. Further, such services allow consumers to see their financial picture holistically, and can present a depository institution or product that is specifically beneficial to the consumer based on the criteria provided by the consumer. In addition to benefitting consumers, deposit listing services provide an efficient and increasingly frictionless way for depository institutions to acquire customers, which in turn can lower operating costs and potentially lower the fees charged to customers.

The evolution of the FDIC's interpretation of the application of brokered deposit regulations to deposit listing services illustrates that the industry has changed and continues to change quickly, and can be expected to continue to expand to offer new services to consumers. Clarification of the treatment of deposits derived with the aid of deposit listing services will enable deposit listing services to more efficiently analyze whether future services will fall within the scope of brokered deposits. Specifically, sites like Bankrate

[18] Pew Research Center, *Mobile Fact Sheet*, https://www.pewinternet.org/fact-sheet/mobile/ (last visited Apr. 1, 2019).

could provide a platform whereby a consumer would click a link on the Bankrate website and be directed to a co-branded (with the Bankrate and financial institution's branding) or white-labeled web portal to transmit depositor information and apply for a depository product. The portal would not be administered by the depository institution, but rather by Bankrate. The current advisory framework is ambiguous on what the proper treatment of such service with respect to brokered deposit regulations would be. Although we believe this type of service should not be restricted by the brokered deposit regulations because it is functionally indistinct from a customer response to an advertisement and the customer, and not Bankrate, is selecting the depository institution with whom the relationship is established, the current regulatory framework is unclear. This is just one example of a service from which deposit listing services would benefit from regulatory guidance and clarification of the definition of brokered deposits.

Further, since Bankrate is primarily, if not exclusively, a conduit between depositors and depository institutions, Bankrate should be permitted to evaluate or rate depository institution products or use information provided by a customer to sort through depository institution products and suggest products that may be desirable to a particular depositor without being deemed to be a deposit broker or held to steer a customer. Consumers want expert opinions on which institution is "best" in a lot of ways (the best APY, the best for low fees, the best for seeing financial situation holistically, etc.). At all times, it would be the consumer making a decision to establish a relationship, even if such decision is based on information provided by Bankrate to the consumer.

As the FDIC considers the role of deposit listing services, it is important to note that Bankrate does not control the deposit relationship and may not redirect customers to another depository institution. Bankrate acknowledges that the ability of a single entity to redirect a significant portion of an insured depository institution's deposits to another institution could jeopardize an institution's liquidity. A deposit listing service like Bankrate, however, does not have that ability. It may offer new products to a customer based on information provided by a customer, but it does not move relationships from one institution to another. Individuals establish their own relationships with the institution. Bankrate helps institutions find depositors and vice versa, but does not act as a broker without input from a customer. The customer is making the decision to establish a relationship even if through a branded or white-listed site.

We respectfully request that the FDIC clarify the exclusion of deposit listing services for purposes of its regulations on brokered deposits. Such clarification would be consistent with the purpose of the existing brokered deposit regulations and the FDIC's interpretation thereof, and will allow deposit listing services to expand their offerings to keep up with technological and industrial advances to better serve consumers.

Market Rate Restrictions are Unnecessary in Light of Increased Interstate Market for Deposits

Bankrate also respectfully submits that the second prong of brokered deposit regulations, which prohibits financial institutions from soliciting deposits by offering rates of interest on deposits that are significantly higher than similarly-situated depository institutions in the institution's market area, should be revised because (1) it is difficult to define an institution's "market" in light of increased interstate commerce and (2) the market rate restrictions are excessively penal to covered institutions and increase the likelihood of a liquidity failure.

The Market Restriction is No Longer Practical

The second prong of Section 29 of the FDI Act was enacted to prevent institutions from avoiding the use of brokered deposits by "brokering" deposits in-house through a "money desk operation,"[19] and prohibits certain institutions from offering deposit rates relative to each institution's "normal market area."[20] As stated in the ANPR, the definition of "market area" was not clarified until a 2009 rule, which defined the market area as "any readily defined geographical area in which the rates offered by any one insured depository institution soliciting deposits in that area may affect the rates offered by other insured depository institutions *in the same area*."[21] As noted above, and as a result of services like Bankrate and technological advances, consumers can obtain depository products from institutions within a national market. Gone are the days when a consumer needed to walk into a branch and meet in person with a banker to purchase a depository product; a consumer can now use their computer or smartphone to purchase depository products from a variety of institutions with branches within or outside the "market area" in which the consumer lives. In light of the ability of consumers to obtain deposit products from depository institutions throughout the country, the need for a market restriction is not only unnecessary, it is impractical.

Market Rate Restrictions Prohibit Financial Institutions from Competing

Congress's initial intent of restraining depository institutions from accepting "hot money" deposits is no longer served by the interest rate restrictions in Section 29 of the FDI Act. Now, the effect of such restrictions is to impede the ability of community banks from competing in the marketplace. For example, even an adequately-capitalized community

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[19] FDIC, ANPR, *supra* note 1, at 37.

[20] *See generally*, FDIC, ANPR, *supra* notes 1, at 38; 12 U.S.C. § 1831f (2018).

[21] 74 Fed. Reg. 26516 (2009) (emphasis added).

bank may be prohibited from offering rates that are "significantly higher" than the prevailing rates of interest on deposits offered by other insured depository institutions in the institution's market area. Since the restriction is only imposed on the depository institution (and not on consumers located within the market area) the astute consumer can shop the national market and purchase a more attractive product from an institution located outside the market area. Thus, the restriction unfairly impacts community banks that do not have a national or online presence. These interest rate restrictions can be used as a proxy to restrict such institutions from maintaining liquidity, and further deprives customers of such institutions from being able to obtain competitive rates from their primary institution. The market rate restriction is no longer necessary and hinders the ability of certain financial institutions to compete in the national market, and should be modified in the FDIC's modernization of its regulations thereon. As noted above, the market rate restriction not only ignores the current competitive reality that all insured depository institutions compete nationally for deposits, it also threatens the liquidity of adequately-capitalized institutions and increases the likelihood of a bank failure. At minimum, institutions should be allowed to maintain balance sheet liquidity, even if only adequately capitalized, and should be able to pay national rates and utilize deposit listing services in so doing.

Conclusion

Bankrate appreciates the opportunity to comment on the ANPR and the FDIC's initiative to analyze and modernize the brokered deposit regulations. As discussed, listing services such as Bankrate should be specifically excluded from the definition of "deposit broker." Further, deposit listing services serve a helpful purpose to consumers and should not be stifled, and with clarification from the FDIC, deposit listing services can expand the variety of services offered to consumers. Finally, the market rate restriction is outdated and unnecessary, and should be modified to reflect the changing market for depository products. If you have any questions, please contact me at (612) 371-2428 or colemansa@ballardspahr.com.

Very truly yours,

[redacted]

Scott A. Coleman

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