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June 5, 2020

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 (“Bankrate”) in Response to Notice of Proposed
Rulemaking and Request for Comment dated February 10, 2020
RIN-3064-AE94

Dear Mr. Feldman:

We write in response to the Notice of Proposed Rulemaking and Request for Comment on February 10, 2020¹ (the “NPR”) issued by the Federal Deposit Insurance Corporation (the “FDIC”) about aspects of the FDIC’s proposed revisions to its regulations about brokered deposits. The NPR seeks comments on the FDIC’s regulatory approach to brokered deposits, including on the proposed framework for analyzing certain provisions of the “deposit broker” definition; specifically, the definitions of “facilitating” and “primary purpose.”

This letter provides comments on six of the questions presented in the NPR. Our purpose is to provide input on the application of the FDIC’s proposed revised regulations with respect to deposit listing services like those provided by Bankrate, which we reviewed with FDIC staff at a meeting on March 5, 2020. **Our primary point is this:** as drafted, the NPR might classify Bankrate’s current and proposed activities as brokered. Such a result would be fundamentally flawed because Bankrate refers direct, retail relationships to insured depository institutions (IDI).

Generally, Bankrate reiterates the requests set forth in Ballard Spahr’s May 2, 2019 letter on behalf of Bankrate (the “Ballard Letter”) requesting (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. When Bankrate met with FDIC staff in March, FDIC staff advised that the proposed rule would supersede existing listing service guidance. If true, we believe that significant ambiguity regarding the role of a listing service will be created. We hope the

¹ Notice of Proposed Rulemaking: Unsafe and Unsound Banking Practices: Brokered Deposits Restrictions, 85 Fed. Reg. 7453 (Feb. 10, 2020) [hereinafter FDIC, NPR].

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FDIC will further clarify the following parts of the NPR applicable to Bankrate's business.

Question 2: Is the FDIC's proposed definition of "engaged in the business of facilitating the placement of deposits" appropriate?

Although the FDIC's proposed definition of "engaged in the business of facilitating the placement of deposits" provides more clarification than the current interpretation of the "facilitation" prong of the definition of "brokered deposits," it remains overly broad and could be construed to include listing service products like those offered by Bankrate that historically have **not** been classified as brokered deposits. The NPR states that the proposed "facilitation" definition is "intended to capture activities that indicate that the person takes an active role in the opening of an account or maintains a level of influence or control over the deposit account even after the account is open." But the proposed "facilitation" prong as drafted could also include relationships where the customer maintains decision-making authority to choose an institution in which to deposit the customer's money. To that end, Bankrate: (i) requests clarification that the operation of a deposit listing service does not constitute taking an "active role" in that the customer is selecting an institution and product; and (ii) asks for confirmation that this would be the case even if, for example, the listing services ranked products for the customer based on information provided by the customer as important to the customer's decision (e.g. rate, digital experience, etc.).

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?

As to deposit listing services, the FDIC's list of activities that would determine whether a person meets the "facilitation" prong of the "deposit broker" definition is ambiguous with respect to the first item on the list. Item one ("[t]he person directly *or indirectly* shares *any* third party information with the insured depository institution") (emphasis added), is unclear by including the word "any." As proposed, this item would prohibit a listing service from sharing **any** information with an insured depository institution, including personal information provided at the direction of a customer. So long as the customer chooses a product and directs the listing service to provide certain information to a financial institution, the listing service should not be deemed to meet the "facilitation" prong of the deposit broker definition.

We suggest either deleting this first item entirely or adding a line to the end of it, so it reads: "The person directly or indirectly shares any third party information with the insured depository institution (provided that it will not be deemed facilitating the placement of deposits for a customer to designate an IDI to which the customer's data is provided)."

The proposed addition is consistent with the FDIC's intention of differentiating situations where the depositor maintains control of the selection of a depository

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institution from those where the third party holds such control.² A deposit listing service that allows a customer to designate an institution to whom such customer's information may be shared, and to share such information with the institution, does not constitute taking an "active role in the opening of an account" or "maintain[ing] a level of influence or control over the deposit account,"³ as the *customer* is the party in control and the deposit listing service is acting only at the direction of the customer. And finally, in such a relationship, the needs of the depositor remain the primary driver of the selection of the bank, and therefore the listing service is not facilitating the placement of deposit.

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

As outlined in our response to Question 5, below, we believe additional clarity is required surrounding whether a third-party intermediary meets the "facilitation" prong of the "deposit broker" definition. Deposit listing services should not meet the "facilitation" prong as deposit listing services are not "directly or indirectly controlling or influencing the movement of funds between insured depository institutions *without any involvement or input from the underlying depositor.*"⁴ Even if the deposit listing service presents information in such a way that could potentially influence the customer toward one depository institution over another, by ranking deposit products based on rate, digital experience, or other factors identified by the customer or due to the customer's perception that the deposit terms at such depository institution are superior to another institution, it should not be grounds to be considered to be "facilitating" the deposit. The depositor controls the placement of the funds, not the listing service; such deposits should not raise concerns traditionally associated with brokered deposits and should be excluded from the definition of brokered deposits.

Question 5: Should the FDIC provide more clarity whether any specific type 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.

We request that the FDIC provide clarity on the treatment of deposit placement arrangements enabled by listing services. We specifically propose that the FDIC (i) provide an explicit exemption from the definition of "deposit broker" for listing services, or (ii) maintain or incorporate existing listing service guidance into the proposed regulation. And if (ii), revise listing service guidance to permit account opening services and align financial incentives between listing services and insured depository institutions.

² NPR at 7457

³ *Id.*

⁴ *Id.* At 7458 (emphasis added).

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As described in the Ballard Letter and in this letter, deposits facilitated by deposit listing services where the customer maintains control over where to deposit its funds should be exempted from the definition of “deposit broker.” This is consistent with existing listing service guidance, which has historically distinguished listing services from deposit brokers.⁵

Inherent in that guidance is a recognition of a spectrum from deposit listing service activities to deposit broker activities. A go-forward way to think about this is that the former sells direct, retail relationships to IDIs, while the latter sells money. For example, some businesses allow customers to open a branded account on that business’s website that looks like that business’s deposit account. But on the back end, that business sells those funds to an IDI, which is where the funds are held. To the customer, the account is maintained with the front-end business.⁶ Other businesses may do this with more than one IDI, and still other permutations exist where the business moves funds between IDIs on the back end.⁷ We believe each of these activities presents different levels of risk to the DIF, but they should all continue to be viewed as brokered. Bankrate simply wants to connect customers to an IDI for that customer to establish and maintain a direct relationship. Our model should not be lumped together with activities traditionally considered to be brokered.

Bankrate also believes that it should be able to innovate its product offerings by, for example: (i) offering alternative pricing to financial institutions for Bankrate’s services (Bankrate sees no reason that it should be limited to flat fee pricing, per-click pricing or subscription services – it should be able to charge a bank variable pricing based on the amount of deposits generated) given that its role as a listing service is primarily or exclusively passive; (ii) evaluating or rating depository institution products or using information provided by a customer to sort through depository institution

⁵ FDIC Adv. Op. No. 04-04 (July 28, 2004).

⁶ See e.g., Letter from Credit Karma on the FDIC’s Notice of Proposed Rulemaking and Request for Comment, “Unsafe and Unsound Banking Practices: Brokered Deposit Restrictions,” (April 14, 2020), <https://www.fdic.gov/regulations/laws/federal/2020/2020-unsafe-unsound-banking-practices-brokered-deposits-3064-ae94-c-033.pdf>.

⁷ See, e.g., Wealthfront’s disclosure, at www.wealthfront.com (accessed June 3, 2020): “Cash Account is offered by Wealthfront Brokerage. Neither Wealthfront Brokerage nor its affiliates is a bank. Wealthfront Brokerage conveys Cash Account funds to depository institutions that accept and maintain such deposits. The cash balance in the Cash Account is swept to one or more banks (the “Program Banks”) where it earns a variable rate of interest and is eligible for FDIC insurance. FDIC insurance is not provided until the funds arrive at the Program Banks. While funds are at Wealthfront, before they are swept to the program banks, they are subject to SIPC’s protection limit of \$250,000 for cash. FDIC insurance coverage is limited to \$250,000 per qualified customer account per banking institution. Wealthfront Brokerage uses more than one Program Bank to ensure FDIC coverage of up to \$1 million for your cash deposits. For more information on FDIC insurance coverage, please visit www.FDIC.gov. Customers are responsible for monitoring their total assets at each of the Program Banks to determine the extent of available FDIC insurance coverage in accordance with FDIC rules.”

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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 (Customers want expert opinions on which institution is “best” in a lot of ways--the best APY, the best for low fees, the best digital capabilities, best for seeing financial situation holistically, etc.); or (iii) collecting customer information to pass to an IDI that the customer selects for the purpose of creating a more seamless and modern digital experience for customers.

Question 12: Has the FDIC provided sufficient clarity regarding what will be considered a “business line”? How can the FDIC provide more clarity? Are there other factors that should be considered in determining an agent’s or nominee’s business line(s)?

We hope the FDIC will answer the concerns we raised above and provide clarity. But if not, Bankrate answers questions 12 and 22 under the presumption that we would need to apply for a “primary purpose” exception as described in the NPR.

The guidance regarding what will be considered a “business line” is unclear with respect to the treatment of businesses like deposit listing services. The clarity provided in the NPR relates specifically to a traditional broker-client relationship with defined assets under management and not to businesses like deposit listing services. The guidance on “business line” provides a bright line test for brokers with direct relationships with customers and depository institutions. Deposit listing services like Bankrate do not have such direct relationships, do not have assets under management, and thus the test cannot determine whether a deposit listing service meets the exception.

We request that the FDIC think of “business line” as verticals of a larger enterprise. For example, Bankrate connects customers with various financial products and services, with deposit products being one of those verticals in the Bankrate enterprise. In this context, the FDIC could ask questions about the percentage of total revenue that “deposits” comprises of the enterprise, or how much of the enterprise resources are devoted to the deposits business line, and so on. These questions could help the FDIC to better ascertain whether an enterprise like Bankrate has the “primary purpose” of facilitating the placement of deposits.

Question 22: Are proposed requirements for the applications process for business relationships other than those described in C(1) and C(2), appropriate?

Bankrate believes the proposed requirements for the application processes as to listing services is inappropriate. Bankrate again requests that deposit listing services, which connect customers and financial institutions, be distinguished from traditional brokers (including financial advisors, financial planners, wealth management services, escrow agents and others) who are paid fees by financial institutions directly for funds deposited and maintained with the institution and whose primary purpose may or may not be to generate revenue from the placement of deposits. For example, if a deposit listing service were an applicant under the prescribed application process, there would be no discernable “total amount of assets under management.” Further, due to the nature of the revenue stream of deposit listing services generally, the distinction between “revenue generated from the third party’s activities related to the placement, or the facilitating of

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the placement, of deposits” and “revenue generated from the third party’s activities not related to the placement, or the facilitating of the placement, of deposits” doesn’t work. While certain of the businesses described in this section may or may not generate revenue on establishment of the depository relationship, but also on an ongoing basis through the maintenance of deposits, Bankrate would only be paid for connecting a customer with an IDI where the customer establishes a direct relationship. This distinction is important as it illustrates that Bankrate’s compensation is not based on the maintenance of the relationship, which might be motivating some brokers to re-direct deposits (which can then lead to instability in an institution’s deposit base).

Conclusion

Bankrate appreciates the opportunity to comment on the NPR and reiterate comments made during our meeting on March 5, 2020. As discussed, listing services such as Bankrate should be specifically excluded from the definition of “deposit broker” because we refer direct customer relationships to IDIs. Or, the NPR should clarify that businesses like ours may provide data to an IDI at the customer’s direction. Finally, listing services serve a helpful purpose to customers, and with clarification from the FDIC, the industry can expand the services offered to customers.

Respectfully,



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