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November 23, 2010

Communications Division
Office of the Comptroller of the Currency
Public Information Room
Mailstop 2-3
250 E Street, S.W.
Washington, D.C. 20219
Attention: 1557-0081

Gary A. Kuiper, Counsel
Comments, Room F-1072
Federal Deposit Insurance Corporation
550 - 17th Street, N.W.
Washington, D.C. 20429

Jennifer J. Johnson
Secretary
Board of Governors of the Federal Reserve System
20th Street and Constitution Avenue, N.W.
Washington, D.C. 20551

Re: Proposed Agency Information Collection Activities; Comment Request: Consolidated Reports of Condition and Income (OCC 1557-0081, FDIC 3064-0052, FRB 7100-0036)

Ladies and Gentlemen:

We are writing in strong support of the proposal to add a new Memorandum Item to Schedule RC-E of the Consolidated Reports of Condition and Income ("Call Reports") in which banks would report deposits obtained through so-called "listing services." We believe this is a necessary and vital step toward developing a rational policy concerning access to the national deposit funding markets by banks.

Since 1982, Seward & Kissel has represented broker-dealers, banks and other entities sponsoring deposit placement arrangements for retail and institutional depositors, as well as banks seeking this funding. We are nationally recognized for our expertise in matters relating to the brokered deposit market and regularly submit comments to the federal banking regulators on issues affecting this market. We appreciate the opportunity to submit these comments.

Pursuant to Federal Deposit Insurance Corporation ("FDIC") regulations, a "brokered deposit" is a deposit accepted from a "deposit broker."[1] A "deposit broker" is defined in the Federal Deposit Insurance Act and FDIC regulations as a person that facilitates the placement of deposits.[2] For "well capitalized" banks, the economic characteristics of a deposit (i.e., rate and stability) and the manner in which a deposit is held (i.e., directly by a depositor or indirectly through an agent) are irrelevant in determining whether a deposit is a brokered deposit. The sole determining factor is the existence of an intermediary. An "adequately capitalized" bank will be deemed to accept a brokered deposit if the interest rate on the deposit is significantly higher than the prevailing rates of interest on deposits offered by other banks in the bank's normal market area,[3] whether or not an intermediary is involved in placing the deposit.

In adopting the definition of "deposit broker" in 1989,[4] Congress specifically rejected a proposed exemption from the definition for listing services.[5] However, in 1990 the staff of the FDIC granted by interpretation a limited exemption from the definition of deposit broker for entities that act as a "rate board" to permit banks to list their rates on available deposit

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1 12 C.F.R. § 337.6(a)(2).

2 12 U.S.C. § 1831f(g)(1); 12 C.F.R. § 337.6(a)(5). The definition of "deposit broker" has been interpreted very broadly by the FDIC staff. For example, it has been interpreted to include a company that refers customers to an affiliated bank. *See, e.g.*, FDIC Interpretive Letter 92-68 (October 21, 1992) (a bank referring customers to affiliated banks) and FDIC Interpretive Letter 94-15 (March 16, 1994) (a money management firm referring customers to an affiliated bank). In addition, the payment of a fee to the intermediary by the bank is not a required element of the definition. *See e.g.*, FDIC Interpretive Letter 92-86 (December 7, 1992).

3 12 C.F.R. § 337.6(a)(5)(iii).

4 *See* Financial Institutions Reform, Recovery and Enforcement Act, P.L. 101-73, § 224.

5 *See* 135 CONG. REC. S4266, *et seq.* (daily ed. April 19, 1989) (Amendment No. 58 to S.774, the Financial Institutions Reform, Recovery and Enforcement Act ("FIRREA")). Senator Murkowski (R-AK) offered an amendment to FIRREA as it was being considered by the Senate that established restrictions on the acceptance of brokered deposits by depository institutions in "troubled" condition. As offered on the Senate floor, the amendment specifically excluded listing services from the definition of "deposit broker." After negotiations between Senator Murkowski and Senators Riegle (D-MI) and Garn (R-UT), who were the Chairman and Ranking Member, respectively, of the Senate Banking Committee, the amendment was modified to eliminate the listing service exclusion. As noted by Senator Murkowski, 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." *Id.* at 4268-69.

products for prospective depositors.[6] This exemption has been re-confirmed by FDIC staff several times since 1990.[7]

The Comment Request sets forth the four criteria necessary for an entity to qualify as a listing service. We note that there are ambiguities about the application of certain of the criteria. For example, some listing services purport to offer advice to banks on liability management and regulatory compliance and engage in screening of participating banks. The FDIC guidance precludes the offering of any services except acting as a rate board.[8] In addition, the listing service must charge a "flat fee," and is precluded from charging a fee based upon the volume of deposits raised by a bank. However, some listing services charge a fee to banks based upon the asset size of the bank, rather than the use of the service by the bank. This appears to be a means of charging a fee based on the projected volume of deposits to be raised, not actual use of the service.

We raise these issues because providing clearer interpretative guidance, and policing the guidance, will help eliminate anomalies in the market. The ambiguities in the guidance have permitted the growth of a cottage industry comprised of firms that claim the listing service exemption in order to provide access to "non-brokered" deposit funding, but operate in a manner that is inconsistent with the terms and purpose of the exemption. As discussed below, pricing in the deposit markets is currently distorted by banks using listing services to obtain non-brokered funding.

Listing services fulfill some of the same functions as deposit brokers. These services permit banks to access sources of deposits outside their normal market areas. However, unlike the services offered by registered broker-dealers and banks participating in reciprocal deposit programs, listing services are entirely rate driven. Broker-dealers and banks participating in reciprocal deposit programs place funds with banks as part of a relationship with the depositors. In the case of broker-dealers, their relationship with their customers includes providing investment advice and offering a variety of investment options. In the case of reciprocal deposit arrangements, the bank placing customer funds typically has a pre-existing deposit and/or lending relationship with the depositor. In both cases, the deposit broker acts as custodian for the depositor in holding the deposit accounts at the bank at which funds are placed and provides a single statement setting forth all of the depositor's holdings. Because deposit placement is offered as part of a broader relationship, rates are not the sole factor in depositor investment decisions.

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6 FDIC Interpretive Letter 90-24 (June 12, 1990).

7 *See, e.g.*, FDIC Interpretive Letters 92-50 (July 24, 1992), 02-04 (November 13, 2002), 04-04 (July 28, 2004), and letter to QwickRate (April 3, 2009).

8 The comments filed by QwickRate on November 10, 2010 are puzzling. QwickRate distinguishes its activities from other listing services based upon the additional services it provides. Since it is precluded by the FDIC guidance from offering other services, it is unclear how it qualifies for the listing service exemption.

In contrast, as noted in the Comment Request the singular purpose of a listing service is to offer potential depositors who focus on yield a listing of the highest available rates on deposit products. These potential depositors have no relationship with the service and no reason to use the service other than to find the highest available rates. Data that we submitted to the FDIC in 2008 in response to a request for comments on proposed changes to FDIC insurance premiums demonstrates that listing service rates are historically higher than the rates in the market maintained by broker-dealers.[9]

As a result of actions by the FDIC in 2009 to impose premiums on the use of brokered deposits, deposits solicited through entities claiming an exemption as a listing service have dramatically increased as banks look to access the national deposit funding market without having to report the deposits as "brokered" on their Call Reports. One listing service has reported a 68% increase in transaction activity between May 2009 and May 2010.[10]

Banks have been willing to pay higher rates to access this market. The current spread between the cost of funds obtained through a listing service and funds obtained through registered broker-dealers is 35 to 50 basis points on certificates of deposit of comparable maturities. This differential includes fees to the brokers, but excludes fees to the listing service.

It is clear that the listing service exemption has created a distortion in the bank funding marketplace -- banks needing to access the national deposit funding market are willing to pay a premium to obtain deposits if they can do so without reporting the deposits as brokered on their Call Reports.[11] Because the deposits are not reported as brokered, they are, by implication "core deposits," despite the fact that they are a "less stable source of funding than typical relationship deposit customers."[12]

The proposed amendment to the Call Report will provide important information to regulators about each bank's deposit funding sources and more accurate industry data. However, amending the Call Report will not equalize the treatment of brokered deposits and deposits obtained through a listing service. This can only be accomplished by (i) re-characterizing deposits obtained through a listing service as "brokered" when the service does

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9 *See* Seward & Kissel LLP letter dated December 17, 2008, commenting on RIN: 3064-AD35.

10 *See* May 12, 2010 press release of QwickRate (attached hereto as Attachment A).

11 Further evidence of the consequences of the current stigma associated with brokered deposits includes the prepayment by some banks of brokered CDs, including interest through maturity, in order to remove the CDs from their books prior to filing a Call Report. In some cases, banks have prepaid more than one year of interest to remove brokered CDs from their books.

12 Comment Request, 75 Fed.Reg. 60,497 at 60,501.

not strictly comply with the limited exemption granted by the FDIC and (ii) treating brokered deposits and listing service deposits equally for purposes of deposit insurance premiums.[13]

Finally, we note that the Dodd-Frank Wall Street Reform and Consumer Protection Act requires the FDIC to conduct a study of the definitions of "brokered deposits" and "core deposits" and report to Congress by July 21, 2011.[14] We hope this study will seriously re-examine the use of a legal definition (*i.e.*, "brokered deposits") as a blanket characterization of the underlying economic characteristics of deposits obtained through an intermediary, as well as the absence of an actual definition of the term "core deposits." The lack of precision in this terminology, and the favorable regulatory treatment accorded to funding with one label over funding with another label, causes banks to make funding decisions that are not economically rational.

Very truly yours,

Paul T. Clark

PTC:tv
Attachment

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13 In 2009, the FDIC amended Part 327 of its regulations (assessments) to, among other things, add a brokered deposit adjustment in the calculation of a depository institution's deposit insurance premium. In the 2008 Notice of Proposed Rulemaking, the FDIC requested comment on whether listing services should be included in the definition of "deposit" broker for purposes of the brokered deposit adjustment. The FDIC acknowledged that it would be impossible to do so at that time because listing service deposits were not separately reported on the Call Reports. Adoption of the proposed amendment to the Call Reports would eliminate the barrier to treating brokered deposits and listing service deposits equally for FDIC premium purposes.

14 P.L. 111-203, § 1506 (July 21, 2010).

ATTACHMENT A

QwickRate®

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QwickRate Grows Subscriber Base by 24% in the Past 12 Months

Financial Institutions In Search of Best Rates for CD Funding and Investing Drive 68% Surge in Transaction Activity

ATLANTA, Ga., May 12, 2010 – QwickRate® announced today that more than 3,000 financial institutions are now utilizing its premier, online marketplace as a trusted, nationwide source for non-brokered funding and investing. The Company reported that it has grown its subscriber base by 24% in the past 12 months and has witnessed a 68% increase in transaction activity for the same period.

QwickRate's strong, continued growth is attributed to the fact that an abundance of new investors are turning to its marketplace as a reliable avenue to get better returns on their investments. At the same time, other financial institutions are relying upon QwickRate more and more as a prudent source for generating lower cost funding outside of their local markets, and diversifying their funding mix.

The QwickRate marketplace is a direct forum for hundreds of credit unions to quickly connect with pre-screened banks from all over the country and identify investment opportunities—without incurring third party, rate stripping or broker fees. Through the marketplace, these investors are securing the best nationwide rates for certificate of deposits (CDs), increasing their returns on each CD investment by as much as 30 to 90 basis points.

"Hands down, we are getting the best yields on our CD investments from the QwickRate marketplace," said Linda Williams, CEO at Akron Firefighter's Credit Union. "We made more interest in the first quarter of 2010 on just one third of our investment dollars than we made for all of 2009."

Fully compliant with the FDIC as a non-brokered Direct Deposit CD listing service, the QwickRate marketplace offers banks the ability to generate deposits at the best rates for their institution—even at an interest rate that is lower than the national rate. Since January 1, 2010, the average of the top 10 rates listed in QwickRate has been consistently below the national rate. In addition, rates for over 50% of the deposits generated through QwickRate were posted at least 25 positions below the top rate listed—and those positions are well below the national rate.

"QwickRate has been and will continue to be a valuable source for diversifying our funding," said Brant Ward, Funding Officer at Signature Bank of Arkansas. "The deposits we've raised have helped us reconfigure our balance sheet and better manage assets and liabilities in this lower rate environment. At the same time, we're in a stronger liquidity position for when rates rise."

Financial institutions utilize the Company's QwickTools™ to eliminate paperwork and streamline the direct funding and investing process. QwickRate is constantly advancing the capabilities and automated features of its marketplace to make it even more advantageous for subscribers. The latest development is its new, expanded View Rates capability which provides more flexibility and time-savings for investors purchasing multiple CDs with varied durations at one time.

"The continual growth we're experiencing year over year is a real testament to the incredible value the marketplace is providing institutions seeking to diversify their funding and investing, especially in the wake of the financial crisis," said Shawn O'Brien, president, QwickRate. "We've built a unique marketplace where banks and credit unions across the country are connecting and finding opportunities time and time again that are helping them maximize their net interest margins."

About QwickRate

QwickRate is the premier marketplace for non-brokered funding and investing. With more than 3,000 members, QwickRate offers community financial institutions a cost-effective way to gain access to a nationwide CD market. The marketplace includes QwickTools™, a comprehensive set of online tools that speed the funding and investing process and help banks and credit unions get the best rates for their institutions, while more efficiently managing their portfolios. QwickRate is known for its exceptional customer service which includes unlimited support and valuable regulatory guidance. QwickRate is a Preferred Service Provider of The Independent Community Bankers of America (ICBA). For more information, visit www.qwickrate.com.

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