

November 18, 2024

James P. Sheesley  
Assistant Executive Secretary  
Federal Deposit Insurance Corporation  
550 17th Street, N.W.  
Washington, D.C. 20429

**Re: Comment on FDIC Notice of Proposed Rulemaking, Unsafe and Unsound Banking Practices: Brokered Deposits Restrictions (RIN 3064-AF-99)**

Dear Mr. Sheesley,

I am writing to comment on the listing service aspects of the FDIC's proposed amendments to its "brokered deposits" rule, 12 C.F.R. § 337.6.<sup>1</sup> As part of a broader set of changes to the rule, the FDIC has proposed to revise its long-standing exclusion of listing services from the definition of deposit broker, by imposing a new requirement that the listing service not involve an "algorithm" that "proposes ... an allocation of deposits" or that is involved in the "placement" of deposits at insured depository institutions ("IDIs"). Other than "placement" of deposits, these new terms are not defined by the rule.

We understand the risk that the FDIC is seeking to mitigate in this rulemaking relates to the unstable funding provided by brokered deposits and the increased potential for a bank "run." In particular, the risks associated with brokered deposits providing financing to the (perhaps overly enthusiastic) growth of the asset side of an IDI's balance sheet that is not supported by growth in stable funding from relationship deposits of bank customers, and the potential for sudden loss of that funding when the IDI encounters difficulties or the industry as a whole experiences a crisis. The sudden loss of brokered deposit funding can cause liquidity issues or even liquidity insolvency, and also trigger recognition of embedded losses on long-term fixed-rate bonds and loans owned by the

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<sup>1</sup>FDIC, *Notice of Proposed Rulemaking, Unsafe and Unsound Banking Practices: Brokered Deposits Restrictions* (RIN 3064-AF-99), 89 Fed. Reg. 68244 (Aug. 23, 2024) (the "Proposing Release").

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bank due to changes to interest rates and market conditions as the instruments are sold to raise cash to meet deposit withdrawals.

A deposit broker is an intermediary between IDIs and depositors with the ability and the financial incentive to direct customers' deposit balances to (or from) an IDI – which could result in the broker providing more funding to the IDI when things are going well or pulling funding away from an IDI when times get rough. The proposal would i) roll back or narrow exclusions from the definition of “deposit broker” added to the rule in 2020 which had facilitated various forms of deposit intermediation and ii) simplify the definition by combining the two wings of the definition in the current rule (placing deposits and facilitating the placement of deposits) into one.

The proposal has two flaws that should be remedied. First, it fails to address directly the key lesson from the 2023 banking crisis – the risks to IDIs associated with a concentration of deposits well over the FDIC deposit insurance limits. Second, by deleting a key defined term from subsection (a)(5)(iii)(C) of the current rule (“matchmaking activities”) but retaining without context a sentence fragment from that definition (“proposes deposit allocations”) and adding new undefined terms (“passive listing service” and “algorithm”) the proposal muddies a key functional definition of a “deposit broker” as an intermediary that steers depositors' funds to and from an IDI.

The first flaw is a missed opportunity for the FDIC to use this rulemaking to reduce risk in the system. The second flaw, perhaps inadvertently, puts listing services at risk for treatment as “deposit brokers” despite their not posing the risks that the rule is intended to address and notwithstanding their useful role in allowing IDIs efficient access to new sources of stable deposit funding in the form of direct relationship deposit balances below FDIC deposit insurance limits.

If the FDIC does not intend to hamstring listing services, the language needs to be revised in the final rule. We have some suggestions below on word changes to fix the issue. If the FDIC does intend to change the status of typical listing services so that they are now treated as “deposit brokers,” it first needs to build a record for that change, which it has not done.

In this letter we first discuss in Section I the current status of listing services under the existing rule and the FDIC's long history of interpreting the definition of “deposit broker” under the statute and rule as not including typical listing services. We then discuss in Section II the benefits to the public that listing services provide in the form of stable funding for IDIs of all sizes, fair compensation to depositors, enhanced competition among IDIs, and the fact that they do not create the risks at which the

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brokered deposits rule is aimed. In Section III we discuss how the language of the FDIC’s proposed amendments to the definition of “deposit broker” – possibly inadvertently – expose listing services to treatment as “deposit brokers.” In Section IV we suggest language to add to the FDIC’s proposed new definition and to the description in the adopting release to preserve the current status of listing services (assuming the FDIC does not intend to treat typical listing services as “deposit brokers”). In Section V we discuss administrative process shortcomings with the proposal (assuming that the FDIC does intend to treat typical listing services as “deposit brokers”).

## **I. Current Status of Listing Services and Long History of FDIC Interpreting “Deposit Broker” to Exclude Most Listing Services**

### **A. Description of Traditional Listing Services**

A listing service is an advertising site that allows IDIs to post their current rates for various types of deposits as a means of attracting depositors. In the modern era, it typically is a website operated by a third-party service that aggregates and displays rates for many different IDIs. Depositors access the site to obtain information about rates available at different IDIs, and typically select among the IDIs based upon what the depositor is looking for. Often, the site user is looking to deposit a large amount of cash at the most favorable interest rates, in amounts that are at or below the FDIC deposit insurance limit for any one IDI. Beyond those criteria, the depositor may have other considerations, such as looking for institutions with which it does not currently have a deposit (due to the complexities associated with aggregation of balances across deposits at any one institution for determining maximum insurance coverage), geographic considerations, or past bad experiences with a particular institution.

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

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about deposits, whereas a “deposit broker” is a facilitator in the placement of deposits.<sup>2</sup>

On-line listing services include simple, transparent tools that allow depositors to search, sort and rank potential IDIs for deposits utilizing simple criteria and create their own lists of IDIs to contact, and then to contact the IDIs electronically through the service, or directly if they wish.<sup>3</sup> Under this framework, the IDI and customer communicate with one another with each having full information about the identity and contact information of the other. The IDI does its own AML/KYC screen of the potential customer and decides whether to accept the depositor and on what terms and rates. The listing service does not handle any negotiations or make decisions for either the IDI or the depositor, and does not have custody of funds or stand in the chain of ownership of the accounts. Instead, it acts as a simple informational go-between. If the listing service has a systems failure or goes bankrupt, it is not a disruptive event to either the depositor or the IDI, because there are no omnibus accounts operated by the listing service. Instead the depositor has a direct deposit relationship with each IDI, under which each IDI knows the name, address and other contact information, and tax ID of the depositor. The IDI can communicate directly with the depositors without any sort of intermediation by the listing service.

## **B. FDIC has long viewed listing services as not being “deposit brokers”**

From the inception of the brokered deposits rule, the FDIC has consistently deemed listing services not to be “deposit brokers.”<sup>4</sup> The FDIC’s original brokered deposits rule (which pre-dated the statutory version) excluded listing services from its definition of “deposit broker.” Under that original rule, listing services were excluded, provided that:

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<sup>2</sup>FDIC, *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) (“FDIC 2011 Brokered Deposit Study”). *available at* <https://www.fdic.gov/regulations/reform/coredeposit-study.pdf>

<sup>3</sup>FDIC Advisory Opinion 04-04 (Jul. 28, 2004); Letter of April 3, 2009 from Christopher L. Hencke, Counsel, FDIC to Debbie Walker, QwickRate; FDIC 2011 Brokered Deposit Study at 21; FDIC FIL 42-2016 (June 30, 2016), Question D.2, Listing Services.

<sup>4</sup> 49 *Fed. Reg.* 13003, 13009, 13011 (April 2, 1984); FDIC Advisory Opinion No. 90-24 (June 12, 1990); FDIC Advisory Opinion No. 92-50 (July 24, 1992); FDIC Advisory Opinion No. 02-04 (November 13, 2002); Letter of April 21, 2004 from FDIC Counsel Christopher L. Hencke; FDIC 2011 Brokered Deposits Study at 19.

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(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.<sup>5</sup>

Over the decades, after the enactment of the brokered deposits provisions and their codification as part of Section 29 of the FDI Act in 1989<sup>6</sup> and its amendment in 1991, 1992, 1994, and 2018,<sup>7</sup> the FDIC has repeatedly amended its brokered deposits rule and updated its guidance on the attributes of a listing service that distinguish it from a deposit broker. At each point along the way, the FDIC consistently has made clear that listing services are not “deposit brokers” within the meaning of the statute and rule.

For example, in 1990, the FDIC staff opined that the listing service:

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 listing service] 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.<sup>8</sup>

Similarly, in 2004, in both a letter to a listing service and an interpretive release, the FDIC staff again reaffirmed that listing services are not deposit brokers, and

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<sup>5</sup> 49 Fed. Reg. at 13011.

<sup>6</sup> 12 U.S.C. 1831f and former 1831f-1, as added by *Section 224(a) of title II of the Act of August 9, 1989* (Pub. L. No. 101--73; 103 Stat. 273).

<sup>7</sup> As amended by *section 301(a)(1) of title III of the Act of December 19, 1991* (Pub. L. No. 102--242; 105 Stat. 2343), effective December 19, 1991; *section 1605(a)(1)(A) of title XVI of the Act of October 28, 1992* (Pub. L. No. 102--550; 106 Stat. 4085), *section 337 of title III of the Act of September 23, 1994* (Pub. L. No. 103--325; 108 Stat. 2235), and *Section 202(b) of title II of the Act of May 24, 2018* (Pub. L. No. 115--174; 132 Stat. 1307). The statutory definition of “deposit broker” has not been amended since 1994.

<sup>8</sup> FDIC Advisory Opinion No. 90-24 (June 12, 1990); *See also* FDIC Advisory Opinion No. 92-50 (July 24, 1992).

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described the permissible attributes of listing services. In a letter of April 21, 2004, the FDIC stated:

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.<sup>9</sup>

Shortly thereafter, in FDIC Advisory Opinion No. 04-04 (July 28, 2004), the FDIC staff reviewed its gradual updating of its interpretive criteria to qualify as a listing service excluded from the definition of “deposit broker”:

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.

In that 2004 FDIC Advisory Opinion, the FDIC listed the four characteristics of a listing service distinguishing them from a deposit broker as:

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;

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<sup>9</sup> Letter of April 21, 2004 from FDIC Counsel Christopher L. Hencke.

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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.<sup>10</sup>

This FDIC treatment of listing services was reconfirmed in 2009.<sup>11</sup> In 2011, the FDIC once again confirmed that the criteria outlined in 2004 continue to apply to the determination of whether a listing service is outside the definition of a “deposit broker”:

At present, the FDIC applies these criteria [from FDIC 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.<sup>12</sup>

The FDIC continued to apply the criteria from the 2004 guidance in its FAQs on brokered deposits issued in 2016. The FDIC’s 2016 brokered deposits FAQs stated 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).”<sup>13</sup>

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<sup>10</sup> FDIC Advisory Opinion No. 04-04 (July 28, 2004).

<sup>11</sup> Letter of from FDIC Counsel Christopher L. Hencke, to Debbie Walker, QwickRate (April 3, 2009).

<sup>12</sup> FDIC 2011 Brokered Deposit Study at 21.

<sup>13</sup> FDIC “Frequently Asked Questions on Identifying, Accepting and Reporting Brokered Deposits,” FIL 42-2016 (June 30, 2016), Question D.2, Listing Services.

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## C. Listing services are not “deposit brokers” under the current rule

In 2020, the FDIC amended the rule’s definition of “deposit broker” to include the “matchmaker” portion of the definition of “facilitating the placement of deposits.” That set of rule amendments modified and codified earlier FDIC advisory opinions on listing services and effectively replaced them with the text of the rule.<sup>14</sup> In the adopting release that accompanied the 2020 amendments, the FDIC made clear that the treatment of listing services remained essentially as before, and that typical listing services (which were referenced as “passive”) do not trigger that definition:

The third prong [matchmaking] is defined to capture specific forms of matchmaking that are active in nature; more passive forms of matching depositors and banks, such as those in which traditional listing services often engage, would not be captured.<sup>15</sup>

The adopting release to the 2020 rule amendments stated further that:

A “listing service” is a company that compiles information about the interest rates offered by banks on deposit products. Through the years, staff at the FDIC have developed criteria to help determine whether a “listing service” meets the “deposit broker” definition. Under this final rule, the FDIC anticipates that whether a listing service, or a similar service that posts information about bank rates, is a deposit broker will likely depend on whether the service meets the new criteria under the “facilitation” part of the deposit broker definition. Based upon the new “facilitation” definition, a listing service that is passively posting rate information and sending trade confirmations between the depositor and the bank is unlikely to be a deposit broker. However, if a listing service provides services that meet one of the three prongs of the “facilitation” definition, then it would be considered a deposit broker.<sup>16</sup>

The FDIC’s current brokered deposits FAQs, issued in 2022,<sup>17</sup> reiterates that point:

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<sup>14</sup> FDIC, Final Rule: Unsafe and Unsound Banking Practices: Brokered Deposits and Interest Rate Restrictions, 86 Fed. Reg. at 6759, 6773-6775 (Jan. 22, 2021).

<sup>15</sup> 86 Fed. Reg. at 6747.

<sup>16</sup> 86 Fed. Reg. at 6760.

<sup>17</sup> FDIC, *Questions and Answers Related to Brokered Deposits Rule* (July 15, 2022), Question C-7, Listing Services.



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As the FDIC noted in the preamble of the rule, “the FDIC anticipates that whether a listing service, or a similar service that posts information about bank rates, is a deposit broker will likely depend on whether the service meets the new criteria under the “facilitation” part of the deposit broker definition. Based upon the new “facilitation” definition, a listing service that is passively posting rate information and sending trade confirmations between the depositor and the bank is unlikely to be a deposit broker. However, if a listing service provides services that meet one of the three prongs of the “facilitation” definition, then it would be considered a deposit broker.” 86 Fed. Reg. 6760 (January 22, 2021).

With the evolution of web-based listing services, the FDIC has for two decades recognized that the inclusion of electronic communication features that allow depositors to contact IDIs, and simple tools that allow depositors to sort and rank available IDI deposits by interest rates, do not transform listing services into deposit brokers.<sup>18</sup> The FDIC’s position has remained that listing services do not place deposits or facilitate the placement of deposits even if they operate as a web-based platform for depositors to contact banks and allow for messaging between depositors and depository institutions so long as they do not attempt to steer deposits into particular IDIs. Instead, such listing services provide a way for depositors to find and select an IDI.<sup>19</sup>

#### **D. Text of the definition of “deposit broker” in the current rule**

This long-standing treatment of listing services is reflected in the current text of the rule. Subsection 337.6(a)(5) of the current rule defines a “deposit broker” in a way that does not include typical listing services. Listing services do not need to rely on the litany of exclusions in subsection (a)(5)(v) of the rule from the definition of “deposit broker” because they do not come within the scope of the definition in subsections (a)(5)(i)-(iv). As currently in force, those subsections of the definition specify that:

(i) The term deposit broker means:

(A) Any person engaged in the business of placing deposits of third parties with insured depository institutions;

(B) Any person engaged in the business of facilitating the placement of deposits of third parties with insured depository institutions;

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<sup>18</sup>FDIC Advisory Opinion 04-04 (Jul. 28, 2004).

<sup>19</sup> See FDIC 2011 Brokered Deposit Study at 22-23.

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(C) Any person engaged in the business of placing deposits with insured depository institutions for the purpose of selling those deposits or interests in those deposits to third parties; and

(D) An agent or trustee who establishes a deposit account to facilitate a business arrangement with an insured depository institution to use the proceeds of the account to fund a prearranged loan.

(ii) *Engaged in the business of placing deposits.* A person is engaged in the business of placing deposits of third parties if that person receives third party funds and deposits those funds at more than one insured depository institution.

(iii) *Engaged in the business of facilitating the placement of deposits.* A person is engaged in the business of facilitating the placement of deposits of third parties with insured depository institutions, by, while engaged in business, with respect to deposits placed at more than one insured depository institution, engaging in one or more of the following activities:

(A) The person has legal authority, contractual or otherwise, to close the account or move the third party's funds to another insured depository institution;

(B) The person is involved in negotiating or setting rates, fees, terms, or conditions for the deposit account; or

(C) The person engages in matchmaking activities.

(I) A person is engaged in matchmaking activities if the person proposes deposit allocations at, or between, more than one bank based upon both the particular deposit objectives of a specific depositor or depositor's agent, and the particular deposit objectives of specific banks, except in the case of deposits placed by a depositor's agent with a bank affiliated with the depositor's agent. A proposed deposit allocation is based on the particular objectives of:

(i) A depositor or depositor's agent when the person has access to specific financial information of the depositor or depositor's agent and the proposed deposit allocation is based upon such information; and

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(ii) A bank when the person has access to the target deposit-balance objectives of specific banks and the proposed deposit allocation is based upon such information.

(2) *Anti-evasion.* Any attempt by a person to structure a deposit placement arrangement in a way that evades meeting the matchmaking definition in this section, while still playing an ongoing role in providing any function related to matchmaking may, upon a finding by and with written notice from the FDIC, result in the person meeting the matchmaking definition.

(iv) Engaged in the business —A person is engaged in the business of placing, or facilitating the placement of, deposits as described in paragraph (a)(5)(ii) or (iii) of this section, respectively, when that person has a business relationship with third parties, and as part of that relationship, places, or facilitates the placement of, deposits with insured depository institutions on behalf of the third parties.

Under the text of the existing brokered deposits rule, a listing service generally is not deemed to be a “deposit broker.” Subparagraphs (a)(5)(i)(C) & (D) describe arrangements involving underwriting and resale of deposits as principal, and secured lending arrangements, that are very different than the activities of listing services. To invoke Subparagraph (A) “placing deposits,” a person must receive third-party funds and move them to IDIs, which most listing services do not trigger because they never receive depositor funds. A listing service, can, however, send transaction confirmations between the depositor and the IDI without triggering this part of the definition.<sup>20</sup>

Subparagraph (a)(5)(i)(B), “facilitating the placement of deposits” itself has three triggers, (A) “authority to close accounts and move funds,” (B) “negotiating or setting interest rates or deposit terms,” and (C) “matchmaking.” A typical listing service does not trigger clause (A) because it does not have legal authority to move or direct another entity (*e.g.*, the custodial agent) to move the depositor’s funds or close an account (other than as specifically directed on each occurrence by the depositor). Unlike a sweep deposit program, for example, a typical listing service does not have discretion over how to allocate and rebalance customer deposits among IDIs. A typical listing service does not trigger clause (B) because it does not establish or negotiate or seek to influence through discussions with the issuer IDI the rates or terms on the deposits. A listing service, can,

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<sup>20</sup>FDIC, *Questions and Answers Related to Brokered Deposits Rule* (Jul. 15, 2022) Question C; 86 Fed. Reg. 6747-48, 6760 (Jan. 22, 2021).

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however, post rate information provided by participating IDIs without triggering this part of the definition.<sup>21</sup>

This leaves the “matchmaking” provision of clause (C), which in turn has its own further definition that looks to the matchmaker “proposing an allocation of deposits” among IDIs based upon both its knowledge of the target balance objectives of the IDIs and also the specific financial information and objectives of the depositor or its agent, and uses those two sets of information on the prospective counterparties’ deposit objectives together to propose an allocation of deposits among IDIs. A typical listing service does not have access to the issuer IDI’s target deposit-balance objectives (and therefore does not use that information to formulate a proposed allocation) and consequently does not trigger the clause (C) “matchmaker” part of the definition.<sup>22</sup>

As discussed above at pages 8-9, in the 2020 adopting release that accompanied the adoption of this formulation of the “deposit broker” definition, the FDIC coined the term “passive listing service” to mean a listing service that is not a “matchmaker” within the new definition and therefore not a “deposit broker.”<sup>23</sup>

## **II. Public Benefits from Listing Services**

The Spring 2023 banking crisis was triggered by a concentration of deposit balances well above FDIC insurance limits at some IDIs that had focused their deposit gathering efforts on the relatively small number of very large balance depositors within their direct, primarily local, relationship networks. The crisis was neither caused nor exacerbated by accepting deposit balances sourced by listing services. IDIs are limited by the locations of their branches and relationships in gathering deposits directly. Listing services allow IDIs to source depositors from outside of their branch markets, obtain direct relationships with these customers, and increase the percentage of their deposits that consist of balances below FDIC insurance limits. Allowing IDIs to access deposits

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<sup>21</sup>FDIC, *Questions and Answers Related to Brokered Deposits Rule* (Jul. 15, 2022) Question C; 86 Fed. Reg. 6747-48, 6760 (Jan. 22, 2021).

<sup>22</sup>A listing service also may not have knowledge of the specific financial information and objectives of the depositors, other than the obvious point that they normally want to obtain a competitive rate of interest while maintaining balances that do not exceed the standard maximum deposit insurance limit at any one IDI. Notably, however, the person must have access to the specific information and objectives of both the IDI and the depositor and use both to formulate the allocations to be a “matchmaker” deposit broker under clause (C).

<sup>23</sup> 86 Fed. Reg. at 6747, 6760.

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from outside their geographic footprint and diversify their sources of funding is inherently stabilizing.

**A. Listing services do not create the funding instability and run risks that the brokered deposit statute and rule seek to address.**

In addition to not triggering the textual definition of a “deposit broker” under the FDI Act and brokered deposit rule as they have been interpreted and applied by the FDIC for the past thirty years, listing services do not present the IDI funding instability risks at which the statute and rule are directed. In their current form, listing services enable IDIs to advertise their current rates and terms for deposits, alongside other IDIs, as a way to drum up customers they might not be able to reach through their traditional branch network, while providing a set of simple transparent sorting tools that allow the customers of the site to sort through the offered rates and terms and generate for themselves a list of IDIs into which they wish to deposit their cash.

IDIs source a relatively small portion of their funding through listing services. The FFIEC aggregate call report data as of June 30, 2024, shows that most IDIs do not hold listing service deposits, and those that do use listing services to find depositors hold, in aggregate, approximately \$101 billion in listing service deposits (those not reported as brokered deposits),<sup>24</sup> which is well under 1% of the \$17.6 trillion in total deposit balances of US commercial banks.<sup>25</sup>

There should be no financial incentive for a listing service of the sort described above to steer depositors to one IDI or the other. To avoid conflicts of interest and to reduce the risk of steering deposits, compensation should be agnostic to whether or how much cash the customers place with a particular IDI. Unlike some consumer search engines, under a listing service that meets the criteria of the proposed rule, IDIs should not be able to pay the vendor to move their listing to the top of the list or recommend their IDI ahead of other IDIs solely on the basis of compensation paid by the IDI to the listing service. Customers should do their own sifting and sorting using simple

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<sup>24</sup> See FFIEC Call Report Bulk Data as of June 30, 2024, Schedule RC-E, column AN, and Federal Reserve Bank of New York Aggregate Commercial Bank Deposit Data as of June 30, 2024. As part of its 2019 rulemaking proposal, the FDIC had reported that as of September 30, 2018, IDIs held \$69.6 billion in listing service deposits (those not reported as brokered deposits) and that only a quarter of IDIs held listing service deposits. FDIC, *Advance Notice of Proposed Rulemaking*, 84 Fed. Reg. 236, 2369 (Feb. 6, 2019).

<sup>25</sup> See Federal Reserve Bank of St. Louis Economic Data, [Deposits, All Commercial Banks \(DPSACBW027SBOG\) | FRED | St. Louis Fed.](#)

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transparent tools, with the customer's main goal being to get the best rates while keeping their entire deposit balances fully FDIC-insured.

The listing service should not recommend one IDI over another and it should have no discretion to close deposit accounts or unilaterally move funds. It can merely pass on communications and instructions to the IDI from the depositor (with which the IDI has a direct, fully-disclosed relationship).

A typical listing service should not create an allocation of deposits that takes into account the deposit objectives of IDIs. The listing service website instead allows the customer to apply simple, fully transparent sorting criteria selected by client to create a list ranked by the interest rates set by the IDIs themselves. For example, the customer might typically generate a list of IDIs on the site where the client doesn't maintain an existing banking relationship. Further, a client who maintains cash balances in excess of the FDIC insurance limit might desire to establish accounts at multiple IDIs so as to spread their funds across multiple IDIs and remain fully within the FDIC insurance limits. As such, the customer of the site can choose to apply for a direct account relationship with multiple IDIs and, if each IDI agrees to take them on as a customer, establish direct deposit relationships with these multiple IDIs.

This type of listing service effectively allows depositors to take their own self-guided tour of IDIs and make their own decisions about where to establish deposit relationships directly with IDIs. The listing service does not have the ability to steer the customers to particular IDIs or move the money to other IDIs. The listing service does not have the financial incentive to trigger or exacerbate a "run" of depositors from an IDI. In fact, by helping clients establish relationships with multiple IDIs, these listing services can help ensure that client balances do not exceed the FDIC insurance limits at any one IDI, thereby reducing the likelihood of a repeat of the 2023 banking crisis.

The listing services within the current exemption do not know the IDI's funding goals, objectives or limits, and do not negotiate, suggest or set interest rates or terms for IDIs. If an IDI wants to attract more deposits, it needs to offer a competitive market interest rate to site users. While tweaking the "deposit broker" definition to capture listing services and thereby suppress price competition among IDIs for deposits and force consumers to subsidize the banking industry with below-market interest rates may sound laudable to some,<sup>26</sup> that variation on agoraphobia cannot form the basis for a rulemaking. Making an amendment on that basis would be inconsistent with the statutory and judicial

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<sup>26</sup> 89 Fed. Reg. at 68249, 68254.

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framework governing FDIC rulemakings, and would draw the ire of consumer advocates and Congress.

**B. Listing services do not give rise to the risk issues identified by other recent FDIC requests for comment and regulatory initiatives.**

The FDIC has recently published guidance and requests for comments on several sets of risk issues to customers and IDIs associated with a third party intermediating an IDI's customer relationships including (a) information on the risks posed by deposits of various types and amounts;<sup>27</sup> (b) the risks associated with a third party platform that acts as an "aggregation layer" intermediating and processing IDI customer account relationships and payments through omnibus accounts;<sup>28</sup> and (c) anti-money laundering and know-your-customer issues involving intermediating relationships through third parties.<sup>29</sup> These risk and compliance issues are real issues, but are not present in the context of listing services of the sort described above since the typical listing service does not intermediate customer accounts through omnibus accounts or handle customer cash flows, but instead prompts the depositor to establish individual deposit accounts in their own name with the IDI, using their own address, tax ID, and other identifying information to enable banks to comply with the KYC, BSA, and AML requirements. As such, listing services can be the very solution to many of the risk issues that the FDIC has identified.

In the listing service model, each IDI decides on its own whether to accept each individual customer and establishes a direct relationship with each depositor. The IDI is always in direct privity and direct contact with each depositor on a fully-disclosed basis so there is never any doubt about who owns the deposit, nor risk of loss of funds, ownership, or transaction records if the listing service goes bankrupt or its data is frozen or lost. The typical listing service does not maintain depositor records for the IDI, does not have the ability to close accounts for depositors or transfer funds, does not operate omnibus deposits, and is not in in the chain of custody or title for the deposits.

Furthermore, a listing service that helps depositors calculate how to stay within the FDIC limits is inherently stabilizing to IDIs and the financial system. This type of tool results in more stable deposits and depositors that are less likely to flee out of fear of

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<sup>27</sup>FDIC, *Request for Information on Deposits*, 89 Fed. Reg. 63496, 63497 (Aug. 6, 2024).

<sup>28</sup>FDIC, Federal Reserve, OCC, *Request for Information on Bank-Fintech Arrangements Involving Banking Products and Services Distributed to Consumers and Businesses*, 89 Fed. Reg. 61577 (Jul. 31, 2024), and *Joint Statement on Banks' Arrangements with Third Parties to Deliver Bank Deposit Products and Services* (Jul. 25, 2024).

<sup>29</sup>89 Fed. Reg. at 61583; Joint Statement, at 4, 7.

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bank insolvency. It is a vaccine against bank runs, because these balances are fully insured by the FDIC and the depositor and the IDI have a direct relationship. IDIs that list their deposits on listing services that provide this type of tool to depositors receive funding that is more stable and not subject to the same run risk as occurred in the Spring of 2023.

In contrast, IDIs receive less stable deposit funding when they obtain brokered deposits intermediated by a broker or administrator with discretion to move customer deposits among IDIs. Such a broker or program administrator has the ability and a strong financial incentive to pull all deposits from an IDI (or recommend to clients that they pull deposits from an IDI) that is experiencing financial issues, thereby creating or exacerbating the liquidity issues at the IDI and pushing it towards insolvency.

### **C. Listing services benefit consumers and enhance competition among IDIs**

In the FDIC's 2011 Brokered Deposits Study, the FDIC recognized the benefits to consumers and IDIs provided by listing services:

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 type . . . .<sup>30</sup>

Increased concentration in the banking industry has been viewed by the FDIC, the Administration and the CFPB as potentially harmful to consumers and the economy by limiting choice by customers and competition among banks for their business. The problem is particularly acute for small and rural communities.<sup>31</sup> Competitive analysis of the banking industry presumes the market for deposits is primarily local. Limiting the exclusion of listing services from the definition of deposit brokers would make it more difficult for consumers to find IDIs outside their local markets and make deposits with those IDIs. Such a change would reduce interest rate competition among IDIs and harm consumers.

The 2023 banking crisis was fueled by deposit concentrations well above FDIC insurance limits at some IDIs that had focused their deposit gathering efforts on the relatively small number of very large balance depositors within their direct, primarily

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<sup>30</sup>FDIC 2011 Brokered Deposits Study at 19.

<sup>31</sup>FDIC, Final Statement on Bank Merger Transactions, 89 Fed. Reg. at 79125 (Sep. 27, 2024).



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local, relationship networks. The crisis was neither caused nor exacerbated by accepting deposit balances sourced by listing services. IDIs have historically been constrained by their geographic footprints and relationships on how many deposits they can gather directly. Listing services allow IDIs to advertise and reach depositors outside of their branch footprint market and increase the percentage of their deposits that consist of balances below FDIC insurance limits. The ability for IDIs to access deposits from outside their geographic footprint and diversify their sources of funding is inherently stabilizing.

#### **D. Listing services provide funding to small banks, small businesses and small towns**

Among the comments submitted in the current rulemaking docket are many from banks in small towns, and the small businesses and communities that those banks finance. Those commentors make the point that access to new sources of deposits is very important to those small banks, communities and businesses.<sup>32</sup> Overtightening of the requirements that allow those small banks to access new funding sources will harm these communities and businesses. Listing services are a simple way that depositors from outside these small towns can connect directly with small town banks and provide a stable source of fully-insured deposit funding that is needed by those banks to serve their communities and small business customers.

### **III. The FDIC's Proposed Language and its Impact on Listing Services**

For the most part, the FDIC's proposed changes would have no impact on listing services, because a listing service normally does not conduct the functions or bear the hallmarks of a "deposit broker" as defined in the proposed modified rule.<sup>33</sup> For example, listing services generally do not:

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<sup>32</sup> See, e.g., Comment Letters of John Miller on behalf of Summit National Bank (Sep. 4, 2024); Jason Giannelli Sep. 4, 2024); Matthew Espenshade on behalf of the Pennsylvania State Grange (Aug. 28, 2024); Jon Althoff, on behalf of the Dakota County Minnesota Regional Chamber of Commerce (2024); Christian R. Herr on behalf of PennAg Industries Association (Sep. 14, 2024); Julian Cañete on behalf of the California Hispanic Chambers of Commerce (Sep. 20, 2024); Elise Oliver on behalf of the California Apple Commission (Sep.24, 2024); Patti McLaughlin on behalf of The Bank of Landisburg (undated, 2024); Joshua Henne, Whitehorse Strategies (Sep. 26, 2024); Marc Collazzo, Fishtown Business Improvement District (Sep. 23, 2024); Michael Gordon, Tendon Manufacturing (Sep. 30, 2024); Peter Bochnovich, CEO of The Dime Bank in Northeast Pennsylvania (Oct. 2, 2024); Sandy Cajas, CEO of the Regional Hispanic Chamber of Commerce (undated, 2024); James . Stoner, Welch State Bank (Oct. 16, 2024) in FDIC Comment Docket No. RIN 3064-AF-99 (2024).

<sup>33</sup> 89 Fed. Reg. at 68251, 68252.

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- Receive third-party funds and deposit those funds at one or more IDIs;
- Have legal authority, contractual or otherwise, to close the account or move the third party's funds to another IDI (other than as specifically directed by the depositor);
- Negotiate or set rates, fees, terms, or conditions for the deposit account;
- Determine (on a discretionary basis) deposit allocations at one or more IDIs; or
- Receive fees or other remuneration from the IDI that are based on the placement of deposits or the amount of deposits placed (*i.e.*, no deposit transaction or balance related or success-based compensation and no payments or compensation by IDIs for their deposits to appear first in a list).

Among the elements of the FDIC's proposal, however, is one that is potentially problematic for listing services. The FDIC has proposed to define as a "deposit broker" any person that "proposes or determines deposit allocations at one or more IDIs (including through operating or using an algorithm, or any other program or technology that is functionally similar)."<sup>34</sup> The FDIC expresses the view that this function

indicates a third party is facilitating the placement of customer deposits—proposing or determining deposit allocations of third-party deposits. The proposal would specify that a "deposit broker" includes a person who proposes or determines deposit allocations, including through the operation or use of an algorithm or functionally similar program or technology. The FDIC views this conduct as objectively within the "deposit broker" definition if the algorithm or functionally similar program or technology proposes or determines deposit allocations among IDIs by directing the flow, or facilitating the flow, of third-party funds to be deposited at a particular IDI.<sup>35</sup>

As part of that change, the FDIC also proposes to remove the "matchmaker" clause and its internal definition of the phrase "proposes an allocation of deposits" from the text of the current rule. The proposed new language and the removal of the internal definitions as part of the current "matchmaker" clause creates an ambiguity on the status of listing services that have the features approved by the FDIC since 2004. Those

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<sup>34</sup> 89 Fed. Reg. at 68252.

<sup>35</sup> 89 Fed. Reg. at 68252.

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matchmaker internal definitions also provided meaning to the otherwise undefined term “passive listing service” used in the FDIC’s adopting release which accompanied the 2020 amendments to the brokered deposits rule. The phrase “passive listing service” appears again without its moorings in the FDIC’s current proposing release.

In making this proposed change, the FDIC states its view that it will not affect “passive listing services.”

*“Passive Listing Services.* Under the proposed rule, it is the FDIC’s view that a passive listing service that only advertises information on interest rates offered by IDIs on deposit products would not meet the “deposit broker” definition. It is the FDIC’s understanding that such passive listing services do not receive or deposit third-party funds at one or more IDIs nor have the legal authority to close a deposit account or move third party’s funds to another IDI. Any funds to be invested in deposit accounts are remitted directly by the depositor to the IDI and not, directly or indirectly, by or through the passive listing service. In addition, such passive listing services are not involved in negotiating or setting rates, fees, terms, or conditions for the deposit account. Further, passive listing services do not propose, allocate, facilitate, or determine deposit allocations. Rather, the passive listing services are simply providing information on the interest rates offered by various IDIs but not directing depositors to a particular IDI. Lastly, the FDIC believes that any fees paid to passive listing services are not in exchange for or related to the placement of deposits. Instead, passive listing services receive subscription fees paid by subscribers for information on the rates gathered by the listing service and listing fees paid by IDIs for the opportunity to list or “post” the IDIs’ rates.”

Although we agree with the sentiment of this statement, it fails to address whether the word “algorithm” as used in the proposed rule is intended to include the simple sorting, ranking and communications tools that are available for depositors to use on listing services as described in detail in twenty years of FDIC precedents. We assume, consistent with the text of the FDIC’s current rule and 20 years of interpretations that the FDIC intends the modern colloquial “black box” understanding of what the word “algorithm” means, rather than its full historical meaning. Simply because a listing service helps clients with basic math, does not mean that the listing service controls deposit flows. So long as the individual depositor remains in control of how they allocate their funds, such listing service should not be considered to be a “deposit broker.”

The term “algorithm” is not defined in the proposed rule or the proposing release. The word is commonly used today to mean a complex proprietary computer analytics

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package for crunching massive amounts of data and spitting out recommendations. We expect this “black box” computation package is what is intended by the word “algorithm” in the FDIC proposal. If that is the meaning of the word “algorithm” intended by the FDIC, it would be helpful to make that very clear.

The word “algorithm” predates computers by a thousand years, is drawn from Arabic, Persian and Indian mathematical antecedents and found its way into modern English through Middle French and Middle English terms used in mathematics.<sup>36</sup> “Algorithm” has the same source as “algebra” and is drawn from the name of the 9<sup>th</sup> Century Persian mathematician, Muhammad ibn Mūsa al-Ḳwārizmī. It essentially means calculations using numbers that include a zero and nine Arabic numerals.<sup>37</sup>

Technically, “[a]n algorithm is a set of instructions that is designed to accomplish a task. Algorithms usually take one or more inputs, run them systematically through a series of steps, and provide one or more outputs.”<sup>38</sup> Over the past few decades with the ever-increasing presence computers in our daily lives, however, the word “algorithm” has been used far more frequently,<sup>39</sup> and its most commonly understood popular meaning is to refer to complex, proprietary “black box” computer analytics packages that make decisions and recommendations using non-transparent inputs and criteria. Indeed, this is how the term “algorithm” is used in Section 1033 of the Dodd-Frank Act and in various pronouncements of the CFPB.<sup>40</sup>

In current usage, “[a]lgorithms are typically associated with computing and are an essential element of computer programming. Algorithms can be used to accomplish a

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<sup>36</sup> Oxford Languages Online definition and etymology for “algorithm” (accessed Sep. 26, 2024).

<sup>37</sup> Meriam Webster’s Third International Dictionary (1961). The word “algebra” is derived from the title of al-Ḳwārizmī’s treatise *Hisab al-jabr w'al-muqabala*.

<sup>38</sup> National Library of Medicine, Online Glossary, <https://www.nlm.gov/guides/data-glossary/algorithm>.

<sup>39</sup> Oxford Languages Online definition and etymology for “algorithm” (accessed Sep. 26, 2024).

<sup>40</sup> 12 U.S.C. 5533(b)(1) (using the term “algorithm” to represent a type of “confidential commercial information” with the example of “an algorithm used to derive credit scores or other risk scores or predictors”). *See also*, CFPB use of this meaning of the term “algorithm” in its interpretations of Regulation B (“Some creditors may make credit decisions based on certain complex algorithms, sometimes referred to as uninterpretable or “black-box” models, that make it difficult—if not impossible—to accurately identify the specific reasons for denying credit or taking other adverse actions... Creditors who use complex algorithms, including artificial intelligence or machine learning, in any aspect of their credit decisions must still provide a notice that discloses the specific principal reasons for taking an adverse action. Whether a creditor is using a sophisticated machine learning algorithm or more conventional methods to evaluate an application, the legal requirement is the same: Creditors must be able to provide applicants against whom adverse action is taken with an accurate statement of reasons” for their credit denial”). CFPB, *Consumer Financial Protection Circular 2022-03* (May 26, 2022).

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variety of computational tasks, such as performing calculations or finding information in databases... [and] many algorithms used by companies are closely guarded secrets, blocking users from seeing exactly how they work.”<sup>41</sup>

Despite its modern connotations, the full meaning of the term “algorithm” is very broad and includes everyday tools and processes such as cooking recipes, approaches to sorting papers, the logic of traffic signals and bus schedules, as well as various search engines and online shopping functions.<sup>42</sup> “Algorithms can be created and used outside of computer programming .... They can be executed manually by people or executed automatically by machines: consider performing long division manually on paper versus using a calculator to do the same operation.”<sup>43</sup>

Some algorithms are rote applications of simple transparent ordering rules applied by the user, and do not involve rocket science. Others are highly proprietary, not transparent and are essentially black boxes that create output whose ontology is not readily apparent to the user. Only the latter category of algorithm allows for potential steering and herding of depositors by the vendor and gives rise to the hot money and run risk issues underlying the brokered deposits rule.

The risk of an algorithm is not the existence of software itself — the risk is what that particular software is programmed to do. If software is simply conveying information and helping potential depositors sort through it on their own using objective transparent criteria in a process the depositor controls, as listing services have long done, that should not invoke “deposit broker” status. If, however, the software is opaque – a black box - and allows the operator to steer and herd depositors into and out of IDIs, that could pose a funding risk to IDIs that access depositors through this type of service provider.

The FDIC should reaffirm the current status of “passive” listing services as not being “deposit brokers” and abandon or refine the new “algorithm” trigger. The term “algorithm” should be defined so as to exclude non-discretionary / fully transparent information and communications tools with no deposit balance or transaction-based compensation from IDIs, where the simple sorting criteria in the tools are controlled by the depositor and not based on the needs or objectives of the IDI or the listing service. This type of tool simply allows a customer to see available IDIs, keep deposits in each IDI below FDIC insurance limits, and sort them based on the depositor’s own selected

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<sup>41</sup> National Library of Medicine, Online Glossary, <https://www.nlm.gov/guides/data-glossary/algorithm>.

<sup>42</sup> Invisibly, *10 Algorithm Examples in Everyday Life* (posted Dec. 8, 2021) <https://www.invisibly.com/learn-blog/algorithm-examples-everyday-life/>.

<sup>43</sup> National Library of Medicine, Online Glossary, <https://www.nlm.gov/guides/data-glossary/algorithm>.

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criteria. The tool simply applies the objective sorting criteria selected by the customer to the IDIs who choose to list deposits with the service. In this context the resultant calculation is not a recommendation or advice, and the listing service has no discretion or decision-making authority. Any limited “POA” agency authority of the listing service is simply to convey information back and forth between the IDI and the consumer (what the FDIC has historically called “trade confirmations”) without the listing service itself transferring money or standing in the chain of custody of any deposits or funds.

In addition to clarifying the intended meaning of the word “algorithm” it also would be important to clarify the intent of the phrase “proposes... a deposit allocation” to exclude lists generated using simple tools based upon depositors’ inputs that allow for transparent sorting and ranking of deposits available IDIs that choose to list on the service. Furthermore, it would be important to clarify that the terms “placement” and “facilitating” in the amended rule are not intended to capture “passive” listing services that do not trigger the criteria in subsections (a)(5)(ii)(A)-(C) and (E) of the proposed amended rule relating to receiving and depositing customer funds, control over closing accounts and funds transfers, negotiating and setting rates and terms of deposits, and compensation.

The FDIC proposal would also amend the current rule to include in the definition of “deposit broker” an agent retained and compensated by the depositor. The proposing release does not discuss the reason for this change, discuss the benefits and costs of the change or otherwise provide a basis for it or specifically request comment on this aspect of the proposal. When the agent is retained and compensated by the depositor there are not the same types of conflicts of interest and steering risk that the current rule addresses where the IDI retains and compensates the agent. We therefore suggest that this change not be included in the final rule.

A change to the treatment of listing services in the rule is not required by the statutory text, the relevant portion of which has remained unchanged for over three decades. Nor is such a change supported by the events of Spring 2023 or any other information in the administrative record. In the Proposing Release, the FDIC does not state an intent to change the treatment of listing services or provide a basis for such a change.

In the next section we suggest language to add to the proposed amended rule to clarify that the amended rule does not change the long-standing status of listing services as outside the definition of “deposit broker.” Our suggested language draws from the language of the “matchmaker” definition in the current rule (which the FDIC proposal would otherwise delete) and the substance of the FDIC’s interpretations of what

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characteristics of a listing service place it outside of the definition of “deposit broker.” In the next section we also suggest that the adopting release which accompanies the final rule clarify that a “passive” listing service is one that does not trigger the definition of “deposit broker” in the modified text of the amended rule.

#### **IV. Suggested Revisions to Proposed Amended Rule Language and Proposing Release Description of “Passive” Listing Services**

Our suggested revisions borrow language from the definition of “matchmaking activities” in the current rule to define “proposes an allocation of deposits,” and include in the text of the rule and the adopting release the substance of prior FDIC interpretations of the status of listing services that were incorporated into the 2020 amendments. Our suggested language (both additional language, and one deletion marked with a strike-through) is set forth in bold italics as a suggested revision to the FDIC’s proposed amended language (which is shown below not in bold and not italics) in the definition “deposit broker”):

##### **§ 337.6 Brokered deposits.**

(a)(5) *Deposit broker*, as used in this section and § 337.7:

(i) *Definition*. The term “deposit broker” means:

(A) Any person engaged in the business of placing or facilitating the placement of deposits of third parties with insured depository institutions;

(B) Any person engaged in the business of placing deposits with insured depository institutions for the purpose of selling those deposits or interests in those deposits to third parties; and

(C) An agent or trustee who establishes a deposit account to facilitate a business arrangement with an insured depository institution to use the proceeds of the account to fund a prearranged loan.

(ii) Engaged in the business of placing or facilitating the placement of deposits.

A person is engaged in the business of placing or facilitating the placement of deposits of third parties if that person engages in one or more of the following activities:

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(A) The person receives third-party funds and deposits those funds at one or more insured depository institutions;

(B) The person has legal authority, contractual or otherwise, to close the account or move funds of the third party to another insured depository institution;

(C) The person is involved in negotiating or setting rates, fees, terms, or conditions for the deposit account;

(D) The person proposes or determines deposit allocations at one or more insured depository institutions (including through operating or using an algorithm, or any other program or technology that is functionally similar); or

(E) The person has a relationship or arrangement with an insured depository institution or customer where the insured depository institution [~~or the customer~~] pays the person a fee or provides other remuneration in exchange for deposits being placed at one or more insured depository institution.

**(iii) *Determines Deposit Allocations.***

*A person “determines deposit allocations at one or more insured depository institutions” if the person has unilateral discretion on the insured depository institutions into which deposits will be made or the amounts to be deposited in the selected depository institutions.*

**(iv) *Proposes Deposit Allocations.***

*A person “proposes deposit allocations” at one or more insured depository institutions if the person recommends an allocation of deposits at insured depository institutions based upon both the particular deposit objectives of a specific depositor or depositor's agent, and the particular deposit objectives of specific insured depository institutions. A proposed deposit allocation is based on the particular objectives of:*

*(A) A depositor or depositor's agent when the person has access to specific financial information of the depositor or depositor's agent and the proposed deposit allocation is based upon such information; and*

*(B) An insured depository institution when the person has access to the target deposit-balance objectives of specific insured depository institutions and the proposed deposit allocation is based upon such information.*



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***(v) Transparent Tools and Processes Controlled by Depositors.***

***A person “proposes or determines an allocation of deposits at insured depository institutions through operating or using an algorithm, or any other program or technology that is functionally similar” if the person uses or makes available software, a website or similar technology that produces a list of insured depository institutions and amounts to be deposited in each that uses inputs, factors and considerations that are not fully transparent to the depositor and not subject to control by the depositor. Where the software, website or similar technology allows the depositor to generate a list of insured depository institutions from among those institutions that have listed their deposits on the service and amounts to be deposited in each using fully transparent inputs and criteria such as rank-ordering by interest rates, locations, the ability of the depositor to exclude specified institutions from the list, and dollar caps at each institution set by the depositor or as a default setting at the standard maximum deposit insurance limit, the depositor, and not the person providing the software, website or technology, is deemed to propose or determine the allocation of deposits.***

(vi) Anti-evasion. A person that structures a deposit placement arrangement in a way that evades meeting the “deposit broker” definition in this section, including a structure involving more than one person engaged in activities that result in placing or facilitating the placement of third-party deposits, while still playing an ongoing role in placing or facilitating the placement of third-party deposits or providing any function related to the placement or facilitating the placement of third-party deposits, may, upon a finding by and with written notice from the FDIC, result in the person meeting the “deposit broker” definition.

As discussed above in Section III, the text of the FDIC’s proposing release has used the undefined word “passive” before “listing service” in indicating that “passive listing services” generally do not trigger the definition of “deposit broker.”<sup>44</sup> As noted above, the FDIC used the term “passive listing service” in its 2020 adopting release that accompanied the final rule to mean a listing service that is not a “matchmaker” within the definition and did not trigger other parts of the definition and therefore not a “deposit broker.”<sup>45</sup> Instead of leaving the meaning undefined, it would be more appropriate to retain in the amended definition the criteria from the current “matchmaker” clause (which itself is a distillation of 30 years of FDIC interpretations on the status of listing services)

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<sup>44</sup> Proposing Release, 89 Fed. Reg. at 68252

<sup>45</sup> 86 Fed. Reg. at 6747, 6760.

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as we have suggested above, and specify in the adopting release that a "passive listing service" is one that does not trigger the definitional elements of a "deposit broker" in the rule. We believe this is what the FDIC intends by use of the word, but it would be appropriate to remove any uncertainty from the meaning.

We expect that the FDIC does not intend its new language to capture the sorts of simple tools that have long been available to depositors on listing service websites such as those described in FDIC Advisory Opinion 04-04 (Jul. 28, 2004) and as permitted under the language of the current rule and the FDIC's 2022 brokered deposits FAQs. We assume instead that the FDIC intends the new language to capture only black-box non-transparent complex proprietary engines that spit out allocation recommendations and determinations using complex inputs not controlled and understood by the depositor. Without clarification, the proposed change to the exclusion for listing services could potentially be viewed as treating a range of on-line listing services and commercially-available spreadsheet software as "deposit brokers" because they allow depositors to sort and rank available IDI deposits according to simple criteria selected by the depositors.

We therefore respectfully suggest that the terms "algorithm," "propose....a deposit allocation," "placement" and "passive listing service" be clarified by including our suggested additional language in the amended text and clarifying in the adopting release that a "passive listing service" is one that does not trigger the criteria in the new text (as revised to include our suggested additional language), so that that the amended rule does not capture listing services that include communications features and software or spreadsheet tools that allow the depositor to sort and rank listed IDI deposits according to simple, transparent criteria selected by the depositor, such as interest rates, maximum amount of deposit in any one IDI, IDI location, and exclusions for IDIs that the customer does not want to consider (for example, the primary IDI already used by the depositor which may already be near or in excess of FDIC coverage limits, or IDIs with which the depositor has had past negative experiences).

On the other hand, if the FDIC does intend to treat listing services that provide only the functions allowed under the current rule and two decades of FDIC interpretations, then as discussed in the next section, the FDIC needs to clearly so state, request public comments on that change in status for listing services, and build an administrative record to support that change. It has not yet done so.

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## V. Administrative Law Issues With Proposing Release

### A. Cost/benefit, economic efficiency and competition analysis.

If the FDIC intends to wash away 20 years of its rulemakings and published precedents to capture as “deposit brokers” any “passive” listing service that makes available to depositors these simple communications, sorting and ranking tools, it must first clearly state that intended change and the reason for the change, request public comments on the proposal and address those comments in meaningful way,<sup>46</sup> weigh the costs and benefits, and establish a need for the change.<sup>47</sup>

Designation of deposits as “brokered” carries a stigma with examiners and securities analysts<sup>48</sup> and imposes very real costs on consumers (more costs, barriers and time spent accessing deposits at competitive rates below FDIC coverage limits and higher costs associated with intermediaries taking a ‘scrape’, resulting in less competitive net rates to the depositor), banks (higher funding costs from capital charges, FDIC insurance premiums, and less access to new customers and out-of-branch-footprint funding sources and, for large banks, higher liquidity rule requirements)<sup>49</sup> and on the economy as a whole (less competition among banks, more reliance on expensive fixed-cost branch networks and less efficient allocation of funding among banks). When a category of deposits is reclassified as “brokered,” these costs and stigma cause banks to reduce their use of them, which cuts directly against public policy goals of easing consumer access to deposit information through third parties,<sup>50</sup> enhancing competition among banks and avoiding

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<sup>46</sup> *Ohio v. EPA*, 603 U.S. 279, 144 S. Ct. 2040 (2024).

<sup>47</sup> Administrative Procedure Act, 5 U.S.C. 553, 706; *Michigan v. EPA*, 576 U.S. 743 (2015). A legal determination of the meaning of the statutory term “deposit broker” is subject to review by in federal court under the reduced deference standards recently established by the Supreme Court in *Loper Bright Enterprises v. Raimondo*. 603 U.S. \_\_\_, 144 S. Ct. 2244 (2024).

<sup>48</sup> Non-brokered deposits invite less criticism from examiners and securities analysts over the stability of the IDI’s funding sources, *See* 89 Fed. Reg. 68244-68247, 68260, 68263.

<sup>49</sup> 12 C.F.R. §§ 50, 249, 329; FDIC, *Deposit Insurance Assessment and Rates*,

<https://www.fdic.gov/resources/deposit-insurance/deposit-insurance-fund/dif-assessments.html>; 89 Fed. Reg. 68244-68247, 68260, 68263. In addition, recently-chartered IDIs, and IDIs that are less than “well capitalized,” generally are not permitted to accept brokered deposits without a special FDIC waiver.

<sup>50</sup> *See* Section 1033 of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010, Public Law 111-203, tit. X, 124 Stat. 1955 (codified at 12 U.S.C. 5533; CFPB Press Release, *CFPB Proposes Rule to Jumpstart Competition and Accelerate Shift to Open Banking* (Oct. 19, 2023) (CFPB’s proposed Personal Financial Data Rights rule would challenge industry to compete for customers, protect consumers from excessive surveillance, and help people walk away from bad service); 12 CFR 1033.

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more concentration in the industry,<sup>51</sup> and diversifying funding sources to attract deposit balances below FDIC coverage limits.<sup>52</sup> Before imposing these significant costs and economic inefficiencies on the public through a final rule, the precise problem should be carefully defined and evaluated and the rule carefully tailored by the FDIC to address that problem.

A change to the treatment of listing services is not justified by the 2023 banking crisis or any threat to bank stability.<sup>53</sup> Whatever else can be said about the 2023 banking crisis, it was not caused by listing services. Quite the contrary, the 2023 banking crisis was caused largely by concentrations of uninsured deposits and lack of funding diversification at some IDIs. Rather than enhancing the stability of bank deposit funding, the proposed changes to the treatment of listing services will instead reduce the ability of IDIs to expand their sources of stable, fully-insured deposits and thereby negatively impact the stability of IDI deposit funding. In addition, the proposed change to the treatment of listing services is harmful to consumers, and anti-competitive.

A mandatory component of any “reasonable” administrative rulemaking process is a robust economic analysis of the impact of the rule on the public (consumers and

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<sup>51</sup>FDIC, *Final Statement of Policy on Bank Merger Transactions* (RIN 3064-ZA31), 89 Fed. Reg. 79125 (Sep. 27, 2024); OCC, *Final Rule: Business Combinations Under the Bank Merger Act*, 89 Fed. Reg. 78207 (Sep. 25, 2024); U.S. Dep’t of Justice, Press Release: *Department of Justice Withdraws from 1995 Bank Merger Guidelines* (Sep. 17, 2024); Office of Senator Elizabeth Warren, Press Release: *Senator Warren Urges Financial Regulators to Promote Greater Competition in Banking, Strengthen Bank Merger Review Guidelines* (Jun. 27, 2023).

<sup>52</sup>See materials cited below in fn 53.

<sup>53</sup>Although the proposal is premised on the concept that brokered deposits were responsible for the “runs” on banks in the Spring of 2023, see 89 Fed. Reg. at 68245, 68261, the reports of the FDIC, Federal Reserve and FSOC make very clear that the culprits were excessive concentrations of deposits well above FDIC deposit insurance limits from a relatively small number of commercial depositors to fund long term fixed rate loans and government securities, together with a sudden, unanticipated five hundred basis points interest rate hike by the Federal Reserve to combat inflation. See FDIC, *Request for Information on Deposits*, 89 Fed. Reg. 63496, 63497 (Aug. 6, 2024); Office of the Inspector General of the Board of Governors of the Federal Reserve System and the Consumer Financial Protection Bureau, *Material Loss Review of Silicon Valley Bank, 2023–SR–B–013* (Sep. 25, 2023); Office of the Inspector General of the Federal Deposit Insurance Corporation, *Material Loss Review of Signature Bank of New York*, EVAL–24–02, October 2023; Office of the Inspector General of the Federal Deposit Insurance Corporation, *Material Loss Review of First Republic Bank*, EVAL–24–03, November 2023; FDIC, *FDIC’s Supervision of First Republic Bank*, (Sep. 8, 2023); Financial Stability Oversight Council *2023 Annual Report* at 7, 50, 58. Brokered deposits in amounts below the FDIC insurance limits were, if anything, a stabilizing factor on bank funding in 2023.

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industry as well as the general economy), and its effect on competition and efficiency.<sup>54</sup> This is particularly true of financial regulations.

Surprisingly, the word “competitive” does not appear anywhere in the proposal or the accompanying release. The word “competition” appears twice, but in a negative context indicating that competition in price of deposits is a bad thing.<sup>55</sup> Competitive analysis of the banking industry is based on the premise that the market for deposits is primarily local, not national. For banks, the Herfindahl–Hirschman Index (“HHI”), a measure of market concentration, is calculated based on the banks’ market shares in the local market.<sup>56</sup> Unlike other banking products and services, such as commercial lending, home mortgages, credit cards and large-ticket commercial leasing which operate in national markets, the competitive market for deposits under this rubric remains stubbornly local.<sup>57</sup> This seems divorced from reality, in which many products (including online bank accounts) are purchased through digital channels on a national stage. A change to the FDIC’s brokered deposits rule that makes it more difficult for consumers to find and make their deposit with IDIs outside of the consumer’s home market would compound the problem. Limiting the exclusion of listing services would reduce price competition among IDIs for out-of-market depositors and would harm consumers. This type of harm cannot be justified unless the change is necessary to address an actual problem and will be effective in addressing that problem. There is nothing in the record to indicate that listing services are creating or exacerbating funding risks at IDIs.

Similarly, the words “efficient” and “efficiency” do not appear in the FDIC’s proposal or accompanying release at all. This approach to rulemaking is anti-consumer and anti-efficiency, as well as arbitrary and capricious. The FDIC proposal contains no discussion of the impact of the proposed rulemaking on interest rates paid to consumers, and only mentions in passing that consumers might change their behaviors and interaction with IDIs and third parties as a result of the rule if adopted in final as is. As a mandatory part of a rational administrative rulemaking process,<sup>58</sup> the FDIC is required to conduct an analysis and estimate the cost to consumers from lower interest rates paid for the use of their cash in IDI deposits that could result from the proposed rule.

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<sup>54</sup> *Michigan v. EPA*, 576 U.S. 743, 752-53 (2015).

<sup>55</sup> 89 Fed. Reg. at 68249, 68254.

<sup>56</sup> See, e.g., Federal Reserve, *Provident Financial Services, Inc. Jersey City, New Jersey*, FRB Order No. 2024-02 (April 11, 2024) at pp 4-6 (approving merger of two bank holding companies and detailing use of local market HHI calculations to assess impact of the merger on competition); Federal Reserve Bank of St. Louis, *The ABCs of HHI: Competition and Community Banks* (Jun. 11, 2018).

<sup>57</sup> See, e.g., J. DiSalvo, Federal Reserve Bank of Philadelphia Banking Trends, *Has the Banking Industry Become Too Concentrated?* (Q.1, 2023).

<sup>58</sup> *Michigan v. EPA*, *supra*.

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## **B. Impact on small businesses that operate listing services or borrow from IDIs that use listing services**

We also note that the proposed amendment would impose a significant burden on small businesses that operate listing services. We therefore suggest that in addition to clarifying that simple transparent ranking tools used by depositors of a listing service are not an “algorithm” that “proposes an allocation” of deposits among IDIs, and that the listing service is thus not a “deposit broker” if it includes these simple tools, we also request that the FDIC create an exception for small businesses (as defined in the rules of the Small Business Administration, “SBA”),<sup>59</sup> that operate listing services or that use listing services to find IDIs for their deposits. The proposing release mentions but summarily dismisses the impact of the proposal on small banks, but makes no mention of the impact on small businesses that operate listing services or small businesses that utilize listing services to find IDIs to accept their deposits. To meet the requirements of the Regulatory Flexibility Act,<sup>60</sup> the FDIC must analyze the impact on other small businesses beyond IDIs and solicit and consider comments on the impact of the proposed regulation not only on IDIs, but also on listing services and users of listing services that are small entities, including small businesses as defined in SBA rules.

## **Conclusion**

The final rule should not treat a listing service as a “deposit broker” simply because it includes a simple, transparent, non-discretionary ranking or sorting process that allows the customer to sort and rank available IDI deposits by such factors as best interest rates, location, and maximum amount (typically the standard maximum insurance amount) per IDI. This type of program allows the customer to create an output list of IDIs and amounts to be deposited in each using transparent criteria, but does not allow the listing service to steer the customer or exercise discretion or move customer funds among the IDIs. It does not present the types of issues and risks that would allow it to move or steer customers to and from certain IDIs at the discretion of an intermediary, which is the main risk that the deposit brokerage statute and rules are intended to address. Instead, such program is a simple tool that a customer can use as a convenience to make their own choices on where to deposit their money. Unlike some commercial search engines, there is no black box or secret sauce to the output, no behind-the-scenes payments by sponsors to rank their deposits ahead of others. The simple act of helping a customer do their own

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<sup>59</sup>13 C.F.R. § 121.201.

<sup>60</sup> 5 U.S.C. §§ 601 *et seq.*

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math should not, in and of itself, constitute a deposit brokering activity, just as a calculator is a useful tool but does not in-and-of-itself make purchase decisions.

The FDIC in the final rule should keep the current treatment of listing services and reaffirm their status remains as it was under the current rule by refining the phrase so as not to capture non-discretionary, transparent tools that allow the customer to set simple parameters to create an ordered and ranked list of deposit balances in the IDIs that are listed on the listing service. Our suggested additional language set out above at pages 22-25 of this letter would clarify the definition so as to retain the current treatment of listing services.

Respectfully submitted,

/s/ David F. Freeman, Jr.

David F. Freeman, Jr.