

April 3, 2009

Debbie Walker
Director of Regulatory and Compliance
QwickRate
1350 Church Street Ext., NE
Suite 200
Marietta, GA 30060

Dear Ms. Walker:

You have requested advice about the assessment rule recently adopted by the FDIC. This rule became effective on April 1, 2009. See 74 Fed. Reg. 9525 (March 4, 2009). Specifically, you have asked whether this rule changed the definition of a "brokered deposit."

The answer is no. Under the new rule, certain brokered deposits (known as "reciprocal deposits") are treated differently than other brokered deposits for assessment purposes. See 12 C.F.R. Part 327. Nothing in the new rule, however, provides that any brokered deposits shall cease to be "brokered deposits." Thus, the new assessment rule does not change the restrictions on the acceptance of "brokered deposits" by insured depository institutions that are less than well capitalized. See 12 U.S.C. § 1831f; 12 C.F.R. § 337.6.

In your letter, you presented the following specific question: "Can financial institutions who are generating deposits on a direct basis through the QwickRate marketplace continue to classify those deposits as 'non brokered' provided that QwickRate is in compliance with the criteria established by the FDIC in FDIC Advisory Opinion No. 04-04 and the institution, if it is less than well capitalized, abides by the interest rate restrictions put forth in 12 CFR Part 337?"

The answer is yes. In FDIC Advisory Opinion No. 04-04 (July 28, 2004), the FDIC staff set forth certain criteria for determining when a "listing service" (such as QwickRate) shall not be treated as a "deposit broker." The criteria or requirements set forth in Advisory Opinion No. 04-04 remain valid. Therefore, assuming the satisfaction of these

requirements, QwickRate will not be classified as a "deposit broker" and the deposits will not be "brokered deposits." Of course, this conclusion assumes that QwickRate is the only third party facilitating the placement of the owners' deposits at the insured depository institutions. If some other third party is involved in the process, the deposits could be "brokered deposits" despite the fact that QwickRate itself is not a "deposit broker." The issue would depend on whether the other third party is a "deposit broker."

In your letter, you also presented the following question: "Will 'non-brokered' deposits generated through QwickRate be excluded from the calculation of the adjusted brokered deposit ratio for the purposes of 12 CFR Part 327?"

The answer is yes. The "adjusted brokered deposit ratio" applies solely to "brokered deposits." It does not apply to non-brokered deposits, including non-brokered deposits placed at insured depository institutions through a service such as QwickRate.

For your convenience, the FDIC's criteria for determining when a "listing service" shall not be treated as a "deposit broker" are set forth in detail below.

The FDIC's Criteria

A "listing service" is a company that compiles information about the interest rates offered on certificates of deposit ("CDs") by insured depository institutions. 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. . . ." 12 U.S.C. § 1831f(g)(1)(A); 12 C.F.R. § 337.6(a)(5)(i)(A). In other words, a "listing service" is a compiler of information about deposits whereas a "deposit broker" is a facilitator in the placement of deposits.

Of course, a particular company could be a "listing service" (compiling information about CDs) as well as a "deposit broker" (facilitating the placement of CDs). In fact, the FDIC staff has set forth criteria for determining when a "listing service" qualifies as a "deposit broker." The development of these criteria began in 1990 with Advisory Opinion No. 90-24 (June 12, 1990). That opinion involved "a computerized rate listing service for jumbo CD issuers" that "link[ed] thousands of potential buyers and sellers of CD's together." The service charged a monthly subscription fee; it did not charge any

transaction fees. Indeed, the service was not involved in any transactions. In determining that the "listing service" was not a "deposit broker," the FDIC staff reasoned as follows:

In our opinion, [the Company] 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 Company] 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*. . . . [E]ven if the only payment received by [the Company] came from its subscribers as subscription fees, if [the Company] were involved in placing the deposits -- for instance, if customers seeking to place deposits gave [the Company] their names and other pertinent information and [the Company] passed that information along to the given depository institution, that . . . would be viewed as deposit brokering (and this would be true even if the funds involved were sent directly from the CD-buying customer to the institution, without any other involvement by [the Company]).

Subsequently, in Advisory Opinion No. 92-50 (July 24, 1992), the FDIC staff set forth specific criteria to determine when a "listing service" is a "deposit broker." Through these criteria, the staff took the position that a "listing service" is not a "deposit broker" if the service "is compensated only by means of subscription fees . . . and such fees are not calculated on the basis of the number or dollar amount of deposits placed as the result of information provided by the listing service." In other words, a "listing service" must charge flat subscription fees. Otherwise, the service will be a "deposit broker." Although the staff did not articulate the rationale for this distinction, the rationale is inferable: compensation based on the amount of deposits placed through a "listing service" may create a motivation on the part of the service to become involved in the placement of deposits. Indeed, such compensation strongly suggests that the service is involved in some manner in placing deposits. Therefore, the existence of such compensation will result in the classification of the "listing service" as a "deposit broker."

Again, the purpose of the FDIC's criteria is to distinguish between the following: (1) "listing services" that merely provide information about deposits; and (2) "listing services" that participate in the placement of deposits. The latter are "deposit brokers."

The FDIC revised its criteria in 2002 through Advisory Opinion No. 02-04 (November 13, 2002). We made additional revisions in 2004 through Advisory Opinion No. 04-04 (July 28, 2004). In 2004, 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. The "listing service" will not be treated as a "deposit broker" if the following requirements are satisfied:

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.
2. The fees paid by depository institutions are flat fees: they are not calculated on the basis of the number or 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.

Assuming the satisfaction of these requirements, the FDIC would not view a company such as QwickRate as a "deposit broker."

I hope that this information is useful. The opinions expressed herein represent the views of the Legal Division staff and should be considered advisory in nature. Staff opinions are not binding upon the FDIC or its Board of Directors. This opinion is based upon the facts presented. Any changes in the facts or circumstances could result in different conclusions.

Sincerely,

A handwritten signature in black ink, appearing to read "Christopher L. Hencke". The signature is fluid and cursive, with a long horizontal flourish extending to the right.

Christopher L. Hencke
Counsel