International Bancshares
Corporation

July 6, 2021

Via email: Comments@fdic.gov

Federal Deposit Insurance Corporation
Mr. James P. Sheesley, Assistant Executive Secretary
Attn: Comments - RIN 3064-AF71
550 17th Street N.W.
Washington, D.C. 20429

Re: Comments on Notice of Proposed Rulemaking Regarding False Advertising, Misrepresentation of Insured Status, and Misuse of the FDIC's Name or Logo (RIN 3064-AF71)

Dear Sir:

The following comments are submitted by International Bancshares Corporation ("IBC"), a publicly-traded, multi-bank financial holding company headquartered in Laredo, Texas. IBC maintains 186 facilities and 280 ATMs, serving 87 communities in Texas and Oklahoma through five separately chartered banks ("IBC Banks") ranging in size from approximately $400 million to $10 billion, with consolidated assets totaling approximately $15 billion. IBC is one of the largest independent commercial bank holding companies headquartered in Texas.

This letter responds to the notice of proposed rulemaking ("Notice") by the Federal Deposit Insurance Corporation ("FDIC") related to implementation of Section 18(a)(4) of the Federal Deposit Insurance Act ("FDIA"), which Section prohibits false or misleading representations about deposit insurance and use of the FDIC's name or logo in a manner that would imply that an uninsured financial product is insured or guaranteed by the FDIC. In short, the proposed rule would describe the process by which the FDIC will identify and investigate conduct that may violate Section 18(a)(4), the standards under which such conduct will be evaluated, and the procedures which the FDIC will follow when formally and informally enforcing the provisions of Section 18(a)(4).

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The FDIC said it has observed an increasing number of instances where financial services providers or other entities or individuals have misused the FDIC's name or logo or have made false or misleading representations that would suggest to the public that their products are FDIC-insured. (Notice at 24770) Additionally, the proposed rule would establish a point-of-contact for receiving complaints about potentially false or misleading representations regarding deposit insurance; and would direct depositors and prospective depositors to where they could obtain information or verification about deposit insurance claims.

The proposed rule couches its prohibitions in broad terms, mandating that no person may represent or imply that any "Uninsured Financial Product" is insured or guaranteed by the FDIC by using "FDIC-Associated Terms" as part of a business name, or by using FDIC-Associated Terms or "FDIC Associated Images" in an advertisement, solicitation, or other publication or dissemination, and that no person may knowingly make false or misleading representations about deposit insurance. A statement is deemed to be a statement regarding deposit insurance if it includes any FDIC-Associated Images or FDIC-Associated Terms, or meets certain other conditions. The proposed rule adopts the test established under Section 5 of the Federal Trade Commission Act to determine whether a statement regarding deposit insurance violates the regulation.

The proposed rule focuses on two prohibited activities: the misuse of the FDIC's name or logo, and false or misleading representations regarding FDIC insurance. The Notice provides a non-exhaustive list of examples of activity that the FDIC believes would violate the prohibitions, including the following:

1. For the misuse of the FDIC name or logo, an example includes advertisements for uninsured products that feature FDIC images or terminology without a clear disclaimer that the products being offered are not FDIC insured.
2. For false or misleading representations, examples include representations that mislead persons with respect to the insured status of a financial product, the amount of deposit insurance coverage available for that product, or the qualifications or process for benefiting from insured status.

The Notice invites input on several general and specific issues related to the proposed rule. IBC has provided comments to the specific issues below.

General Comments

IBC wholeheartedly supports the FDIC making clear that it has the authority, and will use such authority, to investigate and hold accountable any person and/or entity that violates Section 18(a)(4), regardless of whether such person/entity is an insured depository institution ("IDI") or IDI-affiliated party ("IAP"). The rise in fintechs and novel financial service providers has resulted in a flood of marketplace participants that are not traditionally familiar with, or respectful of, the highly regulated nature of the financial services space. These new, cavalier participants generally have not operated in highly regulated industries before, and do not appreciate the intricate and burdensome regulatory framework, let alone why it exists.

The increase in these parties has led to, whether through ignorance or willful wrongdoing, an increase in misuse, deception, and false statements regarding FDIC insurance and related protections. IDIs understand the nature of the industry, and the absolute importance of regulatory compliance. IBC strongly supports the FDIC in its application of the rules to all parties that may misuse, misrepresent, or otherwise make falsehoods regarding FDIC insurance and protections.

Specific Requests for Comment

False Advertising, Misuse of Logo, and Misrepresentations

1. Please describe the extent to which the proposed rule sufficiently identifies situations that present potential risks related to false or misleading representations regarding deposit insurance coverage and the misuse of the FDIC's name or logo, including those related to specific products and advertising channels. If there are additional types of false or misleading representations about deposit insurance coverage that may not be effectively captured by the rule, please describe them.

> **IBC Comment:** IBC believes the proposed rule sufficiently identifies situations that present potential risks related to false or misleading representations regarding deposit insurance coverage and the misuse of the FDIC's name or logo. However, IBC requests the FDIC clarify certain proposed terms related to "knowing" violations of the proposed rule. The proposed rule provides that a violation would be considered "knowingly made" if the party making the statement "has been advised by the FDIC in an advisory letter, as provided in § 328.106(a) or has been advised by another governmental or regulatory authority, including, but not limited to, another Federal banking agency, the Federal Trade Commission, the U.S. Department of Justice, or a state bank supervisor." (Notice at 24776) IBC asks the FDIC to clarify that such notice from any other applicable party would also be required to be "formal" per the terms of the applicable parties' regulations related to violations and notice. The proposed rule already requires that the notice from the FDIC must be provided formally through an advisory letter, which is controlled by regulation. It should also be the case that notice from another applicable regulatory authority must also be formal, otherwise any comment by an examiner or regulator may function as sufficient prior notice of violation. Formal notice should also be required because such notice would be more likely to include the IDI in a scenario where an IAP is violating the rule. Without requiring formal notice, IAPs may ignore "notice" or fail to alert its IDI partner of such informal notice from an applicable regulator.
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> Additionally, IBC requests the FDIC to clarify the advertising and marketing requirements applicable to "Hybrid Products." The FDIC's April 2020 Request for Information on FDIC Sign and Advertising Requirements and Potential Technological Solutions (RIN 3064-ZA14) stated that:

> Insured depository institutions may not include the official advertising statement or other statements that imply Federal deposit insurance in any advertisement relating solely to "nondeposit products" or "hybrid products." With "mixed" advertisements for both insured deposit products and uninsured or hybrid products, the official advertising statement must be segregated within the ad. "Hybrid product" means "a product or service that has both deposit product features and non-deposit product features." "Non-deposit products" are defined to include "insurance products, annuities, mutual funds and securities" but not credit products.

However, the proposed rule applies to "[a]n Advertisement for any NonDeposit Product or Hybrid Product by a Regulated Institution which include any statement or symbol which implies or suggests the existence of Federal deposit insurance relating to the Non-Deposit product or Hybrid Product" and provides that:

> (1) No person may represent or imply that any Uninsured Financial Product is insured or guaranteed by the FDIC by using FDIC-Associated Terms as part of any business name or firm name of any person; (2) No person may represent or imply that any Uninsured Financial Product is insured or guaranteed by the FDIC by using FDIC-Associated Terms or by using FDIC-Associated Images as part of an Advertisement, solicitation, or other publication or dissemination. (Notice at 24776)

While these two publications may not directly conflict, IBC requests the FDIC to clarify the proposed rule's applicability to, and the FDIC's review and investigation of, hybrid products. It is IBC's understanding that FDIC-insured features of hybrid products can be marketing and advertised using, at least in part, the FDIC's logo and an accurate description of the scope of any deposit insurance, so long as such marketing sufficiently discloses and segregates insured and non-insured statements. IBC requests clarity regarding how these two FDIC publications work together and how the FDIC will consider and investigate complaints and statements regarding hybrid products.

2. Please describe the extent to which the proposed rule sufficiently addresses false or misleading representations regarding deposit insurance and the misuse of the FDIC's name and logo. If there are additional or alternative ways to more effectively or efficiently address such misrepresentations and/or misuse, please describe them.

IBC Comment: IBC strongly urges the FDIC to consider allowing IDIs insight into complaints and actions against IAPs regarding false or misleading representations in order to allow IDIs to properly vet and run due diligence on IAPs, as well as oversee their active IAP relationships. This is especially important given the proposed rule's informal investigation and oversight provisions and the provisions allowing the FDIC to publicly disclose certain IAP investigations and complaints. The proposed rule provides that "the FDIC may disclose the existence of an investigation under this part that does not involve a bank or a known IAP of a bank."

As discussed elsewhere herein, IBC is concerned that an investigation of an IAP may be publicly disclosed (in contravention of standard confidentiality applicable to regulatory supervision and investigation) before an IDI has a chance to review and respond to any complaints or issues. Without disclosure to IDIs of complaints and investigations related to IAPs, such complaints and investigations may become inappropriately public. FDIC should consider creating a closed database or communication portal available to IDIs in order to allow IDIs to monitor complaints and investigations related to IAPs in order to allow IDIs to notify the FDIC that an IAP is bank-affiliated prior to public disclosure of the complaint or investigation.

Procedures for Investigations, Informal Resolution, and Formal Enforcement Actions

3. Are the proposed complaint and inquiry procedures sufficiently clear about how business entities and members of the public may contact the FDIC if they have questions or concerns relating to potentially false or misleading representations regarding deposit insurance or misuse of the FDIC's name and logo? Are there other types of procedures the FDIC should consider? If so, please describe them.

IBC Comment: Regarding the consumer complaint portal, will the FDIC allow IDIs (or other parties) to view, or request to view, submitted complaints? Will the complaint portal function like the CFPB's and be publicly available and require IDI/IAP response? What, if any, expectations will the FDIC have regarding an IDI's review of or response to such complaints? Does the FDIC anticipate such complaint portal to function more like a municipal "311" information/non-emergency line for consumers, with no review, input, or response required or allowed by IDIs/IAPs?

IBC believes the FDIC should allow IDIs to review any complaint made against them in order to get feedback on potential customer confusion, as well as provide a better customer experience. IBC also asks the FDIC to consider making the complaints made against IAPs public or at least viewable by IDIs, so that IDIs can consider such complaints as part of the due diligence process when engaging with IAPs. If an IAP has a history of non-compliance, an IDI may choose not to engage with the IAP. Without a public complaint portal, or one at least viewable by IDIs, IDIs may not otherwise have any insight into an IAPs previous advertising and marketing issues. IDIs would be better equipped to review and investigate an IAP to determine whether the IAP is an appropriate partner for the IDI if the IDI were able to review the complaints made against the IAP.

4. Are there other alternative, effective, and efficient methods by which a customer can ensure that a third-party's representations regarding deposit insurance are true and accurate? If so, please describe them.

IBC Comment: The FDIC could consider creating a voluntary register of FDIC-insured products and publish such database for consumer review. This would allow IDIs and IAPs stability and peace of mind regarding the status of the products (and related marketing) and would provide customers a place to start when checking the FDIC insurance status of a product. This would be especially helpful for IAPs. If an IAP had certain products enrolled in the register, IDIs may feel more comfortable engaging with such IAP and may consider that information during the due diligence process.

5. Is the proposed informal resolution process an adequate means of addressing, in the first instance in most circumstances, potentially false or misleading representations regarding deposit insurance or misuse of the FDIC's name and logo? Should the FDIC consider other or additional procedures? If so, please describe them.

IBC Comment: IBC does not agree with the proposed rule's provisions regarding notice to "Third-Party Publishers." The proposed rule states that "the FDIC may issue an advisory letter to such a person and/or any person who aids or abets another in such conduct, including any Third-Party Publisher." (Notice at 24777) IBC believes this is much to broad for informal resolution and requests the FDIC constrain this provision to only provide advisory letters/notices to Third-Party Publishers if the IDI/IAP refuses to discontinue the applicable advertisement/marketing/statement. IDIs commonly engage with Third-Party Publishers to create and distribute marketing and other collateral. The FDIC should not undermine those relationships through informal resolution processes. IDIs and IAPs may be unnecessarily harmed if marketing partners are notified of a potential violation by an IDI/IAP and given an advisory letter. Marketing partners may choose to terminate relationships with IDIs and may take legal action based on the contractual terms of the relationship, all based on informal resolution procedures of the FDIC. Moreover, a marketing partner responsible for the printing and physical creation of customer agreements may choose to stop creating such collateral immediately upon such advisory letter. IDIs and IAPs may face huge obstacles to their ongoing business activities if they lose the services provided by Third-Party Publishers because of informal FDIC interruption. The FDIC is fully empowered to take action against IDIs and IAPs, including estopping and prohibiting those parties from publishing certain material and statements, and it should focus on those groups, as opposed to Third-Party Publishers.

6. The proposed rule contains a provision that would permit the FDIC, in those limited circumstances where there is risk of imminent harm to consumers or depositors, to confirm the existence of a formal investigation, so long as the target of the investigation was not an IDI or a known IAP thereof. This provision would be an exception to the longstanding confidentiality provisions found in 12 CFR 308.147. Is such an exception appropriate?

Does the proposed rule strike an appropriate balance between the need to maintain the confidentiality of investigations involving IDIs and known IAPs, versus the potential value in identifying the existence of investigations into non-bank persons and entities whose conduct may result in risk of imminent harm to consumers and depositors? Are there alternatives the FDIC should consider? If so, please describe them.

> **IBC Comment:** IBC strongly urges the FDIC to consider clarifying what it means when it says such disclosure would only apply to "a known [Insured Depository Institution Affiliated Party]" and how FDIC will determine whether a party is a "known IAP." While the rule would keep in place confidentiality requirements related to investigations of IDIs and "known IAPs," IBC requests the FDIC to provide further clarification and assurances that investigations that may implicate IDIs will remain confidential pursuant to 12 C.F.R. 308.147. The FDIC itself notes that the proposed rule's disclosure provisions are a "departure" from the current requirements and practice of FDIC investigations. (Notice at 24772) While IBC appreciates the FDIC's reasoning of preventing imminent consumer harm, IBC believes that the current balance between disclosure and consumer harm is appropriate as applied to IDIs. IDIs should have insight into active investigations that may implicate their IAPs, and the opportunity to consider and challenge the FDIC's disclosure of such investigation. IBC suggests the FDIC create a confidential database of active investigations of non-IDI parties that IDIs may review so that the IDIs can take appropriate, informed action in the event of an misrepresentation, misuse, or falsehood related to FDIC insurance or protection. The FDIC's stated goal in allowing public disclosure is to promote confidence and stability in the banking system. A public alert to consumers related to a bad actor may easily cause instability by initiating a ripple effect throughout the financial system if a large entity or widespread financial product or service is implicated in an FDIC investigation. An IDI should be provided the chance to review, comment on, respond to, and object to the publicity of FDIC investigations that affect the IDI's IAP.

7. Is the formal enforcement action process sufficiently clear, given that Section 18(a)(4) expressly references the use of established enforcement mechanisms set forth in Section 8 of the FDI Act? Should other provisions be added? If so, please describe them.

> **IBC Comment:** The formal resolution process is adequate based on the FDIC's existing formal enforcement authority.

8. Do the investigation, informal resolution, and formal enforcement action processes described in the proposed rule strike the appropriate balance between addressing in a timely manner potentially false or misleading representations regarding deposit insurance and allowing the parties identified as potentially participating in the false or misleading representations an opportunity to present additional facts or provide a legal defense?

IBC Comment: As noted herein, IBC believes the proposed rule should be structured to allow an IDI the ability to be notified of and review complaints made against the IDI and all IAPs in order to grant the IDI sufficient opportunity and ability to respond and resolve the issue. The potential harm to an IDI and its business is not sufficiently outweighed by potential consumer harm because additional options exist to mitigate harm to the IDI while not increasing the risk of consumer harm, including non-public notice to IDIs of complaints against and investigations of IAPs (or potential IAPs) prior to public consumer notice of such complaint/investigation.

Other Areas of Concern

9. Upon entering into a relationship or arrangement with a third-party non-bank entity, as part of FDIC-insured institutions' due diligence, do such institutions currently take steps to ensure: (a) That the non-bank is aware of existing laws and regulations related to the use of the FDIC's name and logo, and (b) that representations made by the non-bank regarding the insured status of bank products are accurate and comply with existing laws and regulations? If not, are there practices that FDIC-insured institutions could adopt to spread awareness of and compliance with these laws and regulations by non-banks?

IBC Comment: IBC (and IBC believes most FDIC-insured institutions that enter into relationships or arrangements with third-party non-bank entities) take(s) a number of steps during the due diligence review in order to ensure its third-party partners are aware of their responsibilities and obligations for compliance with FDIC advertising requirements, including with respect to any representations made as to the insured status of deposit or other financial products. This frequently includes (i) contractual obligations imposed on the third-party with appropriate penalties and remedies in place for non-compliance; (ii) providing the third party its policies and guidelines that the third-party is contractually required to adhere to with respect to the marketing of products, (iii) its prior review of marketing materials prepared by the third-party before they are used, and (iv) its ability to audit and require changes to the third-party's marketing collateral or practices at any time in order to comply with applicable law. To the extent the FDIC would like to issue additional guidance or handbooks covering applicable FDIC regulations and laws related to false or misleading statements about deposit insurance status, IBC welcomes such additional collateral. Much like the OCC published its Third-Party Relationships Risk Management Guide, the FDIC could do the same for IAPs and FDIC insurance status and statements.

Thank you for the opportunity to share IBC's view.

Sincerely,

[redacted]

Judith I. Wawroski
Principal Financial Officer