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comments@fdic.gov
James P. Sheesley, Assistant Executive Secretary
Attention: Comments – RIN 3064-AF26
Federal Deposit Insurance Corporation
550 17th Street, N.W.
Washington, D.C. 20429

Re: RIN 3064-AF26

IntraFi Network LLC (“*IntraFi*”)¹ appreciates having this opportunity to comment on the FDIC’s Notice of Proposed Rulemaking on FDIC Official Sign and Advertising Requirements, False Advertising, Misrepresentation of Insured Status, and Misuse of the FDIC’s Name or Logo published in the Federal Register on December 21, 2022 (“*NPR*”).²

INTRODUCTION

IntraFi supports the FDIC’s efforts to prevent false and misleading statements about deposit insurance. We also applaud the flexibility that the FDIC has provided in how the proposed rule’s requirements can be met. This flexibility will help make the rule workable and effective.

Our comments focus on disclosure methods for deposit networks that, in our view, meet or exceed the proposed rule’s standards. Although we do not propose any changes in the proposed rule, we believe that deposit placement networks would find it helpful if the FDIC would confirm in connection with the final rule that disclosures of the nature we describe below are satisfactory.

DISCUSSION

A. Key Goals

FDIC advertising regulations serve the important goal of protecting consumers from false and misleading statements that erroneously characterize uninsured deposits as insured. At the same time, the regulations serve the equally important goal of giving depositors confidence that FDIC insurance will protect insured deposits whenever the law so provides.

The requirement for use of the official sign and advertising statement instills confidence in deposit insurance coverage. In the same vein, FDIC advertising regulations state that a false or misleading representation is material if it “states, suggests, or implies” that deposits are not FDIC-

¹ Founded in 2002, IntraFi, formerly known as Promontory Interfinancial Network, LLC, provides services to the banking and brokerage industries and operates a deposit network.

² 87 Fed. Reg. 78,017 (Dec. 21, 2022).

insured when in fact they are FDIC-insured.³ A false or misleading representation is also material if it “states, suggests, or implies” that the amount of deposit insurance coverage is more or less than the amount actually provided by statute.⁴

IntraFi believes that the proposed rule’s disclosure requirements should be applied in a manner that serves both goals. Disclosures should prevent false and misleading assertions of coverage, but they should not undermine depositor confidence that deposits are FDIC-insured when the law provides that the deposits are FDIC-insured. Nor should disclosures cause unwarranted doubts that deposits are insured in the full aggregate amount provided by law.

We address below, in light of these goals, the three disclosures required by the proposed rule that are most relevant to deposit networks: (1) identifying banks into which deposits may be placed, (2) disclosing that a non-bank is not a bank and is not FDIC-insured, and (3) disclosing that “pass-through” FDIC deposit insurance coverage is subject to conditions.⁵ We also briefly address certain Internet advertisements that are too short for extensive disclosure text.

B. Disclosure Methods for Deposit Networks

1. *Identifying Banks Into Which Deposits May Be Placed*

Section 328.102(b)(5)(i) of the proposed rule retains a provision from the Final Rule on False Advertising, Misrepresentation of Insured Status, and Misuse of the FDIC’s Name or Logo of June 2, 2022 (“2022 Final Rule”).⁶ Under this provision, if a non-bank makes a statement “that represents or implies that an advertised product is insured by the FDIC,” the non-bank must identify banks “with which the representing party has a direct or indirect business relationship for the placement of deposits and into which the consumer’s deposits may be placed”⁷

In the supplementary information for the 2022 Final Rule, the FDIC stated regarding this provision: “The final rule provides that [a non-bank entity that advertises FDIC-insured deposits] must identify the IDIs with which such an entity has an existing direct or indirect business

³ 12 C.F.R. § 328.102(b)(4)(ii).

⁴ *Id.* § 328.102(b)(4)(iii).

⁵ The proposed rule also requires a disclosure concerning non-deposit products when a person makes a statement about both insured deposits and non-deposit products. Proposed Rule § 328.102(b)(5)(iii), 87 Fed. Reg. at 78,037. This requirement is straightforward, and we do not address it below.

⁶ 87 Fed. Reg. 33,415 (June 2, 2022).

⁷ 12 C.F.R. § 328.102(b)(5), added by 2022 Final Rule, 87 Fed. Reg. at 33,422.

relationship for the placement of deposits and into which consumers' deposits may be placed.”⁸ Specifically addressing placement through a deposit network, the FDIC stated as follows:

To the extent that a non-bank entity places deposits through a deposit network, it may satisfy this requirement by identifying the deposit network and each IDI in the deposit network or by providing a hyperlink to a current list of all the IDIs that are part of such a network. . . .⁹

This hyperlinking procedure efficiently provides ready access to a current list of network banks. The proposed rule places the provision on identifying banks in a new subsection, but does not change it. We therefore understand that the hyperlinking procedure continues to apply.

2. *Stating That a Non-Bank Is Not a Bank and Is Not FDIC-Insured*

Section 328.102(b)(5)(ii) of the proposed rule provides that, if a non-bank makes a statement “regarding deposit insurance” for its customers, the non-bank must “clearly and conspicuously disclose that the [non-bank] is not an FDIC-insured depository institution and that FDIC insurance only covers the failure of the FDIC-insured depository institution.”¹⁰

The NPR explains:

The proposed rule does not prescribe specific disclosure language; however, it explains that a statement that a person is not an FDIC-insured bank and deposit insurance covers the failure of an insured bank would be considered a clear statement for purposes of this provision. This approach gives non-banks that wish to make statements regarding deposit insurance coverage some flexibility in how they communicate the required information.¹¹

IntraFi believes that this flexibility is important. Stating clearly and conspicuously that a non-bank “is not an FDIC-insured bank and deposit insurance covers the failure of an insured bank,” without more, could be misunderstood to mean that deposits placed by the non-bank through a deposit network are not eligible for FDIC insurance when in fact they are. The flexibility

⁸ 87 Fed. Reg. at 33,418. A footnote states: As an example, a non-bank entity may identify such IDIs by providing consumers with a link to a current list on its website of the IDIs with which it has existing business relationships for the placement of deposits. *Id.* n.18.

⁹ *Id.* at 33,418. A footnote states, in part: “A non-bank entity may satisfy this requirement by providing a link to a list it maintains.” *Id.* n.19.

¹⁰ *Id.* at 78,036. The same section of the proposed rule further states: “A statement that a person is not an FDIC-insured bank and deposit insurance covers the failure of an insured bank would be considered a clear statement for purposes of this provision.” *Id.*

¹¹ *Id.* at 78,024.

in the proposed rule avoids this problem by permitting a non-bank to add language that accurately clarifies the meaning.

For example, IntraFi believes that, in the case of a deposit network, section 328.102(b)(5)(ii) of the proposed rule is satisfied by the following language:

[Name of non-bank] is not an FDIC-insured bank, and deposit insurance covers the failure of an insured bank. Deposits placed through [name of deposit network or service] are placed at FDIC-insured banks and are eligible for FDIC deposit insurance coverage at such banks.

A formulation of this nature discloses that the non-bank is not a bank and is not FDIC-insured. At the same time, it avoids undermining depositor confidence that the FDIC will honor valid FDIC insurance claims at the FDIC-insured banks that receive the deposits.

3. Stating That Pass-Through Deposit Insurance Coverage Is Subject to Conditions

Section 328.102(b)(5)(iv) of the proposed rule provides that, if a person makes a statement “regarding pass-through deposit insurance coverage,” the person must “clearly and conspicuously disclose that certain conditions must be satisfied for pass-through deposit insurance coverage to apply.”¹² The NPR notes that the proposed rule “does not prescribe specific disclosure language,”¹³ which again provides important flexibility.

As the NPR points out, “[t]he FDIC has a long history of providing ‘pass-through’ deposit insurance coverage”¹⁴ Pass-through insurance coverage plays a key role in a variety of established and important financial arrangements. Deposit networks, a relatively recent innovation, also rely on pass-through coverage. In IntraFi’s ICS and CDARS services, for example, deposit accounts at destination institutions are titled, in accordance with the FDIC’s titling requirements for pass-through coverage, in the name of The Bank of New York Mellon (“*BNY Mellon*”) acting as agent for others, each acting for itself and others. BNY Mellon, which is one of the world’s largest and most trusted funds custodians, also maintains the requisite custodial records for pass-through coverage. As a result, since IntraFi’s inception, the FDIC has fully honored each deposit insurance claim for a deposit placed through an IntraFi service at an IntraFi network bank.

Requiring a clear and conspicuous disclosure that certain conditions must be satisfied for pass-through insurance coverage to apply, without more, could lead a depositor to wonder what those conditions might be and might give the mistaken impression that the FDIC is reluctant to honor valid pass-through claims. This risk is especially significant because the proposed rule

¹² *Id.* at 78,037.

¹³ *Id.* at 78,025.

¹⁴ *Id.* at 78,024.

requires the disclosure regarding conditions only for pass-through coverage, even though all FDIC coverage is subject to conditions and limitations with which a depositor may not be familiar.¹⁵

The flexibility in the proposed rule makes it possible to reduce the risk that the disclosure will create unwarranted doubt about pass-through insurance. For example, IntraFi believes that, in the case of a deposit network, the following language satisfies the proposed rule:

Certain conditions must be satisfied for “pass-through” FDIC deposit insurance coverage to apply. In [name of deposit network or service], to meet these conditions, deposits accounts are titled, and deposit account records are maintained, in accordance with FDIC regulations for pass-through coverage.

A formulation of this nature discloses that conditions apply without leading anyone to question whether the FDIC will honor valid claims for pass-through coverage.

4. *Internet Search Engine and Social Media Advertising*

The NPR emphasizes the FDIC’s desire “[t]o keep pace with the ongoing market and technological developments.”¹⁶ One such development is that advertisers now commonly place on a search engine results page (“*SERP*”) or social media page (“*SMP*”) a brief advertisement that links to a home page or other landing page on which a product or service is described. These brief advertisements with links benefit not only advertisers, but also users, including those who see advertisements that are relevant to their interests (as reflected in a search or social media activity) and those who are less likely to see advertisements that are not relevant to their interests.

As noted above, in the supplementary information for the 2022 Final Rule, the FDIC specifically recognized that a deposit network can hyperlink to a list of network banks to satisfy the provision that appears in the proposed rule as section 328.102(b)(5)(i).¹⁷ IntraFi believes that a deposit network’s use of hyperlinks for the newly required disclosures – that a non-bank is not a bank and that pass-through insurance coverage is subject to conditions – should also be considered sufficient in the specific case in which an advertisement (i) appears on a SERP or SMP and (ii) links to a home page or other landing page that contains the disclosures.¹⁸

¹⁵ See, e.g., 12 C.F.R. § 330.3(h) (“ownership under state law of deposited funds is a necessary condition for [all] deposit insurance”); 12 C.F.R. § 330.6(a) (funds in multiple single ownership accounts at a single bank are added together and the standard maximum deposit insurance amount (“*SMDIA*”) applies to the aggregate amount, not to each account); 12 C.F.R. § 330.9(b) (interests of a co-owner in “qualifying” joint accounts are “added together” and the *SMDIA* applies to the aggregate amount, not to each account).

¹⁶ 87 Fed. Reg. at 78,018.

¹⁷ See note 9 *supra* and accompanying text (“providing a hyperlink to a current list of all the IDIs” in a deposit network satisfies identification requirement).

¹⁸ In the supplementary information accompanying the 2022 Final Rule, the FDIC noted that commenters had suggested that it “implement standard disclosures and a ‘one-click’ rule for social media and internet advertising.” 87 Fed. Reg. at 33,417. The FDIC declined to adopt a blanket set of standard disclosures or a blanket rule that a link to

Interpreting the proposed rule as mandating inclusion of the newly required disclosure text in a SERP or SMP advertisement itself would be unwarranted. No one expects that a prospective depositor will submit a large deposit for placement on seeing a brief SERP or SMP advertisement for a deposit network. Rather, the purpose of such advertisements is to lead the user, through a link, to a home page or other landing page on which there is sufficient space to explain what a deposit network offers. Once the user reaches the home page or other landing page, the user will see the newly required disclosures, which must be clear and conspicuous.¹⁹

Moreover, requiring that the new disclosures appear not only on the home page or other landing page to which a SERP or SMP advertisement links, but also in the SERP or SMP advertisement itself, is not practicable. Google text ads on SERPs, for example, are limited to up to three headlines of 30 characters each and two descriptions of 90 characters each (plus a link).²⁰ The system rotates the headlines and descriptions. As a result, only one description displays at a given time.²¹ The bare minimum text for the two new required disclosures using the FDIC's sample language is 180 characters with spaces, not counting the name of the non-bank or other person making the disclosures, which must also appear.²² This minimum disclosure text is twice the entire number of permitted characters in a Google text ad description. Applying the rule to mandate the disclosure text in such an ad would not result in any new disclosure, but would unnecessarily prevent deposit networks from using this important means to enable interested persons to follow a link for accurate information.

* * *

such standard disclosures would suffice. Instead, the FDIC said that it would adopt “standard-based requirements as opposed to prescribing specific formats.” *Id.* The FDIC concluded that using a link to a list of network banks satisfied the relevant standards, note 9 *supra* and accompanying text, and we believe that, similarly, using a link from an advertisement on a SERP or SMP satisfies these standards when the link leads to a home page or other landing page on which the required disclosures appear.

¹⁹ In IntraFi's deposit network, no one can submit funds for placement even on the basis of the home page or other landing page to which such an advertisement links. Rather, before submitting any deposit for placement in IntraFi's ICS or CDARS service, a depositor enters into a Deposit Placement Agreement and a Custodial Agreement with a regulated financial institution. These agreements contain extensive disclosures. Similarly, before a broker-dealer sweeps the funds of any customer using the IntraFi Sweep service, the broker-dealer provides extensive disclosures as required by securities law and gives customers the opportunity to opt out.

²⁰ Google Ads Help, *About text ads*, <https://support.google.com/google-ads/answer/1704389?hl=en>.

²¹ *Id.*

²² “[Name] is not an FDIC-insured bank and deposit insurance covers the failure of an insured bank. Certain conditions must be satisfied for pass-through deposit insurance coverage to apply.”



Thank you again for giving us the opportunity to comment. Please do not hesitate to contact the undersigned at dphillips@intrafi.com if you have any questions or need further information.

Sincerely,



Douglas E. Phillips
Senior Vice President and General Counsel