



Consumer Federation of America

Request for Information Regarding the FDIC Official Sign and Advertising Requirements, False Advertising, Misrepresentation of Insured Status, and Misuse of the FDIC's Name or Logo¹

**Comments
to the
Federal Deposit Insurance Corporation**

**regarding
12 CFR Part 328
Document No. 2022-27349
RIN 3064-AF26**

**by the
National Consumer Law Center (on behalf of its low-income clients)
and
Americans for Financial Reform Education Fund
Consumer Reports
Student Borrower Protection Center
Public Justice Center
Public Good Law Center
U.S. PIRG
Consumer Federation of America
Better Markets**

April 6, 2023

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

Introduction

The National Consumer Law Center (on behalf of its low-income clients), Americans for Financial Reform Education Reform Fund, Consumer Reports, Student Borrower Protection Center, Public Justice Center, Public Good Law Center, U.S. PIRG, Consumer Federation of America, and Better Markets submit the following comments regarding the Federal Deposit Insurance Corporation's (FDIC) recent proposed changes to part 328 of its regulations, which would modernize the rules governing use of the official FDIC sign and advertising statements and clarify the FDIC's regulations regarding misrepresentations of deposit insurance coverage.²

Throughout its ninety-year history, the FDIC has helped maintain stability in the nation's financial system and earned the trust of consumers. However, the banking landscape has undergone significant changes in recent years leading to increased confusion among and deception of consumers as to whether a financial institution is an insured depository institution (IDI) and whether the consumers' funds are protected by deposit insurance. Unfortunately, regulation has not kept pace with these changes.³ The FDIC's proposed rule will help close that gap and bring greater certainty and confidence to the new digital channels through which depositors increasingly handle their banking needs, and provide clearer rules to prevent bad actors from misusing the FDIC's name to deceive consumers. We appreciate the opportunity to respond to your request for comments and to the following specific questions:

² 12 C.F.R. § 328.

³ The FDIC last made major amendments to these rules in 2006. 71 Fed. Reg. 66,098 (Nov. 13, 2006).

Physical Signage

(2) With respect to the proposed rule’s non-deposit signage requirements, are there better alternative methods by which IDIs might help consumers distinguish insured deposits from non-deposit products?

Section 328.3 of the proposed rule governs signage within an IDI’s premises. As written, the proposed rule would require IDIs to physically segregate non-deposit products from areas where insured deposits are usually and normally accepted.⁴ Where non-deposit products are offered, IDIs “must continuously, clearly, and conspicuously display signage indicating that the non-deposit products: are not insured by the FDIC, are not deposits, and may lose value.”⁵ This rule is intended, according to the FDIC’s rule summary, to mitigate consumer confusion where an IDI offers both insured deposits and non-deposit products through the same channel.

We support the proposed rule’s non-deposit signage requirements. However, in addition to the proposed non-deposit signage requirements, we strongly encourage the FDIC to also require written and oral disclosures with respect to the sale or recommendation of any non-deposit product offered within IDI premises. As stated in longstanding interagency guidance, “[c]onspicuous and easy to comprehend disclosures concerning the nature of non-deposit investment products and the risk inherent in investing in these products are one of the most important ways of ensuring that the differences between non-deposit products and insured deposits are understood.”⁶ In order to minimize confusion to the extent possible, the FDIC should require IDIs to obtain a consumer’s signature affirming their understanding that the products they are purchasing are not insured by the FDIC, not a deposit or other obligation guaranteed by the IDI, and subject to investment risks, including possible loss of the principal

⁴ 12 C.F.R. § 328.3(a).

⁵ 12 C.F.R. § 328.3(b).

⁶ See Interagency Statement on Retail Sales of Nondeposit Investment Products, FIL–9–94 (Feb. 15, 1994).

amount invested. Furthermore, the FDIC should require IDIs to make these same disclosures orally, through branch tellers and other qualified employees.

(3) Would it be beneficial to consumers to standardize the design of the proposed rule’s non-deposit signage? If a standard design were required, which design elements would minimize any potential challenges associated with integrating it into an IDI’s other non-deposit product marketing materials?

Yes, the FDIC should standardize the design of the proposed rule’s non-deposit signage. As written, the proposed rule does not prescribe specific disclosure language for physical non-deposit signage.⁷ Without standardized requirements, consumers are more likely to be confused; there is an increased risk that consumers will be misled, whether intentionally or unintentionally, into believing non-deposit products are FDIC-insured or otherwise protected. The FDIC should thus require all IDIs that offer non-deposit products within their premises to display the same sign indicating that their non-deposit products are not FDIC-insured, are not deposits, and may lose value.

We recommend use of a standardized icon such as the red circle-backslash symbol overlaid on the word “FDIC” or “FDIC-insured.” Underneath the symbol it should read clearly and conspicuously, “NOT FDIC-insured.” Industry-wide standardization of the design and language of non-deposit signage will ensure consumers are clearly and fully informed of the nature and risks associated with non-deposit products offered within IDI premises.

⁷ 12 C.F.R. § 328(a)(2).

Digital Channels

(4) Are there any particular aspects of a potential design or the placement of the digital sign that might improve its presentation or readability for consumers, or minimize any potential technical challenges of introducing this sign into digital interfaces?

We recommend that the FDIC require IDIs to display digital signs clearly, continuously, and conspicuously – in such size and print to be clearly legible, in line with existing requirements for official advertising statements under § 328.3(b)(2).

(5) Would it be beneficial to consumers to require the digital sign on other pages in addition to the homepage, application, landing, login, and transactional pages of an IDI’s digital channels, including websites and mobile applications?

The proposed rule would require an IDI to display a digital sign clearly, continuously, and conspicuously on the IDI’s homepage, landing and login pages or screens and transactional pages or screens involving deposits, to the extent applicable.⁸ We support the proposed rule but encourage the FDIC to adopt broader language to cover anywhere within an IDI’s digital channel where insured deposits are at all mentioned. A broader requirement would better achieve the FDIC’s goal to “visually communicate to consumers that they are doing business with an IDI rather than a non-bank entity,” and to ensure “consumers are informed before signing up for or signing into an online account that such an account is associated with an IDI.”⁹ We also support the FDIC’s clarification that “clear and conspicuous” means that the digital sign is displayed continuously near the top of the page and in close proximity to the IDI’s name.¹⁰ We agree that an IDI that displays the digital sign solely at the footer of the page should be considered to be in violation of FDIC rules.

⁸ 12 C.F.R. § 328.5(c).

⁹ 87 Fed. Reg. 78022.

¹⁰ *Id.*

However, we note that it will be especially critical that any uninsured products offered on an IDI's website have extremely prominent warnings that those products are not insured, as the IDI sign could be confusing.

(6) Should the proposed rule require, rather than permit, IDIs to link the digital sign to the FDIC BankFind tool?

Yes, the proposed rule should require IDIs to link the digital sign to the FDIC BankFind tool. Linking IDIs' digital signs to the BankFind tool would facilitate consumer due diligence and help consumers reliably differentiate between IDIs and non-banks. If left to their sole discretion, IDIs may not link to the FDIC BankFind tool. Additionally, one possible indication that an entity has engaged in deceptive and unfair practices by falsely claiming to be an IDI would be its failure to link to the BankFind tool. As a result, the FDIC should make it mandatory for an IDI utilizing the digital sign to link to the FDIC BankFind tool.

(7) Does the proposed rule sufficiently address the risk of confusion where consumers interact with deposits and non-deposit products through the same digital channels? Are there any additional or alternative requirements that would draw a clear distinction between deposits and non-deposit products on digital channels?

Under the proposed rule, if a digital deposit-taking channel offers access to both deposits and non-deposit products, the IDI would be required to clearly and conspicuously display signage indicating that the non-deposit products are: (1) not insured by the FDIC; (2) are not deposits; and (3) may lose value.¹¹ IDIs would be required to display this non-deposit signage via a one-time notification when consumers initially access a page offering non-deposit products. To dismiss the notification before accessing the rest of the page or content related to non-deposit products, consumers would need to dismiss the notification.

Although we generally support the proposed rule, we encourage the FDIC to amend it to require IDIs to explicitly denote clearly and conspicuously next to and/or under each product

¹¹ 12 C.F.R. § 328.5(d).

offered on their digital channels whether said product is or is not FDIC-insured. As such, IDIs would be required to disclose with each deposit product offered via digital channel that said product is “FDIC-insured.” For each non-deposit product offered on its digital channels, IDIs would be required to expressly disclose that this product is (1) not insured by the FDIC; (2) is not a deposit; and (3) may lose value. As stated in response to question (3) regarding non-deposit signage, we recommends that the FDIC require industry-wide use of a standardized icon, like the red circle-backslash symbol overlaid on the word “FDIC” or “FDIC-insured,” to warn consumers of the risks of non-deposit products. Underneath the symbol it should read clearly and conspicuously, “NOT FDIC-insured.” Industry-wide standardization of the design and language of non-deposit signage will ensure consumers are clearly and fully informed of the nature and risks associated with non-deposit products offered within IDI premises. The FDIC should require all product-specific disclosures to be displayed prominently and in an appropriate size and print so as to be clearly legible.

ATMs and Similar Devices

(9) Do the proposed rule’s disclosure requirements for ATMs and similar devices sufficiently differentiate between deposits and non-deposit products? If not, please suggest better alternative methods.

The proposed rule would require the electronic display of the official sign on IDIs’ ATMs and all other remote electronic facilities that receive deposits. Where an ATM or like device both receives deposits for an IDI and offers access to non-deposit products, IDIs would be required to clearly, continuously, and conspicuously display electronic disclosures indicating that non-deposit products: are not insured by the FDIC, are not deposits, and may lose value. We generally support the proposed rule but encourage the FDIC to clarify that IDIs would be required to display these disclosures on each screen that references a deposit product or

non-deposit product. As the FDIC notes, consumers, when interacting with ATMs and similar devices, do not have the opportunity to seek clarification from bank representatives about which products offered by the IDI are FDIC-insured. Consumers may navigate from one screen to the next without fully comprehending what was first displayed on a home screen. They would then be forced to cancel and reinitiate a transaction, or scroll backwards to verify what was read. To compensate for this information asymmetry, the FDIC should require more stringent signage disclosures on any ATM screen or page that references a deposit product or non-deposit product.

Official Advertising Statement

(12) In addition to “FDIC-insured,” are there other options for the short advertising statement that the proposed rule should allow?

The proposed rule would expand IDIs’ options for use of a short advertising statement. The current regulation allows IDIs to use the short title “Member of FDIC,” “Member FDIC,” or a reproduction of the symbol of the corporation (defined in § 328.2(b)). In addition to these options, the proposed rule would allow the use of “FDIC-insured.”

We oppose the addition of the term “FDIC-insured” for use in the short advertising statement. IDIs should continue to use the same short advertising statement as currently regulated (either “Member of FDIC,” or “Member FDIC”).

When an IDI offers products that are not FDIC-insured, the term “FDIC-Insured” can be misleading and thus its use poses more risk of consumer confusion. The purported benefit to IDIs of increased flexibility is not worth the likely risk of increased confusion among consumers.

Additionally, wherever the term “FDIC” appears on a digital screen, an IDI should be required to clearly and conspicuously indicate whether a product is insured by the FDIC or, for each non-deposit product offered on its digital channels, to expressly disclose that this product is (1) not insured by the FDIC; (2) is not a deposit; and (3) may lose value.

Misrepresentations and Material Omissions

(13) Are there additional practices or scenarios that the FDIC should clarify as being misrepresentations of deposit insurance?

We generally support the proposed rule which would amend subpart B to expressly address which statements or omissions constitute a misrepresentation under section 18(a)(4) of the FDI Act.¹² As the FDIC notes, non-banks have increasingly misused the official advertising statement, FDIC-Associated Terms, and FDIC-Associated Images to the detriment of consumers.¹³ For example, Cash App advertises on its website that “with a Cash Card, your Cash balance is FDIC-insured through our partner banks, which means the federal government promises to protect it.”¹⁴ This is misleading insofar as Cash App fails to explain that many funds held through the Cash App are not insured. It is also possible that funds accessed through the Cash Card are not continuously held in insured accounts with pass-through insurance, and may be transferred from Cash App’s non-FDIC insured accounts to insured accounts when purchases are made. Such representations by non-banks can be false and misleading and present a high risk of confusing consumers as to whether they are dealing with an IDI and whether deposit insurance applies to their funds.

We strongly encourage the FDIC to amend the proposed rule to (1) require non-banks to clearly, conspicuously, and continuously disclose that it is not a bank and that its non-deposit products are not insured by the FDIC,¹⁵ (2) prohibit non-banks from using the words “banking”

¹² 12 U.S.C. 1828(a)(4).

¹³ See, e.g., FDIC, “FDIC Issues Cease and Desist Letters to Five Companies For Making Crypto-Related False or Misleading Representations about Deposit Insurance” (Aug. 19, 2022), <https://www.fdic.gov/news/press-releases/2022/pr22060.html>.

¹⁴ Cash App, <https://cash.app/bank> (last accessed March 21, 2023).

¹⁵ Although many non-banks already disclose that they are not a bank, they do so in fine print footnotes unlikely to be read by consumers. See, e.g., Chime, <https://www.chime.com/about-us/> (last accessed March 21, 2023) (Chime discloses in fine print on its sub-page, “About Us,” that it “is a financial technology company, not a bank. Banking services and debit card provided by The Bankcorp Bank, N.A. or Stride Bank, N.A.”); Money Lion, <https://www.moneylion.com/> (last accessed March 21, 2023) (MoneyLion discloses in fine print that although it “is a financial technology company, not a bank, RoarMoney is powered by Pathward, N.A., Member FDIC.”).

and “bank account” to describe their products or services offered,¹⁶ and (3) require non-banks to disclose that even if they partner with an FDIC-insured bank, customer funds sent to the non-bank are not FDIC-insured unless and until the non-bank deposits them in an FDIC-insured bank and holds them in a manner in which they are eligible for pass-through insurance.¹⁷ Failure by a non-bank to comply with any of the above should constitute a material omission under the proposed rule.

Additional Comments

Crypto-Assets

We see little to no legitimate use for crypto-assets and few, if any, potential benefits that are not heavily outweighed by the high degree of risk, harm, and evasion of consumer protection laws:

- Individual consumers are investing money they cannot afford to lose in speculative assets that will often crater in value and trigger high fees if the consumer attempts to cash out.
- Scams using crypto-assets are exploding off the charts.
- Stablecoins are not as stable as they claim and exist primarily as a gateway to and support for unstable and dangerous crypto-assets.
- As a payment method, crypto-assets have no protections and do not comply with laws that require protecting consumers from unauthorized use and errors.

These problems are serious for all consumers, especially for low-income consumers with no buffer of assets to lose, and for Black and Latino communities, which disproportionately invest

¹⁶ See, e.g., mobile finance apps, Porte, <https://www.joinporte.com/> (last accessed March 21, 2023) (“Banking built for you. Porte believes your banking experience is about more than money. With account alerts, charitable giving, and mobile capture, we’ve built a mobile banking experience around you. Download the app today to open an account.”).

¹⁷ See, e.g., Chime, <https://www.chime.com/checking-account/> (last accessed March 21, 2023) (“Chime accounts are insured up to the standard maximum deposit insurance amount of \$250,000 through our partner banks, Strike Bank, N.A. or the Bancorp Bank, N.A., Members FDIC.”).

in crypto-assets. Crypto-assets are becoming the latest in a long line of devices used to strip wealth from communities of color and push them further behind.

In addition, some crypto firms have actively engaged in misleading communications to their customers and clients regarding whether their products received deposit insurance coverage. As noted by the FDIC in its request for comments on this proposed rule, the FDIC sent cease and desist letters to five firms, including FTX.US, claiming the firms falsely suggested on their websites and social media accounts that certain crypto-related products were FDIC-insured, or that stocks held in brokerage accounts were FDIC insured.¹⁸ The FDIC sent a similar note earlier in 2022 to the once large and now bankrupt crypto lending platform Voyager Digital, demanding the firm stop making inaccurate claims that customer-held crypto-assets were protected by the government.¹⁹ We believe the agency took appropriate action here, but this pattern of activity underscores the need to make it clear via formal rulemaking that crypto-assets are unequivocally uninsured financial products.

As a result, we support the FDIC's proposal to amend Part 328, prohibiting a person from representing or implying that any uninsured financial product is insured or guaranteed by the FDIC, to include crypto-assets as a type of "uninsured financial product." We also support the inclusion of crypto-assets in the definition of "non-deposit product" and the disclosure requirements for "non-deposit products" for ATMs and similar devices.

Language Access

We support Proposed § 328.6(f), which provides that a non-English equivalent of the official advertising statement may be used provided that the translation has had the prior written

¹⁸ See FDIC, "FDIC Issues Cease and Desist Letters to Five Companies For Making Crypto-Related False or Misleading Representations about Deposit Insurance" (Aug. 19, 2022), <https://www.fdic.gov/news/press-releases/2022/pr22060.html>.

¹⁹ See Banking Dive, "FDIC probes Voyager's language surrounding deposit insurance." July 8, 2022, available at

approval of the FDIC. However, we encourage the FDIC to provide a model official advertising statement in the eight languages most frequently used by limited English proficient consumers.

Thank you for the opportunity to submit these comments. With questions, please contact Carla Sanchez-Adams, National Consumer Law Center, csanchezadams@nclc.org.

Yours very truly,

National Consumer Law Center (on behalf of its low-income clients)
Americans for Financial Reform Education Fund
Consumer Reports
Student Borrower Protection Center
Public Justice Center
Public Good Law Center
U.S. PIRG
Consumer Federation of America
Better Markets