

MEMO

TO: The Board of Directors

FROM: Mark Pearce
Director, Division of Depositor and Consumer Protection

DATE: December 13, 2022

RE: Notice of Proposed Rulemaking on FDIC Official Sign and Advertising Rule and a Rule Relating to False Advertising, Misrepresentation, and Misuse of the FDIC's Name and Logo

RECOMMENDATION

Staff recommends that the FDIC Board of Directors (the Board) authorize publication of the attached notice of proposed rulemaking (“NPR,” “proposed rule,” or “the proposal”) with a 60-day comment period.

SUMMARY

Through this NPR, the FDIC would invite comment on proposed revisions to its regulations governing use of the official FDIC sign and insured depository institutions’ (IDIs) advertising statements and clarify the FDIC’s regulations regarding misrepresentations of deposit insurance coverage. The proposed rule, informed by comments received pursuant to two Requests for Information, would generally: (1) modernize and amend the rules governing the display of the official sign in branches, to, for example, apply the rules to non-traditional branches; (2) require the official signs, a new digital sign, and other signs differentiating deposits and non-deposit products across all banking channels, including automated teller machines (ATMs) and evolving digital channels (which functionally serve as a digital teller window); (3) clarify the FDIC’s rules regarding misrepresentations of deposit insurance coverage by addressing specific scenarios where information provided to consumers may be misleading; (4) amend definitions of “non-deposit product” to include crypto-assets; and (5) require IDIs to maintain policies and procedures addressing compliance with part 328.

Concur:

Harrel M. Pettway
General Counsel

Statutory Authority and Regulations

Sign and advertising statement requirements for IDIs date back to the Banking Act of 1935, and are now set forth in section 18(a) of the Federal Deposit Insurance Act (FDI Act).¹ Section 18(a) grants the FDIC authority to prescribe regulations with respect to these requirements, which are currently contained in subpart A to 12 CFR Part 328.² The agency last made major amendments to these regulations in 2006.³ The current text of the FDIC’s sign regulations refer to an IDI’s physical premises and Remote Service Facilities, but does not specify other banking channels that have further developed.⁴

The FDIC's official sign and advertising statement regulations require banks to continuously display the official sign where insured deposits are usually and normally received in the bank's principal place of business and at all of its branches and to use an official advertising statement, such as “Member FDIC,” when advertising deposit products and services.

In addition, section 18(a)(4) of the FDI Act prohibits any person from misusing the name or logo of the FDIC or from engaging in false advertising or making knowing misrepresentations about deposit insurance.⁵ The FDIC has broad statutory authority in this area, and earlier this year issued specific regulations in subpart B to 12 CFR Part 328 regarding false representations related to FDIC insurance and the misuse of the FDIC name and logo.⁶

Requests for Information

In February 2020 and April 2021, the FDIC published Requests for Information (collectively, the “RFIs”) in the *Federal Register* to seek public input regarding potential modernization of the official sign and advertising rules to reflect changes in deposit-taking via physical branch, digital, and mobile banking channels.⁷ In response to the RFIs, the FDIC received 20 comments from trade associations, IDIs, and others.⁸ In addition, FDIC staff met

¹ 12 U.S.C. 1828(a)(1).

² See subpart A to 12 CFR Part 328 (§§ 328.0 - 328.5-328.99).

³ 71 FR 66098 (Nov. 13, 2006).

⁴ See 12 CFR 328.2. “Remote Service Facility” includes any automated teller machine, cash dispensing machine, point-of-sale terminal, or other remote electronic facility where deposits are received. 12 CFR 328.2(a)(1)(ii).

⁵ 12 U.S.C. 1828(a)(4). Section 18(a)(4) also provides the FDIC independent authority to investigate and take administrative enforcement actions, including the power to issue cease and desist orders and impose civil money penalties, against any person who misuses the FDIC name or logo or makes misrepresentations about deposit insurance. 12 U.S.C. 1828(a)(4)(C)-(D). Further, under Federal law, it is also criminal offense to misuse the FDIC name or make false representations regarding deposit insurance. See 18 U.S.C. 709.

⁶ 87 FR 33415 (June 2, 2022); Subpart B to 12 CFR Part 328 (§§ 328.100 – 328.109). Subpart B establishes 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).

⁷ 85 FR 18528 (Feb. 26, 2020); 86 FR 18528 (Apr. 9, 2021).

⁸ Comments to the RFIs can be found on the FDIC’s website, available at <https://www.fdic.gov/resources/regulations/federal-register-publications/2020/2020-rfi-fdic-sign-and-advertising-requirements-3064-za14.html> and <https://www.fdic.gov/resources/regulations/federal-register-publications/2021/2021-rfi-fdic-official-sign-and-advertising-requirements-3064-za14.html>.

with representatives from IDIs, a technology service provider, and consumer groups. Commenters generally recognized the importance and value of displaying FDIC signs and the advertising statement, and some commenters stressed that depositors place significant trust in FDIC signs.

The majority of comments recognized the need for updating FDIC sign and advertising requirements in response to changes in industry practice and the increasingly significant role played by digital and mobile banking. At the same time, commenters generally favored greater flexibility in terms of the size, design, and location of the official FDIC sign at IDIs' branches. Several commenters proposed requiring a single, conspicuous physical or digital display in the teller area as opposed to smaller signs placed at each window. Some commenters suggested amending the continuous display requirement to allow for rotating digital disclosures.

Commenters also indicated that consumers assume products offered through IDIs are insured and emphasized the importance of enabling consumers to identify uninsured products and understand the role of third parties in offering such products.

One commenter noted the increase in uninsured entities offering products and services similar to banks, and indicated that consumer confusion will likely increase. This commenter suggested a clear articulation by the FDIC regarding the obligations that non-banks have with respect to offering these products and services, whether insured or not, can promote consumer understanding and mitigate the risk of consumer confusion.

Commenters also suggested that the FDIC clarify how sign requirements apply to digital and mobile banking channels. While some requested clarity on the size and location of the FDIC sign on web pages and mobile applications, others urged the FDIC to adopt a flexible policy that better accounts for technological limitations and preservation of user experience. Similarly, several commenters requested clarity on how teller window sign requirements apply to digital banking channels and revisions to the definition of Remote Service Facility to incorporate digital and mobile banking. Some IDIs also indicated that they voluntarily display the FDIC advertising statement on their digital pages.

Developments in Consumer Access to Banking and Financial Services

In recent years there have been significant changes in the banking landscape, including the evolution of bank branches and their role in serving consumers, the proliferation of digital channels as a critical and fundamental mechanism to access banking and financial services, and an increasingly broad array of financial products offered through banking channels, including access to non-deposit products.

While many bank branches retain a traditional footprint, serving depositors primarily at teller windows or stations, IDIs have increasingly begun operating branches with different styles and designs. These locations may include electronically-staffed kiosks, interactive ATMs that provide remote assistance with a teller, and teller-less cafés where deposits can be accepted on tablets or through ATMs. The FDIC's existing sign rules, which focus on display of the official sign at teller windows or stations, have not kept pace with these developments.

The existing sign rules also do not reflect evolving digital channels, which have become an increasingly important means of access to banking products and services. While some consumers continue to visit branches, others rely on ATM access and digital channels such as online banking and mobile banking. For these consumers, an IDI's ATM, website, or mobile application effectively serves as a digital teller window.

Banking customers are also offered an increasingly wide array of products and services, regardless of whether they are in a branch, using an ATM, or connecting with an IDI through digital channels. In many instances, IDIs offer both deposits and non-deposit products to consumers. For example, IDIs might allow depositors in their branches to consult with an investment adviser and purchase securities or mutual funds. Options to purchase non-deposit products are continuing to evolve, with some IDIs offering ATM or digital banking customers the ability to purchase crypto-assets with their funds. Absent adequate signs or disclosures, simultaneous offering of both insured deposits and non-deposit products may lead consumers (who are aware that the IDI is insured by the FDIC) to mistakenly conclude that all of the products being offered are insured. Some of these uninsured products may be speculative.

Growth in the fintech sector has also served to blur the distinction between IDIs and non-banks in the eyes of many consumers, increasing the potential for confusion regarding deposit insurance coverage. Business arrangements between IDIs and non-banks can take many forms and continue to evolve at a rapid pace. For example, an IDI might enter into an arrangement with the fintech company to offer the IDI's products to the fintech company's customers. In other instances, fintech companies might deposit their customers' funds at an IDI. In such cases, the fintech company might state to its customers that their funds are FDIC-insured, or that they are insured by the FDIC on a "pass-through" basis, without an accurate explanation of what this means. The proliferation of relationships and disclosures may confuse consumers as to whether they are dealing with an IDI, whether their funds are insured by the FDIC, and the risks they are protected against.

Previous Rulemaking

On May 17, 2022, the FDIC issued a final rule adding a new subpart B to 12 CFR Part 328. The final rule describes: (1) the process by which the FDIC will identify and investigate conduct that may violate the prohibitions against misuse and misrepresentation; (2) the standards under which such conduct will be evaluated; and (3) the procedures that the FDIC will follow when formally and informally enforcing these prohibitions.

Staff at the FDIC continues to observe an increase in the number of instances where financial services providers or other entities or individuals have misused the FDIC's name or logo or have made misrepresentations about FDIC insurance. This has caused continuing challenges for consumers in determining whether they are doing business with an IDI and whether their funds are protected by the FDIC's deposit insurance coverage.

Description of the Proposed Rule

Staff recommend that the Board, under its authority under Sections 9 and 18 of the FDI Act to prescribe regulations relating to FDIC signs and deposit insurance misrepresentations, issue a notice in the *Federal Register* that proposes the amendments to part 328 described below.

The proposed rule's sign requirements under subpart A include three distinct signs relating to deposit insurance. The first is the FDIC's official sign, which is currently displayed at IDIs' principal place of business and branches. Second, the proposed rule would require the display of a digital sign on IDIs' digital deposit-taking channels, such as online banking websites and mobile applications. The digital sign, which would be an abbreviated version of the FDIC's official sign, would promote a clear understanding by consumers of when they are interacting with an IDI rather than a non-bank and when their funds are insured by the FDIC. Third, the proposed rule includes a non-deposit sign requirement that would address the potential for consumer confusion where an IDI offers both insured deposits and non-deposit products through the same channel (e.g., insured deposits and non-deposit products are both offered at a branch).

The proposal also provides limited amendments to its official advertising statement requirements. These updates would provide IDIs with an additional option for a shortened official advertising statement, and include technical corrections to address the statutory increase of the deposit insurance amount that has occurred since the regulation was last amended.

In addition, the proposal amends the provisions of subpart B to provide further clarity on the application of the misrepresentation statute in specific situations where consumers may misunderstand or be misled as to whether an entity is insured by the FDIC or the nature and extent of deposit insurance coverage.

Lastly, the proposal would require IDIs to establish and maintain written policies and procedures to comply with part 328 commensurate with the nature, size, complexity, scope, and potential risk of the deposit-taking activities of the IDI. IDIs would also be required to include in its policies and procedures, as appropriate, provisions related to monitoring and evaluating activities of persons that provide deposit-related services to the IDI or offer the IDI's deposit-related products or services to other parties.

Below is a summary of the proposed amendments to part 328.

1. Sign Requirement for IDIs' Physical Premises

The proposed rule would retain the existing design of the official sign, which in addition to prominently bearing the name of the FDIC, includes statements indicating that each depositor is insured up to at least \$250,000 and that the FDIC's deposit insurance is backed by the full faith and credit of the U.S. government. Also consistent with current regulations, the proposed rule would define the "symbol" of the FDIC as the portion of the official sign that consists of "FDIC" and the statements "Each depositor insured to at least \$250,000" and "Federal Deposit Insurance Corporation www.fdic.gov." Consistent with current regulations, all IDIs would be required to continuously, clearly, and conspicuously display the official sign in their principal place of business and all their U.S. branches.

To accommodate evolving styles and footprints of branches, however, the proposed rule would provide separate requirements for traditional footprint branches and non-traditional branches or other places of business, such as café-style branches.

Official Sign in Traditional Branches

IDIs have traditionally received deposits at teller windows or stations, and the proposed rule would continue to provide for display of the official sign at traditional footprint branches in a manner consistent with current regulations. If deposits are usually and normally received at teller windows or stations, IDIs would generally be required to display the official sign at each teller window or station in a size of 7” by 3” or larger, with black lettering on a gold background.

Staff at the FDIC believe, however, that it is appropriate to allow additional flexibility with respect to display of the official sign in instances where the IDI only offers deposit products on the premises. In such cases, the requirement to display the official sign could be satisfied by displaying the official sign in one or more locations visible from the teller windows or stations, in a size large enough to be legible from anywhere in that area. If the IDI also offers non-deposit products on the premises, display of the official sign at each teller window would be required, consistent with current regulations. Under the proposed rule non-deposit signage would also be required as described below.

Official Sign in Non-traditional Branches

The proposed rule also would include sign requirements that accommodate the non-traditional footprint branches operated by some IDIs. For example, some IDIs operate café-style branches that include open areas where customers work with bankers. These branches may, or may not, include traditional teller windows or stations. Under the proposed rule, if insured deposits are usually and normally received in areas of the premises other than teller windows or stations, the IDI would be required to display the official sign in one or more locations in a size large enough to be legible anywhere in those areas. If the IDI also offers non-deposit products on the premises, under the proposed rule, non-deposit signage would also be required as described below.

Non-deposit Signs on IDIs’ Premises

The proposal would provide a new requirement for non-deposit signs when both insured deposits and non-deposit products are offered within the IDI’s premises. In such instances, an IDI would be required to physically segregate the areas where non-deposit products are offered from areas where insured deposits are usually and normally accepted, and display a sign in the non-deposit areas indicating that non-deposit products: are not insured by the FDIC; are not deposits; and may lose value.⁹

⁹ As noted above, this requirement is intended to be generally consistent with longstanding interagency guidance on the retail sale of non-deposit investment products that many institutions already follow, and thus should be familiar to many consumers.

This non-deposit sign would be required to be continuously, clearly, and conspicuously displayed; however, the proposed rule does not include specific design or size requirements. To minimize the potential for consumer confusion, the proposed rule would prohibit display of non-deposit signs in close proximity to the official FDIC sign. The proposed rule's non-deposit sign requirements would apply to both traditional footprint branches and non-traditional footprint branches.

Use of Electronic Media or Varied Signs to Satisfy Official Sign and Non-deposit Sign Requirements on IDIs' Premises

The proposal also provides IDIs the flexibility to utilize electronic media to satisfy sign requirements on an IDIs' premises. This would apply to both display of the official sign and non-deposit signage, where required. However, where the proposed rule requires "continuous" display of signs, this applies equally to signs utilizing electronic media. Accordingly, a rotating display that includes the required sign periodically would not satisfy the "continuous" requirement.

2. Sign Requirements for IDIs' Digital Channels

As explained above, consumers are increasingly using IDIs' websites and mobile banking applications to open deposit accounts, deposit and transfer funds, and buy and sell non-deposit products.¹⁰ For many consumers, an IDI's website and applications are the primary method of accessing banking products and, in turn, these platforms functionally serve as a digital teller window.¹¹ Given these developments, the staff at the FDIC believes it is important to require signage with respect to IDIs' digital deposit-taking channels that is consistent with in-branch signage, to the extent feasible. This would promote a clear understanding by consumers of when they are interacting with an IDI and when their funds are protected by the FDIC's deposit insurance coverage.

Digital Sign Requirement for Digital Deposit-taking Channels

The proposed rule would define "digital deposit-taking channels" to mean any electronic communications methods through which an IDI accepts insured deposits. This would include, but not be limited to, IDI websites, web-based applications, and mobile applications that offer consumers access to insured deposits at IDIs.

Under the proposed rule, an IDI would be required to clearly, continuously, and conspicuously display the digital sign on the IDI's homepage, landing and login pages or screens, and transactional pages or screens involving insured deposits, to the extent applicable. The digital sign would prominently bear the name of the FDIC, state that insured deposits are backed by the full faith and credit of the U.S. Government, and indicate that each depositor is insured up to at least \$250,000. To be clear and conspicuous, the digital sign must be displayed

¹⁰ Federal Deposit Insurance Corporation (FDIC), *2021 National Survey of Unbanked and Underbanked Households* (October 2022)

¹¹ Federal Deposit Insurance Corporation (FDIC), *2021 National Survey of Unbanked and Underbanked Households* (October 2022)

in a continuous manner, near the top of the relevant page or screen in close proximity to the IDI's name. The proposed rule does not include, and staff recommends soliciting comment on, a design for the digital sign that includes these elements.

Under the proposed rule, if a digital deposit-taking channel offers both access to 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. IDIs would be required to display this non-deposit signage via a one-time notification when consumers initially access such a page, and consumers would need to take action to dismiss the notification before accessing the relevant page or screen. Moreover, consumers would need to take action to dismiss the notification before accessing the relevant page or screen. This could include, for example, an IDI using a "pop-up," "speedbump," or "overlay" that displays a notification to the consumer that the consumer must dismiss before accessing the content related to non-deposit products.

In addition, the rule would require the continuous display of the non-deposit signage on each page relating to non-deposit products and prohibit displaying the non-deposit signage in close proximity to the digital FDIC sign.

Digital Deposit-taking Channels are not Advertisements

As discussed above, the proposed digital sign would be displayed on an IDI's homepage, landing and login pages, and transactional pages involving insured deposits. Staff at the FDIC views these pages as environments where the customer may interact directly with the IDI, rather than as "advertisements" as defined in the rule's advertising statement requirements.¹² Furthermore, even if these pages were considered "advertisements," the inclusion of the digital sign on these pages would make clear that the IDI is insured by the FDIC, making use of the official advertising statement unnecessary under the exceptions that are provided by the advertising statement requirements. IDIs, however, would remain responsible for complying with the official advertising statement requirements for other qualifying advertisements, including those contained on other webpages.

3. Automated Teller Machines and Similar Devices

Under current regulations governing ATMs and like devices, IDIs have the option to display the physical official FDIC sign. The proposed rule would require electronic display of the official FDIC sign on IDIs' ATMs and like devices. The proposed rule provides that the official FDIC sign must be displayed clearly and conspicuously. ATMs and like devices must, at a minimum, display the official FDIC sign on the home page or screen and each transaction page or screen relating to deposits. The FDIC believes that the proposed rule offers flexibility for IDIs to determine how best to deliver services to their customers while clarifying the steps IDIs must take to comply with FDIC signage requirements.

¹² "Advertisement" is defined in both the existing and proposed rule as "a commercial message, in any medium, that is designed to attract public attention or patronage to a product or business."

While ATMs and similar devices offer less of an opportunity to physically separate deposit products from non-deposit products, the proposed rule nevertheless distinguishes these products to reduce the potential for consumer confusion. As such, the proposed rule would require electronic non-deposit signs where an ATM or like device both receives deposits for an IDI and offers access to non-deposit products. The ATM or like device would be required to clearly, continuously, and conspicuously display disclosures indicating that non-deposit products: are not insured by the FDIC; are not deposits; and may lose value. The proposed rule would require the display of these disclosures on each transaction page or screen relating to non-deposit products.

4. Official Advertising Statement For IDIs

The proposal provides limited amendments to the advertisement statement requirements and would expand IDIs' options for use of a short advertising statement. Currently, IDIs must include the official advertising statement in all advertisements that promote deposit products. The term advertisement means a commercial message in any medium that is designed to attract public attention or patronage to a product or business.¹³ The FDIC views this definition to include advertising published through social media channels.

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 section 328.2(b)). In addition to these options, to provide additional flexibility, the proposed rule would allow the use of "FDIC-insured."

5. Misrepresentations and Material Omissions by Any Person

Staff at the FDIC believes that it may be beneficial to provide further clarity on the application of the misrepresentation statute in specific situations where consumers may be misled as to whether an entity is insured by the FDIC or the nature and extent of deposit insurance coverage. The proposal would amend subpart B to expressly address these situations, making clear when specific statements or omissions constitute a misrepresentation under section 18(a)(4).

Use of the Official Advertising Statement or FDIC-Associated Terms or Images

Consumers have historically identified the use of the official advertising statement (such as "Member FDIC") and FDIC-Associated Terms or FDIC-Associated Images to signify that they are dealing with an IDI and will receive the protection of deposit insurance. Staff at the FDIC believes that use of the official advertisement or FDIC-Associated Terms or FDIC-Associated Images in such instances presents a high risk of confusing consumers as to whether they are dealing with an IDI and whether deposit insurance applies to their funds.

To address this risk, the proposed rule would clarify specific circumstances under which use of the official advertising statement, FDIC-Associated Terms, or FDIC-Associated Images

¹³ 12 CFR 328.3(a), (c).

by a non-bank would constitute a misrepresentation of insured status. For example, a non-bank's use of the "Member FDIC" logo on its website or in its marketing materials would be a misrepresentation unless that logo is next to the name of one or more IDIs. As another example, a non-bank's use of either the official FDIC sign or the digital sign that IDIs would be required to display through their digital deposit-taking channels (under proposed section 328.5) would be a misrepresentation if it inaccurately implies that the non-bank is insured by the FDIC and backed by the full faith and credit of the U.S. government. Similarly, a non-bank's use of FDIC-Associated Terms in statements suggesting that the non-bank is insured by the FDIC would constitute a misrepresentation.¹⁴

Failure to Disclose that a Person is a Non-bank is a Material Omission When a Statement is Made Regarding Deposit Insurance

Non-banks that purport to deposit their customers' funds at IDIs sometimes make statements regarding deposit insurance coverage for those funds. Absent additional context, such statements misrepresent the insured status of the non-bank and suggest that the FDIC's deposit insurance will protect consumers in the event of the non-bank's insolvency. To minimize risk of consumer confusion, the proposed rule provides that if a non-bank makes statements regarding deposit insurance for its customers, it is a material omission for the non-bank to fail to clearly and conspicuously disclose that it is not itself an FDIC-insured institution and that the FDIC's deposit insurance coverage only protects against the failure of an FDIC-insured depository institution.

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.

Failure of Persons to State that Non-deposit Products are Not Insured by the FDIC is a Material Omission When a Statement is Made Regarding Deposit Insurance

Staff at the FDIC believes that where banks or non-banks make statements regarding deposit insurance in a context where deposits and non-deposit products are involved, additional information is necessary to ensure that consumers understand which products are subject to deposit insurance. To prevent consumer confusion, the proposed rule provides that if a person makes statements regarding deposit insurance in a context that involves both deposits and non-deposit products, it is a material omission to fail to disclose that non-deposit products: are not insured by the FDIC; are not deposits; and may lose value. For example, if a non-bank's website offered customers the option to have their funds deposited at an IDI and protected by deposit insurance or invested in non-deposit products, it would be a material omission if the non-bank's

¹⁴ These examples are intended to be illustrative, rather than an exhaustive list of ways in which a non-bank might misrepresent its insured status. Any use of the official advertising statement, FDIC-Associated Terms, or FDIC-Associated Images that inaccurately states or implies that the non-bank is insured by the FDIC would violate the proposed rule.

website failed to state that the non-deposit products are not insured by the FDIC, are not deposits, and may lose value.

Failure to State that Requirements Apply to Pass-Through Deposit Insurance

The FDIC has a long history of providing “pass-through” deposit insurance coverage, meaning that deposits placed at an IDI by a party on behalf of one or more owners are insured as if deposited directly at the IDI by the owner(s). Pass-through insurance allows each owner of the funds in such an arrangement to be separately insured up to the statutory deposit insurance limit, currently \$250,000, even if the total deposit of all owners (in the aggregate) exceeds the \$250,000 limit. Pass-through insurance only applies, however, if certain regulatory requirements are satisfied.¹⁵

The proposed rule provides that if a person makes statements regarding pass-through deposit insurance for its customers’ funds, it is a material omission to fail to clearly and conspicuously disclose that certain conditions must be satisfied for pass-through deposit insurance coverage to apply. The proposed rule would not require a person making a statement regarding pass-through deposit insurance to list the specific conditions that must be satisfied; simply referencing that conditions must be satisfied would be sufficient under the proposed rule. The proposed rule also does not prescribe specific disclosure language, providing flexibility in how parties may wish to express the necessary information. For example, if a website for a financial product were to state that consumers’ funds are eligible for pass-through deposit insurance, it would be a material omission to fail to clearly and conspicuously state that certain conditions must be satisfied in order for pass-through insurance to apply.

6. Crypto-assets

Among other things, part 328 currently prohibits any person from representing or implying that any Uninsured Financial Product is insured or guaranteed by the FDIC.¹⁶ This prohibition applies to advertisements, publications, and other disseminations of information. Staff at the FDIC has recently noted a number of misrepresentations of insurance coverage and crypto-assets,¹⁷ and believes that part 328 should be amended to make clear that representations concerning crypto-assets fall within its scope. Accordingly, the proposed rule would amend the definitions of “Non-Deposit Product” and “Uninsured Financial Product” in subpart B to include crypto-assets and define crypto-asset as “any digital asset implemented using cryptographic techniques.” This would include a digital asset that is a digital representation of value that functions as a medium of exchange, a unit of account, and, or a store of value; as well as a digital

¹⁵ See 12 C.F.R. §§ 330.5, 330.7. For pass-through deposit insurance to apply: (1) the deposit account records of the IDI must disclose a basis for pass-through coverage, such as a custodial or agency relationship; (2) the identities and interests of the actual owners of the funds must be ascertainable either from the records of the IDI or records maintained in good faith and in the regular course of business by another party; and (3) the relationship that provides the basis for pass-through deposit insurance coverage must be genuine, with the deposited funds actually owned by the named owners. Additional requirements apply to arrangements involving multiple levels of relationships.

¹⁶ “Uninsured Financial Product” is currently defined to include non-deposit products, hybrid products, investments, securities, obligations, certificates, shares, or financial products other than insured deposits.

¹⁷ See FDIC Press Release PR-60-2022, *FDIC Issues Cease and Desist Letters to Five Companies for Making Crypto-Related False or Misleading Representations About Deposit Insurance* (Aug. 19, 2022).

asset that has an equivalent value in and is convertible to real currency, or that acts as a substitute for real currency and is not legal tender.

The proposed rule also includes crypto-assets in subpart A's definition of "non-deposit product," using the definition of "crypto-asset" described above. Accordingly, the non-deposit sign requirements proposed in subpart A would apply to crypto-assets. For example, if an IDI's ATM offered customers the ability to purchase crypto-assets, the ATM would be required to clearly, continuously, and conspicuously display disclosures indicating that the crypto-assets: are not insured by the FDIC; are not deposits; and may lose value.

7. Policies and Procedures For IDIs

The proposed rule would require IDIs to establish and maintain written policies and procedures related to these requirements that are commensurate with the nature, size, complexity, scope, and potential risk of the deposit-taking activities of the institution. As part of these policies and procedures, IDIs would also need to include, as appropriate, provisions related to monitoring and evaluating activities of persons that provide deposit-related services to the IDI or offer IDI's deposit-related products or services to other parties.

Signs, Advertising Statement, and Misrepresentations

Such policies and procedures could include, for example, measures that an IDI would take to ensure compliance with the proposed sign and advertising requirements when the IDI changes its advertising strategy or engages with, or expands into, new physical or digital deposit-taking channels. For example, this could include, if applicable, establishing procedures to ensure that the IDI's technology (e.g., websites and mobile applications) is capable of implementing the proposed sign and advertisement statement requirements across all digital deposit-taking channels. Ultimately, an institution's policies and procedures would need to be commensurate with the nature, size, complexity, scope, and potential risk of its deposit-taking activities.

Certain Third Party Relationships

To the extent a third party has a business relationships with, and is serving as a deposit-taking channel for, an IDI, sound risk management would compel the IDI to be aware of the activities of the third party to ensure that the availability of deposit insurance is not being misrepresented. As such, under the proposed rule, and as appropriate, IDIs would establish policies and procedures that include provisions related to monitoring and evaluating deposit-related services that a third party provides to the IDI or deposit-related products or services offered by the third party to other parties. Having policies and procedures in place relating to certain third party relationships is critical to mitigating the risks of consumer harm and confusion, consistent with the statutory purpose underlying section 18(a) of the FDI Act, and the FDIC's mission to maintain and promote public confidence in the banking system.

To the extent an IDI has a business relationship with a third party that provides deposit related services, it should consider including reasonable provisions in its policies and procedures to ensure the marketing and advertising materials provided to prospective depositors by that third party do not misrepresent the insurability of financial products. This could include, for example,

policies related to training staff to review the marketing and advertising materials to evaluate whether such materials contain misrepresentations about deposit insurance. Further, as appropriate to the potential risk, an IDI should consider policies and procedures related to steps that the IDI might take to mitigate its risk were the third party to misrepresent deposit insurance and therefore cause potential consumer confusion and harm about a product provided by the IDI.

The policies and procedures related to certain third parties would be commensurate with the nature, size, complexity, scope, and potential risk of the deposit-taking activities. With regard to third party relationships, IDIs would be expected to focus on the relationships that pose a higher degree of risk to consumers.

REQUEST FOR COMMENTS

The FDIC would seek comment on all aspects of the rule and in response to a series of specific questions.

CONCLUSION

The proposed rule is intended to enable consumers to better understand when they are doing business with an IDI and when their funds are protected by the FDIC's deposit insurance coverage. FDIC staff recommends that the Board approve the NPR for publication in the Federal Register.

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