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

Re: RIN 3064–AF71

IntraFi Network LLC ("*IntraFi*")[1] appreciates having this opportunity to comment on the FDIC's Notice of Proposed Rulemaking on False Advertising, Misrepresentation of Insured Status, and Misuse of the FDIC's Name or Logo, published on May 10, 2021 ("*NPR*").[2]

INTRODUCTION

IntraFi supports the FDIC's efforts to prevent false or misleading statements about deposit insurance. One element of the proposed rule is so broad, however, that it will – inadvertently, we believe – prevent organizations that provide important services to banks from making truthful and factual statements about deposit insurance in their advertising and other communications.

Because this issue arises from a single sentence in the proposed rule, the FDIC can address it without in any way diminishing the important focus of the FDIC's proposal. We include below two alternative suggested drafting solutions.

DISCUSSION

1. **One sentence in the proposed rule has an effect that we believe is unintended.**

IntraFi supports the FDIC's efforts to prevent the use of false or misleading statements regarding deposit insurance. Preventing such statements is important. IntraFi commends the FDIC for addressing them through this rulemaking and, when needed, the agency's enforcement powers.

IntraFi's concern with the proposed rule relates to a single sentence at the end of proposed subsection 12 C.F.R. § 328.102(b)(3)(ii). Under that sentence, if any person that is not an FDIC-insured bank makes any "statement regarding deposit insurance," the person's "failure to identify

[1] Founded in 2002, IntraFi, formerly known as Promontory Interfinancial Network, LLC, provides services to the banking and brokerage industries.

[2] NPR, 86 Fed. Reg. 24,770 (May 10, 2021).

the name(s) of the Insured Depository Institution(s) that will be receiving the deposits is deemed a material omission" that violates the rule.[3]

We believe that this proposed language, although it addresses a legitimate concern, if retained will prevent important bank service providers like IntraFi from making appropriate and necessary communications, even though the communications are entirely truthful and not misleading. These effects are inconsistent with the FDIC's stated purpose. The FDIC's legitimate goal can be served equally well, or better, by a more closely tailored provision.

When an entity that is not an FDIC-insured bank partners with a single FDIC-insured bank to send deposits to that bank, identifying the FDIC-insured bank that will receive the deposits should be feasible and may be helpful. But the situation is entirely different if the identity of the receiving bank or banks is not yet determined at the time marketing or informational statements are made, as is the case for many statements about a deposit placement network.

For example, in a deposit placement network such as that administered by IntraFi for the services that have been known as CDARS and ICS, deposits are placed at FDIC-insured banks in amounts that do not exceed the standard maximum deposit insurance amount of $250,000.[4] IntraFi discloses this fact, which refers to FDIC insurance, in marketing and informational materials.[5] This truthful disclosure would violate the proposed rule if the disclosure did not include the names of one or more particular banks at which particular deposits will be placed. But including those names is not possible when marketing and informational materials are issued, because the identities of the particular banks that will receive particular deposits is not yet determined.

Several thousand FDIC-insured banks participate in the services that have been known as CDARS and ICS. Which network banks will receive particular deposits through these services necessarily is determined after orders have been processed on the day of placement. This determination reflects the deposit and withdrawal orders that have been submitted. It also takes into account, among other things, the need to provide reciprocal deposits to banks that are placing deposits on a reciprocal basis. Although depositors can see proposed placements on the day of placement and receive statements that show exactly which banks have received exactly which portions of their funds, there is no way to identify, before orders have been processed on the day of placement, which particular network banks will receive particular deposits.

Because the identification of particular receiving banks cannot be made until the day of placement, the apparent effect of the proposed rule in its current form is to ban any and all

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[3] *Id.* at 24,776, in proposed 12 C.F.R. § 328.102(b)(3)(ii).

[4] IntraFi is in the process of rebranding these services, but the rebranding is immaterial to the present topic.

[5] Depositors are further informed, before any placement occurs, that deposits placed at a bank will be aggregated for FDIC insurance purposes with any other deposits that the depositor may maintain at the bank in the same insurable capacity. In addition, they are informed, before any placement occurs, that a depositor may exclude any bank from eligibility to receive its deposits and may reject any bank at which a placement is proposed.

statements regarding deposit insurance – even though they are entirely truthful and are not in any way misleading – that the non-bank administrator of a deposit placement network makes before placement occurs. The proposed rule would also ban such truthful statements by any participating institution that is not a bank, such as a registered broker-dealer.[6]

Sharply limiting the dissemination of accurate information by and about deposit placement networks would, in turn, impair an important source of stable deposits for community banks, many of which rely on that funding to support their community lending. Because nearly all advertising and other description of deposit placement networks occurs well before deposit placement, limiting the ability of a network sponsor or other nonbank to advertise or otherwise describe its network would inevitably reduce the availability of network deposits to banks.[7]

2. The unintended effect can readily be avoided.

The FDIC can address the problem described in this letter, while continuing to serve the purpose of the proposed rule, by modifying the last sentence of subsection 328.102(b)(3)(ii). We present two alternative revisions of that sentence, either of which we believe would suffice. Both alternatives also deal with the problem that the term "the deposits" in the current version of the sentence has no antecedent.

The first alternative for the last sentence of section 328.102(b)(3)(ii) is simply to add the underlined language below:

> Where ~~such~~ a statement <u>regarding deposit insurance for particular deposits</u> is made by a person other than an Insured Depository Institution, failure to identify the

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[6] The discussion above refers to the services that have been known as CDARS and ICS. IntraFi's deposit sweep service for broker-dealers operates in different manner. Nevertheless, the proposed rule in its current form would also be potentially problematic for broker-dealers or other non-banks that make truthful disclosures about a sweep program. For example, the proposed rule would appear to prohibit statements in a disclosure document that accurately and usefully inform prospective depositors about how FDIC insurance works, such as by explaining aggregation, because they are also statements "regarding deposit insurance" and do not name particular FDIC-insured banks.

[7] To the extent that the proposed rule prohibits a deposit placement network from providing information about reciprocal deposits, it would also appear inconsistent with the adoption of new section 29(i) of the Federal Deposit Insurance Act. Section 29(i), which was added to the FDI Act via section 202 of the Regulatory Relief, and Consumer Protection Act (2018), reflects a favorable Congressional judgment about reciprocal deposits received through a deposit placement network. 12 U.S.C. § 1831f(i).

In addition, we note that the restriction as it stands appears to be inconsistent with judicial precedents regarding limitations on commercial speech under the First Amendment. *See Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*, 447 U.S. 557, 561 (1980); *Safelite Group, Inc. v. Jepsen*, 764 F.3d 258, 261 (2d Cir. 2014). As the Supreme Court stated in *Central Hudson*, if a governmental interest that is served by restrictions on commercial speech "could be served as well by a more limited restriction on commercial speech, the excessive restrictions cannot survive." 447 U.S. at 564.

> name(s) of the Insured Depository Institution(s) that will be receiving the deposits, if known at the time the statement is made, is deemed a material omission.

This alternative would ensure that, when a non-bank entity has partnered with a particular bank that is known to be the bank that will receive particular deposits, a statement by the non-bank entity regarding deposit insurance for the deposits must name that bank. At the same time, a statement by a non-bank entity that administers a deposit placement network would not be required to identify by name a particular bank or banks that are not known at the time of the statement.

The second alternative for the last sentence of section 328.102(b)(3)(ii) is to modify the second to read as follows:

> Where ~~such~~ a statement regarding deposit insurance for particular deposits is made by a person other than an Insured Depository Institution, ~~failure to identify the name(s) of the Insured Depository Institution(s)~~ the statement will be deemed to contain a material omission if it states or implies that the deposits will be FDIC-insured without either (A) identifying the Insured Depository Institution(s) that will be receiving the deposits ~~is deemed a material omission~~ or (B), if the deposits will be placed through a deposit placement network and the receiving institutions have not yet been determined, disclosing that access to FDIC insurance will be provided through placement at one or more Insured Depository Institutions in the network.

No reasonable consumer can be misled by a truthful statement about deposit insurance that accurately describes how a deposit placement network works merely because it does not name particular banks the identity of which is not yet known.

By modifying the sentence as shown in either of the alternatives suggested above, the FDIC will avoid unnecessarily restricting accurate descriptions of deposit placement. At the same time, the rule will continue to serve the FDIC's important goal of preventing false and misleading statements regarding deposit insurance.

Please do not hesitate to contact the undersigned at dphillips@intrafi.com if you have any questions or need further information.

Sincerely,

[redacted]

Douglas E. Phillips
Senior Vice President and General Counsel