July 8, 2021

Via Electronic Mail

Mr. James P. Sheesley
Assistant Executive Secretary
Federal Deposit Insurance Corporation
550 17th Street, N.W.
Washington, D.C. 20429

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

Dear Mr. Sheesley:

The Bank Policy Institute[1] and the American Bankers Association[2] (together, the "Associations") appreciate the opportunity to provide comments on the Federal Deposit Insurance Corporation's notice of proposed rulemaking and request for information relating to false advertising, misrepresentation of insured status, and misuse of the FDIC's name or logo ("Proposal").[3] We applaud the agency for recognizing the increasing number of potential violations of the underlying statute and agree a clearer, more robust process by which the FDIC identifies and investigates these acts benefits not only banks and other financial organizations, but consumers of financial products as well.

As described in section II of the Proposal, the Associations also have noted an increase in the misuse of FDIC signage and misrepresentation of deposit insurance status by non-bank financial institutions. The financial services industry is increasingly migrating to online or other virtual advertisements and product offerings, and the number of insured depositories partnering with other

1 BPI is a nonpartisan public policy, research and advocacy group, representing the nation's leading banks and their customers. Our members include universal banks, regional banks and the major foreign banks doing business in the United States. Collectively, they employ almost 2 million Americans, make nearly half of the nation's small business loans and are an engine for financial innovation and economic growth.

2 The American Bankers Association is the voice of the nation's $21.9 trillion banking industry, which is composed of small, regional and large banks that together employ more than 2 million people, safeguard $17 trillion in deposits and extend nearly $11 trillion in loans.

3 86 Fed. Reg. 24770 (May 10, 2021).

financial service providers continues to grow. These trends make modern signage regulations – and a robust process to deter and prosecute misrepresentation – imperative.

The growing instances of misuse of the FDIC's name or logo is of particular concern for the Associations due to the potential for significant consumer confusion and the reputational risk misrepresentation can pose to our members. Though seemingly straightforward, the nuances of deposit insurance and the similarities of products offered by insured and non-insured firms, makes assessing whether and how a deposit is insured increasingly difficult.

Several recent instances reported in the financial and other media involve non-bank financial institutions implying FDIC insurance coverage in a manner which could easily confuse or mislead the average consumer. These often include entities that utilize partner banking relationships or pass-through insurance advertising that funds deposited with them are FDIC insured, without clear disclaimers that such funds are only insured once they are swept to the partner bank. These entities may fail to disclose the identity of their partner banks or may do so inaccurately. There also have been instances of firms including language in their terms and conditions or advertising that asserts FDIC insurance coverage well in excess of the $250,000 limit through multiple partner banking relationships, which while presumably truthful, further confuses and misleads consumers, degrading the FDIC's core message and intentions.

We note that there is overlap between the Proposal and the FDIC's recent Request for Information on Sign and Advertising Requirements ("RFI") and refer the FDIC to the comments submitted by the Associations in response to the RFI.[4] We again encourage the FDIC to take steps to minimize consumer confusion by requiring non-banks that maintain balances on behalf of consumers to adhere to FDIC signage and disclosure regulations, and clearly indicate that they are not FDIC members and that the balances held are not FDIC-insured. Given the diversity of the activities and businesses of non-bank entities, we encourage the FDIC to coordinate with other financial and market regulators to ensure a consistent approach with respect to addressing potentially deceptive practices by non-bank entities. Additionally, we reiterate the recommendation that the FDIC provide clear and easily accessible tools to help consumers distinguish insured depository institutions from other financial services providers. FDIC insurance is synonymous with the word "bank" and this improvement will help to preserve that association.[5]

The remainder of this letter provides comments on the specific provisions of the Proposal.

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[4] Letter to FDIC, from the American Bankers Association and the Bank Policy Institute re: Request for Information on FDIC Sign and Advertising Requirements and Potential Technological Solutions (RIN 3064-ZA14) (May 24, 2021).

[5] For example, this was found to be the case with Chime Financial, Inc., which was the subject of a recent enforcement action by the California Department of Financial Protection and Innovation. As part of its settlement, Chime is required to "provide a clear and prominent disclaimer during the account set up process to inform the consumer that Chime is a financial technology company not a bank and banking services are provided by Chime's Bank Partner(s)". *See* The Commissioner of Financial Protection and Innovation v. Chime Financial Inc., Settlement Agreement (March 29, 2021), *available at* https://dfpi.ca.gov/wp-content/uploads/sites/337/2021/04/Admin.-Action-Chime-Financial-Inc.-Settlement-Agreement.pdf.

A. The FDIC should clarify application of the proposed rules to bank communications with respect to non-deposit and hybrid products.

Banks are prohibited from using the FDIC's official advertising statement, which states that the institution is a member of the FDIC, for advertisements related solely to non-deposit products or hybrid products like sweep accounts.[6] However, for "mixed advertisements" including information about both insured deposit products and non-deposit or hybrid products, FDIC regulations require a bank to "clearly segregate the official advertising statement…from that portion of the advertisement that relates to the non-deposit products."[7] The Proposal reinforces this prohibition by including hybrid and non-deposit products among those about which a person may not represent or imply deposit insurance.[8]

Taken together, these requirements make it difficult to advertise product offerings on social media and, at the very least, mandate delivering to consumers a confusing set of disclosures. Banks also promote their firms and products through newsletters and other communications, a means of advertising that also presents a measure of difficulty when advertising non-deposit products. We await the FDIC's revised rules on signage, clarifying how a bank should advertise its deposit products in combination with non-deposit products, such as hybrid products and fiduciary services including trusts, estates, financial planning, and investment management.

We recommend that the FDIC clarify the application of the Proposal to a bank's mixed advertisements, particularly those delivered through mobile channels where segregation is not always feasible. In addition, the Associations recommend that the final rule include a safe harbor for these and other bank products and communications.

B. The proposed bright-line rule for knowing misrepresentations should be strengthened.

The Proposal would include a bright-line rule for when the FDIC will presume a misrepresentation to have been knowingly made and notes that the agency reserves the right to establish a misrepresentation by introducing additional evidence. The Associations support the inclusion of such a presumption in a final rule. The Associations also believe this provision in the proposed rule should include additional clarity.

The proposed standard presumes that a respondent has made a knowing misrepresentation if, after having been advised that representations are false or misleading, the respondent continues to make those representations. However, the Proposal does not include a timeframe within which a respondent would be required to cure a misrepresentation without being deemed to have made a knowing misrepresentation. The Associations recommend the FDIC strengthen the bright line rule by including this additional specificity. For example, if a respondent does not correct a representation within 30 days after receiving notice, the FDIC should presume the misrepresentation is knowing and take appropriate action.

The Associations also recommend that the FDIC provide additional detail on the kinds of evidence that it may introduce in order to substantiate claims of knowing misrepresentation. This will increase the transparency of the process and expectations, providing additional clarity as to the

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[6] 12 C.F.R. § 328.3(e).

[7] 12 C.F.R. § 328.3(e)(4).

[8] Proposed section 328.102(a)(3)(iii).

situations that may be deemed misrepresentations. Additionally, greater clarity will assist institutions in planning their marketing and other activities to ensure they remain in compliance with the regulations.

C. The FDIC should include federal financial and market regulators and appropriate state regulators among those to which it refers potential violations.

The proliferation of non-bank financial institutions participating in the business of banking presents a challenge with respect to the enforcement of misrepresentation of FDIC insurance. While the FDIC has enforcement authority under section 18(a)(4) of the Federal Deposit Insurance Act with respect to misuse of the FDIC name or logo, it is highly likely that in addition to violating that provision of the FDI Act, a non-bank financial institution may also violate other laws. Because of that likelihood, the Associations fully support the FDIC's inclusion of the referral provisions in the final rule to make the appropriate regulatory authorities aware of potential violation of laws outside the FDIC's jurisdiction.

Given the diversity of activities and business of non-bank entities, we recommend that the FDIC coordinate with other federal financial and market regulators, including the Securities and Exchange Commission, Consumer Financial Protection Bureau, the Financial Industry Regulatory Authority and the Federal Trade Commission to ensure a consistent approach with respect to addressing potentially deceptive acts and practices by non-bank entities. We also recommend that the FDIC coordinate with the appropriate state regulators, such as state banking agencies, given the variety of jurisdictions in which these organizations operate. As we have seen recently, state banking agencies are taking a more active role in oversight of these institutions such that coordination between the FDIC and states would be beneficial.[9]

D. The FDIC should clarify that banks may submit complaints through the proposed process.

The Associations support the inclusion of a process for members of the public to submit complaints regarding suspected false or misleading representations about deposit insurance. As non-bank financial institutions are targeting their marketing toward consumers, these consumers are best positioned to alert the FDIC to instances of misuse of the FDIC logo or misleading representations about deposit insurance. However, the text in proposed section 328.103 references both "persons," which is defined to include corporations, and "individuals" as those who may submit complaints. This language seems to indicate that non-individuals may not avail themselves of the complaint process. In addition to individuals, insured depository institutions are also well-positioned to notify the FDIC of instances of misuse of the logo or misrepresentations of deposit insurance. Banks may become aware of these potential violations both in the context of market research into other institutions that offer similar services, but also with respect to partnerships. Because of the possibility that a bank may need to notify the FDIC of a violation committed by a non-bank financial institution partner, the Associations recommend that the FDIC clarify that banks are able to take advantage of the process to submit complaints. If the intent was that non-individuals would not be able to submit complaints as prescribed by the proposed rule, the Associations recommend that the FDIC provide for a process by which a bank may submit a report of violation to the FDIC.

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9 *See e.g.,* The Commissioner of Financial Protection and Innovation v. Chime Financial Inc., *supra* note 5.

E. Banks should not be held responsible for third party activities beyond the bank's control.

The Proposal requested in question 10 that commenters discuss the steps a bank takes to ensure a non-bank partner is aware of, and complies, with the laws and regulations related to the use of the FDIC name and logo. While a bank may partner with a non-bank, the FDIC should specify in any final rule that a bank does not have an obligation to oversee the activities of third parties that are outside the scope of the relationship. We understand the need for banks to have strong third-party standards and practices, but do not believe it is appropriate to impose this expectation on banks in an unlimited fashion. For example, while a bank may be responsible for ensuring any joint marketing materials are in compliance with existing laws and regulations, the bank should not be responsible for monitoring and policing the third-party's advertising activities that are beyond the control of the bank.

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The Associations appreciate the opportunity to comment on the Proposal and would welcome the opportunity to discuss them further with you. If you have any questions, please contact Dafina Stewart at *dafina.stewart@bpi.com* or Alison Touhey at *atouhey@aba.com.*

Respectfully submitted,

Dafina Stewart
Senior Vice President, Associate General Counsel
Bank Policy Institute

Alison Touhey
Vice President, Bank Funding Policy
American Bankers Association

cc: Doreen Eberly
Diane Ellis
Federal Deposit Insurance Corporation