May 21, 2021

Submitted electronically
Mr. Robert E. Feldman
Executive Secretary
Federal Deposit Insurance Corporation
550 17th Street, NW
Washington, DC 20429

Re: *Request for Information on FDIC Sign and Advertising Requirements and Potential Technological Solutions (RIN 3064-ZA14)*

Dear Mr. Feldman:

The American Bankers Association[1] and Bank Policy Institute[2] (together, the "Associations") appreciate the opportunity to provide comments on the FDIC's Request for Information (RFI) on FDIC official sign and advertising requirements and potential technological solutions.[3] The RFI seeks information on how the FDIC can best modernize its sign and advertising regulations so that they align better with the today's digital and mobile banking channels. The RFI also seeks information on how to help consumers differentiate between insured banks and nonbanks, particularly online and across digital channels.

The Associations support the FDIC's initial steps toward modernizing these requirements, particularly as the nature of banking itself has significantly changed and moved toward increased digitization since the FDIC last updated these rules in 2006. Moreover, given the rise of new market participants providing pass-through deposit insurance or similar products and services—whether through partnerships or on their own—it is appropriate for the FDIC to take steps to

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[1] 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.

[2] The Bank Policy Institute 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.

[3] Request for Information on FDIC Official Sign and Advertising Requirements and Potential Technological Solutions. 86 Fed. Reg. 18528 (Apr. 9, 2021).

mitigate the risk of consumer confusion or potential misrepresentations that may arise in the marketplace.

The Associations' member banks continue to grapple with how best to deliver their products and services to consumers in transparent and innovative ways. Flexibility and regulatory clarity regarding the FDIC's sign and advertising requirements will further these efforts, without adding additional burdens to banks. As such, we believe the FDIC should be thoughtful in its approach to modernizing these requirements. We encourage the FDIC to clarify and streamline its expectations, leveraging technological advances and innovations to assist in promoting compliance. To address these issues, this letter sets forth and discusses the following key areas that we believe warrant further focus and consideration by the FDIC as it updates its sign and advertising requirements. We recommend the following:

- The FDIC should amend its signage requirements to permit depository institutions to display a single sign in one prominent location per branch, allowing for electronic displays. Similarly, signage requirements should be updated to require insured depository institutions to display an FDIC sign or logo only on the homepage or landing page of their online or mobile platform.

- Efforts to modernize the FDIC's advertising requirements should clarify requirements related to promotional materials, and social media use and activities. With respect to each of these areas, due to changes in bank advertising practices and the growth of bank partnerships with third parties, banks face challenges in implementing the FDIC's requirements across various online channels.

- With the increasing proliferation of non-insured entities offering similar products and services to banks, the risk of customer confusion will likely increase. A clear articulation by the FDIC as to the obligations that non-banks have with respect to offering these types of products and services, whether insured or not, can promote consumer understanding and mitigate the risk of consumer confusion. Additionally, the FDIC should increase the accessibility and transparency of its tools to help consumers differentiate between insured and noninsured institutions.

Finally, we note that any changes or clarifications the FDIC makes should be flexible enough to adapt to both the present and the future. This will better enable the industry to develop and address yet unknown challenges. Ensuring flexibility, rather than implementing prescriptive requirements that may impose additional burdens on banks, will better permit banks to adjust to the needs of an ever-changing marketplace and its consumers.

I. The FDIC should modernize its official signage requirements to reflect modern branches, as well as the new technologies by which banks are providing their products and services.

a. The FDIC should amend its signage requirements to permit depository institutions to display a single sign in one prominent location per branch and allow electronic displays.

The FDIC's sign and advertisement requirements were set forth in 1935 and last revised in 2006.[4] The implementing regulations, found in 12 C.F.R. Part 328, require banks to display the FDIC sign "where insured deposits are usually and normally received in the bank's principal place of business and all of its branches…"[5] Given the new ways in which banks are providing deposit and other services, the FDIC's current requirements are not aligned with existing branch design and deposit-taking practices. We recommend updating the regulations in a manner that allows the banking industry to be nimble now and into the future. Creating sign and advertising requirements that are more flexible and can adapt to evolving technology, social media platforms, and business practices will reduce the need to update the requirements each time they fall out of step with technology, business practices, or insurance coverage, and other policy changes.

To promote increased alignment with current practices, the FDIC should consider taking a less prescriptive approach to implementation of these requirements than it has in the past.[6] Because the current signage requirements align more closely with the traditional bank branch model, banks face increasing difficulty in determining how best to comply with the FDIC's requirements. Providing more flexibility to each individual institution, depending on the way in which they deliver their deposit and other services, should be a primary consideration.

Banks of all sizes are beginning to move away from the traditional branch model and toward more flexible branch designs. Some of these branch concepts have embraced open floorplans, communal space, and greater technological connectivity. The increased technological connectivity allows for the use of devices, such as tablets or smart phones, by bank employees with various banking functions that can be done anywhere in the branch. These modern branches can be an uneasy fit for FDIC signage requirements premised on a traditional teller-window banking model. The FDIC should consider how best to define the term "continuously" for the purposes of its display requirements, as well as consider the ways in which banks are using new technologies as part of their branches.

As one step, the FDIC should permit banks to use electronic displays, such as TV or video monitors, in the branch setting to satisfy signage requirements. The use of a centrally located and conspicuous monitor could be utilized to display all required disclosures and information. For example, the use of monitors in this manner would permit the display of multiple disclosures

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[4] 71 Fed. Reg. 40440 (Jul. 17, 2006).

[5] 12 C.F.R. § 328.2(a).

[6] *See e.g.*, FDIC Advisory Opinion, FDIC 92-20, *Display of Official Deposit Insurance Signs* (Apr. 9, 1992), *available at* https://www.fdic.gov/regulations/laws/rules/4000-7110.html (stating "…you ask if it is acceptable to display an official sign between two closely adjoining teller windows. FDIC regulations require that an official sign be displayed at each station or window where deposits are usually and normally received. It would be acceptable to post one sign between the two stations only if the adjoining teller windows are so close together that it can reasonably be said that the official sign is displayed 'at' both of the teller windows.").

as they rotate across the screen. Additionally, this use would allow for the timely, cost effective and easily adaptable display of required disclosures. For example, banks faced expense to update their signs to reflect the increase in deposit insurance from $100,000 to $250,000. Permitting electronic displays would make changes like this considerably easier to implement.

Another alternative to the current signage requirements would be to allow the placement of a single sign in one prominent location per branch. This consolidated disclosure could include the FDIC's official signage expectations and any other necessary consumer disclosures that must be posted. As long as this consolidated disclosure is visible in an area that is easily within customer view, this approach would be a major improvement to the current fragmented disclosures present in certain bank branches.

b. The FDIC should amend its signage requirements to only require display of an FDIC sign or logo only on the home page or landing page of a mobile or online platform.

The FDIC should consider the ways in which consumers interact with their banks via online and mobile platforms. For example, institutions currently provide a digital representation of the FDIC sign or logo on a website at the time of the account opening. In this circumstance, the FDIC should clarify the permissibility of this approach to allow for consistency in application.

The FDIC should consider how to provide FDIC signage that centers on retail consumers looking for clear and accessible disclosures on the status of their insured funds, not redundant disclosures at each step of their banking experience. With respect to mobile applications or online platforms, we suggest that signage only be required on the home screen, which is often the primary launching point consumers use to manage their fund and engage with their banks—although banks should still be permitted to continue using signage consistent with current rules and regulations. It does not seem reasonable to require signage on every screen of a mobile application or every time a mobile deposit is made. When a consumer is making a mobile deposit into their account, they have already been made aware of the FDIC-insured status of their deposits. Additionally, the technological burden placed on the banks to comply with such a rule would be costly relative to the benefit the consumer is deriving—a redundant notification that their deposits are insured.

II. Efforts to modernize the FDIC's advertising requirements should clarify requirements related to displays, promotional materials, social media use and activities.

As noted in the RFI, the "advertising statement seeks to enable consumers to recognize FDIC-insured deposit products, as contrasted with non-deposit investment products that are not insured."[7] For that reason, banks are prohibited from using the official advertising statement for

[7] 86 Fed. Reg. at 18530. Under 12 C.F.R. § 328.3, there is a general requirement that banks convey their insured status with "Member FDIC" or some variant in their advertising (i.e. the "official advertising statement"). However, 12 C.F.R. § 328.3(d) lists ten exceptions to the general requirement to provide an official advertising statement.

advertisements solely focused on non-deposit products or hybrid products like sweep accounts.[8] While there are circumstances where the FDIC permits "mixed advertisements," institutions are still required to "clearly segregate the official advertising statement from that portion of the advertisement that relates to the non-deposit product."[9]

In light of changes to bank advertising practices due to increased use of digital channels, as well as the growth of bank partnerships, the existing FDIC advertising requirements are misaligned with current practices. As a result, banks face challenges in implementing the FDIC's requirements in a consistent manner across various channels.

a. *The FDIC should define the term "display advertisement" in the regulation*

Under 12 C.F.R. § 328.3(d)(8), banks are not required to provide an official advertising statement for advertisements by radio or television, <u>*other than display advertisements*</u>, which do not exceed 30 seconds time (emphasis added). Banks have expressed confusion around what constitutes a "display advertisement." Thus, further clarity regarding the term "display advertisement," including by defining the term itself, would be useful.

b. *The official advertising statement requirement should exclude all promotional items and employee uniforms*

Under § 328.3(d)(9), banks are not required to provide an official advertising statement for promotional items such as calendars, matchbooks, pens, pencils, and key chains. This exception seems driven by the rationale that it would be impractical to include the official advertising statement on these small items. However, it is unclear whether larger promotional items like bank-branded clothing or coffee mugs fit within this exception. This exception can lead to unanticipated compliance questions. For instance, bank-branded clothing worn by employees at affiliated trust and wealth management departments raises considerations related to compliance with the FDIC's requirements for those employees selling non-deposit products.

A full exemption of promotional items, and uniforms, would be appropriate, and would also allow for a bright line for bank compliance. Furthermore, permitting banks to use alternative methods to educate consumers on deposit insurance would be more useful than that of promotional materials.

c. *Revised regulations should require banks to place a simplified marker of FDIC membership or deposit insurance coverage, instead of an official advertising statement on social media or mixed advertisements.*

Under current FDIC regulations, it is particularly challenging for banks to advertise using social media platforms. As noted in the FDIC's Social Media Guidance (Guidance) from 2013, the sign and advertising requirements "apply equally to advertising and other activities conducted

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[8] 12 C.F.R. § 328.3(e).

[9] 12 C.F.R. § 328.3(e)(4).

via social media as they do in other contexts."[10] The Guidance extends the already broad requirements found in 12 C.F.R. Part 328 to the banking industry's use of social media.

Highlighted in the Guidance, but stemming from the "Interagency Statement on Retail Sales of Nondeposit Investment Products," is the requirement that a bank inform retail customers that non-deposit investment products are not insured by the FDIC, are not deposits and are not guaranteed by the institution, and are subject to investment risks, including possible loss of the principal invested.[11]

As noted earlier, in advertisements related solely to non-deposit products or hybrid products like sweep accounts, banks are prohibited from using the official advertising statement. However, for "mixed advertisements" there is a requirement to "clearly segregate the official advertising statement from that portion of the advertisement that relates to the non-deposit product."[12]

Taken together, these disclosures make it difficult to advertise product offerings on social media and, at the very least, mandate delivering consumers a confusing set of disclosures. Consider a bank that looks to use social media to advertise its deposit products in combination with non-deposit products it offers. The bank will be required to clearly segregate these products on its advertisement. Then, the bank will be required to disclose "Member FDIC," while at the same time disclosing that certain products are not insured by the FDIC. One challenge here is that official advertising statements placed online can present themselves differently. These challenges include, but are not limited to, the display differences across devices, applications, web browsers, websites, and screens.

Further, many digital advertising methods simply do not lend themselves to the requirements envisioned by current rules. For example, advertising methods that are extremely space constrained such as banner ads, paid search ads, and social media ads cannot accommodate current advertising signage requirements which fail to account for the ways in which these advertisements work. These forms of advertising function by directing consumers to web pages containing more information about the products and services referenced.

Therefore, we would urge the FDIC to find a balance between the need for simplicity and the need for insured banks to clearly differentiate themselves. One way to achieve this balance would be by requiring the FDIC logo, a "Member FDIC" statement or both on online and social media advertising. We encourage the FDIC to offer several options and formats to ensure that the required logos and disclosures work across all social media platforms. Additionally, the FDIC should consider an approach where product specific disclosures or the bank's website can be "one-click away," which would enable better communication with customers, while still providing required product disclosures designed to minimize customer confusion.

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[10] Social Media: Consumer Compliance Risk Management Guidance FIL-56-2013. (December 11, 2013) Available at: https://www.fdic.gov/news/news/financial/2013/fil13056.pdf

[11] *See* Retail Sales of Nondeposit Investment Products (February 17, 1994), available at: https://www.fdic.gov/regulations/laws/rules/5000-4500.html

[12] 12 C.F.R. § 328.4.

d. The FDIC should eliminate the requirement to notify customers of the expiration of the unlimited insurance coverage for certain non-interest bearing accounts.

The Dodd-Frank Act provided temporary unlimited FDIC coverage for certain non-interest bearing accounts from the time of enactment in 2010 to December 31, 2012. Though the program ended almost a decade ago, the FDIC still requires that banks post notices regarding its expiration. We urge the FDIC to remove this requirement.

III. The FDIC should take steps to minimize consumer confusion by requiring non-banks that maintain balances on behalf of consumers to adhere to FDIC requirements, and clearly indicate that they are not members and that the balances held are not FDIC-insured.

The current FDIC requirements designed to address the risk of potential consumer confusion or misrepresentation of deposit activities apply solely to insured banks and savings associations. However, the increasing proliferation of partnerships between insured depository institutions and non-bank entities can increase the risk of customer confusion with respect to their understanding of how deposit insurance may be provided. Moreover, as non-insured entities continue to offer products and services that offer similar deposit capabilities, which do not provide for deposit insurance, consumers are increasingly subject to misrepresentation of the availability of deposit insurance and potentially deceptive acts or practices.

Therefore, the FDIC should clearly articulate the obligations that non-banks have with respect to offering these types of products and services, whether insured or not, to promote consumer understanding and mitigate the risk of consumer confusion. Given that insured depository institutions are subject to the FDIC's existing disclosure obligations in this regard, the below suggestions are potential ways that the FDIC could promote consistency of application across insured depository institutions and non-insured entities that provide deposit-like products.

First, the FDIC should provide for additional disclosure requirements for non-banks to assist consumers in understanding that funds in the possession of non-insured entities only become insured after they are transferred to an insured bank or savings association and require disclosure about the timing of when funds given to the non-insured entity are transferred to the partner bank. Customers should be informed of the interval in which the funds are at risk of total loss (prior to transfer). Given the diversity of activities and business of non-bank entities, we recommend that the FDIC coordinate with other 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 practices by non-bank entities.

Second, the FDIC should provide specific guidance regarding advertising and disclosure requirements with regard to partnership models between banks and non-banks to make clear which entities are insured and which are not. This would include providing clarity with respect to how a bank should clearly and conspicuously disclose to consumers that the non-bank entity is not an insured institution, and that only those funds booked to the bank are covered by FDIC deposit insurance. For example, disclosures should be mandated to make it clear that products of a non-bank that are being offered are not FDIC insured (by stating so explicitly, similar to securities product disclosures). Any such guidance also would need to address how best to do so regardless of the channel in which it is offered, and more specifically with respect to mobile or online platforms, as well as the potential for joint oversight and enforcement responsibilities with the other financial and market agencies.

Third, the FDIC should specify that a bank does not have an obligation to oversee the advertising activities of third parties that are outside the scope of the bank/third-party relationship. For example, while a bank may be responsible for overseeing appropriate use of joint marketing materials that reference the bank's name in cases where a bank and non-bank enter into a partnership, the bank should not be responsible for monitoring and policing the third-party's advertising activities that are beyond the control of the bank.

IV. Any move toward technological solutions by the FDIC should not impose additional obligations on banks to educate consumers about the risks of transacting with non-insured entities.

The RFI seeks input on ways the FDIC may use technological options to allow consumers to distinguish FDIC-insured banks and savings associations from non-banks. As an initial step, the FDIC could play a helpful role in assisting consumers by further developing and promoting a streamlined version of BankFind that is easily accessible through modern technologies (e.g., smart phones) and applications. This would ensure that BankFind, which is a browser-based resource of the FDIC, is more broadly accessible as a tool to help consumers avoid being the victims of fraudulent schemes. The FDIC should also offer context on BankFind, which could include a clear explanation of deposit insurance and the significance of not being listed in BankFind.

The FDIC could be a key partner with the banking industry in a joint effort to educate the public on these matters. This goal could be accomplished by providing insured institutions the optional ability to fulfill disclosure and advertising requirements by hyperlinking the FDIC logo or statement to a centrally maintained FDIC website that contains the current and authoritative information that consumers need to make an informed decision. This solution would empower the FDIC to educate the public through the industry's marketing efforts, thereby creating a powerful partnership centered around the betterment and protection of the consumer.

As a final and more general point, to ensure that banks have the flexibility to develop appropriate solutions to these challenges as technologies evolve, the FDIC should avoid placing new obligations on banks to educate consumers about the risks of transacting with non-banks. Rather, the FDIC, in partnership with the CFPB, should focus its thinking on whether it is appropriate to set standards or expectations on non-banks to ensure that consumers engaging with these non-banks fully understand the uninsured status of their funds.

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The Associations appreciate the opportunity to provide the FDIC comments on this RFI. If you have any questions, please contact Alison Touhey, at atouhey@aba.com or, Dafina Stewart at dafina.stewart@bpi.com.

Sincerely,

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