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July 9, 2021

Mr. James P. Sheesley
Assistant Executive Secretary, Legal-ESS
Attention: Comments—RIN 3064-AF71
Federal Deposit Insurance Corporation
550 17th Street NW
Washington, DC 20429

Re: False Advertising, Misrepresentation of Insured Status, and Misuse of the FDIC's Name or Logo

Dear Mr. Sheesley:

The Independent Community Bankers of America (“ICBA”)¹ appreciates the opportunity to provide comments on the Federal Deposit Insurance Corporation’s (FDIC) notice of proposed rulemaking titled *False Advertising, Misrepresentation of Insured Status, and Misuse of the FDIC’s Name or Logo* (the “NPR”). ICBA acknowledges the timeliness of this proposal and commends the FDIC for clarifying the prohibition on making false or misleading representation about deposit insurance and using the FDIC logo to imply that an uninsured financial product is insured or guaranteed by the FDIC. This is particularly a problem for financial products in cyberspace that are often promoted by entities that are either unregulated or operate in jurisdictions where the regulatory framework does not properly safeguard potential investors from the risk of loss. Establishing the new proposed regulation will better inform both issuers of financial products and investors who might be skeptical about an FDIC guarantee. If enacted, the proposal will also clearly outline a way that concerned members of the public can alert the agency’s point of contact when they are concerned about deposit insurance coverage.

¹ The Independent Community Bankers of America® creates and promotes an environment where community banks flourish. With more than 52,000 locations nationwide, community banks constitute 99 percent of all banks, employ more than 760,000 Americans and are the only physical banking presence in one in five U.S. counties. Holding more than \$4.9 trillion in assets, \$3.9 trillion in deposits, and \$3.4 trillion in loans to consumers, small businesses and the agricultural community, community banks channel local deposits into the Main Streets and neighborhoods they serve, spurring job creation, fostering innovation and fueling their customers’ dreams in communities throughout America. For more information, visit ICBA’s website at www.icba.org.

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Background: The NPR proposes a framework to identify and investigate violations of the prohibition on persons who misuse the name or logo of the FDIC or engage in false advertising or making misrepresentations about the existence of deposit insurance for a financial product as provided under Section 18(a)(4) of the Federal Deposit Insurance Act. By proposing new regulations, the FDIC wants to provide more transparency when the agency identifies, investigates, and takes informal and formal action to address violations.

Definitions. The proposed regulation seeks to define applicable financial products including non-deposit products, uninsured financial products, and FDIC-associated terms and images.

Prohibited Conduct. The proposed regulation provides specific examples of practices that the FDIC deems to be violations of Section 18(a)(4) including instances where false statements are made regarding the existence of deposit insurance and situations where material information is omitted from a third-party representation that a product is FDIC-insured without identifying the names of the institutions where deposits are held. The FDIC will also establish a “bright-line” rule for determining when a misrepresentation is presumed to have been knowingly made.

Public Inquiries and Complaints. The proposed regulation details the process for submitting complaints to the FDIC regarding potential false or misleading representations about deposit insurance. Members of the public will be directed to existing resources through the FDIC’s Information and Support Center.

Investigation & Referral. The proposed regulation sets forth procedures for formal investigations of potential violations of the law. FDIC would have the discretion to recommend that another Federal banking agency take action when a violation has occurred under Section 18(a)(4).

Informal Resolution & Formal Enforcement Action. The proposed regulation describes the process for notifying an offending party through an advisory letter that requests that action be taken by the recipient of the letter to address FDIC’s concerns. When the recipient of the letter takes the requested corrective action in the timeframe allotted, FDIC will not take further action. Alternatively, the FDIC will take formal enforcement action when violations of Section 18(a)(4) continue.

Since the proposed rule is consistent with existing procedures used by the FDIC when considering potential violations of Section 18(a)(4), it is not expected to have a significant impact on the current enforcement of the law. Rather, it is the FDIC's expectation that approval of the proposed rule will benefit both FDIC-insured institutions and stakeholders by further clarifying the circumstances surrounding a violation of Section 18(a)(4).

ICBA Comments

General: ICBA commends the FDIC's clarification of the existing prohibitions in Section 18(a)(4). As the number of financial products offerings has expanded internationally through the online marketplace, the number of firms purporting to guarantee outsized yields has increased. As the FDIC is well aware, the number of financial firms participating in decentralized finance activities of cryptocurrency assets with substantial yields has exploded in the past twelve months. The general popularity of these firms, along with the excitement surrounding new cryptocurrency offerings with financial incentives has led to a loss of transparency particularly concerning the guarantee that some sovereign governments might be offering.

In some cases, providers have been known to use the FDIC's logo on a website or otherwise imply that deposit insurance exists. ICBA expects that as the decentralized finance space continues to grow, the FDIC will need to increase its attention to potential misuse or mischaracterization of FDIC insurance. The adoption of this proposed rule will help increase both financial institution and depositor attention to potential false and misleading representations about who and what are covered by FDIC insurance.

For example, if a digital currency backed by the dollar or convertible into dollars does form and becomes a popular way to transact goods and services in the United States, it will compete with other digital assets that serve a similar role. Community banks that choose to transact in such digital forms of commerce will need to be prepared to educate depositors on how a financial product or digital currency with deposit insurance is differentiated from one without deposit insurance. When a competing offering falsely implies or outright misstates the existence of FDIC insurance, community banks would be able to rely on the complaint process and the informal resolution process of the proposal and, if needed, the formal enforcement action granted to the FDIC currently in existence and codified in this proposed rule to keep potential depositors safe.

Deposit Placement Networks: ICBA notes that the FDIC cites as an example of prohibited conduct in the Summary of Proposed Regulation for the proposed Section 328.102—*Prohibition* instances where a non-bank third party represents that its products are FDIC-insured without identifying the name of the institution(s) where customer deposits will be placed. Additionally, the proposed rule under Section 328.102(b)(3)(ii) states as follows:

The statement omits material information which would be necessary to prevent a reasonable consumer from being misled, regardless of whether any such consumer was actually misled. Where such a statement is made by a person other than an Insured Depository Institution, failure to identify the name(s) of the Insured Depository Institution(s) that will be receiving the deposits is deemed a material omission.

ICBA does not believe that a statement by a non-bank third party that deposits will be placed at insured depository institutions is deceptive merely because it does not identify particular banks by name. This provision would be very harmful in its current form if applied to deposit placement networks.

Deposit placement networks provide valuable funding for community banks, including reciprocal deposits and sweep deposits. This funding plays a key role in helping community banks fulfill community-focused missions, which include lending to support local community development. It is virtually impossible to explain how a deposit placement network functions without referring to deposit insurance and the FDIC. But such a network can have thousands of member banks, and it is not feasible to name them all in advertising or explanatory documents. Moreover, the particular banks that will receive particular deposits are not determined until near the time of placement and therefore cannot be named before then, when advertising and explanation occurs.

As a result, the proposed provision threatens to have the practical effect of banning virtually all advertising and explanation for a deposit placement network by its sponsor or another non-bank, such as a broker-dealer that places sweep deposits. This effect, which we presume is unintended, would significantly damage community banks and the communities they serve by impeding the free flow of truthful information about a vital source of community bank funding. We therefore urge that the provision be removed or changed.

If a non-bank states that deposits will be placed at one or more FDIC-insured banks, and this statement is true, there is no reason to deem the statement deceptive merely because it does not include the name or names of one or more particular banks, especially when – as in a deposit network – the names of the particular banks that will receive particular deposits are not yet known. It is simply not the case that not naming particular banks converts a truthful statement that deposits will be placed at FDIC-insured banks into a statement that is somehow false or misleading.

To prevent this outcome, we recommend that the final rule permit a deposit placement network to note that deposits will be placed at one or more insured depository institutions even if the identities of those institutions are not known at the time of placement. Alternatively, if the proposed provision in Section 328.102 is retained, it should be modified so that a non-bank’s failure to identify by name an insured depository institution at which deposits will be placed is deemed a material omission only if (1) a person that is not an insured depository institution makes a statement regarding deposit insurance for particular deposits in a commercial solicitation for the deposits, (2) the identity of the insured depository institution at which the deposits will be placed is known at the time of the statement, and (3) the statement does not disclose that the deposits will be placed at one or more insured depository institutions (or “FDIC-insured banks”). This more focused approach would serve the protective purpose of the rule but would do so without harming community banks and the communities they serve.

ICBA appreciates the opportunity to comment on this proposed rule and request for comment. If you have any questions or would like additional information, please do not hesitate to contact me at (202) 821-4364 or james.kendrick@icba.org.

Sincerely,

/s/

James Kendrick
First Vice President, Accounting and Capital Policy