

FDIC and CFPB Adopt Sweeping Guidance on Deposit Insurance Advertising

June 6, 2022

On May 17, 2022, the Federal Deposit Insurance Corporation (“**FDIC**”) adopted a final rule (the “**Final Rule**”) elaborating on what constitutes false advertising of deposit insurance for purposes of the Federal Deposit Insurance Act (the “**FDIA**”).¹ On the same day, the Consumer Financial Protection Bureau (“**CFPB**”) issued a circular (the “**Circular**”) articulating its views as to when representations involving the name or logo of the FDIC constitute deceptive acts or practices in violation of the Consumer Financial Protection Act (“**CFPA**”).²

The Final Rule, which takes effect on July 5, 2022, and the related Circular sweep broadly, treating some common practices as potential violations. Of particular note, the Final Rule not only prohibits certain statements, but also mandates that entities that offer pass-through insurance identify the insured depository institutions (“**IDIs**”) at which customer funds may be held. Furthermore, the Circular indicates that certain statements can constitute violations of the CFPA regardless of whether the institution knew of their inaccuracy.

If you have any questions concerning this memorandum, please reach out to your regular firm contact or the following authors

New York

Hugh Conroy
+1 212 225 2828
hconroy@cgsh.com

Brandon Hammer
+1 212 225 2635
bhammer@cgsh.com

Washington

Tom Bednar
+1 202 974 1836
tbednar@cgsh.com

Megan Lindgren
+1 202 974 1579
mlindgren@cgsh.com

Special thanks to Katherine Kennedy, a Law Clerk working in our New York office, for her assistance on this alert memorandum.

¹ Federal Deposit Insurance Corporation, *False Advertising, Misrepresentation of Insured Status, and Misuse of the FDIC’s Name or Logo* (May 17, 2022) ([link](#)) (87 Fed. Reg. 33415-33423 (June 2, 2022) ([link](#))).

² Consumer Financial Protection Bureau, *Deceptive representations involving the FDIC’s name or logo or deposit insurance* (May 17, 2022) ([link](#)); 12 U.S.C. § 5531.



Overview of FDIC Final Rule and CFPB Circular

FDIC Final Rule. Section 18(a)(4) of the FDIA prohibits any person from engaging in false advertisement through the misuse of the FDIC name or logo or by making knowing misrepresentations about deposit insurance.³ The FDIA gives the FDIC primary authority to enforce this prohibition against institutions that do not have a federal banking regulator. For institutions that do have a federal banking regulator, the FDIC has secondary authority that it can exercise only if the primary authority does not act.

The Final Rule sets out the FDIC's interpretation as to what conduct violates Section 18(a)(4), as well as the procedures the FDIC will use to address potential violations. The scope of impermissible conduct is broadly worded, in many instances going beyond the plain text of the statute. For example, the Final Rule applies not only to the liabilities, shares, and certificates described in Section 18(a)(4), but also to any "investment" or "financial product," including a sweep account. In addition, under the Final Rule, a statement need not actually cause harm in order to be a violation. Rather, a statement need only to "have the tendency or capacity to mislead a reasonable consumer" as to the existence or extent of deposit insurance.

Of particular note, the Final Rule considers the following to be potential violations of Section 18(a)(4):

- Any statement that "implies" or "suggests" the existence of deposit insurance for a non-insured product;⁴
- Any omission of information that "would be necessary to prevent a reasonable consumer from being misled," as to whether a product is insured or the extent or nature of the insurance;

³ 12 U.S.C. § 1828(a)(4).

⁴ 12 C.F.R. § 328.102(a).

⁵ Governmental and regulatory authorities include but are not limited to "another Federal banking agency, the Federal Trade

- Any reference to the FDIC without a "without a clear, conspicuous, and prominent disclaimer that the products being offered are not FDIC insured or guaranteed", if they are not.

The Final Rule includes a few examples of specific conduct that would be a violation of Section 18(a)(4). At least one is a very common practice:

Under the Final Rule, a firm that represents or implies that a product is insured or guaranteed by the FDIC, or backed by insured deposits, violates Section 18(a)(4) of the FDIA unless it identifies each of the insured depository institutions at which the firm may deposit customer funds.

Unlike several other statutes prohibiting deceptive practices, Section 18(a)(4) requires misleading statements (though not misrepresentations) be made "knowingly." The Final Rule provides that the "knowing" requirement can be satisfied if the representing party continues to make the false or misleading statement after being advised by the FDIC in an advisory letter or being advised by another federal or state agency⁵ that the statement is false or misleading.⁶ However, the Final Rule makes clear that FDIC may commence enforcement action at any point if it "has reason to believe that consumers or Insured Depository Institutions may suffer harm arising from continued violations."⁷

In the event of a violation, the FDIC may issue cease and desist orders, impose monetary penalties, and/or refer the matter to regulatory or criminal authorities.

CFPB Circular. Coinciding with the release of the Final Rule, the CFPB issued the Circular indicating that it will also pursue false or misleading misrepresentations of FDIC deposit insurance under the CFPA. The CFPA prohibits "unfair, deceptive, or abusive act[s] or practice[s] in connection with the

Commission, the U.S. Department of Justice, or a state bank supervisor."

⁶ 12 C.F.R. § 328.102(b)(6).

⁷ 12 C.F.R. § 328.106(e).

offering or provision of a consumer financial product or service” and grants the CFPB authority to oversee representations of FDIC insurance by “covered persons and service providers.”⁸ In the Circular, the CFPB stated that it considers “deceptive” both express or implied misrepresentations of deposit insurance by firms that accept funds for use by consumers. The CFPB further indicated that it may pursue both knowing and *unknowing* misrepresentations of deposit insurance coverage, without proving the violator’s intent.

The scope of entities that may be covered persons and service providers is not entirely clear, but emerging firms such as fintech companies offering payments services, digital asset trading platforms, digital asset custodians, and stablecoin issuers could fall in scope.⁹ In the Circular, the CFPB specifically highlighted firms offering or providing digital assets as being “particularly prone to making such deceptive claims to consumers about FDIC deposit insurance coverage.” In his statement regarding the Final Rule, CFPB Director Rohit Chopra also noted that, “We are especially concerned about potential misconduct involving novel technologies, including so-called stablecoins and other crypto-assets.”¹⁰ These statements align with the CFPB’s recent efforts to extend its authority from certain banking entities and consumer lenders to emerging financial products and technology platforms.¹¹

Key Takeaways

Both traditional financial institutions and emerging participants in the financial markets should review their existing statements and advertisements relating to FDIC insurance to ensure compliance with these new rules and standards. In particular, firms that state or

suggest that sweep accounts or custodial arrangements benefit from FDIC pass-through insurance should take steps to disclose the IDIs at which customer funds may be maintained and ensure that each of the statements as to the extent or requirements for pass-through insurance are complete and accurate.

The FDIC’s and CFPB’s coordinated efforts likely represent the first in a series of initiatives by the CFPB to regulate the growing number of firms offering services that fall outside of traditional banking and financial services. The Final Rule and Circular directly followed an announcement by the CFPB on May 16, 2022, declaring the CFPB’s “new system to provide guidance to other agencies with consumer financial protection responsibilities.”¹² The announcement stated that the CFPB aims to ensure consistent enforcement of federal consumer financial law across the many responsible agencies and regardless of a firm’s status as a bank or nonbank.

...

CLEARY GOTTLIB

⁸ 12 U.S.C. §§ 5531, 5536.

⁹ The CFPB possesses the authority to regulate anyone who offers “financial products or services” to consumers, including those “engaging in deposit-taking activities, transmitting or exchanging funds, or otherwise acting as a custodian of funds or any financial instrument for use by or on behalf of a consumer, as well as (subject to certain exceptions) selling, providing, or issuing stored value or payment instruments.” 12 U.S.C. § 5481(15)(A)(iv).

¹⁰ Rohit Chopra, CFPB Director and FDIC Board Member, *Statement on FDIC Final Rule Regarding False Advertising*,

Misrepresentations of Insured Status, and Misuse of the FDIC’s Name or Logo (May 17, 2022) ([link](#)).

¹¹ See, e.g., Consumer Financial Protection Bureau, *CFPB Invokes Dormant Authority to Examine Nonbank Companies Posing Risks to Consumers* (April 25, 2022) ([link](#)); See, also, Consumer Financial Protection Bureau, *CFPB Shuttles Lending by VC-Backed Fintech for Violating Agency Order* (Dec. 21, 2021) ([link](#)).

¹² Consumer Financial Protection Bureau, *System of Consumer Financial Protection Circulars to agencies enforcing federal consumer law* (May 16, 2016) ([link](#)).