

FDIC Continues Rulemakings Related to Misrepresentation in Advertising: Digital Asset Businesses Still in the Crosshairs

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On December 21, 2022, the Federal Deposit Insurance Corporation published a notice of proposed rulemaking elaborating on what constitutes false advertising of deposit insurance for purposes of the Federal Deposit Insurance Act. The Proposal would modernize rules on using the FDIC's official sign and insured depository institutions' advertising statements, as well as clarify regulations regarding misrepresentations of deposit insurance coverage. Should the Proposal be adopted, IDIs offering digital asset products (including stablecoins) and non-banks relying on pass-through deposit insurance arrangements with IDIs would face expanded disclosure obligations, even beyond those imposed last year.

The Proposal arises out of the FDIC's concern that, as consumers increasingly access banking products through online and mobile channels, and deposit and non-deposit products are offered simultaneously, consumers may not understand which products and services benefit from FDIC insurance. The Proposal would impose new requirements for the use of the FDIC logo and deposit insurance signage in both IDIs' physical premises and digital channels, and would require IDIs to maintain policies and procedures to ensure compliance.

In addition, notwithstanding a previous 2022 FDIC rulemaking aimed at modifying non-bank disclosures regarding pass-through deposit insurance, the FDIC cited increased misleading representations about deposit insurance in digital banking channels and continued to express concern that certain business relationships between IDIs and non-banks may be confusing to consumers. Accordingly, the Proposal would again update the FDIC's rules regarding misrepresentation of deposit insurance coverage and would amend the definition of "non-deposit product" to explicitly include "crypto-assets." Emerging financial market participants may need to amend their disclosures to comply with any final rule, especially if seeking to offer pass-through deposit insurance.

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Background to [the Proposal](#)¹

Section 18(a) of the Federal Deposit Insurance Act (the “FDIA”) grants the Federal Deposit Insurance Corporation (the “FDIC”) authority to prescribe regulations with respect to signage and advertising for insured depository institutions (“IDIs”).² The FDIC’s signage and advertising regulations require IDIs to continuously display the FDIC official sign where insured deposits are usually and normally received in the bank’s principal place of business and at all of its branches and to use an official advertising statement, such as “Member FDIC”, when advertising deposit products and services.

In addition, Section 18(a)(4) of the FDIA prohibits *any person* (not just IDIs) from misusing the name or logo of the FDIC or from engaging in false advertising or making knowing misrepresentations about deposit insurance. The FDIC has the primary authority to enforce this prohibition against institutions that do not have a federal banking regulator, and secondary authority in relation to others that do have a federal banking regulator.

The FDIC last made major amendments to the signage regulations in 2006, and adopted new regulations related to false advertising and misrepresentations recently in 2022.

Policy Rationale. The banking industry in recent years has seen a major shift in the way consumers access banking and financial services, from bank branches with live tellers to non-traditional branches (*i.e.*, banking cafes) and digital channels. According to the Proposal, IDIs’ ATM, website, and mobile applications now effectively serve as “digital teller windows”.³ While existing regulations refer to physical premises and certain electronic facilities, such as ATMs, they do not address more modern banking channels.

Banking customers also now have access to a wide variety of both deposit and non-deposit products, and

the FDIC expressed concern that growth in the fintech sector has blurred the line between IDIs and non-banks. For example, a fintech company may deposit customer funds at an IDI and state that such funds are insured by the FDIC on a “pass-through” basis without providing a detailed explanation.⁴

The FDIC believes that these developments may increase the risk of confusion regarding the availability of deposit insurance and result in harm to consumers. Accordingly, the Proposal looks to implement a set of rules that require more transparent disclosures to better inform customers as to when their funds are protected by FDIC deposit insurance.

Recent Rulemaking. As detailed in [our alert memorandum](#) from June 6, 2022, the FDIC previously adopted a final rule on May 17, 2022 that elaborates on what constitutes false advertising for the purposes of the FDIA (the “**FDIC Final Rule**”).⁵ It also mandates that entities that offer pass-through insurance identify the specific IDIs at which customer funds may be held. The Proposal stated that, while the FDIC believes that the 2022 FDIC Final Rule was an important step forward, the continuing increase in the number of instances in which entities or individuals have misrepresented the availability of FDIC deposit insurance coverage makes it necessary to further clarify these regulations.

Overview of the Proposal

The Proposal updates the FDIC’s rules for signage and advertising to reflect modern banking channels, and provides further clarity on the application of the misrepresentation statute in specific situations where consumers may, in the FDIC’s view, misunderstand or be misled as to whether an entity is FDIC-insured or the nature and extent of FDIC deposit insurance coverage. The Proposal also would require IDIs to establish and maintain written policies and procedures to comply with the revised rules.

¹ FDIC, [FDIC Official Sign and Advertising Requirements, False Advertising, Misrepresentation of Insured Status, and Misuse of the FDIC’s Name or Logo](#), 87 Fed. Reg. 78017 (Dec. 21, 2022) (the “Proposal”).

² 12 U.S.C. § 1828(a).

³ Proposal at 78018.

⁴ Proposal at 78019.

⁵ FDIC, [False Advertising, Misrepresentation of Insured Status, and Misuse of the FDIC’s Name or Logo](#), 87 Fed. Reg. 33415 (Jun. 2, 2022).

The FDIC proposes to make it a material omission for an entity to fail to clearly and conspicuously disclose that certain conditions must be satisfied for pass-through deposit insurance to be available. Accordingly, nonbanks such as digital asset trading platforms and custodians utilizing pass-through insurance arrangements with IDIs should review their disclosures to identify any changes needed to comply with the Proposal, should it be adopted.

Misrepresentation Amendments (applicable to all institutions). The FDIC proposes to amend 12 C.F.R. § 328.102(a) to clarify when specific statements or omissions constitute a misrepresentation under FDIA Section 18(a)(4) by expressly addressing certain additional situations beyond those identified in the 2022 FDIC Final Rule.

- *Examples of Misrepresentations:* Circumstances that constitute a misrepresentation include, but are not limited to, a non-bank’s use of (i) the official advertising statement; (ii) the “Member FDIC” logo on its website or in its marketing materials, unless that logo is next to the name of one or more IDIs; or (iii) either the official FDIC sign or the digital sign that IDIs would be required to display through their digital deposit-taking channels, if the use implies that the non-bank is FDIC-insured.⁶
- *Examples of Material Omissions:* The Proposal also deems it a material omission if (i) a non-bank fails to clearly and conspicuously disclose that it is not itself an FDIC-insured institution and that the FDIC’s deposit insurance coverage only protects against the failure of an FDIC-insured depository institution; and (ii) when IDIs or non-banks make statements regarding deposit insurance in a context that involves both deposit and non-deposit products, they fail to disclose that the non-deposit

products are not FDIC-insured, are not deposits, and may lose value.⁷

- *Statements Regarding Pass-Through Insurance:* Finally, the Proposal addresses “pass-through” deposit insurance coverage in which deposits placed at an IDI by an entity on behalf of the funds’ owners are FDIC-insured, provided certain regulatory requirements are met. The FDIC expressed concern that representations by non-banks claiming pass-through deposit insurance for customers’ funds may be inaccurate, may mislead customers and may fail to apprise them of the risk that their funds are not fully insured if the IDI fails, should the regulatory requirements for pass-through insurance not be satisfied. Thus, in addition to the new disclosures required under the 2022 FDIC Final Rule, the FDIC proposes to make it a material omission for an entity to fail to clearly and conspicuously disclose that certain conditions must be satisfied for pass-through deposit insurance coverage to be available.⁸

Inclusion of Crypto Assets in Non-Deposit Products (applicable to all institutions). Part 328 of the FDIC’s regulations prohibits any person from representing or implying that any “uninsured financial product” is insured or guaranteed by the FDIC. The Proposal notes there have been a number of recent misrepresentations of FDIC deposit insurance coverage related to digital assets, and looks to amend part 328 to make clear that representations regarding “crypto-assets” fall within its scope. The Proposal would amend the definitions of “Non-Deposit Product” and “Uninsured Financial Product” to include crypto-assets and would define crypto-assets as “any digital asset implemented using cryptographic techniques.”⁹ Accordingly, the non-deposit signage requirements described above would also explicitly apply to crypto-assets. For example, if an IDI’s ATM offered customers the ability to purchase crypto assets, the ATM would have to clearly,

⁶ Proposal at 78024.

⁷ *Id.*

⁸ *Id.*

⁹ “Uninsured Financial Product” means any Non-Deposit Product, Hybrid-Product, investment, security, obligation, certificate, share,

or financial product other than an “Insured Deposit”. “[N]on-deposit product” includes, but is not limited to, insurance products, annuities, mutual funds, and securities. *See* 12 C.F.R. §§ 328.101, 328.3(e)(1)(i).

continuously and conspicuously display disclosures indicating that such products (i) are not FDIC-insured, (ii) are not deposits, and (iii) may lose value.¹⁰

Signage Requirements (applicable to IDIs).

Consistent with current regulations, all IDIs would be required to clearly, continuously and conspicuously display the official FDIC logo sign in their principal place of business and all their U.S. branches.

- *IDIs' Physical Premises:* The Proposal would add new requirements for traditional branches and non-traditional branches (*i.e.*, banking cafes) to clearly display the official FDIC logo sign in a size large enough to be legible if the locations receive insured deposits. It would also require IDIs to physically segregate areas where non-deposit products are offered from areas where insured deposits are accepted, and to continuously display signs in the non-deposit product area that such products (i) are not FDIC-insured, (ii) are not deposits, and (iii) may lose value.¹¹ The Proposal noted that this new requirement “is intended to be generally consistent with longstanding interagency guidance on the retail sale of non-deposit investment products that many institutions already follow.”¹²
- *IDI's Digital Channels:* The Proposal would require IDIs to clearly, continuously and conspicuously display FDIC digital signage in “digital deposit-taking channels” that include, but are not limited to, bank websites, web-based applications and mobile applications. The Proposal requires the digital sign to be displayed on the IDI's homepage, landing and login pages or screens, and transactional pages or screens involving deposits. The Proposal would also require a digital deposit-taking channel that offers both deposit and non-deposit products to display signage indicating that the non-deposit products (i) are not FDIC-insured,

(ii) are not deposits, and (iii) may lose value.¹³ The Proposal prescribes that the non-deposit signage must be displayed (a) via a one-time notification requiring consumers to take action to dismiss the notification before initially accessing a page (*i.e.*, through a “pop-up”) and (b) continuously on each page relating to non-deposit products but not in close proximity to the digital FDIC sign. Nevertheless, to provide flexibility, the Proposal does not propose specific design or size requirements for non-deposit signage through digital channels.¹⁴

- *Advertising Statement Amendments:* The Proposal also provides IDIs with an option to use the short form “FDIC-insured” in addition to “Member of FDIC” and “Member FDIC” in their advertising statement, including advertising through digital channels.¹⁵

Policies and Procedures (applicable to IDIs). The Proposal would require IDIs to establish written policies and procedures related to these requirements that are commensurate with the nature, size, complexity, scope and potential risk of the deposit-taking activities of the institution. IDIs would also need to include, as appropriate, provisions related to monitoring and evaluating activities of persons that provide deposit-related services to the IDI or offer IDI's deposit-related products or services to other parties.¹⁶ In particular, the Proposal would require that, if a third party is acting as a deposit-taking channel for a bank (*e.g.*, a fintech company that connects to an IDI via APIs to offer banking as a service (“BaaS”)), the relevant policies and procedures must include reasonable provisions to review and monitor the third party's marketing materials provided to depositors to ensure that they do not contain misrepresentations regarding deposit insurance.¹⁷

¹⁰ Proposal at 78026.

¹¹ Proposal at 78021-22.

¹² Proposal at 78021 n.19. *See also* [FDIC: FIL-9-94: Financial Institution Letters: Interagency Statement on Retail Sales of Nondeposit Investment Products](#) (Feb. 15, 1994).

¹³ Proposal at 78022-23.

¹⁴ The Proposal also noted that it may be helpful to consumers if IDIs linked the digital sign to the FDIC's online BankFind tool,

although it declined to impose a requirement to do so. *See* Proposal at 78022 n.20.

¹⁵ Proposal at 78023.

¹⁶ But note, the Proposal stated that “[t]he existence of adequate policies and procedures would not preclude the FDIC from taking actions against IDIs or third parties to address violations.” Proposal at 78026.

¹⁷ Proposal at 78025-26.

Request for Comments. Comments on the Proposal are due on or before February 21, 2023. The FDIC seeks feedback on the scope of the Proposal and its requirements, and in particular:¹⁸

- Any particular aspects of the signage design or requirements that can be standardized or improved to minimize confusion to consumers and mitigate implementation challenges for institutions;
- Any additional or alternative requirements that would more clearly draw the distinction between deposits and non-deposit products;
- Any additional or specific criteria that IDIs should consider when establishing policies and procedures to comply with the rules;
- Any additional practices or scenarios that the FDIC should clarify as being misrepresentations of deposit insurance; and
- The proposed definition of “crypto-asset.”

Key Takeaways

Although a number of the logo, signage and advertising requirements would primarily affect IDIs, broader financial market participants should take note of how the Proposal would impact non-traditional banking channels and non-deposit products, including digital assets, as well as the potential for further FDIC action.

1. The Proposal Would Clarify Additional Circumstances That the FDIC Deems Misleading, and Therefore Would Require Further Review of Both IDI and Non-Bank Firm’s Disclosures.

In addition to requiring IDIs to provide clear disclosure in channels where non-deposit products are offered, the Proposal provides more concrete guidance on the types of marketing statements that could constitute misrepresentations by both IDIs and non-banks.

IDIs and non-bank firms (particularly those that utilize pass-through insurance arrangements with IDIs) should review the scenarios provided in the

Proposal and consider their existing disclosures and advertising statements. The Proposal preserves some flexibility by not prescribing specific disclosure language, but firms would have to clearly and conspicuously disclose that certain conditions must be satisfied in order for pass-through insurance to apply. The requirements of the Proposal would extend to statements and advertising through all digital channels, including social media.

2. The Non-Deposit Product Rules Would Expressly Cover Digital Assets.

The Proposal would amend 12 C.F.R. Part 328 to include “crypto-assets” within the definitions of non-deposit products and uninsured financial products. Any IDI with a digital deposit-taking channel that offers both deposit products and crypto-asset products would need to display appropriate signage.

While the proposed definition of “crypto-asset” (“any digital asset implemented using cryptographic techniques”) is relatively general, the Proposal elaborated that this definition “would include a digital asset that is a digital representation of value that functions as a medium of exchange, a unit of account, and/or a store of value; as well as a digital asset that has an equivalent value in and is convertible to real currency, or that acts as a substitute for real currency and is not legal tender.”¹⁹

As such, stablecoins would likely fall within the definition, apparently even if a stablecoin were issued by an IDI and its reserves were held in deposits.

IDIs currently offering digital asset products and digital asset trading platforms and custodians utilizing pass-through insurance arrangements with IDIs should consider the steps they would need to take to ensure compliance with any final rule in

¹⁸ Proposal at 78032-33.

¹⁹ Proposal at 78026.

relation to a wide range of digital assets. Such firms may also wish to comment on whether the proposed definition of “crypto-asset” is appropriately scoped.

3. **Firms May Need to Amend Their Disclosures on Pass-Through Insurance Coverage.**

Emerging financial market participants seeking to offer pass-through insurance coverage, including digital asset trading platforms and digital asset custodians that use correspondent banks for customers’ funds, would need to ensure that their disclosures (*i.e.*, in user agreements, terms of service and marketing materials) state that certain conditions must be satisfied for pass-through deposit insurance to apply.

In addition, such firms should review current compliance with the disclosure requirements of the FDIC Final Rule issued in May 2022.

4. **Increased Third Party Oversight.**

In July 2022, the FDIC issued a [statement](#) reminding IDIs to monitor third-party relationships with companies offering digital asset products and services to ensure that they do not misrepresent the availability of deposit insurance, and introduced an online portal to collect public complaints about cases of suspected misrepresentation.²⁰ The Proposal reflects the feedback the FDIC received from the process since the issuance of the FDIC Final Rule.

Given the proposed requirements for IDIs’ policies and procedures governing third party relationships, fintech companies offering BaaS should also anticipate coordinating more closely with their IDI partners to prevent misrepresentations of deposit insurance.

5. **Expect Continued FDIC and CFPB Focus on Deposit Insurance Statements in 2023.**

FDIC Chair Gruenberg, Director Hsu and Director Chopra all expressed their support for the Proposal, citing the changing landscape in the banking industry and the need to preserve the public’s confidence in FDIC insurance.²¹ Director Chopra noted the FDIC’s recent cease and desist orders against certain crypto companies, and also expressed concern that the public may not be aware that consumer funds held by peer-to-peer payment services companies are not FDIC insured.

In the coming year, the FDIC is likely to continue to prioritize enforcement of 12 C.F.R. Part 328 and may issue further statements, especially with respect to companies offering products and services for payments and digital assets. In light of the [CFPB’s circular](#) on deposit insurance advertising last year, issued one day after the FDIC Final Rule, the CFPB may also prioritize enforcement action and/or issue guidance with respect to consumer protection and statements on deposit insurance for modern retail banking and payments offerings.

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²⁰ FDIC, [Advisory to FDIC-Insured Institutions Regarding Deposit Insurance and Dealings with Crypto Companies](#) (Jul. 29, 2022).

²¹ Martin J. Gruenberg, FDIC Acting Chairman, [Statement by Acting Chairman Martin J. Gruenberg on Notice of Proposed Rulemaking](#)

[on FDIC Official Sign and Advertising Rule and Rule Relating to False Advertising, Misrepresentation, and Misuse of the FDIC’s Name and Logo](#) (Dec. 13, 2022).