

MEMORANDUM

TO: The Board of Directors

FROM: Mark Pearce,
Director, Division of Depositor and Consumer Protection

DATE: December 20, 2023

RE: Notice of Final Rule on FDIC Official Signs and Advertising Requirements, False Advertising, Misrepresentation of Insured Status, and Misuse of the FDIC's Name or Logo

Recommendation

Staff recommends that the FDIC's Board of Directors (Board) authorize publication of the attached notice of a final rule (final rule) in the Federal Register.

Summary

Through the final rule, the FDIC would amend its regulations governing use of the official FDIC sign and insured depository institutions' (IDIs) advertising statements, and clarify the FDIC's regulations regarding misrepresentations of deposit insurance coverage. The final rule would generally:

- (1) Modernize and amend the rules governing IDIs' display of the official sign;
- (2) Require the official sign, a new official digital sign, and other signs differentiating deposits and non-deposit products across all banking channels, including physical bank branches and other premises, automated teller machines (ATMs), and evolving digital channels, such as bank websites and mobile applications (which functionally serve as digital teller windows);
- (3) Clarify the FDIC's rules regarding misrepresentations of deposit insurance coverage by addressing specific scenarios where information provided to consumers may be misleading;
- (4) Amend definitions of "non-deposit product" to include crypto-assets and specifically address safe deposit boxes; and
- (5) Require IDIs to maintain policies and procedures addressing compliance with part 328.

As explained below, the final rule is intended to enable consumers to better understand when they are doing business with an IDI and when their funds are protected by deposit insurance.

Concur:

Harrel M. Pettway
General Counsel

Statutory Authority and Regulations

Sign and advertising statement requirements for IDIs date back to the Banking Act of 1935, and are now set forth in section 18(a) of the Federal Deposit Insurance Act (FDI Act). Section 18(a) grants the FDIC authority to prescribe regulations with respect to these requirements, which are currently contained in subpart A to 12 CFR Part 328. The agency last made major amendments to these regulations in 2006. The current text of the FDIC's sign regulations refer to an IDI's physical premises and Remote Service Facilities, but does not specify other banking channels that have further developed, such as digital banking channels.

The FDIC's official sign and advertising statement regulations currently require banks to continuously display the 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 FDI Act prohibits any person 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 broad statutory authority in this area, and in 2022 issued specific regulations in subpart B to 12 CFR Part 328 regarding false representations related to FDIC insurance and the misuse of the FDIC name and logo that primarily focused on the process by which the FDIC will identify and investigate conduct that may violate the prohibitions against misuse and misrepresentation.

Developments in Consumer Access to Banking and Financial Services

In recent years there have been significant changes in the banking landscape, including the evolution of bank branches and their role in serving consumers, the proliferation of digital channels as a critical and fundamental mechanism to access banking and financial services, and an increasingly broad array of financial products offered through banking channels, including access to non-deposit products.

While many bank locations retain a traditional footprint, serving depositors primarily at teller windows or stations, IDIs have increasingly begun operating physical premises with different styles and designs. These locations may include electronically-staffed kiosks, interactive ATMs that provide remote assistance with a teller, and teller-less cafés where deposits can be accepted on tablets or through ATMs. The FDIC's existing sign rules, which focus on display of the official sign at teller windows or stations, have not kept pace with these developments.

The existing sign rules also do not reflect the proliferation of digital banking services now offered, which have become an increasingly important means for consumers to access banking products and services. For many consumers, an IDI's ATM, website, or mobile application effectively serves as a digital teller window.

Banking customers are also offered an increasingly wide array of products and services, regardless of whether they are in a branch, using an ATM, or connecting with an IDI through digital channels. In many instances, IDIs offer both deposits and non-deposit products to consumers. For example, IDIs might allow depositors in their branches to consult with an investment adviser and purchase securities or mutual funds. Options to purchase non-deposit products are continuing to evolve, with some IDIs offering ATM or digital banking customers the ability to purchase crypto-assets with their funds. Absent adequate signs or disclosures, simultaneous offering of both insured deposits and non-deposit products may lead consumers (who are aware that the IDI is insured by the FDIC) to mistakenly conclude that all of the products being offered are insured.

Growth in the financial technology (fintech) sector has also served to blur the distinction between IDIs and non-banks in the eyes of many consumers, increasing the potential for confusion regarding FDIC deposit insurance coverage. Business arrangements between IDIs and non-banks can take many forms and continue to evolve at a rapid pace. For example, an IDI might enter into an arrangement with a fintech company to offer the IDI's products to the fintech company's customers. In other instances, fintech companies might deposit their customers' funds at an IDI. In such cases, the fintech company might state to its customers that their funds are FDIC-insured, or that they are insured by the FDIC on a "pass-through" basis, without an accurate explanation of what this means. The proliferation of relationships and disclosures may confuse consumers as to whether they are dealing with an IDI, whether their funds are insured by the FDIC, and the risks they are protected against.

December 2022 Notice of Proposed Rulemaking

In December 2022, the FDIC issued a notice of proposed rulemaking intended to address the issues described above. The proposal included a number of potential amendments to part 328. The proposed rule's sign requirements under subpart A included three distinct signs relating to deposit insurance. The first is the FDIC's official sign, which is currently displayed at an IDI's principal place of business and branches. Second, the FDIC proposed to require display of a new official digital sign on IDIs' digital deposit-taking channels, such as online banking websites and mobile applications, and ATMs. This digital sign, which would be an abbreviated version of the FDIC's official sign, was intended to promote a clear understanding by consumers of when they are interacting with an IDI rather than a non-bank and when their funds are insured by the FDIC. Third, the proposal included a non-deposit sign requirement addressing potential confusion where an IDI offers both insured deposits and non-deposit products through the same channel (e.g., insured deposits and non-deposit products are both offered at a branch). With respect to digital channels, this also included a one-time notification that consumers would be required to dismiss when the consumer initially accessed non-deposit products via the IDI's digital deposit-taking channel.

The proposal also included limited amendments to the FDIC's official advertising statement requirements. This included an additional option for a shortened official advertising statement,

as well as technical corrections to address the statutory increase of the deposit insurance amount that occurred after the regulation was last amended.

The proposal included changes to subpart B to clarify application of the misrepresentation statute in specific situations where consumers may misunderstand or be misled as to whether an entity is insured by the FDIC or the nature and extent of deposit insurance coverage.

The FDIC also proposed to require IDIs to establish and maintain written policies and procedures to comply with part 328 commensurate with the nature, size, complexity, scope, and potential risk of the IDI's deposit-taking activities. The required policies and procedures would include, as appropriate, provisions related to monitoring and evaluating activities of persons that provide deposit-related services to the IDI or offer the IDI's deposit-related products or services to other parties.

Finally, the FDIC proposed to amend part 328's definition of "non-deposit product" to include crypto-assets. This was intended to emphasize that representations regarding deposit insurance in connection with crypto-assets fall within the scope of part 328.

The NPR was published for comment in the Federal Register on December 21, 2022. In response to a comment letter, the FDIC subsequently extended the comment period for an additional 45 days, and the comment period ended on April 7, 2023.

Discussion of Comments and the Final Rule

The FDIC received seventeen substantive comments from a variety of parties, including financial institutions, industry trade groups, consumer organizations, investor advocacy groups, crypto-asset/blockchain firms, deposit networks, and third-party vendors.¹ Below is a discussion of select comments on each aspect of the proposal, along with staff's recommendations for the final rule. Staff recommends finalizing the rule generally as proposed, with some changes and clarifications intended to address commenters' feedback.

1. Sign Requirement for IDIs' Physical Premises

Display of Official Sign at Teller Windows

Under the proposed rule, if IDIs usually and normally receive deposits at teller windows or stations, IDIs would have been required to display the official sign at each teller window or station in a size of 7" by 3" or larger with black lettering on a gold background. The proposal retained the existing design of the official sign, which in addition to prominently bearing the name of the FDIC, includes statements indicating that each depositor is insured up to at least

¹ As part of this rulemaking process, staff also considered twenty comments submitted in response to two previous Requests for Information the FDIC published in the *Federal Register* relating to modernization of the official sign and advertising rules. See 85 Fed. Reg. 18528 (Feb. 26, 2020); 86 Fed. Reg. 18528 (Apr. 9, 2021).

\$250,000 and that the FDIC's deposit insurance is backed by the full faith and credit of the U.S. government. The proposed rule would also have allowed flexibility with respect to display of the official sign where the IDI usually and normally receives deposits at teller windows or stations and only offers insured deposit products on the premises. In such instances, an IDI would have the option to display the official sign at one or more locations visible from the teller windows or stations in a manner that ensures a copy of the official sign is large enough so as to be legible from anywhere in that area. If, however, non-deposit products are offered on the premises, the official sign would be displayed at each teller window.

One commenter suggested giving IDIs flexibility to display clear and conspicuous signage and disclosures best suited for a particular branch facility. Other commenters suggested that the FDIC require a single, centralized disclosure addressing both deposit and non-deposit products, rather than separate signage requirements. Staff believes the proposed official sign and non-deposit signage requirements establish clear standards and more effectively mitigate the potential for consumer confusion than a centralized disclosure. Staff therefore recommends that the Board finalize these aspects of the rule as proposed.

Display of Official Sign Where Deposits are Received in Areas Other Than Teller Windows

The proposal included signage requirements for non-traditional branches that were intended to clarify the application of deposit insurance coverage for consumers using those locations. For example, some IDIs operate café-style locations that include open areas where customers work with bankers. These locations may, or may not, include traditional teller windows or stations.

A commenter suggested that the FDIC eliminate the reference to such locations as “branches,” stating that offices like deposit production offices are not generally considered to be “branches.” Staff did not intend to affect how the term “branch” is defined or interpreted in other regulations, but agrees that use of the term “branch” in this context could be unclear. Staff recommends that the final rule instead include more general language describing the locations at which the official sign would be displayed. The final rule would require display of the official sign at each IDI's places of business where consumers have access to or transact with deposits, including all of its branches (except for branches located in foreign countries) and other physical premises.

Under the final rule, if insured deposits are usually and normally received in areas of the premises other than teller windows or stations, the IDI would be required to display the official sign in one or more locations in a size large enough to be legible anywhere in those areas.

Non-deposit Signs on IDIs' Premises

The proposal would have required non-deposit signs where an IDI offered both insured deposits and non-deposit products within its premises, regardless of whether deposits are received at teller windows or stations or in areas other than teller windows or stations. The proposed rule would have required that IDIs continuously, clearly, and conspicuously display signage not in close

proximity to the official sign indicating that the non-deposit products: are not insured by the FDIC; are not deposits; and may lose value.

A commenter requested clarification on the products that constitute non-deposit products under the rule. Specifically, the commenter noted that the proposal listed products such as life insurance policies that are whole or variable, and requested clarification on other insurance offerings. Staff recognizes that the proposed rule could be read to exclude from the definition of “non-deposit product” certain products that are not, in fact, insured by the FDIC. Staff therefore recommends the final rule generally retain the current definition of “non-deposit product,” with two changes. The first is the addition of crypto-assets, which is discussed in further detail below. Second, staff is recommending a revision to the definition of “non-deposit product” to clarify the treatment of safe deposit boxes. Banks have a longstanding history of providing safe deposit box services to consumers to store valuables in a private, secure section of the bank. The final rule’s definition of “non-deposit product” would read: “[A]ny product that is not a ‘deposit,’ including, but not limited to, insurance products, annuities, mutual funds, securities, and crypto-assets. For purposes of this definition, credit products and safe deposit box services are not non-deposit products.”

Consistent with the proposal, the final rule requires non-deposit signs if both insured deposits and non-deposit products are offered within the IDI’s premises. In such instances, an IDI generally would be required to physically segregate the areas where non-deposit products are offered from areas where insured deposits are usually and normally accepted, and to display a sign in the non-deposit areas indicating that non-deposit products: are not insured by the FDIC; are not deposits; and may lose value. In response to comments noting concerns of segregating physical signage across multiple locations and requesting further clarification on when separation would be required, the non-deposit sign requirement is intended to be generally consistent with practices described in the longstanding interagency guidance on the retail sale of non-deposit investment products.² As a result, the final rule provides that in limited situations in which physical considerations present challenges to offering non-deposit products in a distinct area, institutions must take prudent and reasonable steps to minimize customer confusion.

IDIs would be required to continuously, clearly, and conspicuously display this non-deposit sign; however, the final rule does not include specific design or size requirements. To minimize the potential for consumer confusion, the final rule prohibits display of non-deposit signs in close proximity to the official FDIC sign. The final rule’s non-deposit sign requirements apply to both branches and non-traditional premises where consumers have access to or transact with deposits.

Some commenters requested that the FDIC take a less prescriptive approach with respect to non-deposit sign requirements. As the final rule does not require standardization of the non-deposit sign and it provides IDIs flexibility regarding the design of non-deposit signs, staff believes the

² See Interagency Statement on Retail Sales of Non-deposit Investment Products, FIL-9-94 (Feb. 17, 1994), available at <https://www.fdic.gov/news/financial-institution-letters/1994/fil9409.html>.

final rule is responsive to commenter concerns on flexibility. As explained in the proposal, the non-deposit sign requirement is intended to be generally consistent with practices described in longstanding interagency guidance on the retail sale of non-deposit investment products.

2. Sign Requirements for IDIs' Digital Channels

Traditionally, the display of the official FDIC sign at banks' teller windows has provided bank customers with certainty, confidence, and assurance that their deposited funds are safe. However, ongoing market and technology developments, coupled with changing banking habits, pose new and heightened risks that could ultimately impact public confidence in the U.S. banking system. Specifically, consumers are increasingly using IDIs' websites and mobile banking applications to open deposit accounts, deposit and transfer funds, and buy and sell non-deposit products. For many consumers, IDIs' websites and mobile banking applications are the primary method of accessing banking products and, in turn, these platforms functionally serve as digital teller windows. At the same time, fintech companies offer consumers new options for accessing financial products and services. These changes may make it more difficult for depositors and consumers to understand when they are conducting business with an IDI and when their funds are protected by the FDIC's deposit insurance coverage. In addition, staff has noted an increase in false and misleading representations about deposit insurance on the internet.

The proposal would have required IDIs to clearly, continuously, and conspicuously display a digital sign on the IDI's homepage, landing and login pages or screens, and transactional pages or screens involving deposits. The digital sign was intended to visually communicate to consumers that they are doing business with an IDI rather than a non-bank entity. The proposal provided that the FDIC expected the digital sign to be an abbreviated version of the official sign and that it would prominently bear the name of the FDIC and the statement that insured deposits are backed by the full faith and credit of the U.S. Government.

Commenters raised concerns that changes in digital signage design and placement were overly prescriptive and may be difficult to implement due to technological and budgetary limits. Some commenters also stated that the digital signage could lead to customer confusion and create a suboptimal customer experience. However, other commenters supported the digital signage proposal, noting that it would be beneficial for customers to understand an entity's insured status. Staff recommends finalizing the digital signage requirements of the rule as proposed.

Official Digital Sign Requirement for IDIs' Digital Deposit-taking Channels

The final rule defines "digital deposit-taking channels" to mean any electronic communications methods through which an IDI accepts insured deposits. This includes, but is not limited to, IDI websites, web-based applications, and mobile applications that offer consumers access to insured deposits at IDIs.

Consistent with the proposal, the final rule requires an IDI to clearly, continuously, and conspicuously display the official digital sign on the IDI's homepage, landing and login pages or

screens, and transactional pages or screens involving insured deposits, to the extent applicable. The official digital sign prominently bears the name of the FDIC and states that insured deposits are backed by the full faith and credit of the U.S. Government. The digital sign included in the final rule has the following design:

FDIC *FDIC-Insured - Backed by the full faith and credit of the U.S. Government*

The final rule establishes a clear standard to promote consistency in the use and application of the official FDIC digital sign by IDIs. The rule specifies the color, size, and font to establish an easily recognizable, consistent digital sign to convey the certainty and confidence historically provided by the FDIC official sign at banks' teller windows. The FDIC logo in the official digital sign will be navy blue, with the remaining text in black. Recognizing the variability of IDI digital design placement circumstances, the final rule also provides an alternative color (white logo and text) if the specified colors would not be legible against the background design colors of the webpage or mobile banking application. To be clear and conspicuous, the official digital sign must be displayed in a continuous manner, near the top of the relevant page or screen in close proximity to the IDI's name.

Non-Deposit Sign Requirements for IDIs' Digital Deposit-taking Channels

The proposal would have required IDIs to clearly, continuously and conspicuously display a non-deposit sign indicating that the non-deposit products: are not insured by the FDIC; are not deposits; and may lose value, if a digital deposit-taking channel offers access to deposits, as well as non-deposit products.

To satisfy this proposed requirement, the proposed rule would have required the continuous display of the non-deposit sign on each IDI page relating to non-deposit products and prohibit displaying the non-deposit sign in close proximity to the FDIC official digital sign. The proposal also included a one-time per session notification to provide an initial, prominent display of the non-deposit signage to alert a consumer that they are dealing with non-deposit products that are not subject to FDIC-insurance. Moreover, the consumer would have needed to take action to dismiss the notification before accessing the relevant page or screen. This could include, for example, an IDI using a "pop-up," "speedbump," or "overlay" that displays a notification to the consumer, who then must dismiss the notice before accessing the content related to non-deposit products.

Several commenters supported the proposed requirement, noting that it would be beneficial for customers to know a given entity's or product's insured status. Other commenters were not supportive of the proposed requirement to display a one-time notification when a consumer initially accesses non-deposit products through an IDI's digital deposit-taking channel. For example, while agreeing with the sentiment behind the proposed requirement, two commenters noted that creating pop-ups can be operationally complex and may be burdensome for smaller institutions to implement. The commenters suggested this approach was overly prescriptive.

Similarly, another commenter raised technical concerns and suggested a reduction of the repetitive disclosures. In addition, one commenter noted that small and mid-sized banks that do not have the resources to build proprietary digital channels. This commenter supported the static non-deposit disclosure on applicable non-deposit pages, while noting that other regulators have requirements for digital banking channels.

Consistent with the proposal, the final rule requires the continuous display of the non-deposit signage on each IDI page relating to non-deposit products indicating that the non-deposit products are: (1) not insured by the FDIC; (2) are not deposits; and (3) may lose value. The final rule also prohibits displaying this non-deposit signage in close proximity to the digital FDIC sign.

With respect to the one-time per session notification requirement, the final rule includes a limited, more narrowly tailored one-time notification requirement for a specific digital banking setting. More specifically, the final rule requires a one-time notification if a bank customer who has logged into their account at the IDI's website (rather than all consumers, who were the focus on the proposed rule) can access an IDI's deposit products offered by the IDI as well as a third party's non-deposit products via a hyperlink (or similar weblinking feature) on an IDI's digital deposit taking channel. In this situation, a customer clicks a hyperlink to, in effect, leave the IDI's digital deposit taking channel and interact with a third party that may sell non-deposit products. The final rule requires IDIs to display the one-time notification after a customer clicks on such a hyperlink, but before the customer leaves the IDI's digital deposit taking channel.

3. Automated Teller Machines and Similar Devices

The proposal would have required IDIs' ATMs to clearly, continuously, and conspicuously display the official digital sign on the home page or screen and each transaction page or screen relating to deposits. The proposed rule would have further required electronic non-deposit signs where an IDI's ATM or like device both receives deposits for an IDI and offers access to non-deposit products.³ In this instance, the ATM or like device would be required to clearly, continuously, and conspicuously display electronic disclosures indicating that non-deposit products are not insured by the FDIC, are not deposits, and may lose value. The proposed rule would have required the display of these disclosures on each transaction page or screen relating to non-deposit products.

Commenters expressed concern over the difficulty or cost in implementing signage requirements for ATMs. Some commenters noted that costs will disproportionately affect community banks who rely on third party vendors that provide ATM operating software; one commenter noted that software changes take time, and these vendors would be expected to prioritize large banks. Another commenter noted that a handful of third-party vendors are utilized by many banks, and

³ The FDIC would not view postage stamps sold at ATMs to require these disclosures.

the changes would create supply bottlenecks since digital platforms are individualized for each bank.

Other commenters were supportive of the proposed rule's signage requirements for ATMs. One commenter stated the proposed rules were beneficial because consumers do not have the opportunity to seek clarification from bank employees at an ATM, like they would at a bank or bank branch. One commenter advocated for more stringent signage requirements for ATMs, recommending that the FDIC require IDIs to display disclosures on each screen that references a deposit or non-deposit product.

Staff recommends that the Board finalize certain parts of the proposed ATM signage requirements with changes and clarifications in response to comments. The new requirements will provide clear information to consumers as to when they are engaging with insured deposit products and when they are engaging with non-deposit products.

For an IDI's ATM or like device that receives deposits but does not offer access to non-deposit products, the final rule provides flexibility to meet the signage requirement by either (1) displaying the FDIC official digital sign on the ATM, or (2) displaying the physical official sign by attaching or posting it to the ATM. However, IDIs' ATMs or like devices that accept deposits and are put into service after January 1, 2025 must display the official digital sign (with no option to satisfy the requirement through display of the physical official sign).

For an IDI's ATM or like device that both receives deposits and offers access to non-deposit products, the final rule requires that such ATMs must: (a) display the official digital sign clearly, continuously, and conspicuously on the home page or screen and on each transaction page or screen relating to deposits; and (b) clearly, continuously, and conspicuously indicate that non-deposit products are not insured by the FDIC, are not deposits, and may lose value on each transaction page or screen relating to non-deposit products.

The final rule also provides that degraded or defaced physical official signs would not meet the "clearly, continuously, and conspicuously" standard.

4. Official Advertising Statement For IDIs

Consistent with the proposal, the final rule provides limited amendments to the advertisement statement requirements and expands IDIs' options for use of a short advertising statement. Currently, IDIs must include the official advertising statement in all advertisements that promote deposit products. The term advertisement means a commercial message in any medium that is designed to attract public attention or patronage to a product or business. The FDIC views this definition to include advertising published through social media channels.

The current regulation allows IDIs to use the short title "Member of FDIC," "Member FDIC," or a reproduction of the symbol of the corporation (defined in section 328.2(b)). In addition to

these options, to provide additional flexibility, the final rule would allow the use of “FDIC-insured.”

A comment letter opposed the addition of the term “FDIC-insured” for use as a shortened form of the official advertising statement, and suggested that IDIs continue to use the shortened forms of the advertising statement found in the existing regulation (“Member of FDIC” or “Member FDIC”). The commenters suggested that when IDIs offer products that are not FDIC-insured, their use of the term “FDIC-insured” could be misleading and poses risk of consumer confusion. Staff appreciates the concern about risk of consumer confusion, but believes that restrictions on usage of the advertising statement (including a shortened form) in connection with non-deposit products sufficiently mitigate any risk of consumer confusion. Specifically, IDIs are prohibited from using the official advertising statement in any advertisement relating solely to non-deposit products or hybrid products. IDIs may use the official advertising statement in advertisements containing information about both insured deposit products and non-deposit or hybrid products, but are required to clearly segregate the official advertising statement from any portion of the advertisement that relates to the non-deposit products. Staff therefore recommends that the Board finalize this aspect of the rule as proposed.

5. Misrepresentations and Material Omissions by Any Person

Staff believes that it would be beneficial to provide further clarity on the application of the statutory prohibition on misrepresentations, section 18(a)(4), in specific situations where consumers may be misled as to whether an entity is insured by the FDIC or the nature and extent of deposit insurance coverage. The FDIC proposed to amend subpart B of part 328 to address several of these situations. Staff recommends finalizing these aspects of the rule generally as proposed, with limited changes described below.

Use of the Official Advertising Statement or FDIC-Associated Terms or Images

Consumers have historically identified the use of the official advertising statement (such as “Member FDIC”) and FDIC-Associated Terms or FDIC-Associated Images to signify that they are dealing with an IDI and will receive the protection of deposit insurance. Staff believes that use of the official advertising statement or FDIC-Associated Terms or FDIC-Associated Images by non-banks presents a high risk of confusing consumers to believe they are dealing with an IDI.

To address this risk, the final rule clarifies specific circumstances under which use of the official advertising statement, FDIC-Associated Terms, or FDIC-Associated Images by a non-bank constitutes a misrepresentation of insured status. For example, a non-bank’s use of the “Member FDIC” logo on its website or in its marketing materials would be considered a misrepresentation unless that logo is next to the name of one or more IDIs. As another example, a non-bank’s use of either the official FDIC sign or the new digital sign that IDIs will be required to display through their digital deposit-taking channels would be a misrepresentation to the extent it inaccurately implies that the non-bank is insured by the FDIC and backed by the full faith and

credit of the U.S. government. Similarly, a non-bank's use of FDIC-Associated Terms in statements suggesting that the non-bank is insured by the FDIC would constitute a misrepresentation.

This provision of the final rule includes a technical change from the proposal. The proposal had stated, without limitation, that a false or misleading representation is deemed to be material if it states, suggests or implies, that, "A person or Uninsured Financial Products are insured or guaranteed by the FDIC". The final rule corrects the reference to "A person" to "A person other than Insured Depository Institution" and moves this amendment to a different paragraph of the regulation.

Failure to Disclose that a Person is a Non-bank is a Material Omission When a Statement is Made Regarding Deposit Insurance

Non-banks that purport to deposit their customers' funds at IDIs sometimes make statements regarding deposit insurance coverage for those funds. Absent additional context, to the extent such statements suggest that the FDIC's deposit insurance will protect consumers in the event of the non-bank's insolvency, they likely misrepresent the insured status of the non-bank. To minimize risk of consumer confusion, the final rule provides that if a non-bank makes statements regarding deposit insurance for its customers, it is a material omission for the non-bank to fail 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.

The final rule does not prescribe specific disclosure language; however, it explains that a statement that a person is not an FDIC-insured bank and deposit insurance covers the failure of an insured bank would be considered a clear statement for purposes of this provision. This approach gives non-banks that wish to make statements regarding deposit insurance coverage some flexibility in how they communicate the required information.

Failure of Persons to State that Non-deposit Products are Not Insured by the FDIC is a Material Omission When a Statement is Made Regarding Deposit Insurance

Staff's view is that where banks or non-banks make statements regarding deposit insurance in a context where deposits and non-deposit products are offered on a website in close proximity, additional information is necessary to ensure that consumers understand which products are subject to deposit insurance. The final rule provides that if a person makes statements regarding deposit insurance in a context where deposits and non-deposit products are both offered on a website in close proximity, it is a material omission to fail to disclose that non-deposit products: are not insured by the FDIC; are not deposits; and may lose value. For example, if a non-bank's website offers customers the option to have their funds deposited at an IDI and protected by deposit insurance or invested in non-deposit products, it would be a material omission if the non-bank's website failed to state that the non-deposit products are not insured by the FDIC, are not deposits, and may lose value.

Staff notes that certain non-banks offer payment products that are not FDIC-insured that allow consumers to store, send, or receive fiat money (for example, U.S. dollars) electronically. While these products are not insured by the FDIC and therefore are vulnerable to risks related to the nonbank's insolvency, they do not otherwise fluctuate in value. Accordingly, its staff's view that requiring nonbanks to disclose to consumers that such products "may lose value" may not be beneficial. As such, staff recommends that under the final rule, if a non-bank offers customers access to deposit products and a digital wallet where funds placed in a digital wallet are not covered by FDIC deposit insurance, it will not be a material omission for the non-bank entity to not include "may lose value" with respect to such digital wallet products. It will be a material omission for the nonbank to fail to disclose that any such uninsured products are: "not insured by the FDIC and are not deposits."

Staff also notes that services or products offered by a non-bank that are unrelated to financial or investment products and physical goods are generally not the type of non-deposit product that would confuse consumers about deposit insurance. As such, staff recommends that services unrelated to financial products or investments and physical goods should be excluded from non-deposit products for purposes of this particular example in the final rule.

One commenter suggested that it would be material omission for a non-bank to fail to disclose that its non-deposit products are not FDIC-insured. Staff believes the final rule addresses these concerns regarding misrepresentations and helps to mitigate potential consumer confusion when deposit insurance statements are made in the context of deposit and non-deposit products on a website in close proximity. Staff recommends that the Board finalize this aspect of the rule as proposed with the clarifications discussed above.

Failure to State that Requirements Apply to Pass-Through Deposit Insurance

The FDIC has a long history of providing "pass-through" deposit insurance coverage, meaning that deposits placed at an IDI by a party on behalf of one or more owners are insured as if deposited directly at the IDI by the owner(s). Pass-through insurance allows each owner of the funds in such an arrangement to be separately insured up to the statutory deposit insurance limit, currently \$250,000, even if the total deposit of all owners (in the aggregate) exceeds the \$250,000 limit. Pass-through insurance only applies, however, if certain regulatory requirements are satisfied.

The final rule provides that if a person makes statements regarding pass-through deposit insurance for its customers' funds, it is a material omission to fail to clearly and conspicuously disclose that certain conditions must be satisfied for pass-through deposit insurance coverage to apply. The final rule does not require a person making a statement regarding pass-through deposit insurance to list the specific conditions that must be satisfied; simply referencing that conditions must be satisfied is sufficient. For example, if a website for a financial product were to state that consumers' funds are eligible for pass-through deposit insurance, it would be a material omission to fail to clearly and conspicuously state that certain conditions must be

satisfied in order for pass-through insurance to apply. The final rule does not prescribe specific disclosure language, which means that parties have flexibility as to how they express the required information.

One commenter suggested it should be a material omission for entities that are not FDIC-insured to advertise pass-through deposit insurance without setting forth all the conditions necessary to receive such coverage. Another commenter suggested that requiring a clear and conspicuous disclosure that certain conditions must be satisfied for pass-through insurance, without more, could lead a depositor to wonder what those conditions might be and question whether pass-through claims will be honored. Staff believes the disclosure required by the final rule makes consumers aware of the risks they face without inundating them with a technical recitation of the pass-through insurance requirements. Further, such technical information may be impracticable for some types of advertisements due to the amount of text required to adequately disclose the requirements. Staff believes that the final rule's approach reflects a better balance, as it puts consumers on notice that pass-through insurance is not automatic and empowers them to raise questions or concerns.

Staff notes, however, that even with this notice, it is challenging to consumers to assess the risks related to the likelihood of receiving pass-through insurance given its technical legal requirements. As such, in the event the FDIC identifies disclosure language through consumer testing that would improve consumer understanding of the risks related to pass-through coverage, the FDIC could consider options to promote use of the disclosure.

6. Crypto-assets

Among other things, part 328 currently prohibits any person from representing or implying that any Uninsured Financial Product is insured or guaranteed by the FDIC. This prohibition applies to advertisements, publications, and other disseminations of information. Staff has recently noted a number of misrepresentations of deposit insurance coverage for crypto-assets, and believes that part 328 should be amended to make clear that representations concerning crypto-assets fall within its scope. Accordingly, the FDIC proposed to amend the definitions of "Non-Deposit Product" and "Uninsured Financial Product" in subpart B to include crypto-assets. The proposed rule also included a definition of the term crypto-asset, meaning "any digital asset implemented using cryptographic techniques."

Commenters generally supported the FDIC's efforts to address deposit insurance misrepresentations involving crypto-assets, but raised concerns regarding the proposed definition of "crypto-asset." One commenter stated that the proposed definition of "crypto-asset" was over inclusive and vague; specifically, the definition's reference to "cryptographic techniques" could refer to a variety of technologies not associated with the crypto-asset ecosystem, such as the end-to-end encryption technology that secures common communications applications. The commenter stated that the broader context of the FDIC's proposal did not indicate an intent to capture such usage.

Staff recognizes that the proposed definition of “crypto-asset” could be read to be over inclusive for the purposes of this regulation, and is recommending a more flexible approach better suited to an evolving landscape. The final rule adds crypto-assets to the list of enumerated examples in the definitions of “non-deposit product” and “uninsured financial product,” but does not include a definition of “crypto-asset.” Staff believes this approach will signal that representations regarding deposit insurance in the crypto-asset marketplace are subject to the prohibitions of section 18(a) and part 328, like other financial products, without relying on a specific regulatory definition of “crypto-asset” that could quickly become obsolete. The test of whether a particular financial product is uninsured will continue to be based upon application of the statutory definition of “deposit,” and is by its nature fact-specific.

7. Policies and Procedures Regarding Compliance with Part 328

The proposal would have required IDIs, as appropriate, to establish written policies and procedures to comply with part 328 that are commensurate with the nature, size, complexity, scope, and potential risk of the deposit-taking activities of the institution. As part of these policies and procedures, 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.

The IDI’s policies and procedures could include, for example, measures that the IDI would take to ensure compliance with the proposed sign and advertising requirements when the IDI changes its advertising strategy or engages with, or expands into, new physical or digital deposit-taking channels. For example, this could include, if applicable, establishing procedures to ensure that the IDI’s technology (e.g., websites and mobile applications) is capable of implementing the proposed sign and advertisement statement requirements across all digital deposit-taking channels.

The proposal also provided that to the extent a third party has a business relationship with, and is serving as a deposit-taking channel for, an IDI, sound risk management would compel the IDI to be aware of the activities of the third party to ensure that the availability of deposit insurance is not being misrepresented. As such, under the proposal, and as appropriate, IDIs would establish policies and procedures that include provisions related to the deposit-related services that a third party provides to the IDI or deposit-related products or services offered by the third party to other parties. These policies and procedures would include, as appropriate, provisions related to monitoring and evaluating whether such third parties are in compliance with subpart B.

Commenters expressed concerns that the proposed policies and procedures requirement were not aligned with existing interagency third-party risk management guidance. Staff believes the new requirement is consistent with recent interagency third-party guidance issued earlier this year. The interagency guidance underscores that a banking organization’s use of third parties can increase its risk, and that the use of third parties does not diminish or remove a banking organization’s responsibility to perform all activities in a safe and sound manner, and in compliance with applicable laws and regulations, including those related to consumer protection.

The policies and procedures established and maintained by IDIs related to part 328 will facilitate compliance with part 328, including by ensuring that appropriate monitoring is conducted and evaluations are performed regarding activities of certain persons they have businesses relations with involving the provision of deposit-related services to IDIs or offer an IDI's deposit products or services to other parties.

Commenters also suggested that the policies and procedures requirement exclude non-contractual relationships. While staff understands that IDIs often have provisions in their contracts with third parties to review certain marketing materials, limiting the scope of this requirement to contractual relationships would not capture IDI relationships with certain third parties that the rule is intended to capture.

Staff recommends that the Board finalize this aspect of the rule as proposed.

Conclusion

The final rule is intended to enable consumers better understand when they are doing business with an IDI and when their funds are protected by the FDIC's deposit insurance coverage. The amendments made to the final rule would have an effective date of April 1, 2024, with an extended compliance date of January 1, 2025.

FDIC staff recommends that the Board approve the final rule for publication in the Federal Register.

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