James P. Sheesley
Assistant Executive Secretary, Attention: Comments—RIN 3064-AG07
Federal Deposit Insurance Corporation
550 17th Street NW, Washington, DC 20429

October 10, 2024

Dear Mr. Sheesley:

I am writing to provide comments that I hope will improve this rule. I am both a victim of the Synapse failure and a former bank regulator.

Complaint Portal; Misconduct by FDIC Staff

The proposed rule's preamble descriptions the option to contact the FDIC to make related complaints about misleading FDIC insurance claims. However, when contacted via phone, staff at the FDIC Information and Support Center have in the past refused to accept complaints of violations of Section 18(a)(4) for persons, other than banks, in violation of the act because these staff rigidly believe that the FDIC only regulates insured depository institutions—a belief that is not true because Section 18(a)(4) applies to all *persons*, rather than banks.

The form for the Ombudsman says that anyone not wanting to contact them anonymously needs to call or email, but the phone number listed (1-877-275-3342) leads to a phone tree that used to allow you to reach the Ombudsman office, but which the Office of the Ombudsman later removed themselves from. As a result, the FDIC website misleadingly tells the public to call, despite the FDIC website providing that "The FDIC Office of the Ombudsman serves as an independent, neutral, and confidential liaison for the banking industry and **general public**."

This number only allows you to reach the FDIC Information and Support Center complaint staff, who have made knowingly false statements that the Office of the Ombudsman refuses to talk to members of the public, without actually having consulting with the Office of the Ombudsman.

The FDIC should update its procedures and training related to intake of such complaints. The Ombudsman's office should adopt procedures and policies where members of the public are concerned that the FDIC staff are refusing to take complaints that are within the FDIC's jurisdiction, or are inappropriately forwarding them to federal banking agencies or others who lack jurisdiction over all matters of the complaint.

The Chair and other members of the FDIC Board of Directors are encouraged to report refer these systemic issues and misconduct to the FDIC's Office of Inspector General (OIG), since the FDIC's OIG also no longer answers phone calls. If the FDIC staff do not understand their own authorities and responsibilities under Section 18(a)(4) of the Federal Deposit Insurance Act, it is unlikely that the frontline staff of the OIG do.

Questions Posted by FDIC in Proposed Rule

Should the rule's recordkeeping requirements instead apply to all custodial deposit accounts, not only to those with "transactional features" as described in the proposed rule? Why and what would be the benefits or challenges of applying the requirements to all custodial deposit accounts?

The proposed definition appears to invite sophisticated attorneys to work around the FDIC's proposed regulation. In particular, by designing an account that works the same in practice as past accounts do but somehow is not for the "benefit" of "beneficial owners" (e.g., the legal structure is somehow slightly different).

The FDIC may consider imposing a prohibition that no person who is not an insured depository institution may use the term "FDIC insured" in advertising a product or service if the funds are not owned by or beneficially owned by the person who would use the product or service.

Are there other categories of custodial deposit accounts with transactional features that should be expressly exempted from the proposed rule's recordkeeping requirements? If so, why should they be exempt, and what factors would tend to ensure that complete and accurate records of the beneficial owners of the deposits are readily available for the FDIC in the event of the failure of an IDI holding such custodial deposit accounts?

For the avoidance of doubt, the FDIC may wish to clarify that "Accounts exclusively holding security deposits tied to property owners for a homeownership, condominium, or other similar housing association governed by State law, or holding security deposits tied to residential or commercial leasehold interests" includes interest accrued on the security deposits (payable to the beneficial owner, which may be required under State law) and does not include reserve funds for homeownership, condominium, or other similar housing association.

Recordkeeping Insufficient as a Regulatory Response

The proposed rule does not sufficiently address misleading statements about the extent or manner of FDIC insurance, nor other related issues.

In addition to recordkeeping requirements, the FDIC should adopt the final rulemaking:

1. No *person* may represent any deposit as "FDIC insured," regardless of process or scheme, where the insured depository institution itself does not have sufficient up-to-date information to directly and correctly identify the relative breakdown of those funds to specific persons if that money were to be withdrawn; and

2. The FDIC should add to 12 CFR 337 that any insured depository institution who holds funds on behalf of any person violating the above provision is engaged in an unsafe or unsound banking practice.

Section 18(a)(4) of the Federal Deposit Insurance Act provides that "no person may knowingly misrepresent […] the extent to which or the manner in which any deposit liability, obligation, certificate, or share is insured under this chapter, if such deposit liability, obligation, certificate, or share is not so insured, to the extent or in the manner represented."

In the Synapse Failure, the relevant parties knowingly misrepresented the extent or manner that the funds were insured. *Black's law dictionary* defines insurance as "A contract whereby, for a stipulated consideration, one party undertakes to compensate the other for loss on a specified subject by specified perils."

Under this definition and the concept of insurance ordinarily understood by a reasonable person, an essential feature of insurance is that it must be provided for benefit of an identifiable party. A person depositing money into whatever technology or scheme identified as "FDIC insured" is misrepresenting the "extent to which or manner" that money is insured if there are not clear systems to identify who the money would ultimately belong to. It's similar to claiming a house is insured, knowing that the scheme of insurance means that it is not possible to determine who the insurance would be paid out to.

Despite it being accurate that the way FDIC insurance works is limited to paying out in the case of bank failure, the FDIC has been given additional authority and responsibility to make sure that no *person*, regardless of whether they are an insured depository institution or not, *the extent* to which or the *manner in which* deposits are insured. FDIC staff have consistently misunderstood their role to be limited to banks, whereas Section 18(a)(4) applies to *any person*, and have frequently only been able to imagine violations of this section to mean claiming that a bank is FDIC insured when it is not – whether that conduct regarding the extent or manner that also violates the law.

The proposed rule also does not address another issue, which was the movement by FinTechs of money out of FDIC insured accounts. Under the proposed rule, a person could advertise a product as FDIC insured, comply with the rule, and then immediately or later relocate all of the money somewhere not covered by FDIC insurance—as Synapse and partners claimed to do through a notice. In doing so, they would then have deceived the depositors but would no longer be covered by this regulation.

The FDIC should consider providing that it is an unsafe or unsound bank practice for the related insured depository institution to allow the funds to be transferred in this way to another non-FDIC-insured custodian without specific opt in from consumers.

Specific Procedures for Enforcement of Section 18(a)(4)

The FDIC has failed to adopt sufficient policies and procedures to identify violations of the law in this area and bring enforcement action and should consider updating its FDIC Information and Support Center policies and procedures.

Section 18(a)(4) of the Federal Deposit Insurance Act also provides additional authorities for the FDIC, including the authority to recommend enforcement action to the appropriate federal banking regulator (Section 18(a)(4)(C)) for insured depository institutions and institution-affiliated parties.

Section 18(a)(4)(D) grants specific authority for the FDIC to take enforcement action if the federal banking agency fails to take the FDIC's recommendation action.

Section 18(a)(4)(E) grants specific authority for the FDIC to take enforcement action against nonbanks, including "any other person," for violations of the Act. In the case of such persons, there is no federal banking regulatory with authority.

Instead, the FDIC appears to have incorrectly just forwarded all complaints related to the Synapse failure, regardless of whether they alleged violations by nonbanks, to the Federal Reserve Bank of St. Louis—even though the Federal Reserve Bank of St. Louis lacks authority over the nonbanks.

The FDIC not only appears to have ignored these complaints, but actively "rejected" complaints as being outside the FDIC's authority. Without reviewing the complaints, the FDIC would have no basis to make a recommendation to the federal banking agency and know when to independently bring action against a bank when that agency fails to do so. It also means the FDIC will consistently fail to investigate violations by nonbanks – which only the FDIC has authority over.

Even more absurd, in addition to failing to read my complaint, the FDIC's official response to my complaint encouraged me to contact those persons violating Section 18(a)(4) directly to share my concerns instead of the FDIC.

Paperwork Reduction Act

The current Paperwork Reduction Act section does not appear to specify how long records need to be kept. 5 CFR 1320.9(f) and other relevant sections of the Paperwork Reduction Act require that the FDIC "Indicates for each recordkeeping requirement the length of time persons are required to maintain the records specified." 5 CFR 1320.5(d)(2) requires that the FDIC explain a statutory requirement or "other substantial need" if it requires specific records to be maintained for more than 3 years.

In particular, I recommend that the FDIC specify that respondents are to keep copies of not only their current "written policies and procedures to achieve compliance with the rule's requirements" but any policies and procedures that were in effect for the prior 3 years. This would ensure that in a bank examination or investigation, the FDIC and other federal banking agencies could see the policies in effect during the entire review period, not just the current policy that the entity may have created only after learning the FDIC or another federal banking regulator was coming.

Best,

James Crowe, DSW