

MEMORANDUM TO: The Board of Directors

FROM: Harrel M. Pettway
General Counsel
Legal Division

SUBJECT: Final Rule on False Advertising, Misrepresentation of Insured Status, and Misuse of the FDIC's Name or Logo

I. SUMMARY

Staff is presenting for the approval of the Federal Deposit Insurance Corporation (FDIC) Board of Directors (the Board) a final rule that will implement section 18(a)(4) of the Federal Deposit Insurance Act (Section 18(a)(4)),¹ which prohibits any person from making false or misleading representations about deposit insurance or from misusing the FDIC's name or logo in a manner that would imply that an uninsured financial product is insured or guaranteed by the FDIC. The final rule will describe: (1) the process by which the FDIC will identify and investigate conduct that may violate the statutory provision; (2) the standards under which such conduct will be evaluated; and (3) the procedures which the FDIC will follow when formally and informally enforcing the provision.

II. RECOMMENDATION

FDIC staff recommends that the Board approve and adopt this final rule and authorize its publication in the *Federal Register*. The final rule will take effect thirty days after publication of the rule in the *Federal Register*.² The rule will clarify the FDIC's procedures for identifying, investigating, and where necessary taking formal and informal actions to address potential violations of Section 18(a)(4).

¹ See 12 U.S.C. § 1828(a)(4).

² One substantive provision of the final rule will have a delayed enforcement date. Specifically, section 328.102(b)(3)(ii) of the final rule imposes new disclosure requirements for non-bank entities that make certain types of statements regarding deposit insurance. Under the Paperwork Reduction Act of 1995, no person shall be subject to penalty for failing to comply with a collection of information if the collection of information has not been approved by the Office of Management and Budget (OMB). Consequently, the FDIC will not subject anyone to penalties for violations of section 328.102(b)(3)(ii) related to such third-party disclosures until the information collection request has been approved by the OMB. The FDIC is seeking such approval.

III. BACKGROUND

The FDIC has steadfastly and proactively sought to protect consumers³ by limiting the use of the FDIC's name, seal, and logo to insured depository institutions (IDIs) and preventing false and misleading representations about the manner and extent of FDIC deposit insurance. Section 18(a)(4) prohibits any person from engaging in false advertising by misusing the name or logo of the FDIC or from making knowing misrepresentations about the existence of or the extent or manner of deposit insurance.⁴ Section 18(a)(4) provides the FDIC independent authority to investigate and take administrative enforcement actions, including the power to issue cease and desist orders and impose civil money penalties, against any person who misuses the FDIC name or logo or makes misrepresentations about deposit insurance.⁵

Although the FDIC has broad statutory authority in this area, the FDIC has never issued specific regulations regarding false representations related to FDIC insurance or the misuse of the FDIC's name or logo.

In recent years, the FDIC has observed an increasing number of instances where financial service providers or other entities or individuals have misused the FDIC's name or logo on their websites or apps.⁶ The FDIC has also observed instances where entities or individuals have attempted to undermine confidence in the U.S. banking system by making false misrepresentations regarding the existence or effectiveness of FDIC deposit insurance in an effort to steer prospective customers towards alternative, uninsured products.⁷ State bankers associations have also noted increased instances of misuse in the industry.⁸

³ As used in this memorandum, the term "consumer" is broadly defined to encompass all current and potential depositors, including natural persons, organizations, corporate entities, and governmental bodies.

⁴ See 12 U.S.C. § 1828(a)(4).

⁵ See 12 U.S.C. § 1828(a)(4)(C)-(D).

⁶ For example, in 2019, the FDIC identified more than 65 websites that made misleading, false, or fraudulent representations about affiliations with the FDIC and/or FDIC-insured IDIs, including using the "Member FDIC" logo, when no such affiliation existed. See 2019 Annual Report, p. 38. In 2020, the FDIC identified more than 100 websites and apps making similar false claims. See 2020 Annual Report, p. 47. In 2020, the FDIC began looking into a mobile banking app offered by Beam Financial, Inc. (Beam). Beam's app prominently featured the FDIC's seal on its splash page, falsely claimed it had relationships with numerous IDIs, and promised to pay customers higher-than average returns (as high as 7%) on FDIC-insured deposits. On November 18, 2020, the Federal Trade Commission (FTC) filed suit against Beam for engaging in false and misleading advertising, and on March 29, 2021, the FTC and Beam reached a settlement, which included a broad injunction against making false representations, and customer restitution of at least \$2.6 million.

⁷ For example, the FDIC recently issued a press release regarding a company that was engaging in a deceptive marketing campaign to sell gold products by falsely claiming that federal law allows IDIs to seize consumers' deposits in the event of financial distress by the IDI. See *FDIC Press Release: FDIC Demands Monetary Gold Cease False Advertising Campaign* (March 19, 2020).

⁸ See Conference of State Bank Supervisors Comment Letter in Response to RIN 3064-AF71 (July 9, 2021), <https://www.fdic.gov/resources/regulations/federal-register-publications/2021/2021-false-advertising-misrep-misuse-fdic-logo-3064-af71-c-015.pdf>.

Historically, the FDIC has responded to these situations in various ways without a formalized process or procedure. To provide transparency into how the FDIC will address these and similar concerns moving forward, staff recommends that the FDIC adopt the attached final rule to clarify the FDIC's procedures for identifying, investigating, and where necessary taking formal and informal actions to address potential violations of Section 18(a)(4). The final rule will also establish a point-of-contact for receiving complaints about potentially false or misleading representations regarding deposit insurance, and addressing inquiries about deposit insurance claims. Although the FDIC is not required to promulgate regulations to implement Section 18(a)(4), FDIC staff nonetheless believes that the final rule, if adopted, will establish a more transparent process that will benefit all parties and promote stability and public confidence in FDIC deposit insurance and the nation's financial system.

Notice of Proposed Rulemaking

On May 10, 2021, the FDIC published in the *Federal Register* a notice of proposed rulemaking (the NPR, or proposed rule) to establish a new subpart B to Part 328 to implement Section 18(a)(4) with a 60-day comment period. The proposed subpart described certain procedures by which the FDIC would identify and investigate conduct that may violate Section 18(a)(4), the standards under which such conduct would be evaluated, and the procedures the FDIC would follow when formally and informally enforcing the provisions of Section 18(a)(4).

Comments on the Proposed Rule

FDIC received nineteen comment letters in response to the NPR. Commenters included national and state trade associations, advocacy groups, one IDI, and other interested parties. All of the commenters expressed support for the proposed rule. Some commenters noted that they have observed similar trends of misuse in the industry and applauded the FDIC's efforts to prevent false and misleading statements regarding deposit insurance. Several commenters stated the proposed regulatory text sufficiently identified potential risks related to false or misleading representations regarding deposit insurance and misuse of the FDIC's name or logo. Commenters also stated the proposed formal and informal enforcement processes were adequate.

Though all commenters supported the proposed rule, several commenters requested clarification on specific elements of the proposed rule. Two commenters specifically requested clarification regarding the advertising and marketing requirements applicable to non-deposit and hybrid products. Other commenters suggested the FDIC take additional actions beyond the proposed rule to prevent misuse and misrepresentations and regulate financial service providers or other entities. Among these, one comment proposed that the FDIC should institute a formal information sharing system with state regulatory authorities. These and all comment letters are discussed more fully in the preamble of the attached *Federal Register* notice for the final rule.

The majority of comments received (ten) related to proposed section 328.102(b)(3)(ii) of the NPR, which provided that, if a non-bank entity makes claims regarding the insured-status of its products, the failure to identify the name(s) of the IDI(s) which “will be receiving the deposits” would be a material omission in violation of the rule. The commenters, mostly trade associations, recommended that the FDIC clarify or remove this provision because, they argued, as proposed, it could constrain the dissemination of information by and about so-called “deposit placement networks.”⁹ They explained that a deposit network may involve many IDIs, making it difficult to name with certainty the specific IDI(s) in the network that will receive a deposit until the deposit is placed. The commenters urged the FDIC to modify or remove this requirement in the final rule.

The FDIC also received two comments, relevant to the NPR, that came in response to a Request for Information (RFI) regarding FDIC Sign and Official Advertising Requirements issued on April 9, 2021 (2021 RFI).¹⁰ The 2021 RFI was related in part to an RFI previously issued in 2020 (2020 RFI),¹¹ but it focused on soliciting information on the modernization of the FDIC’s advertising requirements applicable to IDIs, and related topics. Though the 2021 RFI did not contain questions relating to misrepresentations and misuse, the FDIC stated in the NPR that it would consider any relevant responses to the 2021 RFI when drafting the final rule. The two comments on the 2021 RFI that are relevant to the NPR came from a trade association and an IDI. Both comments echoed the FDIC’s concern about consumers’ ability to understand how funds placed with IDIs through a third party, such as a fintech, are insured. Both comments, and some comments submitted in response to the NPR, suggested that the FDIC mandate that non-IDIs make certain affirmative statements related to deposit insurance.

After full consideration of all the comments received with respect to the proposed rule, and relevant comments related to the 2021 RFI, staff recommends several changes to the text of the proposed rule as published in the *Federal Register*, which are discussed below and more fully in the preamble of the attached *Federal Register* notice for the final rule.

⁹ The term “Deposit Placement Network” is a defined term under section 29(g) of the FDI Act (12 U.S.C. § 1831f(g)) in relation to brokered deposits. Although the commenters used the term “deposit placement networks” in their comment letters, their comments appeared intended to apply more broadly to any deposit network administered by a non-bank entity (referred to here as a “deposit network sponsor”) that, through a network of IDIs with which it has business relationships, arranges or facilitates the placement of deposits. To distinguish these broader networks from “Deposit Placement Networks,” as described in section 29(g) of the FDI Act, the FDIC will refer to the former as merely “deposit networks.”

¹⁰ 86 FR 18528 (Apr. 9, 2021).

¹¹ 85 FR 10997 (Feb. 26, 2020).

IV. FINAL RULE

Modifications to Address Comments

The final rule adopts the text of the proposed rule with certain limited changes. First, staff proposes to amend section 328.101 to add a definition for the term, “Consumer,” to broadly identify those intended to be protected under the regulation. Second, staff proposes to add a new section 328.109 to expressly state that the FDIC’s authority under Section 18(a)(4) does not bar any other action authorized by law, by the FDIC or any other state or federal agency. Third, staff proposes to amend section 328.102(b)(3)(ii), add a new section 328.102(b)(5), and redesignate the proposed section 328.102(b)(5) as 328.102(b)(6) in order to clarify how marketing related to deposit networks can comply with the regulation. Finally, staff proposes making minor, technical amendments to the regulation.

While reviewing the comments, staff recognized the need to define a single term to describe those that may be impacted by violations of Section 18(a)(4). Therefore, staff recommends that the final rule include an additional defined term, “consumer,” to include all current or potential depositors, including natural persons, organizations, corporate entities, and governmental bodies.¹²

Staff considered the comment received suggesting that the FDIC should create a separate information sharing system with state regulatory authorities to foster federal-state collaboration in this space. While staff believes that the proposed section 328.105 already sufficiently provides for such disclosure, staff recognizes the importance of working with other state and federal agencies to address deceptive representations regarding deposit insurance. Staff also recognizes that misrepresentations that would violate Section 18(a)(4) may also violate other state or federal statutes or regulations. Consequently, staff proposes to add a new section 328.109 to the final rule to expressly reiterate that the FDIC’s authority under Section 18(a)(4) does not bar any other action authorized by law, by the FDIC or any other state or federal agency.

To accommodate the concerns expressed by commenters regarding the impact of the proposed rule on banks that may be working with deposit networks, staff recommends amending the proposed section 328.102(b)(3)(ii), adding a new section 328.102(b)(5), and redesignating the proposed section 328.102(b)(5) as 328.102(b)(6). Staff continue to believe that, where a non-bank entity represents or implies that an advertised product is insured or guaranteed by the FDIC,

¹² As noted in the NPR, the standards governing this rule were adapted from those applicable to Section 5 of the Federal Trade Commission Act, 5 U.S.C. 45 (Section 5). Section 5 prohibits unfair or deceptive acts or practices in commerce, and federal courts have concluded that the protections offered by Section 5 extend broadly to “consumers,” including natural persons, businesses, and not-for-profit organizations. *See, e.g., FTC v. IFC Credit Corp.*, 543 F.Supp.2d 925, 934 (N.D.Ill. 2008).

it would be a material omission for the non-bank entity to fail to identify the IDI(s) with which that party is doing business. Nonetheless, staff recognizes that there may be situations in which it might be difficult to identify with specificity the IDI into which a future deposit “will be” placed, such as when a non-depository is placing deposits through a large deposit network.

Rather than effectively requiring non-bank entities to identify the specific IDI that will receive a consumer’s deposit, the final rule will allow such non-bank entities to identify the IDI(s) into which consumers’ deposits *may* be placed in limited circumstances. The use of the word “may” does not allow non-bank entities to satisfy this requirement by merely identifying one or more IDIs with which a non-bank entity might one day do business. The final rule provides that such non-bank entities must identify the IDI or IDIs with which the representing party has an existing direct or indirect business relationship for the placement of deposits at the time of the representation.¹³ The revised provisions related to this sort of material omission by non-bank entities have been moved into a stand-alone subsection, 328.102(b)(5), related to material omissions. This new subsection clarifies that a non-bank entity’s failure to identify the bank with which the non-bank is doing business is merely one example of the type of conduct prohibited under this subsection.

Finally, staff proposes making a minor, technical amendment to section 328.107 to provide clarity regarding the General Counsel’s delegated authority to initiate and prosecute formal enforcement actions under the final rule. Similarly, staff proposes making technical amendments to section 328.3 to limit the applicability of definitions in that section to the new subpart A of part 328, and not to part 328, generally.

Summary of the Final Rule

The final rule will establish two subparts to Part 328: Subpart A, entitled “Advertising of Membership,” and Subpart B, entitled “False Advertising, Misrepresentation of Insured Status, and Misuse of the FDIC’s Name or Logo.” The existing sections of Part 328 (sections 328.0 through 328.4) will be placed in Subpart A. Subpart B will contain the new regulations setting forth the process by which the FDIC will identify and investigate conduct that may violate Section 18(a)(4), the standards under which such conduct will be evaluated, and the procedures the FDIC will follow when enforcing the provisions of Section 18(a)(4) as outlined in more detail below.

¹³ To the extent that a non-bank entity places deposits through a deposit network, it may satisfy this requirement by identifying the deposit network and each IDI in the deposit network or by providing a hyperlink to a current list of all the IDIs that are part of such a network. A non-bank entity may satisfy this requirement by providing a link to a list it maintains. Alternatively, if the deposit network maintains a current list of IDIs with which the deposit network has existing business relationships on the deposit network’s public website, the non-bank entity may provide consumers with a link to such a list on the deposit network’s website.

Scope

The final rule provides transparency by setting forth the scope of prohibited conduct, including specific examples of conduct deemed to violate Section 18(a)(4). The identified practices include false advertising, misrepresentations about deposit insurance, and the misuse of the FDIC name or logo. The rule lists several illustrative examples of false statements regarding the existence or extent of deposit insurance associated with a product, as well as illustrative examples of when information omitted from a representation is a material omission. Given the broad enforcement authority set forth in Section 18(a)(4), the final rule applies to *any* person who violates Section 18(a)(4) or who aids another in such a violation.

Inquiries and Complaints

The final rule provides a process by which members of the public may submit complaints to the FDIC regarding suspected false or misleading representations about deposit insurance. It also directs members of the public to the agency's existing resources to submit inquiries about representations regarding deposit insurance. Both complaints and inquiries will be directed to the FDIC's Information and Support Center.

Investigations

The final rule sets forth procedures for investigations into potential violations of Section 18(a)(4). Among other things, the rule will delegate authority to the FDIC's General Counsel to investigate potential violations.¹⁴ The final rule will also clarify that such investigations will generally be conducted in accordance with section 10(c) of the Federal Deposit Insurance Act¹⁵ and the FDIC's rules governing investigations.¹⁶

Informal Resolution

To date, the FDIC has generally resolved apparent violations of Section 18(a)(4) informally by notifying the party responsible and requesting the apparent misrepresentation be withdrawn and corrected. The final rule describes the process for informal resolution. Under this process, the FDIC will generally send any person making an apparent misrepresentation or misusing the FDIC's name or logo, or any person aiding or abetting such violation, an advisory letter notifying the person of the basis for the FDIC's concerns and requesting corrective action. Such letter will also provide the recipient the opportunity to provide the FDIC with supplemental

¹⁴ Prior to October of 2020, the Board had granted the General Counsel and his/her delegees independent authority to investigate non-bank entities for violations of Section 18(a)(4). Due to an inadvertent oversight, the master delegations issued on October 20, 2020, no longer reference this independent investigative authority. *See* Board Resolution 08682, *Supervisory Filings, Enforcement Matters, Capital Determinations, and Information Sharing Agreements* (Oct. 20, 2020). The final rule reestablishes by regulation the Board's delegation to the General Counsel or his/her delegees the authority to investigate potential violations of Section 18(a)(4).

¹⁵ 12 U.S.C. § 1820(c).

¹⁶ Notwithstanding the general confidentiality provisions of 12 C.F.R. § 308.147, in cases that may pose a risk of imminent harm to consumers, the final rule will allow the FDIC to disclose or confirm the existence of an investigation that does not involve an IDI or a known IAP thereof. Such disclosure may not, however, disclose any information obtained or uncovered during the course of the investigation.

information if the recipient contends that the representations made are accurate and/or that any use of the FDIC's name or logo is authorized.

The final rule provides that if the recipient of such a letter takes the requested corrective action within the time requested, the FDIC will generally take no further action. However, if the recipient fails to timely take corrective action, the FDIC will be able to pursue all remedies available to it.

Formal Enforcement Action

The final rule permits the FDIC to commence formal enforcement action at any time if the FDIC has reason to believe that depositors or IDIs may suffer harm as a result of continued conduct or if the person who appears to be violating Section 18(a)(4) has been previously advised of the agency's concerns. In the event that the FDIC is required to initiate a formal enforcement procedure to address violations of Section 18(a)(4), the rule clarifies the procedures that will govern any formal enforcement action brought by the FDIC. Such actions shall be brought under Section 8 of the Federal Deposit Insurance Act¹⁷ against any person in the same manner, to the same extent, and subject to the same rules of procedure¹⁸ as the agency would follow when bringing an enforcement action against IDIs or their IAPs.

Finally, the final rule sets forth provisions regarding the venue and appeals process for any formal enforcement action. These provisions are consistent with other enforcement actions taken pursuant to 12 U.S.C. § 1818.

V. CONCLUSION

FDIC staff is requesting the Board approve and adopt this final rule and authorize its publication in the *Federal Register*.

VII. STAFF CONTACTS

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¹⁷ 12 U.S.C. § 1818(b), (c), (d), (i).

¹⁸ Part 308 of the FDIC's Regulations.