

United States

FDIC INSURANCE

Financial regulators take action to combat misrepresentation

US financial regulators take action on misrepresentations about deposit insurance

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US Financial Regulators Take Action on Misrepresentations About Deposit Insurance

On 5 July 2022, the Federal Deposit Insurance Corporation (FDIC) implemented new rules addressing misrepresentations about deposit insurance and the use of the FDIC's name and logo by the private sector.¹ These new rules complement enforcement and supervisory positions taken by the Consumer Financial Protection Bureau (CFPB) and the Office of the Comptroller of the Currency (OCC) which announced several actions earlier this year.²

These actions foreshadow greater attention from federal regulators on how banks and others advertise the availability of deposit insurance to customers. Fintechs and others working with banks to offer deposit products will need to ensure that their customer-facing documents and advertisements comply with these requirements.

We discuss here the actions taken by the US regulators and what they may mean for the banking industry and non-banks working with depository institutions to offer deposit products and services.

FDIC rulemaking

The most significant action has been the implementation by the FDIC of a final rule to implement s.18(a)(4) of the Federal Deposit Insurance Act.³ That provision prohibits any person from misusing the name or logo of the FDIC, engaging in false advertising, or making knowing misrepresentations about

¹ Press Release, "FDIC Issues Final Rule Regarding False Advertising, Misrepresentations About Insured Status, and Misuse of the FDIC's Name or Logo" (17 May 2022), <https://www.fdic.gov/news/press-releases/2022/pr22041.html>; 87 Fed. Reg. 33,415 (2 June 2022).

² Press Release, "CFPB Takes Action to Protect Depositors from False Claims About FDIC Insurance" (17 May 2022), <https://www.consumerfinance.gov/about-us/newsroom/cfpb-takes-action-to-protect-depositors-from-false-claims-about-fdic-insurance/>; News Release, "Acting Comptroller Issues Statement on Misuse of FDIC Name, Logo" (17 May 2022), <https://www.occ.gov/news-issuances/news-releases/2022/nr-occ-2022-53.html>.

³ This rulemaking was conducted in tandem with the FDIC's efforts to modernise the FDIC official sign and advertising requirements, but the final rule does not address the sign and advertising requirement.

deposit insurance.⁴ The final rule describes the process by which the FDIC will identify and investigate conduct that may violate the statutory provision, the standards under which such conduct will be evaluated, and the procedures that FDIC will follow to enforce the provision.

Scope of the final rule

The final rule applies to persons who misuse the FDIC name or logo, such as those who represent that an uninsured product is insured by the FDIC by using the FDIC name or logo. The final rule also applies to a person who knowingly misrepresents that a product is insured by the FDIC when the item is not insured, or the extent to which or manner in which the product is insured by the FDIC when it is not insured to the extent or manner represented.⁵ These prohibitions extend to any person who aids another in such a violation.

The final rule broadly construes the scope of s.18(a)(4) by providing several guidelines on what the FDIC considers prohibited conduct under the Federal Deposit Insurance Act. The rule also lists illustrative examples of types of prohibited conduct, such as false statements regarding the existence or extent of deposit insurance or when information omitted from a representation is considered a material omission. For example, the final rule specifies that a statement will be considered to contain a material omission if a person other than an insured depository institution (IDI) represents or implies that an advertised product is insured or guaranteed by the FDIC and does not identify the IDIs with which the party has a direct or indirect business relationship for the placement of deposits and into which consumers' deposits may be placed.

Some commenters explained that non-bank entities may use deposit networks involving many IDIs, making it difficult to name the specific IDIs in the network that will receive a deposit until the deposit is placed. In response, the final rule states that to the extent that a nonbank entity places deposits through a deposit network, it may satisfy the requirement to disclose IDIs 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. This provision about material omissions may have a significant impact on non-bank entities who will be required to disclose all the IDIs with which they have an existing business relationship regarding consumer deposits.

Complaint, investigation, informal resolution, and enforcement procedures

The final rule also includes sections detailing the FDIC's procedures for evaluating potential violations of s.18(a)(4).⁶ The final rule provides a process by which the public can submit complaints and inquiries about suspected false or misleading representations about deposit insurance. The final rule also sets forth the procedures for FDIC investigations of potential violations.

The final rule offers various forms of resolution for apparent violations. The final rule describes the process for informal resolution, which is how the FDIC generally resolves apparent violations, as well the process for initiating formal enforcement.⁷ The FDIC notes that the final rule will not affect the

⁴ FDIC, "Final Rule on False Advertising, Misrepresentation of Insured Status, and Misuse of the FDIC's Name or Logo" (17 May 2022), <https://www.fdic.gov/news/board-matters/2022/2022-05-17-notice-dis-a-fr.pdf>.

⁵ FDIC, "Final Rule on False Advertising, Misrepresentation of Insured Status, and Misuse of the FDIC's Name or Logo" (17 May 2022), <https://www.fdic.gov/news/board-matters/2022/2022-05-17-notice-dis-a-fr.pdf>.

⁶ FDIC, "Final Rule on False Advertising, Misrepresentation of Insured Status, and Misuse of the FDIC's Name or Logo" (17 May 2022), <https://www.fdic.gov/news/board-matters/2022/2022-05-17-notice-dis-a-fr.pdf>.

⁷ The FDIC explains in the preamble to the final rule that it used the informal resolution process 165 times in 2019 and 2020.

application of related criminal prohibitions under 18 USC § 709. Thus, the FDIC states that it believes the final rule is unlikely to have any significant effect on informal and formal enforcement of s.18(a)(4).

CFPB Circulars

For those who are unfamiliar with CFPB Circulars, on 16 May 2022, the CFPB announced that it will issue them on various topics related to federal consumer financial law.⁸ It intends for the circulars to provide guidance to other agencies with consumer financial protection responsibilities on how the CFPB intends to enforce federal consumer financial law. The target audience not only includes federal counterparts, but also state attorneys general and state regulators.

On 17 May 2022, the CFPB issued its first circular, which addresses issues surrounding deposit insurance (CFPB Circular). The CFPB Circular answers the question of when representations involving the name or logo of the FDIC or about deposit insurance constitutes a deceptive act or practice in violation of the Consumer Financial Protection Act (CFPA).⁹ The CFPB takes the position that covered persons or service providers likely violate the CFPA's prohibition on deceptive acts or practices if they misuse the name or logo of the FDIC, engage in false advertising, or make misrepresentations to consumers about deposit insurance, *regardless* of whether such conduct (including the misrepresentation of insured status) is engaged in knowingly. For example, the CFPB Circular notes that claims that financial products or services are "regulated" by the FDIC or "insured" or "eligible for" FDIC insurance are deceptive if those claims expressly or implicitly indicate that the product or service is FDIC-insured when that is not the case.

The CFPB Circular draws attention to the fact that representations about deposit insurance may be particularly relevant with respect to new financial products or services, especially those involving new technologies such as digital assets. CFPB Director, Rohit Chopra, similarly emphasised that the CFPB is especially concerned about potential misconduct involving novel technologies, including stablecoins and other crypto-assets.¹⁰

OCC statement

The OCC's Acting Comptroller of the Currency, Michael J. Hsu, also issued a statement in support of the FDIC's final rule addressing misrepresentations to consumers about deposit insurance and use of the FDIC's name and logo.¹¹ *Acting Comptroller Hsu notes that the final rule is timely given changes in the marketplace. He emphasises that this rule provides important clarity in light of the growth of nonbank crypto firms and fintechs and their relationships with banks, which has been consistent with his statements about the regulation of nonbank financial institutions in general. Acting Comptroller Hsu expresses concern regarding the potential for consumer confusion about the status of cash held at these emerging firms.*

⁸ Blog, "CFPB launches new system to promote consistent enforcement of consumer financial protections" (16 May 2022), <https://www.consumerfinance.gov/about-us/blog/cfpb-launches-new-system-to-promote-consistent-enforcement-of-consumer-financial-protections/>.

⁹ CFPB, CFPB Circular 2022-02, "Deceptive representations involving the FDIC's name or logo or deposit insurance" (17 May 2022), <https://www.consumerfinance.gov/compliance/circulars/circular-2022-02-deception-representations-involving-the-fdics-name-or-logo-or-deposit-insurance/>.

¹⁰ News Release, "Statement of CFPB Director Rohit Chopra, FDIC Board Member, Final Rule Regarding False Advertising, Misrepresentations of Insured Status, and Misuse of the FDIC's Name or Logo" (17 May 2022), <https://www.consumerfinance.gov/about-us/newsroom/statement-of-cfpb-director-rohit-chopra-fdic-board-member-final-rule-regarding-false-advertising-misrepresentations-of-insured-status-and-misuse-of-the-fdics-name-or-logo/>.

¹¹ News Release, "Acting Comptroller Issues Statement on Misuse of FDIC Name, Logo" (17 May 2022), <https://www.occ.gov/news-issuances/news-releases/2022/nr-occ-2022-53.html>.

Conclusion

The FDIC's final rule regarding misrepresentations to consumers about deposit insurance and use of the FDIC's name and logo will affect the types of disclosures that banks and non-banks will have to make in order to comply with this new regulation. Non-bank entities working with banks should ensure that their customer-facing materials comply with the provisions in this final rule with respect to describing their existing business relationships and the products or services offered.

Moreover, the implementation of FDIC's final rule, as well as the CFPB's and OCC's guidance and statements in support of FDIC's final rule, indicate that this topic will continue to be an area of interest for the agencies. Both CFPB Director Chopra and Acting Comptroller Hsu expressed their concerns about new technological developments in the market place, especially as crypto firms and fintechs develop additional relationships with banks. Thus, banks and other entities working with banks to offer deposit products and services to consumers should ensure that they have appropriate compliance procedures in place to address the final rule's expansive provisions.

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