

May 23, 2022

# Agencies Target Misleading Deposit Insurance Claims

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## FDIC and CFPB Releases Suggest Renewed Focus on Representations Related to the Insured Status of Products That Rely Upon or Function Like Bank Deposits

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### SUMMARY

On May 17, 2022, the Federal Deposit Insurance Corporation (“FDIC”) promulgated a final rule implementing its statutory authority to prohibit persons from making misrepresentations about FDIC insurance or misusing the FDIC’s name or logo (the “Final Rule”).<sup>1</sup> On the same day, and in support of the Final Rule, the Consumer Financial Protection Bureau (“CFPB”) released an enforcement circular explaining to other agencies responsible for enforcing federal consumer financial law that such misrepresentations or misuse also likely violates the Consumer Financial Protection Act’s (“CFPA”) prohibition on deception. The circular marks the first issuance in furtherance of the CFPB’s May 16, 2022 announcement of a “new system” to provide guidance to other agencies on how the CFPB intends to enforce federal consumer financial law. In connection with the Final Rule and the circular, Rohit Chopra, the CFPB’s Director and a voting member of the FDIC’s Board of Directors, issued a statement highlighting the CFPB’s particular concerns “about potential misconduct involving novel technologies, including so-called stablecoins and other crypto-assets.” While acknowledging the potential benefits these new technologies can present, Director Chopra warned they “nonetheless pose risks to consumers who may be baited by misrepresentations or false advertisements about deposit insurance.”

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### FDIC and CFPB Releases

#### A. FDIC FINAL RULE

Section 18(a)(4) of the Federal Deposit Insurance Act (the “FDI Act”) prohibits any person from engaging in false advertising or misuse of the FDIC’s name or logo, or from making knowing misrepresentations

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about the existence, extent, or manner of deposit insurance.<sup>2</sup> Section 18(a)(4) affords the Federal banking agencies authority to enforce this prohibition with respect to any person for which the agency is the “appropriate Federal banking agency” and gives the FDIC back-up enforcement authority should the FDIC determine that the appropriate Federal banking agency failed to take appropriate responsive measures.<sup>3</sup> The FDIC also has enforcement authority with respect to persons that have no appropriate Federal banking agency, which would include many digital asset businesses.<sup>4</sup>

Section 18(a)(4) was enacted in 2008, and the FDIC issued its first—and to date only—public enforcement action against a nonbank for apparent violations of section 18(a)(4) the following year.<sup>5</sup> Although no further public enforcement actions were announced, between January 2019 and December 2020 the FDIC worked with nonbanks at least 165 times to reach informal resolutions regarding potential violations of section 18(a)(4).<sup>6</sup> In response to this “increasing number of instances” of apparent violations of section 18(a)(4), the FDIC published a proposed rule in May 2021 intended to provide greater transparency into how the FDIC addresses “these and similar concerns.”<sup>7</sup> The Final Rule marks the culmination of the FDIC’s rulemaking process and largely tracks the proposed rule, with several limited and primarily clarifying changes. According to the FDIC, the Final Rule is generally consistent with the FDIC’s existing practices and is intended to provide clarity as to how the FDIC will identify, investigate, and resolve potential violations of section 18(a)(4).<sup>8</sup>

Perhaps the most notable provisions in the Final Rule are those outlining the standards the FDIC will apply in assessing whether conduct violates section 18(a)(4)’s prohibition on knowing misrepresentations about insured status. The FDIC “adapted in part” the standards governing deception under section 5 of the Federal Trade Commission Act. Under the FDIC’s formulation, a representation will violate the prohibition if it contains material representations which would have the tendency or capacity to mislead<sup>9</sup> a reasonable consumer or omits material information that would be necessary to prevent a reasonable consumer from being misled—in either case regardless of whether the consumer was *actually* misled. The Final Rule also identifies representations that will be deemed to have been “knowingly” made; namely, when the person making the representation is on notice from the FDIC or another authority concerning the representation and continues to make it anyway.

The Final Rule identifies several representations that the FDIC views as material and several that it views as omitting material information, one of which merits additional focus:

[I]f a statement is made by a person other than an [insured depository institution (“IDI”)] that represents or implies that an advertised product is insured or guaranteed by the FDIC, it will be deemed to be a material omission to fail to identify the [IDI(s)] with which the representing party has a direct or indirect business relationship for the placement of deposits and into which the consumer’s deposits may be placed.

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According to the FDIC, this provision requires nonbank entities to identify the IDIs with which they have existing direct or indirect business relationships and into which consumers' deposits *may* be placed.<sup>10</sup> In contrast, the proposed rule would have required nonbank entities that are advertising FDIC-insured deposits to identify the specific insured depository institutions that *would* receive a consumer's deposit. The Final Rule language is aimed at balancing (i) commenters' concerns that it may not always be possible to identify with specificity the IDI(s) that will receive funds placed through a deposit network until those funds are actually deposited at the IDI(s) with (ii) the need to provide consumers with access to adequate information about the extent and manner of deposit insurance provided. According to the FDIC, a nonbank placing deposits through a deposit network 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 IDIs in the network (including by providing a link to a list that it maintains).

Also of note are the enforcement provisions of the Final Rule, which include both an informal resolution process and formal enforcement measures. The informal resolution process begins with an "advisory letter" to the person the FDIC believes may be violating section 18(a). Persons that satisfy the requirements of the advisory letter will generally be subject to no further FDIC action. Persons that do not satisfy those requirements may be subject to formal enforcement measures under section 8 of the FDI Act. In addition, the FDIC may take formal measures regardless of whether an advisory letter has been issued in cases in which the FDIC has reason to believe that consumers or IDIs may suffer harm from continued violations or the person has previously received an advisory letter. Finally, the Final Rule delegates authority to the FDIC's General Counsel to investigate potential violations of section 18(a) and pursue formal enforcement actions to address violations of section 18(a)(4).

### B. CFPB CIRCULAR

On May 16, the CFPB announced that it was "launching a new system to provide guidance to other agencies with consumer financial protection responsibilities on how the CFPB intends to enforce federal consumer financial law." Recognizing that "the CFPB is not the only enforcer of these laws," the new system—consisting of periodic "Consumer Financial Protection Circulars"—is intended to ensure federal consumer financial law is enforced consistently and to provide transparency to "partner agencies" regarding the CFPB's intended approach when cooperating in enforcement actions. The CFPB's intended audience for the circulars includes, among others, state attorneys general, state regulators, federal prudential regulators, the Department of Justice, and the Federal Trade Commission.<sup>11</sup>

On May 17, following the release of the Final Rule, the CFPB issued its first substantive Consumer Financial Protection Circular addressing representations involving the name or logo of the FDIC or about deposit insurance that constitute a deceptive act or practice in violation of the CFPA (the "Circular").<sup>12</sup> The Circular makes clear that the CFPA's prohibition on deception, unlike section 18(a)(4) of the FDI Act, establishes a lower standard for demonstrating that a person acted with intent, and also encompasses

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misrepresentations even if they are not “knowingly” made. Most notable, perhaps, is the Circular’s emphasis on digital assets. According to the Circular, “[r]epresentations about deposit insurance may be particularly relevant with respect to new financial products or services, especially those involving new technologies such as digital assets, including crypto-assets.” The Circular also highlights the potential harms of misrepresentations to consumers, stating that “firms offering or providing digital assets, including crypto-assets, may be particularly prone to making such deceptive claims to consumers about FDIC deposit insurance coverage.”

The Circular suggests that the CFPB intends to take enforcement action for misrepresentations about FDIC insurance status under its authority to prohibit deceptive practices, even though the FDIC has specific authority under section 18(a)(4)(D) to bring enforcement actions against persons who are not otherwise subject to the jurisdiction of the FDIC or the other federal banking agencies.

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### IMPLICATIONS

The Final Rule and Circular, particularly viewed in conjunction with Director Chopra’s accompanying statement, suggest the FDIC and CFPB will both be intensely focused on representations made by nonbanks related to the insured status of products that may function like deposits, in particular in the context of fintechs and digital assets. Stablecoins may be of particular interest, given recent market events and claims made by many stablecoin issuers with respect to the safety of the assets. We believe it would be reasonable to expect an uptick in related enforcement activity by the CFPB and FDIC, even if only informally at first. Accordingly, fintechs offering access to deposit-related products and digital asset businesses should closely review their representations to ensure they are consistent with the Final Rule and the Circular. Nonbanks that place deposits with IDIs, in particular those that rely on deposit networks, should undertake similar efforts.

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ENDNOTES

- 1 FDIC, False Advertising, Misrepresentation of Insured Status, and Misuse of the FDIC's Name or Logo (May 17, 2022), available at <https://www.fdic.gov/news/board-matters/2022/2022-05-17-notice-dis-a-fr.pdf>.
- 2 12 U.S.C. § 1828(a)(4). Federal criminal law also prohibits the misuse of the FDIC's name and false representations regarding deposit insurance. See 18 U.S.C. § 709.
- 3 12 U.S.C. § 1828(a)(4)(C)-(D). The authority extends to such person's institution-affiliated parties.
- 4 12 U.S.C. § 1828(a)(4)(E).
- 5 *In the Matter of AI Amerilife First Financial LLC* (June 18, 2009), available at <https://www.fdic.gov/bank/individual/enforcement/2009-06-04.pdf>.
- 6 *Id.*
- 7 86 Federal Register 24770 (May 10, 2021).
- 8 The Final Rule will appear as a new subpart B of part 328 of the FDIC's rules, with additional definitions in subpart A.
- 9 The FDIC's "tendency or capacity to mislead" formulation has not been used by the FTC to define deception since 1983. The standard adopted at that time was that the representation or omission must be "likely to mislead the consumer" to be actionable. See FTC Policy Statement on Deception, dated October 14, 1983, appended to *In re Cliffdale Associates*, 103 F.T.C. 110, 174 (1984).
- 10 False Advertising, Misrepresentation of Insured Status, and Misuse of the FDIC's Name or Logo, *supra* note 1.
- 11 Consumer Financial Protection Circular 2022-01 (May 16, 2022), available at <https://www.consumerfinance.gov/compliance/circulars/circular-2022-01-system-of-consumer-financial-protection-circulars-to-agencies-enforcing-federal-consumer-financial-law/>. The CFPB appears to have modeled these circulars on the circulars the Office of Management and Budget issues to Federal agencies on a variety of subjects.
- 12 Consumer Financial Protection Circular 2022-02 (May 17, 2022), available at <https://www.consumerfinance.gov/compliance/circulars/circular-2022-02-deception-representations-involving-the-fdics-name-or-logo-or-deposit-insurance/>.

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