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FDIC FINALIZES RULE TO PROTECT AGAINST MISUSE OF DEPOSIT INSURANCE STATUS

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On May 17, 2022, the Federal Deposit Insurance Corporation ("FDIC") finalized a federal rule that provides more transparency on how the FDIC will enforce Section 18(a)(4) of the Federal Deposit Insurance Act.[1] Section 18(a)(4) prohibits any person from (i) misusing the name or logo of the FDIC or (ii) engaging in false advertising or making knowing misrepresentations about federal deposit insurance. Prior to this rule, the FDIC had issued no specific regulations under Section 18(a)(4). The new False Advertising, Misrepresentations of Insured Status, and Misuse of the FDIC's Name or Logo rule applies to any person including banks and nonbanks. While the final rule likely will have a greater impact on nonbanks promoting financial products, banks could also be affected by the new rule for the reasons discussed below. The rule becomes effective on July 5, 2022.

Rule Summary

The FDIC intends for the final rule to clarify the FDIC's procedures for identifying, investigating, and taking formal and informal actions to address potential violations of Section 18(a)(4). The rule sets forth specific prohibitions on the use of the FDIC name or logo in connection with "uninsured financial products."[2] The rule also explains when a person will be deemed to knowingly make false or misleading representations about federal deposit insurance in connection with financial products.

Among other things, the rule requires a person (other than an insured deposit institution) to identify the insured depository institutions(s) with which the person "has a direct or indirect business relationship for the placement of deposits and into which the consumer's deposits may be placed," when the person makes a statement that represents or implies that a product is insured or guaranteed by the FDIC. The FDIC may consider the nonbank's statement to involve a material omission in violation of Section 18(a)(4) if the nonbank fails to make this disclosure. The final rule means, for example, if a nonbank places deposits through a deposit network, the nonbank must disclose the names of all insured depository institutions that are part of the deposit network and may receive a consumer's deposits. In commentary accompanying the final rule, the FDIC explained that a nonbank could provide a list of the insured depository institutions to a consumer in writing or through a website hyperlink.

In addition to identifying activities that could violate Section 18(a)(4), the rule identifies a point of contact at the FDIC to which any person may report potential violations of Section 18(a)(4). Finally, the rule outlines how the FDIC will investigate potential

[1] 12 U.S.C. § 1828(a)(4).

[2] To be codified at 12 C.F.R. §§ 328.100 *et seq.*

violations, coordinate with other regulators, and resolve investigations formally or informally. The FDIC noted that it may disclose or confirm the existence of an investigation that does not involve an insured depository institution or a known institution-affiliated party.

Rule's Impact

The FDIC acknowledged that the final rule will primarily affect nonbanks, but the rule could also impact FDIC-insured banks in at least three ways. First, the rule expressly applies to any person who "aids or abets another in" violating the rule. Banks partnering with nonbanks to offer financial products could be at risk of "aiding or abetting" a nonbank in violation of the rule if the nonbank does not accurately explain federal deposit insurance coverage with its product. The risk of aiding and abetting a nonbank may be more acute in programs where a bank has complex relationships with one or more nonbanks and where money flows through various types of accounts or sub-accounts.

Second, the final rule requires nonbanks to disclose the depository institution(s) behind their products or services. This disclosure requirement places more of a limelight on depository institutions' roles in complex financial relationships and could prompt questions from regulators regarding banks' involvement in such programs. Finally, the new rule provides a point of contact that banks may use to report any potential violations of Section18(a)(4) that the bank observes in the market. Having a clear point of contact to report potential violations could also lead to an increase in regulatory inquiries that a bank must address.

Other Considerations

Other federal and state laws protect consumers against misleading information regarding the deposit insurance status of products. Conduct that violates Section 18(a)(4) and the new rule could also form the basis for a deception claim under Section 5 of the Federal Trade Commission Act, the Dodd Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank Act"), and similar state trade practices statutes. The FDIC acknowledged that nothing in the new rule limits the authority of any federal or state agency to bring an action against a bank or nonbank under another law. On the same date that the FDIC finalized its new rule, the Consumer Financial Protection Bureau ("CFPB") issued a *Consumer Financial Protection Circular* to enforcement personnel outlining how misrepresentations about deposit insurance may violate the Dodd-Frank Act.[3] Unlike the new FDIC rule, misrepresentations do not have to be "knowingly" made to violate the Dodd-Frank Act.

[3] 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, Consumer Financial Protection Bureau (May 17, 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/

Many state laws also prohibit nondepository financial institutions from transacting the business of banking in a manner that could mislead the public or from using the term "bank," "banker," or "banking" in connection with their businesses. In March 2021, California and Illinois entered into separate settlements with a financial technology company ("Fintech") that partnered with banks to provide consumer-oriented banking products.[4] The Fintech used the term "bank" in its URL and in various customer-facing materials, but was not licensed as a bank. As part of each state settlement, the Fintech agreed to review and make changes to its customer-facing materials to clarify that the Fintech is not a bank and that banking services are provided by the Fintech's bank partners.

Closing Thoughts

The new FDIC rule may signal increased regulatory scrutiny of statements or omissions made regarding federal deposit insurance. In commentary accompanying the final rule, the FDIC said it has observed increased instances of misuse of the FDIC's name or logo or false or misleading representations regarding deposit insurance by financial service providers. In its statement, the CFPB expressed concern about potentially misleading deposit insurance claims involving novel technologies including stablecoins and other crypto-assets. Since its enactment in 2008, the FDIC has issued only one formal enforcement order under Section 18(a)(4) against a nonbank but has sought informal resolutions in at least 165 instances. It would not be surprising to see the FDIC and other regulators initiate more enforcement actions for alleged violations of Section 18(a)(4) or deceptive claims regarding a product's deposit insurance coverage.

For questions, please contact Susan Seaman at susan.seaman@huschblackwell.com.

[4] *In re* Chime Financial, Inc., Cal. Dept. of Fin. Protection and Innovation (Mar. 29, 2021) (Settlement Agreement), https://dfpi.ca.gov/wp-content/uploads/sites/337/2021/04/Admin.-Action-Chime-Financial-Inc.-Settlement-Agreement.pdf; *In re* No. 2021-DB-01, Dept. of Fin. and Prof. Reg. (Mar.25, 2021) (settlement agreement and consent order), https://idfpr.illinois.gov/banks/cbt/Enforcement/2021/2021%2003%2025%20Chime%20-%20IL%20Settlement%20Agreement%20and%20Consent%20Order.pdf.