



# Financial Services Management

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## FDIC-Insurance Status Representations

### Cite

Notice of Proposed Rulemaking and Request for Information

### Recommended Distribution

Fintech, Marketing, Legal, Government Relations

### Website

<https://www.govinfo.gov/content/pkg/FR-2021-05-10/pdf/2021-08690.pdf>

## Impact Assessment

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- Nonbanks that make claims about FDIC insurance would be at greater legal risk.
- IDIs competing against such firms would gain a new venue to protest claims about FDIC-insurance coverage and consumers would gain greater protection.
- New restrictions on IDI/nonbank partnerships are possible.

## Overview

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Although federal law expressly bars misrepresentation of FDIC-insurance status, the FDIC has observed increasing instances that might at the least be described as confusing, many of which led to informal enforcement actions. As a result, it is proposing to codify its ability to govern how FDIC insurance and the FDIC are described in public representations, likely doing so to set a clear basis for formal enforcement actions that have so far been scarce. The FDIC is also seeking comment on the extent to which express obligations for IDIs with regard to nonbank partners in arrangements sometimes called "rent-a-banks" are to be governed. New information sources and a hot line would also be established to enhance the FDIC's reach to problematic representations.

## Impact

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The ability to offer FDIC-insurance is one of a shrinking number of benefits unique to insured depository institutions (IDIs).<sup>1</sup> It is also a critical differentiator between deposit products and depositories at which consumers take little to no

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<sup>1</sup> See **PAYMENT20**, *Financial Services Management*, May 10, 2021.

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risk versus other options which may be deemed deposits but are actually investments, payment accounts, or other holdings that could disappear along with the provider or be subject to lengthy disputes not likely when it comes to an deposit account with an IDI. As a result, to the extent deposit-insurance status is clarified and violations or misleading statements are prevented, the greater the benefits of holding an IDI charter along with those to consumers who might otherwise think a higher-yielding, uninsured product is comparable to an FDIC-insured account.

Although only the FDIC has the authority to defend its insurance, states do have laws designed also to prevent companies from using the word "bank" or otherwise describing themselves in ways that could lead consumers to infer that the entity is an IDI. California has in fact recently taken such action against a major fintech, Chime. A federal framework with, in some cases, greater enforcement potential could prevent or eventually preclude similar cases. This would not only reinforce the value of an IDI charter, but also ensure that consumers are able to make an informed decision about risk versus return. If the FDIC's rule and portals work as described, then innovative entities that do not think their offerings compatible with obtaining an IDI charter will need to ensure marketing does not lead to confusion to reduce the risk of civil money penalties or an FDIC referral to other agencies for stiffer enforcement action.

Although the FDIC's rule principally reaches to nonbanks, the agency seeks comment on whether IDIs should take steps to ensure that nonbank partners adhere to appropriate marketing when it comes to FDIC insurance. The agency provides no insight into its thinking on this controversial subject,<sup>2</sup> but options include holding IDIs responsible for partner firm representations under the broad compliance requirements applicable to third-party vendors.<sup>3</sup> This would likely reduce at least some lucrative partnership arrangements, but provide better consumer protection as well as insulation for IDIs against litigation or enforcement risk.

## What's Next

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This NPR/RFI was published in the *Federal Register* on May 10; comments are due July 9. It comes in conjunction with additional FDIC inquiry into and potential rulemaking on signage related to FDIC insurance, which, despite the relationship between that issue and the misrepresentation addressed in this NPR, is advancing on a separate track. However, the FDIC describes this proposal also as an RFI and states in it that the agency will review comments on the signage RFI to inform its final rule.

## Analysis

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### A. FDIC Authority

As detailed in the NPR, the agency has civil administrative independent authority to pursue misrepresentations or falsehoods regarding the FDIC or its insurance and those who knowingly mislead others.

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<sup>2</sup> See *Client Report ILC16*, April 15, 2021.

<sup>3</sup> See **VENDOR8**, *Financial Services Management*, March 18, 2020.

## ***B. Proposal***

This creates a new section of FDIC regulation expressly addressing misrepresentation of insured status and misuse of FDIC logos and similar signage, including an appeals process. It also details a process through which the FDIC will determine if enforcement action is warranted or take enforcement action, permitting public disclosure of certain practices regardless of the confidential nature of an investigation if the FDIC believes consumers may be at imminent risk if the target is not a bank or bank affiliate. This process includes informal resolutions through which the FDIC and a potential target reach agreement without the need for subsequent agency action. A process by which the FDIC would refer incidents to other authorities is also established along with one allowing the public to send questions about FDIC coverage or send claims about false or misleading statements would also be established.

## ***C. Request for Comment***

Views are sought on:

- clarity and scope with regard to likely actions that may be targeted;
- investigative, disclosure, and inquiry procedures;
- alternatives other than the status quo;
- the extent to which the proposed informal action-resolution process suffices; and
- the extent to which FDIC disclosures are appropriate in fintech or other relationships with IDIs. If not, the FDIC seeks views on whether should IDIs should be required to take some sort of action.