

Consumer Financial Protection Circular 2022-02

Deceptive representations involving the FDIC's name or logo or deposit insurance

May 17, 2022

Question presented

When do representations involving the name or logo of the Federal Deposit Insurance Corporation (FDIC) or about deposit insurance constitute a deceptive act or practice in violation of the Consumer Financial Protection Act (CFPA)?

Response

Covered persons or service providers likely violate the CFPA's prohibition on deception if they misuse the name or logo of the FDIC or 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. 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, including crypto-assets.

Analysis

The Consumer Financial Protection Bureau administers a number of laws and regulations relating to the offering or providing of deposit accounts, including these provisions:¹

- The Truth in Savings Act and its implementing regulation (Regulation DD), which enable consumers to make informed decisions about their accounts at depository

¹ See 12 U.S.C. 5481(12), (14), 5511.

institutions through the use of uniform disclosures;²

- The Electronic Fund Transfer Act and its implementing regulation (Regulation E), which protect consumers engaging in electronic fund transfers and remittance transfers;³
- Portions of the Federal Deposit Insurance Act (FDI Act) and its implementing regulations, which require depository institutions lacking Federal deposit insurance to make certain disclosures;⁴
- The CFPA, which, among other things, prohibits unfair, deceptive, or abusive acts or practices.⁵

Deposit insurance has long been a means to promote confidence in the banking system. The most common form of deposit insurance is administered by the Federal Deposit Insurance Corporation (FDIC).⁶ The FDIC insures deposits at FDIC-insured banks and savings associations up to the maximum deposit insurance amount, currently \$250,000, per depositor, per FDIC-insured bank, for each account ownership category.⁷

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, including crypto-assets. New technologies may yield significant benefits for consumers, workers, and small businesses. Nonetheless, especially with respect to new technologies, some market participants may seek to entice consumers to use their products or services by deceptively advertising that uninsured products or services are FDIC-insured. These misrepresentations disadvantage financial institutions that truthfully market FDIC-insured

² See 12 U.S.C. 4301-4313; 12 CFR pt. 1030; CFPB Exam Handbook, at TISA 1, https://files.consumerfinance.gov/f/documents/cfpb_supervision-and-examination-manual.pdf.

³ See 15 U.S.C. 1693-1693r; 12 CFR pt. 1005; CFPB Exam Handbook, at EFTA 1, https://files.consumerfinance.gov/f/documents/cfpb_supervision-and-examination-manual.pdf.

⁴ See 12 U.S.C. 1831t(b)-(f); 12 C.F.R. pt. 1009.

⁵ See 12 U.S.C. 5531, 5536; CFPB Exam Handbook, at UDAAP 1, https://files.consumerfinance.gov/f/documents/cfpb_supervision-and-examination-manual.pdf.

⁶ Additionally, accounts at federally insured credit unions are insured through the National Credit Union Share Insurance Fund (NCUSIF). See NCUA, How Your Accounts are Federally Insured (Feb. 2018), <https://www.ncua.gov/files/publications/guides-manuals/NCUAHowYourAcctInsured.pdf>.

⁷ See FDIC, Your Insured Deposits, at 3 (Jan. 2020), <https://www.fdic.gov/resources/deposit-insurance/brochures/documents/your-insured-deposits-english.pdf>.

accounts to consumers. Such misrepresentations also harm consumers, who may find that their assets are not insured in a time of financial distress.

The CFPB is issuing this *Circular* to emphasize that covered persons and service providers are required to comply with the CFPA with respect to representations to consumers involving the name or logo of the FDIC and representations about deposit insurance. The CFPB is issuing this *Circular* in connection with the FDIC's adoption of a regulation on related subject matter involving section 18(a)(4) of the FDI Act, 12 U.S.C. 1828(a)(4).⁸ Thus, the *Circular* is particularly focused on misrepresentations to consumers about FDIC insurance. This *Circular* describes certain misrepresentations to consumers that can violate the CFPA's prohibition on deceptive acts or practices in connection with a transaction with a consumer for a consumer financial product or service, or the offering of a consumer financial product or service.⁹ This *Circular* notes that misrepresentations to consumers may violate the CFPA regardless of whether they are made knowingly.

Section 18(a)(4) of the FDI Act, 12 U.S.C. 1828(a)(4), prohibits any person from engaging in false advertising or misusing the name or logo of the FDIC to represent or imply that uninsured deposits are FDIC-insured and from making knowing misrepresentations about the extent or manner of deposit insurance provided to any deposits.¹⁰ Under the CFPA, covered persons and service providers are prohibited from committing or engaging in an unfair, deceptive, or abusive act or practice in connection with the offering or provision of a consumer financial product or service.¹¹ A covered person includes any person that engages in offering or providing financial products or services for use by consumers primarily for personal, family, or household purposes.¹² Financial products or services are defined to include, for example, engaging in

⁸ See FDIC, *Final Rule on False Advertising, Misrepresentation of Insured Status, and Misuse of the FDIC's Name or Logo* (adopted May 17, 2022), <https://www.fdic.gov/news/board-matters/2022/2022-05-17-notice-dis-a-fr.pdf>.

⁹ This *Circular* does not constitute an interpretation of section 18(a)(4) of the FDI Act, rules adopted thereunder, or the authorities of the FDIC.

¹⁰ Specifically, FDI Act section 18(a)(4)(A) prohibits any person from representing or implying that any deposit liability, obligation, certificate, or share is insured or guaranteed by the FDIC if such deposit liability, obligation, certificate, or share is not insured or guaranteed by the FDIC (i) by using the terms "Federal Deposit," "Federal Deposit Insurance," "Federal Deposit Insurance Corporation," any combination of such terms, or the abbreviation "FDIC" as part of the business name or firm name of any person, including any corporation, partnership, business trust, association, or other business entity; or (ii) by using such terms or any other terms, sign, or symbol as part of an advertisement, solicitation, or other document. 12 U.S.C. 1828(a)(4)(A). FDI Act section 18(a)(4)(B) prohibits any person from knowingly misrepresenting (i) that any deposit liability, obligation, certificate, or share is insured by the FDIC if such deposit liability, obligation, certificate, or share is not so insured; or (ii) the extent to which or the manner in which any deposit liability, obligation, certificate, or share is insured by the FDIC if such deposit liability, obligation, certificate, or share is not so insured to the extent or in the manner represented. 12 U.S.C. 1828(a)(4)(B).

¹¹ 12 U.S.C. 5531, 5536.

¹² 12 U.S.C. 5481(5), (6).

deposit-taking activities, transmitting or exchanging funds, or otherwise acting as a custodian of funds or any financial instrument for use by or on behalf of a consumer, as well as (subject to certain exceptions) selling, providing, or issuing stored value or payment instruments.¹³

Material misrepresentations are “deceptive” practices in violation of the CFPA.¹⁴ Like FDI Act section 18(a)(4)(A), which prohibits any false advertising or misuse of the name or logo of the FDIC, but unlike under FDI Act section 18(a)(4)(B), which prohibits knowing misrepresentations regarding the extent or manner that deposits are insured, a misrepresentation to consumers may violate the CFPA’s prohibition on deception regardless of whether the misrepresentation was made knowingly.¹⁵ Additionally, disclaimers may not cure otherwise deceptive messages or practices.

Covered persons or service providers likely violate the CFPA’s prohibition on deception if they misuse the name or logo of the FDIC or 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. Representations made by covered persons or service providers about FDIC insurance will typically be material.¹⁶ Accordingly, for example, if a person engages in or purports to engage in deposit-taking activity by accepting (or offering to accept) funds for use by consumers, and that person misrepresents that such funds are insured by the FDIC, that person likely violates the CFPA’s prohibition on deception, even if the misrepresentation was not made knowingly. Similarly deceptive are claims that consumer financial products or services are “regulated” by the FDIC or “insured” or “eligible for” FDIC insurance if those claims expressly or implicitly indicate that the product is FDIC-insured when that is not in fact the case. In particular, 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.

¹³ 12 U.S.C. 5481(15)(A)(iv), (v); *see also* 12 U.S.C. 5481(8).

¹⁴ *See, e.g., CFPB v. Gordon*, 819 F.3d 1179, 1192-93 (9th Cir. 2016).

¹⁵ *See, e.g., FTC v. Verity Intern., Ltd.*, 443 F.3d 48, 63 (2d Cir. 2006) (“The deception need not be made with intent to deceive....”); *FTC v. Bay Area Bus. Council, Inc.*, 423 F.3d 627, 635 (7th Cir. 2005) (“The FTC is not, however, required to prove intent to deceive.”); *FTC v. Freecom Communications, Inc.*, 401 F.3d 1192, 1204 n.7 (10th Cir. 2005) (“Unlike the elements of common law fraud, the FTC need not prove scienter, reliance, or injury to establish a violation.”).

¹⁶ Certain categories of information are presumed to be material. In general, information about the central characteristics of a consumer financial product or service – such as costs, benefits, or restrictions on the use or availability – is presumed to be material. Express claims made with respect to a consumer financial product or service are presumed material. Implied claims are presumed to be material when evidence shows that the institution intended to make the claim (even though intent to deceive is not necessary for deception to exist). Omissions will be presumed to be material when the financial institution knew or should have known that the consumer needed the omitted information to evaluate the product or service. *See* CFPB Exam Handbook, at UDAAP 7, https://files.consumerfinance.gov/f/documents/cfpb_supervision-and-examination-manual.pdf.

About *Consumer Financial Protection Circulars*

Consumer Financial Protection Circulars are issued to all parties with authority to enforce federal consumer financial law. The Consumer Financial Protection Bureau (CFPB) is the principal federal regulator responsible for administering federal consumer financial law, *see* 12 U.S.C. 5511, including the Consumer Financial Protection Act's prohibition on unfair, deceptive, and abusive acts or practices, 12 U.S.C. 5536(a)(1)(B), and 18 other "enumerated consumer laws," 12 U.S.C. 5481(12). However, these laws are also enforced by state attorneys general and state regulators, 12 U.S.C. 5552, and prudential regulators including the Federal Deposit Insurance Corporation, the Office of the Comptroller of the Currency, the Board of Governors of the Federal Reserve System, and the National Credit Union Administration. *See, e.g.*, 12 U.S.C. 5516(d), 5581(c)(2) (exclusive enforcement authority for banks and credit unions with \$10 billion or less in assets). Some federal consumer financial laws are also enforceable by other federal agencies, including the Department of Justice and the Federal Trade Commission, the Farm Credit Administration, the Department of Transportation, and the Department of Agriculture. In addition, some of these laws provide for private enforcement.

Consumer Financial Protection Circulars are intended to promote consistency in approach across the various enforcement agencies and parties, pursuant to the CFPB's statutory objective to ensure federal consumer financial law is enforced consistently. 12 U.S.C. 5511(b)(4). *Consumer Financial Protection Circulars* are also intended to provide transparency to partner agencies regarding the CFPB's intended approach when cooperating in enforcement actions. *See, e.g.*, 12 U.S.C. 5552(b) (consultation with CFPB by state attorneys general and regulators); 12 U.S.C. 5562(a) (joint investigatory work between CFPB and other agencies).

Consumer Financial Protection Circulars are general statements of policy under the Administrative Procedure Act. 5 U.S.C. 553(b). They provide background information about applicable law, articulate considerations relevant to the Bureau's exercise of its authorities, and, in the interest of maintaining consistency, advise other parties with authority to enforce federal consumer financial law. They do not restrict the Bureau's exercise of its authorities, impose any legal requirements on external parties, or create or confer any rights on external parties that could be enforceable in any administrative or civil proceeding. The CFPB Director is instructing CFPB staff as described herein, and the CFPB will then make final decisions on individual matters based on an assessment of the factual record, applicable law, and factors relevant to prosecutorial discretion.