April 7, 2023

Via Electronic Mail: comments@fdic.gov.

James P. Sheesley
Assistant Executive Secretary
Federal Deposit Insurance Corporation
550 17th Street NW
Washington, DC 20429

Re: Proposal to modernize the rules governing use of the official FDIC sign and insured depository institutions' advertising statements (RIN 3064–AF26)

Ladies and Gentlemen:

The Bank Policy Institute[1] and the American Bankers Association[2] appreciate the opportunity to provide comments on the Federal Deposit Insurance Corporation's Notice of Proposed Rulemaking Relating to False Advertising, Misrepresentation of Insured Status, and Misuse of The FDIC's Name or Logo.[3] The proposal is intended to modernize the FDIC's sign and advertising regulations so that they better reflect the increased use of internet and mobile banking channels to access insured depository institution banking and other services. Additionally, the proposal clarifies the FDIC's rules regarding misrepresentation of deposit insurance.

The banking industry is strongly committed to consumer protection, promoting public confidence in insured deposits, and preventing false and misleading representations about the manner and extent of FDIC deposit insurance. Accordingly, we support the modernization of these rules, which have not been comprehensively updated since 2006, largely prior to the digitization of the financial services marketplace. Furthermore, given the rise of new market participants offering bank-like products (or products purporting to be bank-like), including those promising pass-through deposit insurance and

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[1] The Bank Policy Institute is a nonpartisan public policy, research and advocacy group, representing the nation's leading banks and their customers. Our members include universal banks, regional banks and the major foreign banks doing business in the United States. Collectively, they employ almost 2 million Americans, make nearly half of the nation's bank-originated small business loans, and are an engine for financial innovation and economic growth.

[2] The American Bankers Association is the voice of the nation's $23.6 trillion banking industry, which is composed of small, regional and large banks that together employ more than 2 million people, safeguard $19.2 trillion in deposits and extend $12.2 trillion in loans.

[3] 87 Fed. Reg. 78017 (Dec. 21, 2022), available at: 2022-27349.pdf (govinfo.gov).

similar products and services—whether through partnerships with IDIs or independently—we support the FDIC's efforts to prevent misleading representations relating to deposit insurance coverage and to help mitigate customer confusion. Banks seek to provide their customers with a range of products and services through various channels that best meet customer needs and to provide clear descriptions and disclosures of the features of those products and services to prevent false and misleading representations and thereby protect consumers. While the FDIC's regulations do not explicitly apply to digital channels currently, the banking industry is committed to providing consumers clear disclosures related to insured and uninsured products consistent with the principles embodied in both the regulations and the 1994 Interagency Statement on Retail Sales of Non-deposit Investment Products through all banking channels, including digital channels.[4]

For nearly three decades, consistent with the Interagency Statement, banks have experimented with and refined disclosure language and placement and signage placement and format in both physical locations and digital channels to clearly and conspicuously convey to consumers the insured status and possible risks associated with deposit and non-deposit products, respectively.

We are concerned, however, that the proposal is overly prescriptive and does not sufficiently accommodate these current practices and could require significant changes to banks' digital platforms and physical branch locations. Such changes would likely confuse consumers and create unnecessary burden for banks. We urge the FDIC to allow banks greater flexibility to comply with signage and disclosure requirements, accommodate current practices that align with the way technology and the business of banking have evolved and, by extension, the way consumers want to access their funds and other financial services and products.

The rules also should allow banks flexibility to modify signage, advertising, and other disclosures as may be appropriate to provide consumers with greater clarity regarding deposit and non-deposit products as technological advancements in banking and financial services continue apace.

Importantly, if the FDIC proceeds with finalizing a rule substantially similar to the proposed rule, the digital signage and advertising changes would require banks to allocate significant time and IT resources to redevelop, test and deploy their various digital platforms. The process constraints would be exacerbated by the fact that many banks rely on a handful of third-party vendors, such as core providers, to design and host their digital platforms. If the proposal is finalized without change, there will likely be large bottlenecks as core providers and other vendors rework digital platforms that are individualized for each bank. Accordingly, banks would need at least 18 months to comply with the final rule.

Additionally, we are concerned that the proposal is not appropriately aligned with current third-party risk management expectations and guidance. As discussed more fully below, we recommend that the FDIC tailor the proposal so that it addresses only relationships where an IDI relies on a third party to market/offer its deposit-related products or services (i.e., where misrepresentation-related risks could be material), and revise the proposal so that the final rule aligns with well-established distinctions between branches and non-branches.

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[4] *See* Interagency Statement on Retail Sales of Nondeposit Investment Products (February 15, 1994), available at: O:\PUB\NONDEP~1\MUTFNDS1.PDF (occ.gov)).

In addition, we request that the proposed rule be revised to eliminate references to "non-traditional branches." That term is not used currently in the FDIC's regulations or other agency publications and threatens to confuse the well-established distinction between branch and non-branch locations and activities.

Finally, we request that the FDIC amend the definition of "non-deposit product" to include crypto-assets.

I. **The proposed requirements related to monitoring third parties should be aligned with the inter-agency third-party risk management guidance and should cover only marketing materials and other public dissemination of information regarding the availability of FDIC deposit insurance**.

The proposed rule would require IDIs to establish written policies and procedures related to the signage and advertising requirements that "would also need to include, as appropriate, provisions related to monitoring and evaluating activities of persons that provide deposit-related services to the IDI or offer IDI's deposit-related products or services to other parties," because "sound risk management would compel the IDI to be aware of the activities of the third-party to ensure that the availability of deposit insurance is not being misrepresented."[5] The proposal further provides that for IDIs that have business relationships with third parties that provides deposit related services, IDIs' policies and procedures "would include reasonable provisions . . . to ensure the marketing and advertising materials provided to prospective depositors by that third party do not misrepresent the insurability of financial products."[6] The FDIC further states that the "policies and procedures related to certain third parties would be commensurate with the nature, size, complexity, scope, and potential risk of the deposit-taking activities" and that "IDIs would be expected to focus on the relationships that pose a higher degree of risk to consumers."[7]

a. The proposed requirements should be aligned with the forthcoming inter-agency third-party risk management guidance.

Our members are deeply committed to the FDIC's objective in regulating and prohibiting statements regarding the availability of deposit insurance that are false or misleading. However, we believe that the proposed requirement relating to the establishment of policies to monitor third-party statements should align with interagency guidance to assure consistency across regulators. We are concerned that a partially duplicative or conflicting third-party risk mandate issued by the FDIC as part of this rulemaking would create inconsistency and regulatory complexity. In particular, the proposed approach would undermine the banking agencies' previously articulated goal "to promote consistent third-party risk management guidance, better address use of, and services provided by, third parties, and more clearly articulate risk-based principles on third-party relationship risk management."[8] In furtherance of this goal, the agencies proposed to jointly issue third-party risk management guidance in 2021, and we

[5] 87 Fed. Reg. at 78025.

[6] *Id*.

[7] *Id*.

[8] Proposed Interagency Guidance on Third-Party Relationships: Risk Management, 86 Fed. Reg. 38182, 38187 (July 19, 2021), *available at*: 2021-15308.pdf (govinfo.gov).

expect the updated guidance to be finalized in the near future.[9] We urge the FDIC to ensure the final rule is aligned with current guidance and suggest waiting to finalize the rule until the inter-agency guidance has been issued.

In view of the foregoing considerations, any third-party risk management related requirements issued as part of the FDIC rulemaking should (i) align with the overall approach to managing third-party risk under existing and forthcoming guidance, and (ii) adopt a risk-based approach to management of third-party relationships consistent with the guidance.[10]

b. The proposed requirements should only cover marketing materials and other public dissemination of information regarding the availability of FDIC deposit insurance and only apply to contractual relationships between IDIs and third parties.

In addition, to the extent that the FDIC proceeds to amend the regulations to include a third-party risk management monitoring obligation with respect to third-party providers, we recommend the following modifications to the proposal:

- The scope of the required policies should be clarified to cover only marketing materials and other public dissemination of information regarding the availability of FDIC deposit insurance, and
- Only third parties with a contractual relationship with the IDI addressing the offering or sales of the IDI's insured deposits should be covered by the requirement (i.e., non-contractual relationships should be scoped out and addressed via other means such as existing guidance as appropriate).

A more narrowly tailored requirement is appropriate to avoid confusion over the interpretation of the scope of the rule and in view of the specific concern that the FDIC has articulated: to help ensure that depositors and consumers understand when they are doing business with an IDI and when their funds are protected by the FDIC's deposit insurance and to address misrepresentations regarding insured status. Critically, not every third-party relationship involving "deposit related services" is one that poses risks of false or misleading statements regarding deposit insurance. Mere involvement in "deposit-related services" does not necessarily implicate the types of risks the proposal is intended to address. Indeed, it is common for an IDI to have several third-party relationships that support deposit taking activities (e.g., IT and other back-office service providers, strategic consultants, etc.) that do not involve the marketing of products or dissemination of information, and the rule should be more specific in targeting only those third-party relationships that do present the types of concerns that FDIC has articulated. Accordingly, the rule should be narrowly tailored to address only relationships where an IDI relies on a third-party to market/offer its deposit-related products or services (i.e., where misrepresentation-related risks could be material).

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[9] Proposed Interagency Guidance on Third-Party Relationships: Risk Management, 86 Fed. Reg. at 38197-38198.

[10] For example, IDIs that rely on third parties for a significant proportion of their deposit offering activities, may have heightened risk management expectations given the significance of those relationships to the IDI's overall activities.

In addition, for a third-party risk management framework to be effective, an IDI must have a mechanism that allows the organization to enforce rights relative to a third-party such as monitoring rights, where appropriate. Accordingly, any final rule mandating policies and procedures should make clear that it only covers relationships with respect to the sale, offering or marketing of deposits that are "pursuant to a written contract".

Moreover, deposit products offered by IDIs that are ultimately traded on a secondary market, such as negotiable CDs, should not be covered and should be specifically scoped out of any final rule relating to third-party relationships. Negotiable CDs would include information about FDIC insurance at issuance, but IDIs have no practical ability to control what information is passed along to secondary market purchasers (i.e., absent a contractual relationship). Any misrepresentations about the insured status of those products made by any non-bank entities operating in those markets would be appropriately and effectively addressed by other prohibitions in the proposed rule. Similarly, IDIs that offer reciprocal deposits through sweep services such as CDARS and ICS, have no practical ability to control information passed along to customers of another participating bank utilizing the service. It would be incumbent upon the other bank to assure compliance with any marketing-related requirements.

II. **The FDIC should provide IDIs with flexibility to implement signage requirements to reflect modern branch design and possible future evolution**.

We support the goal of the proposed rule to enable customers to distinguish clearly between products that are protected by the FDIC's deposit insurance and those that are not. The implementing regulations require banks to display the FDIC sign "where insured deposits are usually and normally received in the bank's principal place of business and all of its branches…"[11] The proposal states that "[i]f deposits are usually and normally received at teller windows or stations, IDIs would generally be required to display the official sign at each teller window or station."[12] The proposal provides that "where the IDI only offers deposit products on the premises," banks could display "the official sign in one or more locations visible from the teller windows or stations."[13] However, if the IDI also offers non-deposit products on the premises, display of the official sign at each teller window would be required, consistent with current regulations."[14] Furthermore, where an IDI offers both deposit and non-deposit products, IDIs would continue to "be required to physically segregate the areas where non-deposit products are offered from areas where insured deposits are usually and normally accepted, and display a sign in the non-deposit areas indicating that non-deposit products: are not insured by the FDIC; are not deposits; and may lose value."[15] The proposed rule also would prohibit display of non-deposit signs "in close proximity to the official FDIC sign."[16] The FDIC states in the NPR that the "non-deposit sign requirement is intended to be generally consistent with practices described in the longstanding

[11] 12 C.F.R. § 328.2(a).

[12] 87 Fed. Reg at 78021.

[13] *Id*.

[14] *Id.*

[15] *Id.*

[16] *Id.*

Interagency Statement on the retail sale of non-deposit investment products that many institutions already follow, and thus should be familiar to many consumers."[17]

We appreciate the FDIC's willingness to be flexible with respect to signage where the IDI only offers deposit products on the premises. We recommend, however, that the FDIC in the regulation provide IDIs with greater flexibility regarding signage where the IDI offers *both* deposit and non-deposit products on the premises, as is the case with many IDIs. Indeed, IDIs believe that the Interagency Statement and the FDIC's current regulations intend to place top priority on using signage to eliminate customer confusion and have developed signage and disclosure practices in these modern branches to minimize such potential confusion through a more comprehensive disclosure model. The FDIC should consider taking a less prescriptive approach to implementation of these requirements, consistent with the Interagency Statement's and the FDIC's stated intent to avoid customer confusion.

Banks require flexibility in how they convey clear disclosures to their customers to account for the evolving nature of how banks interact with their customers in branch locations and to reflect banks' experience in minimizing customer confusion regarding their products' insured status. For example, some banks have begun to shift to a more collaborative, open model for physical branches. This flexibility would be consistent with the Interagency Statement, which emphasizes the importance of minimizing customer confusion between deposit and non-deposit products. While the Interagency Statement provides that sales or recommendations regarding non-deposit investment products should be conducted in a physical location distinct from the area where retail deposits are taken, the Interagency Statement recognizes that sales of nondeposit products may not always be segregated from sales of deposit products, in which cases, "the institution has a heightened responsibility to ensure appropriate measures are in place to minimize customer confusion."[18]

The current signage requirements and the proposed non-deposit product signage are more appropriate for the traditional bank branch model in which banks receive deposits at "teller windows or stations." However, as the FDIC recognizes, some banks have begun to move toward more open and collaborative branch designs. These designs may feature, for example, open floorplans, communal space, and greater technological connectivity. The prescriptive nature of the signage, disclosure, and segregation requirements for deposit and non-deposit products in the proposal may not be the most effective way to convey clear disclosures to customers in every branch design. The FDIC should provide institutions with flexibility to display clear and conspicuous signage and disclosures best suited for a particular branch facility, as the IDI has determined through experience with its customers. It is also important to recognize that branch managers and other employees are readily available to answer customer questions and address any confusion in a physical branch location to the extent a customer may have questions even with the presence of clear, conspicuous disclosures.

Consistent with the ultimate priority to eliminate customer confusion, some institutions have, where appropriate, developed signage and disclosure practices to minimize such potential confusion through a more comprehensive disclosure model. A comprehensive disclosure model focuses the customer on the types of interaction the customer may have in the branch facility based on the nature of the products or services the customer is seeking, and provides the customer with relevant signage

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[17] 87 Fed. Reg. at 78020-21.

[18] *See* Interagency Statement on Retail Sales of Nondeposit Investment Products.

and disclosure regarding the insured status and risks related to the particular product or service the customer is seeking.

IDIs have found over years of experimentation and adjustment, where appropriate, that a comprehensive approach to signage, whereby all disclosures are made in a central location, visible from all areas of the branch, are clearer and have less potential to cause confusion than signage located in disparate areas of the bank. The latter approach would require a customer to read different disclosures in different locations within the branch and thus may not grasp the totality of the insured status and risks associated with any product the consumer may deal with at the modern branch. Furthermore, the comprehensive disclosures advise consumers about the employees they may encounter and what products or services an employee of the IDI or a related entity may assist the consumer with. For example, banks have found effective a comprehensive disclosure that provides language along the lines along the following: "if you are looking for FDIC insured checking and savings accounts, you will be speaking with a representative of ABC Bank [Member FDIC], and if you're looking for investment products, such as brokerage accounts, you will be speaking with a representative of XYZ Broker Dealer. Investment products are: not insured by the FDIC; are not deposits; and may lose value."

To allow banks to continue to innovate in how they serve their customers to meet customer demand, and consistent with the Interagency Statement's and the FDIC's stated intent to avoid customer confusion, the FDIC should consider taking a less prescriptive approach to implementation of these requirements.[19] Providing more flexibility to institutions would allow them to use signage and disclosures in the most effective and appropriate way based on the way in which they deliver their deposit and non-deposit products. Building flexibility into the regulations will allow the banking industry to be nimble now and into the future while continuing to provide this critical information to customers in an effective way. Creating sign and advertising requirements that are more flexible and can adapt to evolving technology, social media platforms, and business practices will reduce the need to update the requirements each time they fall out of step with technology, business practices, insurance coverage, or other policy changes.

III. **The FDIC should provide IDIs with flexibility to implement digital signage requirements to reflect the ways in which consumers interact digitally with their IDIs and to account for future evolution**.

The proposal would require an IDI to clearly, continuously, and conspicuously display a digital sign on the IDI's homepage, landing and login pages or screens, and transactional pages or screens involving deposits, to the extent applicable. The proposal further provides that "to be clear and conspicuous, the digital sign must be displayed in a continuous manner, near the top of the relevant page or screen, in close proximity to the IDI's name" and that "display of the digital sign at the footer of the relevant page or a similar location would not satisfy the clear and conspicuous standard."[20]

[19] *See e.g.*, FDIC Advisory Opinion, FDIC 92-20, *Display of Official Deposit Insurance Signs* (Apr. 9, 1992), *available at* https://www.fdic.gov/regulations/laws/rules/4000-7110.html (stating "…you ask if it is acceptable to display an official sign between two closely adjoining teller windows. FDIC regulations require that an official sign be displayed at each station or window where deposits are usually and normally received. It would be acceptable to post one sign between the two stations only if the adjoining teller windows are so close together that it can reasonably be said that the official sign is displayed 'at' both of the teller windows.").

[20] 87 Fed. Reg. at 78022.

In addition, under the proposed rule, if a digital deposit-taking channel offers both access to deposits and non-deposit products, the IDI would be required to clearly and conspicuously display signage indicating that the non-deposit products are:

- (1) not insured by the FDIC;
- (2) are not deposits; and
- (3) may lose value.

IDIs would be required to display this non-deposit signage via a one-time notification when consumers initially access such a page, which would provide an initial, prominent display of the non-deposit signage to alert consumers that they are dealing with non-deposit products that are not subject to FDIC insurance.[21] The proposal states that consumers would "need to take action to dismiss the notification before accessing the relevant page or screen."[22] To implement this requirement, the proposal provides that an IDI "could use a "pop- up," "speedbump," or "overlay" that displays a notification to the consumer that the consumer must dismiss before accessing the content related to non-deposit products."[23] In addition, the "rule would require the continuous display of the non-deposit signage on each page relating to non-deposit products and prohibit displaying the non-deposit signage in close proximity to the digital FDIC sign."[24] This would be a new, prescriptive requirement not currently contemplated with this level of specificity in the rule or the Interagency Statement. Furthermore, building "pop ups" is an operationally complex endeavor that may be particularly burdensome for smaller institutions to implement.

We agree with the sentiment behind the proposed requirements that seek to ensure that consumers are not misled or confused about the insured status of deposit and non-deposit products when engaging with banks via digital channels. We also appreciate that the FDIC recognizes that "Institutions should have flexibility in the way they market non-deposit products and [the FDIC] is not proposing specific design or size requirements for this non-deposit signage."[25] However, we have concerns that the proposed requirements are overly prescriptive and could in fact lead to greater customer confusion and a suboptimal customer experience, thereby undermining the purposes of the regulations.

The FDIC's proposed signage rule would require the FDIC sign to be displayed on the IDI's homepage, landing and login pages or screens, and transactional pages or screens involving deposits. The NPR states that the FDIC views an IDI's homepage, landing and login pages, and transactional pages "as environments where the customer may interact directly with the IDI, rather than as "advertisements'" as defined in the rule's advertising statement requirements."[26] However, the rule should differentiate between digital pages that are primarily for marketing or informational purposes,

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[21] 87 Fed. Reg. at 78023.

[22] *Id.*

[23] *Id.*

[24] *Id.*

[25] *Id.*

[26] 87 Fed. Reg at 78022 (note that citation appears to be missing from this statement in the proposal).

such as home pages and landing pages, and those "digital channels where insured deposits are received that are analogous to the traditional teller windows or stations that consumers interact with at an IDI's physical premises" consistent the FDIC's stated intent in the proposal.[27] Home pages and landing pages are generally used for marketing or informational purposes and do not provide deposit taking capability. Landing pages, for example, may display consolidated reports or a dashboard of a customer's deposit and non-deposit accounts, yet not provide transactional functionality. If the FDIC signage was required to be placed at the top of such a page, customers could be misled into thinking that the non-deposit accounts reflected in the dashboard are FDIC-insured. Thus, the advertising rules provide an appropriate framework for disclosures for those types of pages. Requiring the FDIC sign and the proposed nonbank disclosures on pages used primarily for marketing or informational purposes that do not have a deposit taking functionality could be confusing to consumers. Only digital channels, including web pages or display screens, with deposit taking transaction capability, such as landing pages or login pages, should be subject to the FDIC signage requirements. To the extent that an institution or third-party is seeking to describe FDIC insurance for marketing or informational purposes on other digital channels that do not have deposit taking transaction capabilities, banks recognize the importance of providing accurate, clear, conspicuous, and prominent disclosures related to FDIC insurance on those channels.

Furthermore, banks require flexibility to implement the FDIC signage requirements for those transactional pages to which the proposed digital sign requirement would apply. The proposed requirement that the digital sign be displayed near the top of the relevant page or screen, in close proximity to the IDI's name,[28] raises a number of concerns regarding digital channels both (i) where only insured deposit products and services may be accessed, and (ii) where insured deposit products *and* non-deposit products are offered. With respect to the former, banks should be permitted flexibility to display FDIC signage in a clear, conspicuous manner on those digital channels consistent with the bank's experience in providing appropriate disclosures about the insured status of deposit products offered via that particular channel. The FDIC has provided no evidence that the current signage placement on IDIs' digital channels where only insured deposit products and services are available are ineffective or confusing to consumers. Indeed, over many years of experience in displaying the FDIC signage on digital transactional deposit pages, banks have determined the optimal placement for that signage. Given the significant redesign banks would have to undertake to implement the proposed prescriptive requirement, banks should have flexibility regarding where they place the FDIC signage requirement on pages and screens where customers can open an insured account or make deposits, transfers, or payments in connection with an insured account.

Similarly, banks also require flexibility for how they implement the joint requirements regarding FDIC signage about insured deposits and disclosures regarding non-deposit products in light of the ways that consumers interact with their IDIs in practice and based on banks' experience in determining the optimal way to effectively convey important information about products and services to customers. For example, many IDIs, individually or through affiliates, offer both deposit and non-deposit products or services and generally provide customers with the ability to engage with deposit and non-deposit products via one login or other transactional page. Requiring that (i) the digital FDIC sign appear at the top of login and other transactional pages, and (ii) non-deposit disclosures *not* appear in close proximity to the digital FDIC sign on those pages and other digital channels that offer transactional capability for both deposit and non-deposit products, could create significant customer confusion.

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[27] 87 Fed. Reg. at 78022.

[28] *Id.*

With respect to login, and other pages where both deposit and non-deposit products may be accessed, these requirements, taken together, could mislead consumers into thinking that deposit insurance applies to all products and services that can be accessed through that webpage. As is the case with respect to physical branch locations where both deposit and non-deposit products are offered, IDIs should have the flexibility to determine the optimum placement of signage and disclosure language on digital channels. IDIs have experience regarding the best way to convey to consumers in a clear, conspicuous, and comprehensive manner the relevant deposit and non-deposit product signage and disclosure regarding the insured status and risks associated with those different products. Some institutions may have found that displaying signage and disclosures at different places on a screen has not led to optimal consumer understanding of the full scope of products offered and their relative risks. IDIs should have the flexibility, for example, to use a simple, comprehensive disclosure located where the IDI has determined it would be most effective along the lines of the following "by logging in, you will have access to deposit products provided by ABC Bank that are FDIC insured up to applicable limits, and investment products offered by XYZ Securities Corp that, unlike deposits, are not FDIC insured, are not deposits, and may lose value" would help consumers understand in a comprehensive way the insured status of different products offered by the IDI and its affiliates via the website or portal.

Lastly, the FDIC should factor in digital design and development customization constraints. For example, digital platforms commonly have limits on the amount of customization and characters that can be added, particularly with mobile applications. Prescriptive changes in design, messaging, pop-ups, etc. are extremely hard to process and may not be entirely possible. Space and customization constraints may also be limited by a bank's third-party vendor applications, some of which are central to deposit activities. The FDIC's proposed rulemaking will necessitate a significant deployment of resources and coordination with third-party vendors to scope the project and clearly understand applicable platform or application specific constraints or space limitations. For these reasons, banks respectfully ask the FDIC to carefully consider the feasibility of these requirements and requests flexibility in implementing these changes, particularly as it pertains to older platforms approaching end-of-life, some of which have rigid limits on customization capabilities.

IV. <u>The proposed rule should be revised to accord with the well-established distinction between branches and non-branches</u>.

We support the goal of the proposed rule to enable customers to distinguish clearly between products that are protected by the FDIC's deposit insurance and those that are not. We suggest, however, that the proposed rule be revised to eliminate references to "non-traditional branches" – a term not currently used in the FDIC's regulations or other agency publications – to accord with the established legal demarcation between a "branch" and non-branch locations and activities.

As the proposed rule recognizes, a bank "branch" is "any branch bank, branch office, branch agency, additional office, or any branch place of business … at which deposits are received or checks paid or money lent."[29] The FDIC has noted that the "key criteria for a proposed facility to be considered a branch are accepting deposits, paying checks, or lending money (core banking functions) pursuant to

[29] 87 Fed. Reg. 78021, n18 (citing 18 U.S.C. 1813(o)); *see also* 12 U.S.C. § 36(j) (similar definition); 12 CFR § 5.30(d) (same), *i.e.*, a facility that engages in one of the "core banking functions," *Clarke v. Sec. Indus. Assoc.*, 479 U.S. 388, 404 (1987).

Section 3(o) of the FDI Act. Facilities that do not engage in any of these activities are not considered branches and, therefore, are not subject to FDIC approval under Section 18(d) of the FDI Act."[30] The legal implications for being a "branch" are significant. Branching is governed by the McFadden Act,[31] and branches are subject to a host of state and federal laws, including branching restrictions and numerous requirements for establishing, relocating, and closing a branch.[32] By contrast, non-branch facilities are not subject to these requirements; for instance, they are not subject to FDIC approval under Section 18(d) of the FDI Act.[33]

The demarcation between a branch and non-branch (and branch activities and non-branch activities) is thus important–and clear–under the law. The FDIC's regulations provide that a branch "does not include an automated teller machine, an automated loan machine, a remote service unit" or a financial education program that includes the provision of bank products and services."[34] A remote service facility "means an automated, unstaffed banking facility owned or operated by, or operated exclusively for, the bank, such as an automated teller machine, cash dispensing machine, point-of-sale terminal, or other remote electronic facility, at which deposits are received, cash dispersed, or money lent."[35] Likewise, a deposit production office ("DPO") is not a branch.[36]

Consistent with this demarcation, the FDIC takes the view that DPO proposals do not require a branch application, since a "DPO may not receive deposits, pay withdrawals, or make loans."[37] As a corollary, outside of the core banking functions, a DPO may engage in a range of permissible bank activities without becoming a branch. For instance, short of receiving deposits, a DPO "may advertise the availability of deposit accounts for an institution, provide information about deposit products, and assist customers and prospective customers in completing forms and documents related to opening or maintaining a deposit account. Deposit and withdrawal transactions must be performed by the

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[30] FDIC Applications Procedures Manual, Section 7, "Establish a Domestic Branch" (Sept. 2021), 7-3, *available at*: https://www.fdic.gov/regulations/applicatiodns/resources/apps-proc-manual/section-07-establishdomesticbranch.pdf.

[31] 12 U.S.C. § 36 (1982).

[32] *See, e.g.,* Comptroller's Licensing Manual, "Branches and Relocations" (Jan. 2023). Although these OCC policies and procedures are limited in their application to national banks, federal savings associations ("FSAs"), and FSAs that have elected to be covered savings associations, *see id.* at 1, federal law controls whether a bank facility is a "branch" and preempts any inconsistent state law, *see First Nat. Bank of McCook v. Fulkerson*, 2000 WL 33914121, at *5 (D. Colo. Mar. 7, 2000) (federal definition of "branch" to include three core functions preempted broader state statute that included "not only a 'branch' but also … 'an office … used primarily for the purpose of deposit production'").

[33] FDIC Applications Procedures Manual, Section 7, "Establish a Domestic Branch" (Sept. 2021), 7-3.

[34] 12 CFR 303.41(a).

[35] 12 CFR 345(12)(d).

[36] See "Branches and Relocations" 10 (listing a DPO as one "type[] of facilit[y] [that] [is] not considered [a] branch[] of [a] national bank[]"), 26 (same). Likewise, "[a] branch does not include … a loan production office [("LPO")] …, a trust office, an administrative office, a data processing office, or any other office that does not engage in at least one of the [core banking functions]." 12 CFR 5.30(d)(1)(iii). We focus on DPOs here, however, because the proposed rule is focused on deposit-related activities.

[37] FDIC Applications Procedures Manual at 7-3. The OCC's regulations similarly provide that a DPO "is not a branch … so long as it does not receive deposits, pay withdrawals, or make loans." 12 CFR § 7.4004(a).

customer, either in person at the main office or a branch office of the institution, or by mail, electronic transfer, or similar methods."[38]

By its terms, the proposed rule's requirements for physical premises properly apply only to banks' principal place of business and branches.[39] However, in the preamble's discussion of the requirements for what it calls "non-traditional branches," the proposed rule appears to expand the well-established contours of a "branch" and conflates branches and DPOs (and potentially other non-branch locations and activities), and thereby threatens to cause regulatory confusion.[40] To avoid this result, we respectfully request that the following aspects of the proposal be revised, as necessary, to accord with the longstanding distinction between branch and non-branch locations and activities.

First, in seeking to regulate "non-traditional branches," the proposed rule appears to expand the definition of a "branch" beyond its well-established perimeter, potentially encompassing non-branch locations and activities within the definition. Specifically, the proposed rule states that the definition of a "branch" includes "non-traditional footprint branches where customers can receive … assistance from bank personnel to perform … core banking functions."[41] But DPOs and other remote service facilities are expressly permitted to assist customers with deposit and withdrawal transactions, so long as the customer performs the transaction.[42] Such assistance does not transform a DPO into a "branch."[43]

Second, the trigger for requiring the official sign at physical premises without teller windows or stations (what the preamble calls, "non-traditional branches") is seemingly overbroad, arguably capturing transactions that do not transform an office into a branch. Again, the operative terms of the proposed rule would properly apply only to banks' principal place of business and branches.[44] But the preamble suggests that there are separate provisions for "non-traditional branches,"[45] and those

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[38] FDIC Applications Procedures Manual at 7-3 – 7-4. The OCC's regulations similarly provide that a DPO "may solicit deposits, provide information about deposit products, and assist persons in completing application forms and related documents to open a deposit account" without becoming a branch. 12 CFR § 7.4004(a). A DPO may provide onsite access to automated teller machines ("ATMs") and other electronic-based services without becoming a branch. *See* 18 U.S.C. § 1813(o) (A branch "does not include an [ATM] or a remote service unit."); 12 U.S.C. § 36(j) (same); OCC Interp. Ltr. 843 (Sept. 29, 1998) (presence of ATM on premises of LPO/DPO did not convert LPO/DPO into a branch). And the combination of DPO, LPO, and remote service unit ("RSU") services at a facility does not render the facility a "branch." 12 CFR § 7.4005; *see also* OCC Interp. Ltr. No. 1165 at 3 n.8 (June 28, 2019).

[39] *See* 87 Fed. Reg. at 78034, § 328.3(b).

[40] *Id.* at 78021.

[41] *Id.* at 78021 n.18 (citing the definition of a "branch" at 12 U.S.C. § 1813(0)).

[42] *See* 12 CFR § 7.4004(a) (A DPO "may … provide information about deposit products, and assist persons in completing application forms and related documents to open a deposit account."); *id.* ("All deposit and withdrawal transactions of a bank customer using a DPO must be performed by the customer, either in person at the main office or a branch office of the bank, or by mail, electronic transfer, or a similar method of transfer.").

[43] *See* OCC Conditional Approval No. 313 at 12 (July 9, 1999) (assisting customers with operation of an onsite computer terminal, "providing information about deposit accounts," and "assisting [customers] in completing application forms … to open a deposit account" did not render the location a branch).

[44] *See* 87 Fed. Reg. at 78034, § 328.3.

[45] *Id.* at 78021.

provisions would require the official sign to be displayed on the physical premises "if insured deposits are usually and normally received in areas of the premises other than teller windows and stations."[46] As noted, the FDIC's regulations provide that a branch does not include, among other things, a remote service unit, which is "an automated, unstaffed banking facility owned or operated by, or operated exclusively for, the bank, such as an automated teller machine, cash dispensing machine, point-of-sale terminal, or other remote electronic facility, at which deposits are received, cash dispersed, or money lent."[47] Similarly, although DPOs do not receive deposits, deposit-taking ATMs and other electronically based deposit-taking services are often located "in areas of the [DPO] premises."[48] But the OCC has expressly found that the presence, and customers' use of, those services on the premises does not render the location a branch.[49]

Third, the proposal suggests that the term "non-traditional branches" seeks to capture as branches locations with "electronically-staffed kiosks, interactive ATMs that provide remote assistance with a teller, and teller-less cafés where deposits can be accepted on tablets or through ATMs,"[50] as well as "café-style branches that include open areas where customers work with bankers."[51] As discussed, however, none of these functions renders a location a branch, as clearly laid out in the FDIC's regulations. The OCC has taken a similar view: electronically staffed kiosks are not branches.[52] ATMs and RSUs are not branches,[53] even if they are "equipped with a telephone or televideo device allowing contact with bank personnel."[54] Customers may make deposits via tablets or ATMs, and bank personnel may assist customers with such transactions, without rendering a location a branch.[55] And the styling of a location, as a café or otherwise, has no bearing on whether a location is a branch.[56] Indeed, the OCC has expressly found that cafés providing the types of banking services contemplated by the proposed rule combine aspects of a DPO, LPO, and RSU and are not branches.[57]

As the above illustrates, "non-traditional branch" is a misnomer that threatens to cause regulatory confusion. Accordingly, the agency should eliminate references to "non-traditional branches" in the rulemaking and clarify that DPOs and other non-branch locations are not subject to the sign

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[46] *Id.* at 78034, § 328.3(b)(2).

[47] 12 CFR 345(12)(d).

[48] *Id.*

[49] *See* OCC Interp. Ltr. No. 843; *see also* OCC CRA Decision No. 153 at 2 n.2 (office was not a branch where customers could make deposits via ATMs or through remote deposit capture using their smartphones or personal computers).

[50] 87 Fed. Reg. at 78019.

[51] *Id.* at 78021.

[52] *See* OCC Conditional Approval No. 313 at 10-12.

[53] *See* 18 U.S.C. § 1813(o).

[54] OCC Interp. Ltr. No. 1165 (June 28, 2019).

[55] *See* OCC CRA Decision No. 153 at 2 (Oct. 17, 2012) (café where bank employees answered questions and assisted customers with their accounts was not a branch); *id.* at 2 n.2.

[56] *See* 18 U.S.C. § 1813(o).

[57] *See* OCC CRA Decision No. 153 at 2-4.

requirements because DPOs do not receive deposits within the meaning that would render those locations a branch or engage in the other two core banking functions. Doing so would be consistent with the longstanding distinctions between branches and DPOs and other non-branch locations and activities and would ensure continued uniformity among the banking agencies.

Doing so would also be consistent with the goal of the rulemaking. The proposed rule indicates that the category of "non-traditional branches," and the proposed requirements for them, is meant to capture: (1) "café-style branches,"[58] which "may include electronically-staffed kiosks, interactive ATMs that provide remote assistance with a teller, and teller-less cafés where deposits can be accepted on tablets or through ATMs,"[59] and (2) branches that receive deposits other than at teller windows and stations.[60] The agency seeks to encompass these locations because its "existing sign rules, which focus on display of the official sign at teller windows or stations, have not kept pace with these developments."[61] But the FDIC can capture such locations and ensure that the sign rules keep pace with technological developments and the evolving delivery of banking products and services without expanding the well-established definition of a "branch."

For instance, regarding the first category (café-style branches), if such locations have electronically staffed kiosks or deposit-taking ATMs or other electronically based services, the proposed requirements for ATMs and like devices,[62] and for digital deposit-taking channels,[63] would ensure that the appropriate signs are displayed on the pages or screens of those devices. Given that, customers would have the requisite information at such locations, and additional sign requirements on the physical premises of these non-branch locations would be unnecessary and potentially confusing. Regarding the second category (branches that receive deposits other than at teller windows and stations), as discussed previously, the FDIC should provide banks the flexibility to make clear, comprehensive disclosures in the manner best suited to the particular design of the branch. This flexibility would further the FDIC's and the industry's goal to minimize customer confusion without conflating DPOs and other non-branch locations.

V. **<u>The FDIC should amend the definition of "non-deposit product" to include crypto-assets</u>**.

The FDIC states in the NPR that it "has recently noted a number of misrepresentations of insurance coverage and crypto-assets, and believes that part 328 should be amended to make clear that representations concerning crypto-assets fall within its scope. Accordingly, the proposed rule would amend the definitions of "Non-Deposit Product" and "Uninsured Financial Product" in subpart B to include crypto-assets and define crypto-asset as "any digital asset implemented using cryptographic techniques." This would include a digital asset that is a digital representation of value that functions as a medium of exchange, a unit of account, and, or a store of value; as well as a digital asset that has an equivalent value in and is convertible to real currency, or that acts as a substitute for real currency and is

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[58] 87 Fed. Reg. 78021.

[59] *Id.* at 78019.

[60] *Id.* at 78021.

[61] *Id.* at 78019.

[62] *Id.* at 78034, § 328.4.

[63] *Id.* at 78035, § 328.5.

not legal tender. The proposed rule also includes crypto-assets in subpart A's definition of "non-deposit product," using the definition of "crypto-asset" described above. Accordingly, the non-deposit sign requirements proposed in subpart A would apply to crypto-assets. For example, if an IDI's ATM offered customers the ability to purchase crypto-assets, the ATM would be required to clearly, continuously, and conspicuously display disclosures indicating that the crypto-assets: are not insured by the FDIC; are not deposits; and may lose value."[64]

We request that the FDIC clarify that the proposed definition of "crypto-asset" does not include products traditionally offered by banks, such as deposits or permissible securities, regardless of the technology underlying the product. Thus, for example, blockchain-based deposits or tokenized deposits would not fall under the definition of "crypto asset."

VI. If the FDIC proceeds with amending the regulations as proposed, IDIs will need at least 18 months to implement the changes.

If the FDIC proceeds with finalizing a rule substantially similar to the proposed rule that establishes prescriptive requirements for signs and advertising for IDIs in both physical locations and via digital channels, many institutions will have to implement substantial changes that will require sufficient time to implement. As described previously, many banks currently have implemented signage and advertising practices consistent with the spirit of the existing regulations and the Interagency Statement. Additionally, the changes that IDIs would need to make to their digital banking channels would require widespread revisions, and engineers and technologists would need sufficient time to design, code and test these changes that would have to be deployed over hundreds of pages of online and mobile screens, through both iOS and Android operating systems, and in some cases, in multiple spoken languages. Therefore, if the FDIC proceeds with this rulemaking, we respectfully request that the FDIC provide at least an 18-month implementation period to allow institutions to make the necessary changes to come into compliance with the regulations' requirements.

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[64] 87 Fed. Reg. at 78026 (internal citations omitted).

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