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Lauren S. Pless

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The FDIC’s Investigation of Voyager Digital and What That Means for Crypto-Fintechs

I. INTRODUCTION

As he walks past alpine climbers, an early Wright Brothers-style airplane, and astronauts suited up for a space flight, Matt Damon utters, “four simple words that have been whispered by the intrepid since the time of the Romans, ‘fortune favours the brave.’”¹ A few moments of dramatic music follow, suspense building, as viewers wonder what the advertisement is for, before the Crypto.com name and logo appear on the screen.²

Today, it seems like everywhere consumers look, cryptocurrency (“crypto”) is there,³ as are the crypto-focused fintechs (“crypto-fintechs”) which facilitate the transfer and storage of that crypto. In addition to Matt Damon’s advertisement, LeBron James partnered with Crypto.com for a marketing campaign,⁴ and Staples Arena, home of the Los Angeles Lakers, became Crypto.com Arena.⁵ In October 2021, the National Basketball Association (“NBA”) and Coinbase agreed to a deal that would provide Coinbase a platform to advertise through the Women’s National Basketball Association (“WNBA”), NBA G League, NBA 2K League, and USA Basketball.⁶ Consumers are now buying and selling crypto from the comfort of their

1. Crypto.com, *Fortune Favours the Brave*, YOUTUBE (Oct. 28, 2021), <https://www.youtube.com/watch?v=9hBC5TVdYT8> [<https://perma.cc/6LKN-CYJ2>].

2. *Id.*

3. Robert Farrington, *Crypto is Everywhere, But Should You Invest?*, FORBES (Jan. 18, 2021, 10:20 AM), <https://www.forbes.com/sites/robertfarrington/2021/01/18/crypto-is-everywhere-but-should-you-invest/?sh=34ca499f7e73> [<https://perma.cc/WXD7-LXJP>].

4. Abraham Aroloye, *NBA Star LeBron James Joins Crypto.com’s Marketing Campaign*, GLOB. CRYPTO (Jan. 21, 2022), <https://globalcrypto.tv/nba-star-lebron-james-joins-crypto-coms-marketing-campaign/> [<https://perma.cc/W4US-N6GN>].

5. Sam Dean, *Goodbye, Staples Center. Hello Crypto.com Arena*, L.A. TIMES (Nov. 16, 2021, 9:05 PM), <https://www.latimes.com/business/story/2021-11-16/crypto-staples> [<https://perma.cc/N2EP-3BXE>].

6. Jabari Young, *NBA Lands First Cryptocurrency Sponsorship with Coinbase*, CNBC (Oct. 19, 2021, 2:20 PM), <https://www.cnbc.com/2021/10/19/nba-lands-first-cryptocurrency-sponsorship-with-coinbase.html> [<https://perma.cc/JF2V-5S3P>].

homes through smartphone apps.⁷ As crypto and crypto-fintechs have become mainstream, American consumers have not only accepted them, but increasingly trusted them with significant amounts of money.⁸ This increased confidence could lead to consumers equating their risk with crypto-fintechs to their risk with traditional, FDIC-insured banks and trusting the security of their US Dollar (“USD”) deposits with these crypto-fintechs similarly. The rapid development of fintech and its intertwining with traditional banks has changed much of how Americans bank and make investments; however, unchecked by regulation, crypto-fintechs pose risks to consumers.⁹

The Federal Deposit Insurance Corporation’s (“FDIC”) investigation of Voyager Digital (“Voyager”) for violation of the new FDIC regulation¹⁰ (“June 2022 Rule”) on misrepresentation of FDIC-insured status and misuse of the FDIC logo sheds light on these risks and how regulators approach such risks.¹¹ With the broader prohibitions on misrepresentation and misuse of FDIC-insured status in the June 2022 Rule, as well as an increased interest in enforcement in the fintech space, crypto-fintechs will have to review language on their websites, social media platforms, and contracts to ensure it complies

7. See Carmen Reinicke, *1 in 10 People Currently Invest in Cryptocurrencies, Many for Ease of Trading, CNBC Survey Finds*, CNBC (Aug. 24, 2021, 1:00 PM), <https://www.cnbc.com/2021/08/24/1-in-10-people-invest-in-cryptocurrencies-many-for-ease-of-trading.html> [<https://perma.cc/UZ9A-ZL74>] (reporting that in a survey of those who trade crypto, the top cited reason for trading crypto is ease of trading, and almost a quarter of respondents said they trade daily).

8. See Vaibhav Goel et al., *New Trends in US Consumer Digital Payments*, MCKINSEY & COMPANY (Oct. 26, 2021), <https://www.mckinsey.com/industries/financial-services/our-insights/banking-matters/new-trends-in-us-consumer-digital-payments> [<https://perma.cc/B7S3-7A5Y>] (noting that consumers are increasingly trusting familiar fintechs).

9. See Saule T. Omarova, *Dealing with Disruption: Emerging Approaches to Fintech Regulation*, 61 WASH. U. J.L. & POL’Y 25, 34 (2020) (“By putting increasing pressure on the existing regime of financial regulation and supervision, the rise of fintech exposed the need for revisiting the broader regulatory philosophy underlying and guiding that regime.”).

10. Advertisement of Membership, False Advertising, Misrepresentation of Insured Status, and Misuse of the FDIC’s Name or Logo, 12 C.F.R. § 328 (2022).

11. See generally DAVIS POLK, CLIENT UPDATE: A SHOT ACROSS THE FINTECH BOW – THE FDIC’S REPORTED INVESTIGATION OF VOYAGER DIGITAL (July 19, 2022), <https://www.davispolk.com/insights/client-update/shot-across-fintech-bow-fdics-reported-investigation-voyager-digital> [<https://perma.cc/L8MD-YXCJ>] (providing a general overview of the FDIC’s investigation of Voyager, the new FDIC regulation, and guidance for crypto-fintechs).

with this new, stricter regulation.¹² While this new rule does increase transparency into the FDIC's enforcement of prohibitions on misrepresentations about insured status, which consequently works to serve its mission of maintaining stability and public confidence in the American financial system, it should go further in its aims to protect consumers in the still-developing crypto-fintech sector.¹³

This Note proceeds in four parts. Part II explores the Federal Deposit Insurance Act ("FDI Act"), discussing the history and purpose of FDIC deposit insurance, the section of the FDI Act which governs misrepresentation of insured status and misuse of the FDIC name or logo, the FDIC's new rule regarding false advertising, misrepresentations about insured status, and misuse of the FDIC's name or logo, and enforcement of the rule.¹⁴ Part III details Voyager's misleading advertising about its FDIC insurance status, its failure, and the repercussions for customers that ensued.¹⁵ Part IV considers the implications of the June 2022 Rule, as well as recently proposed amendments to this rule ("December 2022 Rule"), and whether it strikes the correct balance in furthering the FDI Act's policy goals.¹⁶ Part V summarizes and concludes this Note.¹⁷

II. BACKGROUND

Since the creation of the FDIC in 1933, American consumers have enjoyed the protection of FDIC insurance for their bank deposits,

12. *See id.* (noting the FDIC's belief that non-banks will primarily be affected by its new regulation indicates that the FDIC may target fintechs with bank partnerships and that the Consumer Financial Protection Bureau (CFPB) has released a circular highlighting its interest in the regulation); CONSUMER FIN. PROT. BUREAU, CIRCULAR 2022-02, DECEPTIVE REPRESENTATIONS INVOLVING THE FDIC'S NAME OR LOGO OR DEPOSIT INSURANCE, 1 (2022), https://files.consumerfinance.gov/f/documents/cfpb_2022-02_circular_2022-05.pdf [<https://perma.cc/7XFP-C8WL>] (noting the rule may be "particularly relevant" to fintechs and that misrepresentations about deposit insurance may violate the Consumer Financial Protection Act).

13. *See* False Advertising, Misrepresentation of Insured Status, and Misuse of the FDIC's Name or Logo, 87 Fed. Reg. 33415, 33415 (June 2, 2022) (to be codified at 12 C.F.R. pt. 328) (noting a policy objective of the regulation is to provide transparency into the FDIC's handling of violations of § 18(a)(4), which it believes will "benefit all parties and promote[] stability and confidence in the FDIC deposit insurance and the nation's financial system.").

14. *See infra* Part II.

15. *See infra* Part III.

16. *See infra* Part IV.

17. *See infra* Part V.

which has increased customer confidence in banks and limited destructive runs on banks.¹⁸

A. *The Stock Market Crash of 1929 and the Banking Act of 1933.*

The FDIC was established by the Banking Act of 1933¹⁹ in response to the stock market crash of 1929 (“1929 Crash”).²⁰ Following the 1929 Crash, many consumers rushed to banks to withdraw their deposits, leading to “runs” on the banks.²¹ A run on a bank occurs when depositors, who are worried about the stability of their bank, race to withdraw their money.²² Because banks typically lend out most of the money in their deposit accounts and cannot sell these loans or other assets quickly enough to accommodate the demand for withdrawals, they face a liquidity problem and do not have enough cash to cover the withdrawal requests.²³ The result is often that the bank closes its doors and may become insolvent if it must borrow money or liquidate assets at fire sale prices to meet withdrawal demands.²⁴ Depositors who are not quick enough to withdraw may end up holding only a claim against an insolvent bank.²⁵

In February and March of 1929, a lack of confidence in deposit security led to runs on banks across the United States, leading to the banking crisis.²⁶ Governors in nearly every state, and later, President

18. See *The 1930's*, FDIC: HISTORICAL TIMELINE (Jan. 2, 2014), <https://www.fdic.gov/about/history/timeline/1930s.html> [<https://perma.cc/WY7G-FFWB>] (explaining that the FDIC’s protections preclude the threat of bank runs causing another banking panic); see also *infra* note 39 and accompanying text.

19. Banking Act of 1933, ch. 89, 48 Stat. 162 (1935) (codified at 12 U.S.C. § 227).

20. *The 1930's*, *supra* note 18.

21. FED. DEPOSIT INS. CORP., *THE FIRST FIFTY YEARS: A HISTORY OF THE FDIC 1933–1983*, at 33 (1984) [hereinafter *FDIC: THE FIRST FIFTY YEARS*].

22. Charles K. Whitehead, *Reframing Financial Regulation*, 90 B.U. L. REV. 1, 21 (2010).

23. *Id.* at 21–22; see also *The 1930's*, *supra* note 18 (“Before the FDIC was in operation, large-scale cash demands of fearful depositors often struck the fatal blow to banks that might otherwise have survived.”).

24. John C. Dugan, *Addressing the Fundamental Banking Policy Problem of Runs: Effectively Subordinating Large Amounts of Long-Term Debt to Short-Term Debt to End “Too-Big-to-Fail”*, 22 N.C. BANKING INST. 11, 13–14 (2018).

25. *Id.* at 13.

26. See President Franklin D. Roosevelt, Speech to the People of the United States Regarding the Banking Crisis (March 12, 1933) (transcript available on FDIC website), <https://www.fdic.gov/about/history/3-12-33transcript.html> [<https://perma.cc/7CQT-KE2D>] (addressing the cause of the banking crisis and outlining the government’s response and planned future response).

Roosevelt, issued proclamations temporarily closing the banks, affording the government the opportunity to “rehabilitate” them through emergency lending provided by the Federal Reserve banks.²⁷

To avoid such a catastrophe again, Congress created an insurance program that would insure up to \$2,500 per depositor in the event of a bank failure.²⁸ The FDIC was created in 1933²⁹ to regain and instill confidence in the American banking system to prevent panic and subsequent runs on banks in the future, which it has done successfully since its inception.³⁰

B. *FDIC Insurance*

In 1950, the Federal Deposit Insurance Act of 1950³¹ was passed to revise and consolidate all previous FDIC legislation into one act,³² reiterating Congress’ commitment to “maintain[ing] stability and public confidence in the nation’s financial system.”³³ Because of the weight the FDIC name carries and the confidence it instills, in order to become FDIC-insured, a depository institution must formally apply and

27. *See id.* (“[The banks temporarily closing] . . . is affording us the opportunity to supply the currency necessary to meet the situation The new law allows the twelve Federal Reserve banks to issue additional currency on good assets and thus the banks that reopen will be able to meet every legitimate call.”).

28. FDIC: THE FIRST FIFTY YEARS, *supra* note 21, at 81; *see also About FDIC: What We Do*, FDIC (May 15, 2020), <https://www.fdic.gov/about/what-we-do/index.html> [<https://perma.cc/CH8L-25EP>] (noting that the standard insured amount is now \$250,000 per depositor).

29. Banking Act of 1933 ch. 89, 48 Stat 162 (codified at 12 U.S.C. § 227); *see also The 1930’s*, *supra* note 18 (noting The Banking Act of 1933 established the FDIC as a temporary entity and The Banking Act of 1935 established the FDIC as a permanent government agency).

30. *See* Roosevelt, *supra* note 26 (“[T]here is an element in the readjustment of our financial system more important than currency, . . . the confidence of the people. Confidence and courage are the essentials of success in carrying out our plan We have provided the machinery to restore our financial system”); *The 1930’s*, *supra* note 18 (“Since the FDIC went into operation, bank runs no longer constitute a threat to the banking industry.”).

31. Federal Deposit Insurance Act of 1950, ch. 967, 64 Stat. 873 (codified at 12 U.S.C. 1811).

32. *The 1950’s*, FDIC: HISTORICAL TIMELINE (Jan. 2, 2014), <https://www.fdic.gov/about/history/timeline/1950s.html> [<https://perma.cc/5J89-TMB7>].

33. *About*, FDIC, <https://www.fdic.gov/about/> [<https://perma.cc/SZR4-KDSJ>] (last visited Jan. 30, 2023).

undergo careful consideration.³⁴ Until this insurance is granted, the institution is not FDIC-insured and cannot advertise itself as such.³⁵ Section 18(a)(4) of the FDI Act prohibits (1) misrepresenting or implying that any obligation is FDIC-insured—through use of certain prohibited terms as part of the institution’s business name or advertisement, solicitation, or other document—and (2) knowingly misrepresenting that an obligation is insured under the FDI Act or knowingly misrepresenting the extent or manner of any insurance.³⁶ It also empowers the FDIC and other Federal banking agencies to bring enforcement actions for violations of the prohibitions.³⁷

A bank’s display of the FDIC name and its advertisement of FDIC insurance is the symbol of the government’s promise to insure repayment of customers’ deposits up to the insured amount in the event of a bank failure.³⁸ The FDIC has largely been successful in its mission to “maintain stability and public confidence in the nation’s financial system,” as insured depositors have been fully protected from loss of their insured deposits since the FDIC’s inception.³⁹ However, to maintain that consumer confidence, the FDIC must ensure institutions do not undermine the FDIC’s credibility through misrepresentations about insured status.⁴⁰

34. See Federal Deposit Insurance Act (“FDI Act”) § 2[6], 12 U.S.C. § 1816 (2018) (providing the seven factors that the FDIC Board of Directors considers in deciding whether to grant FDIC insurance to a depository institution).

35. See FDI Act § 2[18], 12 U.S.C. § 1828(a)(4) (prohibiting misrepresentation of FDIC insurance).

36. FDI Act § 2[18], 12 U.S.C. § 1828(a)(4)(A)–(B).

37. FDI Act § 2[18], 12 U.S.C. § 1828(a)(4)(C)–(E).

38. See *Symbol of Confidence*, FDIC (May 20, 2022), <https://www.fdic.gov/consumers/assistance/protection/depaccounts/confidence/symbol.html> [<https://perma.cc/2TH8-HD95>] (emphasizing the confidence depositors can have in the security of their deposits, even in the unlikely event of their financial institution’s failure).

39. See *About FDIC: What We Do*, *supra* note 28 (“[N]o depositor has lost a penny of insured funds as a result of failure.”).

40. See *False Advertising, Misrepresentation of Insured Status, and Misuse of the FDIC’s Name or Logo*, 87 Fed. Reg. 33415, 33415 (June 2, 2022) (to be codified at 12 C.F.R. pt. 328) (explaining the FDIC is promulgating this regulation in response to the increased instances of misuse of the FDIC’s name or logo and misrepresentations of FDIC-insured status and stating that it “believes that the final rule establishes a more transparent process that will benefit all parties and promotes stability and confidence in FDIC deposit insurance and the nation’s financial system.”).

C. *The June 2022 Rule*

On June 2, 2022, the FDIC published a new regulation implementing § 18(a)(4) of the FDI Act, and it became effective on July 5, 2022.⁴¹ This rule applies to any persons or institutions who (1) use the FDIC’s name or logo to falsely represent their FDIC-insured status, (2) knowingly misrepresent the existence or extent of FDIC insurance, or (3) aid or abet another in making these misrepresentations.⁴² The June 2022 Rule applies regardless of whether the misrepresentations are express or implied.⁴³ Statements that violate the regulation are those that might mislead a reasonable consumer,⁴⁴ and a representation, or as little as an implication, can be considered a “statement.”⁴⁵ The regulation has a strong emphasis on clarity and honesty for consumers, disallowing, through any means of dissemination, any suggestion or implication of association “with an FDIC-insured institution if the nature of the association is not clearly, conspicuously, prominently, and accurately described.”⁴⁶ Further, the regulation expressly prohibits “featur[ing] or includ[ing] one or more FDIC-Associated Terms or FDIC-Associated Images, without a clear, conspicuous, and prominent disclaimer that the products being offered are not FDIC insured or guaranteed.”⁴⁷

Despite its broad statutory authority to do so, the FDIC had never previously issued specific regulations addressing misrepresentations of FDIC-insured status, but increasing occurrences of misrepresentation prompted promulgation of the June 2022 Rule.⁴⁸

41. *Id.*

42. Advertisement of Membership, False Advertising, Misrepresentation of Insured Status, and Misuse of the FDIC’s Name or Logo, 12 C.F.R. § 328.100 (2022).

43. *Id.*

44. *See* § 328.102(b)(3)(i)–(ii) (“[A] statement regarding deposit insurance violates this section, if . . . [it] contains any material representations which would have the tendency or capacity to mislead a reasonable consumer . . . or . . . [it] omits material information that would be necessary to prevent a reasonable consumer from being misled . . .”).

45. *See* § 328.102(b)(2)(ii)–(iii) (“[A] statement regarding deposit insurance” is any statement that “makes any representation, suggestion, or implication about the existence [or extent] of FDIC insurance” or “the existence, extent, or effectiveness of any guarantee by FDIC in the event of financial distress by Insured Depository Institutions.”).

46. § 328.102(a)(3)(v).

47. § 328.102(a)(3)(ii).

48. False Advertising, Misrepresentation of Insured Status, and Misuse of the FDIC’s Name or Logo, 87 Fed. Reg. 33415, 33415 (June 2, 2022) (to be codified at 12 C.F.R. pt. 328).

In 2019 and 2020, “the FDIC reached informal resolutions regarding the potential misuse of the FDIC’s name or logo and misrepresentations in relation to deposit insurance in at least 165 instances.”⁴⁹ While this rule is not necessary for the FDIC to enforce its authority under § 18(a)(4), the creation of a reporting process for other institutions and the public further strengthens the FDIC’s ability to regulate these misrepresentations.⁵⁰ The FDIC published a Request for Information (“RFI”) on February 26, 2020, which included questions regarding FDIC insurance misrepresentations.⁵¹ Because of the COVID-19 pandemic, the FDIC postponed action, resuming its efforts with the publication of a new RFI on April 9, 2021; however, this 2021 RFI did not address misrepresentations and misuse, instead focusing on the FDIC’s advertising requirements and related topics.⁵²

The June 2022 Rule that was ultimately published aims to address the significant occurrences of misuse of the FDIC name or logo or misleading representation of FDIC insurance status, thus promoting and protecting stability and confidence in the American financial system.⁵³

D. FDIC Focus on Crypto-Fintechs

On July 29, 2022, the same month the June 2022 Rule became effective, and the day after it issued a cease-and-desist letter to Voyager,⁵⁴ the FDIC issued a Financial Institution Letter (“FIL”) “[t]o address certain misrepresentations about FDIC deposit insurance by some crypto companies”⁵⁵ with an accompanying Advisory⁵⁶ and Fact

49. *Id.* at 33418.

50. *Id.* at 33415, 33419.

51. *Id.* at 33415.

52. *Id.*

53. *See id.* (adopting the regulation to “further clarify [the FDIC’s] procedures for identifying, investigating, and where necessary taking formal and informal action to address potential violations of § 18(a)(4),” thus “benefit[ing] all parties and promot[ing] stability and confidence in FDIC deposit insurance and the nation’s financial system.”).

54. *See infra* text accompanying note 84.

55. FED. DEPOSIT INS. CORP., FIL-35-2022, ADVISORY TO FDIC-INSURED INSTITUTIONS REGARDING FDIC DEPOSIT INSURANCE AND DEALINGS WITH CRYPTO COMPANIES (July 29, 2022), <https://www.fdic.gov/news/financial-institution-letters/2022/fil22035.html> [<https://perma.cc/M69Y-GZE4>].

56. FED. DEPOSIT INS. CORP., ADVISORY TO FDIC-INSURED INSTITUTIONS REGARDING FDIC DEPOSIT INSURANCE AND DEALINGS WITH CRYPTO COMPANIES (July 29, 2022)

Sheet “to assist the public in understanding FDIC deposit insurance coverage in light of recent market activity and media reports.”⁵⁷ The Advisory and Fact Sheet seem to indicate an increased focus on crypto-fintechs, with the Fact Sheet noting that some crypto-fintechs had “suspended withdrawals or halted operations” over the several preceding months and that some of these companies’ misrepresentations might have led their customers to mistakenly believe their money or investments were FDIC-insured.⁵⁸

In the Advisory, the FDIC noted its concern about the risk of harm resulting from inaccurate representations of FDIC-insured status by crypto-fintechs, which can lead to customer confusion and mistaken beliefs about what losses they are protected against, namely, when FDIC insurance applies and what products it insures.⁵⁹ It also warned that these misrepresentations about FDIC insurance could lead to legal risks for crypto-fintechs, advising crypto-fintechs to (1) affirmatively state they are not insured, (2) identify the insured banks they have partnered with, and (3) state that crypto is not FDIC-insured.⁶⁰ Additionally, it advised insured banks to confirm and monitor their crypto-fintech partners’ communications to ensure their representations about insurance are accurate.⁶¹ The accompanying Fact Sheet detailed the extent of FDIC Deposit Insurance Coverage and affirmatively stated what products and risks are not covered by FDIC Deposit Insurance.⁶²

The timing of the Advisory and Fact Sheet relative to the effective date of the June 2022 Rule and Voyager investigation, along with the content of these FDIC documents, suggests that crypto-fintechs

[hereinafter FDIC ADVISORY], <https://www.fdic.gov/news/financial-institution-letters/2022/fil22035b.pdf> [<https://perma.cc/6ZHR-J2D5>].

57. FED. DEPOSIT INS. CORP., FACT SHEET: WHAT THE PUBLIC NEEDS TO KNOW ABOUT FDIC DEPOSIT INSURANCE AND CRYPTO COMPANIES (July 29, 2022) [hereinafter FDIC FACT SHEET], <https://www.fdic.gov/news/fact-sheets/crypto-fact-sheet-7-28-22.pdf> [<https://perma.cc/9KCA-XERH>].

58. *Id.*

59. FDIC ADVISORY, *supra* note 56.

60. *Id.*

61. *Id.*

62. *See* FDIC FACT SHEET, *supra* note 57 (“[T]he FDIC *only* insures deposits held in insured banks and savings associations . . . and *only* in the unlikely event of an insured bank’s failure. The FDIC does not insure assets issued by non-bank entities, such as crypto companies” and “FDIC deposit insurance does not apply to financial products such as . . . crypto assets” and “does not protect against the default, insolvency, or bankruptcy of any non-bank entity, including crypto custodians, exchanges, brokers, wallet providers, and neobanks.”).

and their FDIC-insured partners should take this new rule seriously and work to ensure compliance as soon as possible.⁶³

E. Beyond the FDIC: Additional Regulation

The June 2022 Rule contains a section regarding referral to the appropriate authority,⁶⁴ and the FDIC expects it will cooperate with other agencies to address misrepresentations.⁶⁵ Additionally, the FDIC included a section “to expressly reiterate that the FDIC’s authority under § 18(a)(4) does not bar any other action authorized by law, by the FDIC or any other agency.”⁶⁶

In a Consumer Protection Circular issued by the Consumer Financial Protection Bureau (“CFPB”), after the FDIC proposed, but before it finalized, the rule, the CFPB noted its interest in enforcing this regulation as well, as it has the authority to regulate “unfair, deceptive, or abusive acts or practices” under the Dodd-Frank Act.⁶⁷ In the circular, the CFPB expressed concern that FDIC insurance misrepresentations both disadvantage financial institutions that accurately market FDIC-insured products and harm consumers who mistakenly believe their deposits will be insured in a “time of financial distress” such as bankruptcy.⁶⁸ It also noted a particular interest in

63. See *infra* Part III; see also FDIC ADVISORY, *supra* note 56 (noting concern about potential customer confusion about FDIC insurance by crypto-fintechs in particular); FDIC FACT SHEET, *supra* note 57 (noting concern about the number of crypto companies that had suspended withdrawals during the preceding months and concern that customers may not realize how, if at all, their money is FDIC-insured).

64. Advertisement of Membership, False Advertising, Misrepresentation of Insured Status, and Misuse of the FDIC’s Name or Logo 12 C.F.R. § 328.105(a)(1)–(3) (2022).

65. False Advertising, Misrepresentation of Insured Status, and Misuse of the FDIC’s Name or Logo, 87 Fed. Reg. 33415, 33417 (June 2, 2022) (to be codified at 12 C.F.R. pt. 328).

66. *Id.*

67. See CONSUMER FIN. PROT. BUREAU, *supra* note 12, at 3 (“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.”); Dodd-Frank Wall Street Reform and Consumer Protection Act (“Dodd-Frank”) §§ 1031, 1036, 12 U.S.C. §§ 5531, 5536 (2018) (granting authority to the CFPB to take action to prevent entities from “committing or engaging in an unfair, deceptive, or abusive act or practice under Federal law” in consumer financial product or service transactions and detailing prohibited acts).

68. CONSUMER FIN. PROT. BUREAU, *supra* note 12, at 2.

representations about deposit insurance in relation to digital assets, such as crypto.⁶⁹

Noting that the June 2022 Rule “authorizes the FDIC to notify other authorities . . . of conduct that may fall within their jurisdiction,” the FDIC stated that the Federal Trade Commission (“FTC”) may also have authority related to unfair and deceptive acts and practices under § 5 of the Federal Trade Commission Act.⁷⁰ Further, violation of § 18(a)(4) of the FDI Act is a federal criminal offense under 18 U.S.C. § 709, punishable by a fine or up to a year of imprisonment, or both.⁷¹ Section 328.105(a)(3) of the June 2022 Rule states that it may refer the conduct to the “appropriate criminal law enforcement authority” if it believes the conduct violates 18 U.S.C. § 709.⁷² Because the FDIC’s authority to act here does not bar any other authorities authorized by law from acting, these agencies can take action in addition to any FDIC action.⁷³

III. VOYAGER’S FDIC MISREPRESENTATIONS

Voyager is a crypto-fintech—its primary focus is crypto exchanges.⁷⁴ One unique characteristic of Voyager is that it allows its customers to store USD in accounts on its platform which they can then use to purchase crypto.⁷⁵ Since Voyager does not have a bank charter, it had to partner with Metropolitan Commercial Bank (“Metropolitan”),

69. *Id.* at 4.

70. False Advertising, Misrepresentation of Insured Status, and Misuse of the FDIC’s Name or Logo, 87 Fed. Reg. at 33417; *see also* Federal Trade Commission Act § 5, 15 U.S.C. § 45(a)(1)–(2) (prohibiting “unfair or deceptive acts or practices” and granting the FTC the authority to prevent use of “unfair or deceptive acts or practices in or affecting commerce.”).

71. False Advertising, Misrepresentation of Insured Status, and Misuse of the FDIC’s Name or Logo, 87 Fed. Reg. at 33415.

72. Advertisement of Membership, False Advertising, Misrepresentation of Insured Status, and Misuse of the FDIC’s Name or Logo, 12 C.F.R. § 328.105(a)(3) (2022).

73. *See* False Advertising, Misrepresentation of Insured Status, and Misuse of the FDIC’s Name or Logo, 87 Fed. Reg. at 33417 (“The FDIC is adding a new § 328.109 to expressly reiterate that the FDIC’s authority under § 18(a)(4) does not bar any other action authorized by law, by the FDIC or any other agency.”).

74. *See Voyager Supports 100+ Top Crypto Assets*, VOYAGER, <https://www.investvoyager.com/app/supported-coins/> [<https://perma.cc/3AZ2-88YY>] (last visited Jan. 3, 2023) (advertising the wide variety of crypto that Voyager supports).

75. *Learn Voyager: Bank Deposits*, VOYAGER: NODE (July 2, 2021, 3:40 PM), <https://www.investvoyager.com/blog/how-bank-deposits-work-on-voyager/> [<https://perma.cc/9689-3WJL?type=standard>].

which is FDIC-insured, to hold those USD deposits.⁷⁶ To do so, Voyager deposited customer funds into a “For Benefit of Customers” account at Metropolitan.⁷⁷ As of the writing of this note, Metropolitan’s website states that this account only holds USD, not crypto, that the FDIC insurance coverage only protects against a Metropolitan failure, and that the \$250,000 coverage amount is “per depositor for each ownership category.”⁷⁸

A. *Voyager’s Misleading Assertions*

In a misleading assertion on its website in 2019, Voyager guaranteed customers a full reimbursement, up to the FDIC limit of \$250,000, in the “rare event [customers’] USD funds are compromised due to the company or our banking partner’s failure.”⁷⁹ In July 2022, Voyager’s website no longer explicitly stated that customers’ USD would be protected in the event of a Voyager failure; however, it maintained that its partnership with Metropolitan provided FDIC insurance, asserting that in the event of a failure, customers were “guaranteed a full reimbursement (up to \$250,000), so the cash you hold with Voyager is protected.”⁸⁰ Although no longer a patently false assertion, this was grossly misleading, as these accounts were insured

76. Maria Gracia Santillana Linares, *Former FDIC Regulator on What Comes Next in the Agency’s Investigation of Bankrupt Crypto Brokerage Voyager Digital*, FORBES (July 8, 2022, 4:40 PM), <https://www.forbes.com/sites/mariagraciasantillanalinares/2022/07/08/former-fdic-regulator-on-what-comes-next-in-its-investigation-of-bankrupt-crypto-brokerage-voyager-digital/?sh=7a054f3447e6> [<https://perma.cc/TS8R-NMQW>].

77. Michael P. Regan, *Voyager Is the Brokerage That Crypto Deserves*, BLOOMBERG (July 7, 2022, 5:00 PM), <https://www.bloomberg.com/news/newsletters/2022-07-07/voyager-vygvf-is-the-brokerage-that-crypto-deserves> [<https://perma.cc/4MBG-2YJT>]; see also Gracia Santillana Linares, *supra* note 76 (explaining that omnibus accounts “allow for managed trades of more than one person,” so Voyager’s account at Metropolitan “likely held multiple Voyager users.”).

78. *FDIC Coverage Available to Voyager Customers*, METRO. COM. BANK, <https://www.mcbankny.com/fdic-coverage-available-to-voyager-customers/> [<https://perma.cc/7C4H-YGXB>] (last visited Jan. 29, 2023).

79. See Allyson Versprille, *FDIC Probing How Bankrupt Crypto Broker Voyager Marketed Itself*, BLOOMBERG (July 7, 2022, 2:39 PM), <https://www.bloomberg.com/news/articles/2022-07-07/fdic-probing-how-bankrupt-crypto-broker-voyager-marketed-itself> [<https://perma.cc/45X6-T7AN>] (quoting a deceptive assertion on Voyager’s website in 2019).

80. See *id.* (emphasis added) (quoting a deceptive assertion on Voyager’s website in July 2022).

only in the event Metropolitan failed, not Voyager.⁸¹ This also remains misleading because customers may not realize that they are limited to \$250,000 of FDIC insurance coverage for *all* deposits they may have at Metropolitan, so if they have an account at Metropolitan outside of their deposits through Voyager, their Voyager deposits will only be protected up to \$250,000 less the amount in the other account.⁸² Addressing a slightly different concern, the failure to identify the FDIC-insured bank where the money will be held, the FDIC also noted concern about the insurance shortfalls that could occur as a result of this omission.⁸³

On July 28, 2022, in the same month as Voyager's bankruptcy filing, the FDIC and the Board of Governors of the Federal Reserve System sent a letter to Voyager demanding it "cease and desist, and take immediate corrective action to address [its] false and misleading statements."⁸⁴ Voyager was given two business days from receipt of the letter to comply and confirm its compliance with the requests, which included correcting messaging on website pop-ups, hyperlinks, and chat-bot disclosures, as well as personal social media accounts of senior management and any electronic and hard copy consumer-facing materials and communications.⁸⁵ As the investigation has not yet reached a resolution, Voyager may still face sanctions from the FDIC, up to and including a lifetime ban from the financial services industry.⁸⁶

81. See Gracia Santillana Linares, *supra* note 76 ("[D]epositors' funds would be insured *only* if Metropolitan Bank went bankrupt, not Voyager. Yet statements on Voyager's website did not make this clear.").

82. See *Financial Institution Employee's Guide to Deposit Insurance*, FDIC (May 24, 2016), <https://www.fdic.gov/deposit/diguidebankers/fiduciary-accounts.html> [<https://perma.cc/MCK9-MSGZ>] (explaining that deposit accounts created for the benefit of others are not insured as a separate ownership category, and therefore, funds a depositor has in this account would be combined with any individual accounts they have, and together these accounts would be insured up to \$250,000).

83. See *False Advertising, Misrepresentation of Insured Status, and Misuse of the FDIC's Name or Logo*, 87 Fed. Reg. 33415, 33417 & n.14 (June 2, 2022) (to be codified at 12 C.F.R. pt. 328) (explaining a customer may not "receive the full value of the promised deposit insurance if the non-bank entity placed the consumer's funds at" a bank where they already had deposited funds).

84. Letter from Seth P. Rosebrock, Assistant Gen. Couns., Enf't, Fed. Deposit Ins. Corp., and Jason A. Gonzalez, Assistant Gen. Couns., Enf't, Bd. of Governors of the Fed. Rsrv. Sys. to Stephen Ehrlich, Chief Exec. Officer and David Brosgol, Gen. Couns., Voyager Digit., LLC (July 28, 2022) [hereinafter FDIC Letter] (on file with the FDIC).

85. *Id.*

86. See Gracia Santillana Linares, *supra* note 76 (noting the FDIC's reliance upon its statutory authority under 12 C.F.R. § 328 to ban companies from misusing the name or logo of the FDIC).

B. *Impact of Voyager Bankruptcy on Customers*

Voyager’s bankruptcy filing rendered customers unable to access any of their assets on the platform—USD held through Metropolitan and crypto assets alike.⁸⁷ After Voyager filed for bankruptcy on July 5, 2022,⁸⁸ Metropolitan released a statement clarifying that its FDIC insurance protects deposit accounts against the failure of Metropolitan, and only Metropolitan, stating that its insurance “does not protect against the failure of Voyager, any act or omission of Voyager or its employees, or the loss in value of cryptocurrency or other assets.”⁸⁹ In working toward a resolution for Voyager customers, the U.S. Bankruptcy Court for the Southern District of New York approved Voyager’s return of \$270 million in cash to its customers.⁹⁰ These funds were to be made accessible to customers once “a reconciliation and fraud prevention process is completed with Metropolitan.”⁹¹ However, many customers had assets on the platform worth far more than their USD deposits and were surprised to learn that their investments were not protected.⁹² Customers were confused, as many had invested under the impression that their crypto and money they had converted from USD to USDC, a USD-pegged stablecoin, were protected.⁹³ Customers are still awaiting a resolution of their

87. See MacKenzie Sigalos, *Voyager Customer Lost \$1 Million Saved Over 24 Years and Is One of Many Now Desperate to Recoup Funds*, CNBC (Aug. 15, 2022, 3:45 PM), <https://www.cnbc.com/2022/08/15/voyager-customers-beg-new-york-judge-for-money-back-after-bankruptcy.html> [<https://perma.cc/E94N-49MX>] (quoting multiple Voyager customers whose assets were frozen and inaccessible).

88. Crystal Kim, *Voyager Digital Former Executive Seeking to File Competing Restructuring Plan*, AXIOS (July 29, 2022), <https://www.axios.com/2022/07/29/voyager-digital-former-executive-seeking-to-file-competing-restructuring-plan> [<https://perma.cc/G5L2-EKLV>].

89. Claire Williams, *Voyager is the Tip of the Iceberg*, AM. BANKER (July 20, 2022, 1:55 PM), <https://www.americanbanker.com/news/crypto-firm-voyager-is-the-tip-of-the-iceberg> [<https://perma.cc/MEK8-N9K7>].

90. Kim, *supra* note 88 (Southern District of New York); Akanksha Khushi, *Crypto Lender Voyager Digital Gets Approval to Return \$270 Million to Customers*, *Wall Street Journal Reports*, REUTERS (Aug. 4, 2022, 7:46 PM), <https://www.reuters.com/business/crypto-lender-voyager-digital-gets-approval-return-270-million-customers-wsj-2022-08-04/> [<https://perma.cc/F5V9-74JE>] (\$270 million).

91. Regan, *supra* note 77.

92. See Sigalos, *supra* note 87 (quoting multiple Voyager customers who have investments ranging from five to seven figures “stranded on the app” and noting while Voyager has \$104 million in cash on the platform, it has \$1.3 billion in crypto assets).

93. See *id.* (“I’ve always identified myself as an owner and a rightful depositor of the cryptocurrency that was provided on their platform.” “We were never told that [USDC]

claims regarding their crypto investments.⁹⁴ A bankruptcy sale to FTX US, a crypto exchange, was granted initial approval in October 2022;⁹⁵ however, FTX's subsequent failure caused this deal to fail.⁹⁶ In December, after a second bidding process, Voyager and Binance.US, another crypto exchange, reached a deal for Binance.US to acquire Voyager's assets and customer deposits for \$1.02 billion.⁹⁷ As they are considered general unsecured creditors in this filing, it is unlikely these Voyager customers will receive the full value of their claims.⁹⁸

IV. IMPLICATIONS OF THE JUNE 2022 RULE

The FDIC investigation of Voyager, which commenced shortly after the adoption of the June 2022 Rule, and the resulting cease-and-desist letter,⁹⁹ puts crypto-fintechs on notice that misrepresentation of federal deposit insurance coverage is a significant area of focus for the FDIC.¹⁰⁰ Additionally, the FDIC published the proposed December 2022 Rule to "amend part 328 of its regulations" on December 21, 2022, which indicates a significantly heightened focus on regulating fintechs—defining "crypto-asset," including crypto-assets in its definitions of "Non-Deposit Product[s]" and "Uninsured Financial

wasn't the same as cash. We were told that it had to be listed that way in order to get interest for the money that we put in there as an investment.").

94. Rohan Goswami, *Binance.US to Acquire Bankrupt Crypto Exchange Voyager's Assets for \$1 Billion, Weeks After Planned FTX Deal Failed*, CNBC (Dec. 19, 2022, 8:59 AM), <https://www.cnbc.com/2022/12/19/binance-to-acquire-voyager-assets-weeks-after-ftx-deal-fell-through-bankruptcy.html> [<https://perma.cc/XQ6S-X56L>].

95. James Nani, *Voyager's Looming Bankruptcy Crypto Sale to FTX: Explained*, BLOOMBERG LAW (Oct. 21, 2022, 12:53 PM), <https://news.bloomberglaw.com/bankruptcy-law/voyagers-looming-bankruptcy-crypto-sale-to-ftx-explained> [<https://perma.cc/924A-KFL2>].

96. Goswami, *supra* note 94.

97. *Id.*

98. See Sigalos, *supra* note 87 (noting that Voyager customers were unsecured creditors); Nani, *supra* note 95 (explaining that under the FTX plan, customers were estimated to receive approximately 72% recovery of their claims, which would come in a mix of cryptos, USD, and USDC).

99. FDIC Letter, *supra* note 84.

100. See Williams, *supra* note 89 ("Combined with the Voyager inquiry, experts say, this is a strong signal that the agencies are zeroing in on this issue, and they anticipate the agency will look further into companies' claims of customers' deposits being protected by FDIC insurance."); DAVIS POLK, *supra* note 11 ("The [FDIC's] reported investigation into Voyager Digital's statements about deposit insurance may just be the beginning of an increase in enforcement.").

Product[s],” and proposing that part 328 “be amended to make clear that representations concerning crypto-assets fall within its scope”.¹⁰¹

A. Regulation of Fintechs

The FDIC’s June 2022 Rule adapts to the challenges created by modern day fintechs but still stays true to the FDI Act’s purpose of instilling confidence in the nation’s banks and the security of depositors’ money by ensuring the rules are transparent and broadly enforceable.¹⁰² Because fintechs have developed and evolved so rapidly, there is little precedent on their treatment, thus leaving regulatory gaps for fintechs to take advantage of at consumers’ peril.¹⁰³ Regulators are working with lawyers and experts to determine how fintech should be regulated, but because much of fintech innovation arose out of attempts to “overcome traditional regulatory boundaries,” fintechs have been harder to categorize, and subsequently regulate, than traditional financial institutions.¹⁰⁴ Consequently, they are not subject to the same regulatory regime—constant supervision and examination by a federal financial regulatory agency—as banks.¹⁰⁵

Although fintechs are not subject to this direct supervision or examination by any federal bank regulatory agency, they are integrated into the regulatory framework through indirect supervision based on their relationships with financial institutions as well as the services they provide.¹⁰⁶ Since the regulatory landscape is rapidly evolving and there

101. FDIC Official Sign and Advertising Requirements, False Advertising, Misrepresentation of Insured Status, and Misuse of the FDIC’s Name or Logo, 87 Fed. Reg. 78017, 78026, 78036 (proposed Dec. 21, 2022) (to be codified at 12 C.F.R. pt. 328).

102. See False Advertising, Misrepresentation of Insured Status, and Misuse of the FDIC’s Name or Logo, 87 Fed. Reg. 33415, 33415 (June 2, 2022) (to be codified at 12 C.F.R. pt. 328) (“Although the FDIC is not required to promulgate regulations to implement § 18(a)(4), the FDIC nonetheless believes that the final rule establishes a more transparent process that will benefit all parties and promotes stability and confidence in FDIC deposit insurance and the nation’s financial system.”).

103. See Jill Westmoreland Rose et. al., *Introduction to the Fintech Ecosystem*, 69 DOJ J. FED. L. & PRAC. 23, 29–30 (2021) (noting fintech is currently able to “fly beneath the oversight radar” because of the regulatory gaps).

104. Omarova, *supra* note 9, at 33–34.

105. Aaron C. F. Salerno, Note, *Regulating the Fintech Revolution: How Regulators Can Adapt to Twenty-First Century Financial Technology*, 75 N.Y.U. ANN. SURV. AM. L. 365, 378–379 (2020).

106. See *id.* (explaining fintechs are supervised by their relationships with financial institutions that are subject to certain regulation and that fintechs can be subject to

exist multiple regulators and regulatory schemes, fintechs have to contend with an environment in which they may be unsure who might regulate them and which regulations they must comply with.¹⁰⁷ Accordingly, fintechs that partner with FDIC-insured institutions to offer depository accounts to consumers, and subsequently advertise that insurance, are integrated into the FDIC regulatory framework.¹⁰⁸ Further, this same activity can subject them to regulation by other agencies as well, such as the CFPB and FTC, both of which also have an interest in enforcing this FDIC regulation to prevent consumer deception.¹⁰⁹

The expanded scope of the final rule and the clarity it provides regarding misrepresentation of FDIC-insured status reduces ambiguity for fintechs in this area by better incorporating them into the FDIC's regulatory scheme.¹¹⁰ The December 2022 Rule, which builds upon the June 2022 Rule by addressing its applicability to fintechs, states, "The FDIC 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."¹¹¹

B. *Scope of the Regulatory Scheme*

Considering the devastating consequences of the bank failures during the Great Depression and the rapidly increasing prevalence of crypto and crypto-fintechs, there is too much at stake to leave this space

regulation by agencies, such as the CFPB, "based on the products or services offered, rather than the kind of institution providing such products or services.").

107. *See id.* (detailing the complexity of fintech regulation since it is not currently prescribed and is therefore developed through relationships with other financial institutions and the products or services they offer).

108. *See supra* notes 106–107 and accompanying text.

109. *See* CONSUMER FIN. PROT. BUREAU, *supra* note 12, at 1 (explaining the CFPB's interest in the FDIC's regulation and its relevance to the CFPB's regulation of consumer deception); *supra* note 70 and accompanying text.

110. *See* DAVIS POLK, *supra* note 11 ("The rule, which arguably expands the scope of some prohibitions of the statute, and the agency's statement that it believes the rule will primarily affect non-bank entities, are all signs that fintechs with bank partnerships may be targets of the FDIC.").

111. FDIC Official Sign and Advertising Requirements, False Advertising, Misrepresentation of Insured Status, and Misuse of the FDIC's Name or Logo, 87 Fed. Reg. 78017, 78026 (proposed Dec. 21, 2022) (to be codified at 12 C.F.R. pt. 328).

as self-regulated. While the June 2022 Rule does increase protections for consumers, the current regulatory scheme does not go far enough to protect crypto-consumers in the same spirit as the FDI Act.¹¹² In order to maintain the confidence that the FDIC logo or insurance guarantee provides to consumers, FDIC insurance must exist when consumers think it does; therefore, financial services providers must ensure they are accurately representing their FDIC insurance status to their consumers.¹¹³ The current level of confidence exists because, since its inception, the FDIC has been so effective in its mission that “no depositor has lost a penny of insured funds as a result of failure.”¹¹⁴ However, if consumers begin to lose money on deposits they believe to be FDIC-insured, this could harm the confidence that has been built up over nearly a century.

The June 2022 Rule offers two enforcement mechanisms, an informal process and a formal process.¹¹⁵ The informal process involves an advisory letter with an opportunity to respond before escalating to a formal enforcement action, except in situations of particularly high concern, providing a lower-stakes opportunity for financial services providers to learn of their error and work to correct it.¹¹⁶ A formal enforcement action can include, *inter alia*, termination of FDIC insurance and a Civil Money Penalty.¹¹⁷

The June 2022 Rule regulates any “statement regarding deposit insurance.”¹¹⁸ There could be a question of whether the use of the word

112. *See supra* note 33 and accompanying text.

113. *See Sigalos, supra* note 87 (highlighting stories of depositors who lost money in the Voyager failure who thought their money was safe because Voyager said it was FDIC-insured).

114. *About FDIC: What We Do, supra* note 28.

115. *See* Advertisement of Membership, False Advertising, Misrepresentation of Insured Status, and Misuse of the FDIC’s Name or Logo, 12 C.F.R. §§ 328.106–107 (2022) (detailing processes for informal resolution and formal enforcement actions). The proposed rule does not contain any amendments to the enforcement mechanisms. FDIC Official Sign and Advertising Requirements, False Advertising, Misrepresentation of Insured Status, and Misuse of the FDIC’s Name or Logo, 87 Fed. Reg. 78017 (proposed Dec. 21, 2022) (to be codified at 12 C.F.R. pt. 328).

116. *See* § 328.106(a), (c) (outlining the required steps for a recipient of an informal advisory letter and noting that when the recipient has verifiably followed these steps, it generally will not face further administration action).

117. FED. DEPOSIT INS. CORP., FORMAL AND INFORMAL ENFORCEMENT ACTIONS MANUAL, 1–6 (2022).

118. § 328.102(b)(2).

“statement” throughout the regulation goes too far.¹¹⁹ Because “statement” is undefined and can be construed very broadly to mean any kind of communication—oral or written—it is unclear what exactly the FDIC meant the rule to encompass, and additional guidance from the FDIC could help in determining how far this rule is intended to reach.¹²⁰ Although the December 2022 Rule includes language addressing advertising statements specifically, the broad language addressing “any other statement” still remains, leaving unanswered the question of exactly how far “statement” regulation extends.¹²¹ However, even if the FDIC intends a broad construction, as long as this intention were made clear, crypto-fintechs, as well as all other uninsured financial services providers, could comply and customers could be protected as intended.¹²² If the goal is to protect consumers, it is not excessive to regulate any and all means of communication that may mislead a reasonable consumer.¹²³

C. *Proposed Expansion of the Scope: Shifting Responsibility to FDIC-Insured Banks*

The most effective and clear means of ensuring the goals of the FDI Act and the June and December 2022 Rules are met would be to shift liability for misrepresentation to the insured banks that partner with

119. See Memorandum by Seward & Kissel LLP, FDIC Adopts Rule Prohibiting Misleading Statements About FDIC Insurance that Impacts a Broad Range of Deposit Placement Arrangements Offered by Brokers, Banks, and FinTechs (June 6, 2022), <https://www.sewkis.com/publications/fdic-adopts-rule-prohibiting-misleading-statements-about-edic-insurance-that-impacts-a-broad-range-of-deposit-placement-arrangements-offered-by-brokers-banks-and-fintechs/> [<https://perma.cc/8J5N-6UHE>] (noting a “lack of clarity regarding the definition of ‘statement’”).

120. See *id.* (“[T]he language used in the Rule — ‘statement’ — could be read by the FDIC to apply much more broadly, to many other documents and communications [than just disclosure statements].”).

121. FDIC Official Sign and Advertising Requirements, False Advertising, Misrepresentation of Insured Status, and Misuse of the FDIC’s Name or Logo, 87 Fed. Reg. 78017, 78036 (proposed Dec. 21, 2022) (to be codified at 12 C.F.R. pt. 328).

122. See False Advertising, Misrepresentation of Insured Status, and Misuse of the FDIC’s Name or Logo, 87 Fed. Reg. 33415, 33415 (June 2, 2022) (to be codified at 12 C.F.R. pt. 328) (explaining that a goal of this new regulation is to not only promote stability and confidence, but also to increase transparency into its expectations).

123. See § 328.102(b)(3) (outlining a reasonable consumer standard for determining whether a statement regarding deposit insurance is misleading in violation of the regulation).

the crypto-fintechs, requiring they clarify the extent of their FDIC insurance.¹²⁴ The December 2022 Rule recognizes that banks are increasingly partnering with “non-bank third parties,” such as crypto-fintechs, to provide banking products and services and that banks should play a role in reducing misrepresentation; however, it could go further.¹²⁵ Although it requires that banks create policies to ensure their partners are not misrepresenting their FDIC-insured status, by employing permissive language—“it would be . . . prudent” and “[banks’] policies and procedures could include”—the December 2022 Rule does not go quite so far as to shift liability to banks, or even make them similarly liable as their non-bank partners for their partners’ misrepresentations.¹²⁶ With the ultimate goal of consumer protection and fostering confidence in the American banking system in mind, shifting liability to banks would help avoid situations like that of Voyager’s misrepresentations, as Metropolitan would have been required to clarify that it was insured but that Voyager was not.¹²⁷ Although this would impose a burden on the FDIC-insured banks, it seems to be one that the FDIC has already considered and found to be reasonable.¹²⁸

Because the June 2022 Rule prohibits omissions of material information that could mislead consumers, this can be enforced through a requirement that the FDIC-insured institutions clarify any vague or misleading statements.¹²⁹ If crypto-fintechs advertise the FDIC-insured status of these depository accounts but do not clarify the extent of this insurance, this omission could mislead consumers, who do not

124. See False Advertising, Misrepresentation of Insured Status, and Misuse of the FDIC’s Name or Logo, 87 Fed. Reg. at 33415 (noting the importance of clarity around the enforcement of the regulation).

125. FDIC Official Sign and Advertising Requirements, False Advertising, Misrepresentation of Insured Status, and Misuse of the FDIC’s Name or Logo, 87 Fed. Reg. at 78025.

126. *Id.* at 78025-26.

127. See *supra* note 33 and accompanying text; Versprille, *supra* note 79 (explaining that individual customer accounts were only eligible for insurance in the event of a Metropolitan failure, not a Voyager failure).

128. See FDIC ADVISORY, *supra* note 56 (detailing actions that FDIC-insured banks should take to monitor and correct misrepresentations of FDIC-insured status by their uninsured partners).

129. See Advertisement of Membership, False Advertising, Misrepresentation of Insured Status, and Misuse of the FDIC’s Name or Logo, 12 C.F.R. § 328.102(b)(3)(ii) (2022) (Statements which “omit[] material information that would be necessary to prevent a reasonable consumer from being misled” violate the rule.).

understand that the protection does not apply if the crypto-fintech fails.¹³⁰ In a relationship like that of Voyager and Metropolitan, a broad statement about deposits being FDIC-insured omits material information when it does not differentiate between deposits being insured in the event of a Metropolitan failure but uninsured in the event of a Voyager failure and does not explain the extent of the Metropolitan FDIC insurance coverage.¹³¹ If the FDIC were to specifically require the bank to clarify such a statement, this would help prevent misrepresentations and would allow consumers to make informed decisions with full confidence in the FDIC-insured status of their deposits, furthering the FDIC's mission.¹³²

In the “Risk Management and Governance Considerations” section of its Advisory, the FDIC suggests such action—it asserts that uninsured entities, such as crypto-fintechs, need to ensure their communications regarding FDIC insurance are “clear and conspicuous,” but it also states that insured banks need to “assess, manage, and control risks arising from all third-party relationships, including those with crypto companies.”¹³³ It further recommends that insured banks confirm and monitor these partners to ensure they do not misrepresent FDIC insurance coverage in order to mitigate risk to the bank, recommending they closely review and monitor all marketing and disclosure materials for accuracy and clarity.¹³⁴ Although the June 2022 Rule was enacted to implement § 18(a)(4) of the FDI Act, which contains prohibitions on false advertising that seemingly apply to the entity that actually commits the misrepresentation,¹³⁵ it expands the prohibitions, extending the scope to cover not only these entities, but also an entity who aids and abets in any of the prohibited

130. See Pete Schroeder, *U.S. Regulators Order Voyager Digital to Stop ‘False and Misleading’ Deposit Insurance Claims*, REUTERS (July 28, 2022, 5:45 PM), <https://www.reuters.com/business/finance/us-regulators-order-voyager-digital-stop-false-misleading-deposit-insurance-2022-07-28/> [<https://perma.cc/J6Y9-LBHY>] (explaining that Voyager's vague advertisements of insurance misled consumers who did not understand the extent of Metropolitan's FDIC insurance).

131. See § 328.102(b)(3)(ii) (“[A] statement regarding deposit insurance violates this section, if . . . the statement omits material information that would be necessary to prevent a reasonable consumer from being misled . . .”).

132. See *supra* note 33 and accompanying text.

133. FDIC ADVISORY, *supra* note 56.

134. *Id.*

135. Federal Deposit Insurance Act (“FDI Act”) § 2[18], 12 U.S.C. § 1828(a)(4) (2018).

misrepresentations, bringing such a regulatory scheme within the scope of this rule.¹³⁶

The December 2022 Rule also moves in this direction, providing that a party's failure to disclose that it is a non-bank or that its products are not FDIC-insured is a material omission, and therefore, a misrepresentation.¹³⁷ It also states that "sound risk management would compel [banks] to be aware of the activities of [third-party partners] to ensure that the availability of deposit insurance is not being misrepresented," and accordingly, banks would "establish policies and procedures that include provisions related to the" third party's deposit related services.¹³⁸ However, even the December 2022 Rule could go further in affirmatively outlining liability for banks whose non-bank partners misrepresent their FDIC insured status. While suggesting that banks create policies to ensure their partners are not misrepresenting their FDIC-insured status, the December 2022 Rule still seems to maintain emphasis on enforcement through the banks' partners.¹³⁹

Additionally, there may be some room for the CFPB to enforce this regulation against FDIC-insured banks under its authority to address unfair, deceptive, or abusive acts or practices—such as those which the CFPB can reasonably conclude are "likely to cause substantial injury to consumers" that cannot be reasonably avoided and do not provide benefits to consumers or competition that outweigh the substantial injury.¹⁴⁰ The CFPB may prescribe rules aimed at preventing such acts "in connection with any transaction with a consumer for . . . or the offering of a consumer financial product or service."¹⁴¹ As such, the CFPB could promulgate rules that require FDIC-insured banks to monitor and correct misrepresentations by their crypto-fintech partners, as the practice of partnering with a crypto-fintech to provide deposit accounts and knowingly allowing them to misrepresent their FDIC-insured status could cause substantial injury to consumers, as has happened with Voyager, and there is not an

136. 12 C.F.R. § 328.100.

137. FDIC Official Sign and Advertising Requirements, False Advertising, Misrepresentation of Insured Status, and Misuse of the FDIC's Name or Logo, 87 Fed. Reg. 78017, 78023-24 (proposed Dec. 21, 2022) (to be codified at 12 C.F.R. pt. 328).

138. *Id.* at 78025.

139. *Id.* at 78025-26.

140. Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank") § 1031(a), (c)(1) 12 U.S.C. § 5531(a), (c)(1) (2018).

141. Dodd-Frank § 1031(b)-(c)(1), 12 U.S.C. § 5531(b)-(c)(1).

identifiable countervailing benefit to consumers or competition.¹⁴² In fact, these crypto-fintech partnerships can be incredibly lucrative, so it would not provide a benefit to banking competitors to allow some banks to enter into partnerships without assuming any responsibility for misrepresentations by their partner.¹⁴³

Based on the FDIC Advisory's risk management considerations and the plain language of both the June 2022 Rule and the December 2022 Rule, it seems the FDIC has contemplated an approach in which FDIC-insured banks play an active role in preventing misrepresentation, and it may be in a position to enforce its rules, at least partially, through banks.¹⁴⁴ If they do so, other agencies, such as the CFPB, could follow, as a broader reading of the CFPB's unfair, deceptive, and abusive acts and practices authority could potentially allow the CFPB to pursue enforcement under the Dodd-Frank Act.¹⁴⁵

V. CONCLUSION

The FDIC has indicated its interest in pursuing regulation of financial services providers that share misleading statements about their FDIC-insured status and has noted a particular interest in fintechs, and crypto-fintechs would be wise to evaluate all statements on any platforms to ensure their compliance.¹⁴⁶ The resolution of the Voyager investigation remains to be seen, but crypto-fintechs can certainly learn from this as it unfolds and adjust their actions accordingly.¹⁴⁷ The more clarity a bank can provide, the better, and in keeping with the spirit of

142. See *supra* note 140 and accompanying text.

143. See Regan, *supra* note 77 (“Deposits from digital-currency customers like Voyager were the fastest-growing segment for Metropolitan in recent years, going from just \$117 million in the fourth quarter of 2020 to \$1.5 billion at the end of [2021].” Although deposits dropped to \$1.1 billion in the first quarter of 2021, “that was still about 19% of the bank’s \$5.9 billion in total deposits.”).

144. See FDIC ADVISORY, *supra* note 56 (detailing actions that FDIC-insured banks should take to monitor their uninsured partners in the risk management section of the letter).

145. See *supra* notes 140–143 and accompanying text.

146. See DAVIS POLK, *supra* note 11 (noting that the FDIC’s belief that non-banks will primarily be affected by its new regulation indicates that the FDIC may target fintechs with bank partnerships and that the CFPB has released a circular highlighting its interest in the regulation); CONSUMER FIN. PROT. BUREAU, *supra* note 12, at 1 (noting the rule may be “particularly relevant” to fintechs and that misrepresentations about deposit insurance may violate the Consumer Financial Protection Act).

147. See Gracia Santillana Linares, *supra* note 76 (explaining the FDIC investigation is still ongoing and the ultimate result and sanctions will depend on how Voyager responds).

the FDI Act’s policy goals of maintaining confidence in FDIC insurance and the American banking system, insured banks that partner with crypto-fintechs can, and should, ensure their crypto-fintech partners state not only when a deposit is FDIC-insured and the extent of that insurance but also expressly state when it is not FDIC-insured.¹⁴⁸ This can help avoid omission of material information and can prepare banks and crypto-fintechs for any future, stricter regulations that may, and arguably should, come.

LAUREN S. PLESS*

148. *See* False Advertising, Misrepresentation of Insured Status, and Misuse of the FDIC’s Name or Logo, 87 Fed. Reg. 33415, 33415 (June 2, 2022) (to be codified at 12 C.F.R. pt. 328) (explaining that this regulation is intended to create more transparency and “promote[] stability and confidence in FDIC deposit insurance and the nation’s financial system.”).

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