

Via Electronic Mail

January 19, 2024

Mark Elenowitz  
President  
Horizon Globex GmbH  
[horizon@horizonfintex.com](mailto:horizon@horizonfintex.com)  
[hello@upstream.exchange](mailto:hello@upstream.exchange)

RE: Potential Violations of Section 18(a)(4) of the Federal Deposit Insurance Act

Dear Mr. Elenowitz:

The Federal Deposit Insurance Corporation (“FDIC”) has reason to believe that Horizon Globex GmbH (“Horizon”), which operates Upstream Exchange, has made false and misleading statements, directly or by implication, concerning Upstream Exchange’s insured status and its accounts’ insured status, in violation of section 18(a)(4) of the Federal Deposit Insurance Act (“FDI Act”), 12 U.S.C. § 1828(a)(4) (“Section 18(a)(4)”), and its implementing regulation, 12 C.F.R. Part 328, Subpart B (“Part 328”). We hereby demand that you cease and desist and take immediate corrective actions to address these false and misleading statements, as more fully set forth below.

Section 18(a)(4) and Part 328 prohibit any person from representing that an uninsured financial product is insured or from knowingly misrepresenting the extent or manner in which a deposit or obligation is insured under the FDI Act, whether by making affirmative statements or by omitting material information. Under Part 328, no person may represent or imply that any uninsured financial product is insured or guaranteed by the FDIC as part of an advertisement, solicitation, or other publication or dissemination. 12 C.F.R. § 328.102(a)(2). Moreover, a statement regarding deposit insurance would be deemed to omit material information if the absence of such information could result in a reasonable consumer being unable to understand the extent or manner of deposit insurance provided. *See generally* 12 C.F.R. 328.102(b). For example, under Part 328, it is a material omission for a non-insured entity that advertises deposit insurance to fail to identify the insured depository institution (IDI) with which the representing party has a direct or indirect business relationship for the placement of deposits and into which the consumer’s deposits may be placed. 12 C.F.R. § 328.102(b)(5). The FDIC has the authority to enforce these provisions against any person or entity. Enforcement tools available to the FDIC include the authority to issue cease-and-desist orders and to assess civil money penalties for violations of Section 18(a)(4) and Part 328. *See* 12 C.F.R. §§ 328.104-107.

Certain statements by Horizon, which appeared on the Upstream website and other media, have come to the attention of the FDIC as containing apparent misrepresentations about FDIC deposit insurance. These statements include, but are not limited to, the following:

- In a blog post advertising Non-Fungible Tokens (NFTs), “Keep your brand and fans protected on Upstream’s regulated trading platform, FDIC-insured accounts up to \$250K.” *See* <https://blog.horizonfintex.com/5-ways-nfts-add-value-to-traditional-rewards/>

- On Mr. Elenowitz’s LinkedIn page, “FDIC Insurance: Upstream accounts, U.S. and non-U.S., are FDIC-insured up to \$250,000.” See [https://www.linkedin.com/posts/mark-elenowitz-45a438\\_nutriband-inc-announces-application-for-activity-6982745443415785472-hD6U](https://www.linkedin.com/posts/mark-elenowitz-45a438_nutriband-inc-announces-application-for-activity-6982745443415785472-hD6U)
- In a press release, “All Upstream accounts, U.S. and non-U.S., are FDIC-insured up to \$250,000.” See <https://www.accesswire.com/710442/Upstreams-NFT-Market-Expands-with-Cash-Accounts-Powered-by-Nevada-Trust-Company-Digital-Trust>

All of the statements highlighted above appear to represent or imply that: (1) Upstream itself is FDIC-insured; (2) FDIC insurance is available for NFTs and other uninsured financial products; and (3) FDIC insurance would protect against NFT-related losses. FDIC deposit insurance does not cover NFTs and only covers insured funds in accounts at IDIs in the event of the IDI’s failure. Accordingly, Horizon’s statements appear to violate Section 18(a)(4) and Part 328.

Furthermore, Horizon’s representations regarding the availability of FDIC insurance fail to identify the IDI(s) into which consumers’ funds may be placed. The name of the IDI(s) is necessary for a consumer to understand the extent or manner of deposit insurance provided, and the failure to identify the IDI(s) is deemed to be a material omission in violation of Part 328. In addition, the statements about FDIC deposit insurance coverage which do not identify the IDI(s) may lead a reasonable consumer to believe that Upstream itself is an IDI that provides FDIC deposit insurance directly to consumers.

Based on the information available to the FDIC, it appears that the statements discussed above regarding FDIC deposit insurance violate Section 18(a)(4) of the Act and Part 328. Consequently, the FDIC hereby demands the following corrective actions:

1. You shall immediately remove any and all statements, representations, or references that suggest in any way, explicitly or implicitly, that: (a) Upstream itself is FDIC-insured; (b) any NFTs, cryptocurrency, or other uninsured financial products are or could be protected by FDIC deposit insurance; (c) FDIC deposit insurance may provide coverage for any event other than the failure of an IDI; or (d) FDIC deposit insurance may provide protection or coverage in any manner or extent other than those set forth in the FDI Act, from the Upstream website (including any blog posts, pop-ups, hyperlinks, or chatbots) and any other websites operated by Horizon, LinkedIn, X (formerly known as Twitter) and any other social media platforms (including both corporate accounts and personal accounts of senior management of Horizon, or advertisements paid by Horizon), the mobile app, online outlet, and any other forms (electronic or hard copy) of marketing, advertising, or other consumer-facing publications.
2. You shall cease and desist from making any statements, representations, or references that suggest in any way, explicitly or implicitly, that: (a) Upstream itself is FDIC-insured; (b) any NFTs, cryptocurrency, or other uninsured financial products are or could be protected by FDIC deposit insurance; (c) FDIC deposit insurance may provide coverage for any event other than the failure of an IDI; or (d) FDIC deposit insurance may provide protection or coverage in any manner or extent other than those set forth in the FDI Act, from the Upstream website (including any blog posts, pop-ups, hyperlinks, or chatbots) and any other websites operated by Horizon, LinkedIn, X and any other social media platforms (including both corporate accounts and personal accounts of

senior management of Horizon), the mobile app, online outlet, and any other forms (electronic or hard copy) of marketing, advertising, or other consumer-facing publications.

3. To the extent that Horizon's representations relate to FDIC pass-through deposit insurance arising from the placement of consumer funds into accounts at an IDI(s), you shall amend such statements to: (1) clearly and accurately identify the nature of such deposit insurance, and (2) identify the IDI(s) with which Horizon has a direct or indirect relationship for the placement of deposits and into which consumers' funds may be deposited.
4. Within fifteen (15) days of receipt of this letter, you shall provide written confirmation to the FDIC that Horizon has fully complied with the requests set forth above. Such confirmation shall detail all efforts undertaken to comply with this letter, including all efforts to identify and locate all misrepresentations and the specific actions you took.

If you believe that any statement Horizon or its officers have made related to FDIC deposit insurance is true and accurate, please provide a full listing of all such statements about deposit insurance on any medium or platform, which you allege to be true and accurate, together with information and documentation supporting the basis for your belief in the accuracy of all such statements, no later than fifteen (15) days from the date of this letter.

Failure to timely respond to this letter may result in the FDIC taking appropriate action as authorized by the FDI Act and any other applicable law or regulation. Be advised that this letter is intended to address only potential violations of Section 18(a)(4) and Part 328, as described above. Your response to this matter may or may not affect our conclusions as to the potential violations identified above, and does not preclude the FDIC from taking any further action, as appropriate, with respect to the foregoing or any other violations of laws or regulations. Moreover, nothing in this matter bars or estops any other federal or state agency from investigating, or pursuing actions for, violations of other laws and regulations.

This letter constitutes an advisory letter within the meaning of 12 C.F.R. § 328.106. Accordingly, pursuant to 12 C.F.R. § 328.102(b)(6), continuing and/or future false or misleading deposit insurance representations may be deemed to have been knowingly made.

Should you have any questions about the contents of this letter, please contact Counsel [REDACTED] at [REDACTED]@fdic.gov.

Sincerely,

/s/  
Seth P. Rosebrock  
Assistant General Counsel, Enforcement  
Federal Deposit Insurance Corporation