MCINTYRE & LEMON, PLLC
ATTORNEYS AND COUNSELORS AT LAW
MADISON OFFICE BUILDING
1155 15TH STREET, N.W.
SUITE 1101
WASHINGTON, D.C. 20005
TELEPHONE (202) 659-3900
FAX (202) 659-5763

Via Email: comments@fdic.gov

May 30, 2013

Robert E. Feldman, Executive Secretary
Attention: Comments
Federal Deposit Insurance Corporation
550 17th Street NW
Washington, DC 20429

Re: McIntyre & Lemon, PLLC's Comments on the FDIC's Proposed Guidance on Deposit Advance Products

Dear Mr. Feldman:

Thank you for the opportunity to comment on the Federal Deposit Insurance Corporation's (FDIC) Proposed Guidance on Deposit Advance Products (Proposed Guidance).[1] Our firm represents various banks and other financial institutions, and it is from that experience that we offer the following comments.

While we appreciate the agency's effort to enhance bank safety and soundness, that objective is not achieved by the Proposed Guidance. Rather, this Proposed Guidance provides no factual basis to substantiate concerns about safety and soundness, micromanages the underwriting of deposit advance products, would have a chilling effect on the offering of these products, fails to recognize the Consumer Financial Protection Bureau's (CFPB) significant role in consumer protection, and adopts policy changes without the benefit of regulatory rulemaking. Consequently, not only is this proposed guidance harmful to banks' deposit advance business, it harms consumers by limiting competition and restricting access to needed short-term small-dollar credit.

The FDIC's Safety and Soundness Concerns Lack a Factual Basis

The Proposed Guidance cursorily concludes that deposit advance products pose a safety and soundness risk. That conclusion is not based on any facts in the record and is contrary to industry's understanding of the risks posed by these products.

[1] 78 Fed. Reg. 25268 (April 30, 2013).

Deposit advance products provide subprime borrowers with higher-cost credit – credit that they might not otherwise be able to obtain. The small dollar amount of deposit advance products indicates that even a large program would constitute a minimal amount of a bank's total assets and, if uncollectible, would not affect a bank's safety and soundness. Moreover, rather than pose a reputational risk for banks, this product fills a valuable short-term need for the bank's current customers. As a result, deposit advance products can enhance a bank's reputation within this population, helping subprime consumers manage financial shortfalls, avoid late payment fees, maintain essential services including utilities and healthcare, and prevent damage to their credit history.

Recitation of Applicable Laws Has a Chilling Effect

The Proposed Guidance summarizes the laws and regulations that apply to banks offering deposit advance products. Unfortunately, the Proposed Guidance also applies each law to deposit advance products using sweeping generalities without any factual or evidentiary basis and in a manner that appears designed to intimidate regulated institutions and chill the industry's development of innovative credit products.

For example, the Proposed Guidance states that "[d]eposit advance products may raise issues under the FTC Act depending on how the products are marketed and implemented" and that analysis of the law is fact specific. But that is the case with respect to *any* consumer financial product. Indeed, the Proposed Guidance does not provide any evidence that there is a heightened risk or incidence of FTC Act violations associated with deposit advance products. The Proposed Guidance also implies that "steering or targeting certain customers on a prohibited basis toward deposit advance products while offering other customers more favorable credit products" may result in an Equal Credit Opportunity Act violation. Again, the Proposed Guidance provides no evidence that these products are more subject to being "steered" than other consumer financial products.

Supervisory Expectations Amount to Micromanagement

The supervisory expectations outlined in the Proposed Guidance amount to unprecedented micromanagement of a single credit product without any factual basis for doing so, and it will severely restrict the availability of short-term small-dollar credit to consumers who benefit the most from such credit.

Deposit advance product fees are commensurate with the risk the products represent and the limited underwriting that is conducted when issuing these loans. Given the small amount of principal loaned, it would be cost prohibitive to perform the extensive underwriting analysis proposed. Moreover, banks do not have access to much of the data the guidance would require for consideration, including "typical recurring and other necessary expenses such as food, housing, transportation and healthcare, as well as other outstanding debt obligations." Many of these items may be paid for by cash, other forms of credit, or by members of a borrower's family and are not appropriate for inclusion as an underwriting factor for short-term small-dollar deposit advances.

Additionally, the Proposed Guidance would micromanage the product by requiring: that the customer's relationship with the bank be at least six months old; that adequate deposits and withdrawals occur for at least six months before loan closing; that the consumer has a one-month cooling-off period; and that eligibility be reassessed every six months, among other specific requirements. The Proposed Guidance includes no analysis as to why any of these requirements would address safety and soundness concerns or result in additional consumer protection.

The Consumer Financial Protection Bureau's Role

The FDIC's Proposed Guidance raises consumer protection concerns surrounding repetitive use of the products and the effect on consumers' long-term financial stability. While the FDIC's principal responsibility is maintaining banks' safety and soundness, the Consumer Financial Protection Bureau's (CFPB) sole mission is consumer protection and it is in a better position to issue rules governing these products. Moreover, the CFPB has publicly committed to being a data driven agency and recently published a report on deposit advance products and payday loan products. We encourage the FDIC to defer to the CFPB for the issuance of any new consumer protection regulations governing deposit advance products, or in the alternative, coordinate its review of deposit advance products with the CFPB and base any proposed regulations on sound data.

Policy Changes Should be Set by Regulation, Not Guidance

If the FDIC proceeds with adopting the policy changes outlined in the Proposed Guidance, we urge the agency to afford these changes the full benefit of regulatory rulemaking procedures. A more robust analysis of the specific policy changes and lengthier period for interested parties to comment would be appropriate.

Conclusion

In sum, the FDIC's Proposed Guidance would restrict the sale of deposit advance products, decrease competition, and make it more difficult for subprime consumers to obtain needed credit.

Thank you for your consideration.

Sincerely,

McINTYRE & LEMON, PLLC

Chrys D. Lemon
Adam D. Maarec