The Voice of the Retail Banking Industry

January 21, 2019

Submitted Electronically: *Comments@fdic.gov*

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

Re: RIN 3064-ZA04 FDIC Request for Information on Small-Dollar Lending

Dear Mr. Feldman,

The Consumer Bankers Association ("CBA")[1] appreciates the opportunity to provide our comments in response to the Federal Deposit Insurance Corporation's ("FDIC" or "Agency") Request for Information on Small-Dollar Lending ("RFI"). CBA strongly supports effective consumer protections and, specifically, the principles of choice, transparency and fairness in customer relationships.

CBA commends the FDIC for examining the small-dollar credit marketplace and how lenders in this market meet consumers' need for credit. We believe it is important that consumers receive the products they want and need at fair prices and on transparent terms. We believe it is equally important to weed out bad actors that engage in fraudulent transactions or violate federal laws. However, we believe current guidance and rules discourage traditional depository lenders from remaining in or entering this market.

The FDIC has implemented guidance and the Consumer Financial Protection Bureau ("CFPB") has finalized a strict and prescriptive rule that will stifle progress in the small-dollar market. The agencies have effectively created conditions that call for a level and cost of compliance that is so great many depository lenders simply cannot make these loans. These hurdles only reduce efficiencies, restrict flexibility and reduce consumer options for small-dollar

[1] The Consumer Bankers Association is the only national financial trade group focused exclusively on retail banking and personal financial services—banking services geared toward consumers and small businesses. As the recognized voice on retail banking issues, CBA provides leadership, education, research, and federal representation for its members. CBA members include the nation's largest bank holding companies as well as regional and super-community banks that collectively hold two-thirds of the total assets of depository institutions.

liquidity. Only simple, flexible rules/guidance will foster the innovation needed to meet consumer demand for value, speed of fund availability, and ease of application.

Accordingly, in addition to rescinding the FDIC's 2013 guidance, CBA urges all the Federal banking regulators to work together to issue rules that:

- are based on sound evidentiary conclusions, especially with regard to bank-offered products;
- provide for reasonable and complete consumer protections;
- provide for scalability and ease of administrative burdens to allow greater reach to the unbanked and underbanked;
- provide an option for banks to offer small-dollar loans as a line of credit;
- provide banks with a clear and easily applied standard that consumers will understand; and
- allow for flexibility to meet consumer needs through innovative and competitive credit options.

We appreciate the opportunity to share our suggestions and look forward to working with the FDIC as it considers the issue of small-dollar credit.

Discussion

Today, the need for accessible small-dollar credit for consumers is growing. A stagnant economy for many has left consumers with less of a cushion for emergencies, tarnished credit scores, and reduced credit options; making access to reasonably priced small-dollar liquidity products even more important. While various entry-level credit products exist to meet a wide range of these needs, including traditional credit cards, personal loans, and other forms of credit, many consumers unfortunately cannot qualify for them.

According to the Federal Reserve, nearly half of all American adults say they cannot cover an unexpected expense of $400.[2] Similarly, a recent Bankrate article states "63% of American adults say they are unable to pay an unexpected expense with their savings…"[3] A Center for Financial Services Innovation ("CFSI") study found that more than a third of all households say they frequently or occasionally run out of money before the end of the month. Further, more than four in ten households struggle to keep up with their bills and credit payments.[4]

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[2] Board of Governors of the Federal Reserve System - *Report on the Economic Well-Being of U.S. Households in 2015* (May 2016)

[3] http://www.bankrate.com/finance/consumer-index/money-pulse-1215.aspx?ic_id=Top_Financial%20News%20Center_link_3

[4] Center For Financial Services Innovation - *Understanding and Improving Consumer Financial Health in America* (March 2015)

In light of the high consumer need for these loans, the Federal banking regulators, including the FDIC, have historically encouraged depository institutions to enter or remain in the small-dollar lending market. In response, banks developed products carefully designed to ensure strong safeguards at reasonable prices. Bank-offered products are by nature well understood by the consumers who use them and are an important source of credit for consumers' liquidity needs. Banks would like to continue to make safe, affordable, and easy to access small-dollar loans to consumer in need.

2013 Regulatory Guidance

In late 2013, the Office of the Comptroller of the Currency ("OCC")[5] and the FDIC[6] separately finalized restrictive supervisory guidance on deposit advance products ("DAP"), a product designed and well-suited for small-dollar liquidity needs. The guidance left only one bank offering DAP services remaining in the market.[7] While several reasons contributed to banks exiting from the market, the primary force was the supervisory guidance that was inconsistent with the structure and use of deposit advance products, which provide consumers immediate access to the exact amount of money needed.

In its 2013 guidance, the FDIC indicates the agency is concerned bank-offered deposit advance products could pose significant safety and soundness risks for banks. However, there is little evidence to support the premise that these products pose such risks. Further, we believe that using safety and soundness as the basis for market intervention without clear evidence of risk or careful consideration of the consequences to consumers is a bad precedent and contrary to the policy objective of the prudential regulators to support development of innovative, fair and transparent financial products and services by insured financial institutions.

It is important to note some banks had offered deposit advance products for many years with little or no safety and soundness concerns and we are unsure as to the basis for the FDIC's concern over institutional safety and soundness. Close regulatory examination of these products yielded relatively positive results and, importantly, demonstrated that close working relationships between banks and regulators can result in the development of prudent and fair products. Moreover, as discussed below, bank-offered deposit advance products involve materially less risk of harm to consumers than similar products offered by non-depository providers.

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[5] OCC - *Guidance on Supervisory Concerns and Expectations Regarding Deposit Advance Products* (November 2013): http://www.occ.treas.gov/news-issuances/federal-register/78fr70624.pdf . Rescinded 2018 - Under acting Comptroller Keith Noreika the OCC rescinded the small dollar lending guidance that had made it extremely difficult for national banks to offer small dollar lending products to their customers. In May 2018, the OCC issued Bulletin 2018-14, which stated the OCC would be working with the CFPB to help ensure a product banks can issue to meet customer needs.

[6] FDIC - *Guidance on Supervisory Concerns and Expectations Regarding Deposit Advance Products* (November 2013): https://www.fdic.gov/news/news/press/2013/pr13105a.pdf .

[7] The remaining depository offering a deposit advance product is supervised by the Federal Reserve and not subject to guidance issued by the OCC or FDIC.

Additionally, it is clear the FDIC's 2013 guidance is an attempt to effectively regulate consumer protections through supervisory guidance. However, as you know, the function of interpretive guidance is to clarify or explain existing law and should not be used to impose new, substantive regulatory requirements.[8] Hence, we are concerned the FDIC circumvents proper administrative procedures and that the FDIC has assumed consumer protection authority transferred to the CFPB under the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank Act").[9]

CFPB Rulemaking

On October 5, 2017, the CFPB released a final rule regarding small-dollar lending, which requires lenders, among other things, to determine, pursuant to an overly burdensome standard, whether consumers have the *ability to repay* (ATR) their loans, prior to issuing certain short-term small dollar, payday, and auto title loans.[10] The rule requires an excess of added manual processes including complicated income verifications and "reasonable" projections of future expenses. Other unsecured consumer loans do not require lenders to verify income; the consumer merely needs to state their income. Verifying paystubs, tax forms, and other documentation introduces a manual process that the consumer may not be prepared for, delaying their access to much-needed funds and potentially driving them to an unregulated, unsafe provider to obtain it.

The rule also calls for reports, restrictions and refunds of fees under certain conditions. In total, these provisions serve to negatively affect the pricing and fundamental purposes of small-dollar products and require countless hours of new compliance and oversight. Under these conditions, with a high cost of compliance, the lenders the CFPB would like to see offer more affordable options as an alternative to payday providers simply will not be willing to participate in this space. These new restrictions and requirements unduly hinder the expansion of small-dollar lending products offered by banks and will lead to further retractions in the

[8] 5 U.S.C. §553(b)(A)-(B) (2010) provides a statutory exemption from the notice-and-comment requirements set forth in the Administrative Procedures Act ("APA") for agencies with respect to "interpretative rules, general statements of policy." In *Prof'ls & Patients for Customized Care v. Shalala*, 56 F.3d 592, 595 (5th Cir. 1995) the court noted that "if a rule is 'substantive' the [APA] exemption is inapplicable, and the full panoply of notice-and-comment-requirements must be adhered to scrupulously"); *see also Hemp Indus. Ass'n v. DEA*, 333 F.3d 1082, 1087 (9th Cir. 2003) (noting that "courts have struggled with identifying the difference between legislative rules and interpretive rules," but have generally arrived to the conclusion that "interpretive rules merely explain, but do not add to, the substantive law that already exists in the form of a statute or legislative rule") (*citing to Yesler Yerrace Community Council v. Cisneros*, 37 F.3d 442, 449 (9th Cir. 1994). The Court also noted that "[l]egislative rules, on the other hand, create rights, impose obligations, or effect a change in existing law pursuant to authority delegated by Congress." *Id.*

[9] Pub. Law 111-203.

[10] 12 CFR 1041 – The CFPB is expected to reopen its prior rulemaking in Q12019 to make amendments that would allow for ease in lending for small-dollar products and rescind some of the more restrictive provisions of the current rule.

marketplace. CBA maintains that only easily implemented standards will allow banks to make quick loans at reasonable prices, and we have encouraged the CFPB to create a clear lane for compliance minded lenders to step in to meet consumer needs.[11]

Requested Action

Both the FDIC's guidance and the CFPB's rule make it difficult for banks to provide small-dollar lending, pushing consumers that need access to credit further outside of the heavily regulated bank space, leaving them with fewer, unregulated, and more expensive options, if any. The need for this credit will not simply disappear with the expected constriction of the payday industry. Consumers will ultimately pay higher prices for liquidity options or may face increased delinquencies and late payments.

CBA firmly believes consumers benefit from the competition that banks add to the market for small-dollar credit products. More providers in the market will ensure greater competition and innovation, which will ultimately lower the cost of small-dollar credit for consumers. Overly restrictive regulations often lead to less competition and an increase in prices. According to a study conducted by CFSI, continued market competition and product innovation would be advantageous in expanding small-dollar, short-term lending and may ultimately help lower the cost of these products for both providers and consumers.[12] We believe forcing further monetary constraints on the consumers they intend to help directly contradicts the FDIC's and the CFPB's intent. This principle is especially true for designing products and services that will provide the under-banked and unbanked with greater access to mainstream banking opportunities.

Accordingly, CBA encourages the FDIC to rescind its 2013 guidance in order to allow FDIC-chartered banks to participate in the small-dollar lending market. The reality is that bank products can help countless U.S. consumers obtain access to much needed credit, rather than pushing them to unregulated pawnshops, offshore lenders, and fly-by-night entities. The agencies now have the opportunity to craft rules that will support high quality small-dollar products that are made with confidence in the borrower's ability to repay; are structured to support repayment; are priced to align profitability for the provider with success for the borrower; create opportunities for greater financial health; have transparent marketing, communications and disclosures; and are accessible and convenient for borrowers.

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[11] On January 16, 2018, the CFPB announced it intends to engage in a rulemaking process to reconsider the rule. Compliance with the rule by lenders is not mandatory until August 19, 2019, so the rulemaking would take place between now and then.

[12] According to study conducted the Center for Financial Services Innovation entitled *A Fundamental Need: Small-Dollar, Short-Term Credit* (2008), continued market competition and product innovation would be advantageous in expanding small-dollar, short-term lending and may ultimately help lower the cost of these products for both providers and consumers.

For the many reasons discussed below, we further urge the FDIC to reexamine the utility of bank-offered deposit advance products, and work closely with the other Federal regulators to develop consistent regulation and guidance that will allow banks to operate within clear standards in order to avoid regulatory conflict.

Deposit Advance Products

The media coverage of "payday lending products" incorrectly associates bank-offered deposit advance products with traditional payday lending, with little or no distinction in how bank-offered product features allow for greater consumer protection and better customer pricing. There appears to be widespread misunderstanding about how the products work and how consumers use them responsibly to manage their financial needs. Additionally, many consumer groups have unjustifiably raised concerns over bank-offered deposit advance products. Similar to press accounts, these groups have likened the deposit advance products to non-depository payday lending and have all but ignored the significant positive features in product design and utility.

However, there is little evidence of consumer dissatisfaction with bank-offered deposit advance products. To the contrary, consumer satisfaction with these products is often very high with below average complaint rates. For example, in one bank's survey of deposit advance customers, 90 percent of respondents rated their overall experience with the product as "good" or "excellent." In another survey by a different bank, the customer satisfaction rating ranked higher for the bank's deposit advance product than any other product offered by that bank. Similarly, in yet another bank's survey, more than 95 percent of customers said they were "satisfied" or "highly satisfied" with the product.

Complaint levels for deposit advance products historically were extremely low across the board. One bank that offered the product registered just 41 complaints over the course of a year, representing a mere .018 percent of all active users of that bank's deposit advance product. This percentage equates to roughly one in every 5,500 users. Whether taken together or considered separately, the high customer satisfaction ratings and low levels of customer complaints for deposit advance products refute claims that these products pose significant reputational risk.

There are significant differences between bank-offered deposit advance products and the services offered by non-depository lenders. Bank-offered products have built-in controls designed to limit the usage of the product. These controls include limits on loan amounts, automatic repayment through a linked depository account and "cooling" periods, all designed to keep customers from relying too heavily on the product and to ensure the customer's ability to repay the loan.

Making deposit advance even more transparent and less risky, consumers who use bank-offered deposit advance products already have a relationship with the bank. Deposit advance is an integrated feature added to the customer's existing checking account and is not a stand-alone product, allowing banks to better understand a customer's financial situation and ability to repay. These services are only available to established customers who have maintained checking accounts in good standing with regularly scheduled direct deposits for a minimally prescribed period of time. The maintenance of this relationship is of the utmost importance to a bank. Without a positive banking experience, customers would look elsewhere to meet financial needs and banks would not only lose the opportunity to service the customer's short-term liquidity needs, but also the chance to establish or maintain a long-term banking relationship.

Bank-offered deposit advance products offer customers greater account security. With these products, customers do not have to provide sensitive bank information to third-party financial service providers, opening the door to the possible compromise of sensitive financial information. Accordingly, all personal account information is kept in house, providing a significant security advantage to non-depository services.

The banking industry supports clear and conspicuous disclosures for all financial products and services that assist consumers in making informed decisions about managing their finances. Banks that provide deposit advance products adhere to strict disclosure standards and all product terms are made clearly and fully transparent to customers prior to product use. At a minimum, all deposit advance providers are bound by applicable federal laws and the customer is typically required to sign a separate, detailed terms and conditions document to activate a deposit advance line of credit.

All depository institutions that offered, or still offer, deposit advance products have limits on the amount a consumer may borrow. Although it varies from bank to bank, advances are generally limited to the lesser of a specific amount or a percentage of the total amount of a customer's monthly direct deposits. These limits ensure that there is money available to the customer for other monthly expenses after the advance is paid.

Additionally, all bank-offered deposit advance products imposed a mandatory cooling-off period to ensure customers do not depend on the product to meet their monthly financial needs. These periods are imposed to ensure deposit advance products are used for the intended purpose, namely, short-term liquidity. To manage the risk that the consumer will become reliant, a customer typically will be able to access a deposit advance product for a limited period of time at the end of which they would be required to repay the outstanding balance or completely stop using the product.

Deposit advance products have been criticized for their seemingly high costs when considering the relatively small size of the credit extended. However, in order for any product to be sustainable, not to mention safe and sound, it must be delivered in a cost-effective manner for both the provider and the customer. Previous small-dollar lending programs, such as one suggested by the FDIC,[13] have not been widely adopted by the industry because the costs to administer the programs outweigh the revenues and, hence, are not sustainable.

Furthermore, the expense of providing an open-end line of credit is nearly the same irrespective of the amount outstanding. Most deposit advance products are priced based on a percentage of the amount advanced and do not include additional costs to the consumer such as application fees, annual fees, over-limit fees, rollover or re-write fees, and late payment fees.

Regulatory Coordination

Regulators should be working closely with industry on practical solutions in order to build a foundation to fully support small-dollar lending needs. We believe this to be especially true for designing products and services that will allow the under-banked and unbanked greater access to mainstream banking opportunities.

Title X of the Dodd–Frank Act created the CFPB to specifically address issues of consumer protection surrounding financial products. To ensure equal protections across all financial products and services, the CFPB's authority to promulgate consumer protection rules extends to all providers of financial services and products including depository and non-depository institutions – authority that the prudential banking regulators do not have. Accordingly, *only the CFPB can ensure that consistent rules are applied across the entire financial services industry*. Unilateral actions by other Federal regulators are contrary to Congressional intent in creating the CFPB and directing that agency to regulate consumer financial services whether offered by banks or nonbanks. Absent across-the-board standards, consumers will be pushed into services that offer fewer protections and come at significantly greater costs. Indeed, even within the realm of Federal prudential banking supervision, banks of different charters will apply inconsistent standards with regards to deposit advance products.

For many of CBA members, the existing FDIC supervisory guidance will present a roadblock for bank-offered products, regardless of a workable final rule for the CFPB. Again, we urge the FDIC to remove its guidance and to work closely with the CFPB and the other Federal prudential banking regulators to ensure consistency across all institutions.

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Banks are in a unique position to help millions of Americans that need small-dollar credit. Banks are thoroughly supervised, amply regulated and well capitalized institutions in which U.S. consumers will find fair pricing coupled with established consumer protections.

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[13] FDIC – *Small-Dollar Loan Pilot*: https://www.fdic.gov/smalldollarloans/.

However, the overly restrictive approach currently offered by the Federal regulators will only lead to less depository participation, pushing consumers into more unfavorable alternatives with higher costs and less oversight.

CBA greatly appreciates the opportunity to share our suggestions and to work with the FDIC as it considers regulation of small-dollar credit. Should you need further information please do not hesitate to contact the undersigned directly at dpommerehn@consumerbankers.com.

Sincerely,

[redacted]

David Pommerehn
SVP, Associate General Counsel
Consumer Bankers Association