IBC
International Bancshares
Corporation

January 18, 2019

Via Email: comments@fdic.gov

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

Re: RIN 3064-ZA04; Request for Information on Small-Dollar Lending; Federal Deposit Insurance Corporation ("FDIC")

Ladies and Gentlemen:

The following comments are submitted on behalf of International Bancshares Corporation ("IBC"), a publicly-traded multi-bank financial holding company headquartered in Laredo, Texas. IBC owns five state nonmember banks serving Texas and Oklahoma. With approximately $12 billion in total consolidated assets, IBC is one of the largest independent commercial bank holding companies headquartered in Texas. The FDIC's proposal is very important to IBC's community banks, as consumer loans are among the loans its subsidiary banks originate to meet the needs of small and large borrowers. We appreciate the opportunity to comment on the FDIC's proposal.

On November 14, 2018, the FDIC issued a request for information ("RFI") seeking comments from interested parties on issues related to small-dollar lending, including steps that can be taken to encourage FDIC-supervised institutions to offer small-dollar credit products that are responsive to customers' needs and that are underwritten and structured prudently and responsibly. Specifically, the RFI solicits comments on the consumer demand for small-dollar credit products, the supply of small-dollar credit products currently offered by banks, and what the FDIC can do to better enable banks to offer responsible, prudently underwritten credit products to consumers to meet demand.

Comments

Generally

We urge the FDIC and other federal bank regulators to facilitate the establishment of bank programs that offer fair, convenient, and sustainable small dollar loans to customers. We note that in May 2018, the Office of the Comptroller of the Currency ("OCC") issued a bulletin intended to encourage its supervised institutions to offer responsible short-term, small-dollar installment loans.

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The terms for these loans would typically be two to 12 months in duration with equal amortizing payments, to help meet the credit needs of consumers.[1] The FDIC's issuance of the RFI appears to indicate that the FDIC intends to follow suit. The American Bankers Association ("ABA") has long called on regulators to remove barriers that impede banks from making small-dollar loans, and earlier this year welcomed the OCC guidance encouraging banks to make responsible short-term, small-dollar installment loans to help meet the credit needs of their customers.[2] We also note that in November 2018, a federal court granted the request of the Bureau of Consumer Financial Protection ("CFPB") to delay the August 2019 effective date of its ill-conceived rule on small dollar loans as it plans to reconsider the ability-to-repay provisions of its rule.

A 2016 study by the Federal Reserve found that nearly half of Americans -- 46% -- could not cover a $400 emergency expense without selling a possession or borrowing money.[3] Banks are eager to innovate and expand their offerings of small dollar credit products. As the OCC suggested in its bulletin, a responsible small dollar credit program can be guided by "prudent underwriting and risk-management as well as fair and inclusive treatment of customers without resorting to additional, unnecessary, and consumer unfriendly requirements."

Fair Lending

Unfortunately, through aggressive fair lending enforcement actions, federal bank regulators eliminated pricing discretion in small dollar lending and have used fair lending as a weapon against the banks including the use of disparate impact to drive nails in the coffin of the small dollar lending business previously found with community banks. Most, if not all, of small dollar lending has been pushed out to the high cost, unregulated and unlicensed predatory lenders, the payday lenders and car title lenders, and pawn shops.

Although it is likely too late for purposes of community bank small dollar consumer lending, IBC in August 2018, urged in a comment letter that the U.S. Department of Housing and Urban Development ("HUD") review and re-propose its disparate impact rule[4] so that it reflects and incorporates the framework set forth by the U.S. Supreme Court in the *Inclusive Communities* case.[5] In this way, HUD would place proper emphasis on the true objective of the fair lending laws: ensuring that lenders extend credit to prospective borrowers based on their qualifications, and similarly qualified individuals are treated alike.

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1 OCC Bulletin 2018-14 (May 23, 2018), available at https://www.occ.gov/news-issuances/bulletins/2018/bulletin-2018-14.html.

2 https://bankingjournal.aba.com/2018/11/fdic-seeks-information-on-small-dollar-loans/.

3 Board of Governors of the Federal Reserve System Reporting on the Economic Well-Being of U.S. Households In 2015, at 22 (May 2016), available at http://www.federalreserve.gov/2015-report-economic-well-being-us-households-201605.pdf.

4 https://www.federalregister.gov/documents/2018/06/20/2018-13340/reconsideration-of-huds-implementation-of-the-fair-housing-acts-disparate-impact-standard.

5 *Texas Department of Housing and Community Affairs v. Inclusive Communities Project, Inc.*, 135 S.Ct. 2507 (2015).

This obligation can be managed by compliance programs and can be embraced by all, because it assures equal opportunity and the extension of credit to all those who qualify regardless of their race, national origin, gender, age, or other prohibited characteristic. *Inclusive Communities* establishes that a prima facie case exists only when a creditor's policies result in artificial, arbitrary, and unnecessary barriers to otherwise qualified borrowers.

Absent that showing, HUD and the federal bank regulators should not expend enforcement resources that "may 'push cost-conscious defendants to settle even anemic cases'" and put them in what the Court describes as a "double bind of liability" when they are following prudent lending criteria neutrally applied to all applicants. IBC also urges HUD and the federal bank agencies to address on an interagency basis the standards for agency referrals to the U.S. Department of Justice ("DOJ") consistent with the Court's framework. We believe that there should be consensus and transparency regarding what constitutes a "pattern or practice" of discrimination based on a theory of disparate impact liability, consistent with the decision of the Court, that warrants a referral from one of the banking agencies or HUD to DOJ. Moreover, the standards should require facts establishing a prima facie case as a prerequisite to referral.

Finally, to recognize the Supreme Court's holding of the need for care when using the disparate impact theory, IBC strongly recommends that HUD and the federal bank agencies incorporate in examination procedures the Court's admonishment that when courts do find liability under a disparate impact theory, their remedial orders must be consistent with the United States Constitution.

Overdraft Protection

The CFPB, FDIC, and OCC have previously issued unnecessary, and in some cases, draconian issuances and guidance regarding overdraft protection programs which have had the effect of sharply curtailing the offering of this service to bank customers. The loss of income resulting from these changes has been significant and many banks have stopped offering rewards programs or have significantly scaled back on other benefits to consumers, including free banking products and more convenient branch offices. Unfortunately, these actions have had the unintended effect of negatively affecting consumers. We believe that many consumers actually find overdraft programs to be a convenient and needed banking service, and they choose to be covered.

Industry commentary also supports the conclusion that restrictions on overdraft services have devastating effects on consumers. In particular, there is evidence that payday lending and overdraft protection are economic substitutes, meaning that restrictions on overdraft protection would increase the use of payday lending.[6] Nevertheless, overdraft protection is a superior product to payday lending in many ways. For example, overdraft protection is limited in that banks cover only specific transactions that customers enter into, and customers must repay the amount of any overdrafts promptly.

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6 *See* Todd J. Zywicki, The Economics and Regulation of Bank Overdraft Protection, Geo. Mason Law & Econ. Research Paper No. 11-43, pg. 6 (Oct. 19, 2011).

In contrast, payday loans allow consumers to borrow "more than they need for immediate purposes."[7] As a result, some borrowers "fall into a 'debt trap' of rolling over payday loans or credit card balances."[8] Additional restrictions on overdraft fees may also push customers toward pawn shops and even illegal lenders who may take advantage of a customer's need for emergency funds.

We are not aware of any credible data demonstrating that overdraft protection programs pose safety and soundness risks for healthy banks. The facts are that these programs are generally quite profitable for most banks even after losses are accounted for from the revenues generated by such programs. Additionally, and critically, the profits banks make from overdraft protection programs enable banks to offer consumers with other retail bank products and services for free or at a nominal cost. Some of the requirements contained in the federal bank regulators' guidance imposed additional staffing and operational costs to the already burdened U.S. banking industry. Unfortunately, these facts are apparently lost to regulators who appear to be strongly discouraging banks from offering overdraft protection programs to its customers.

Finally, we note that if a consumer has been fully informed by a bank of the applicable overdraft fee amounts and the availability of alternatives to overdraft protection programs, the consumer would appear to be a very good position to make a voluntary and well-informed decision as to whether to participate in a bank's overdraft protection program without the regulators' unnecessary interference. We believe that many consumers actually find overdraft protection programs to be a convenient and needed banking service. For example, in Texas, the alternative to banks not providing overdraft protection for check transactions, is that a $30 NSF fee will be assessed, the consumer will be embarrassed, and may face additional financial costs and, potentially, criminal consequences.

We believe the previous bank regulators' issuances and guidance were promoted without regard to thoughtful and careful study of overdraft programs and their role in the credit sphere of today's marketplace. Just because you eliminate this product, doesn't mean you have eliminated the credit need.

Conclusion

Unfortunately, most, if not all, of the small dollars lenders in banks are now gone. All that is left is the "lending box." You either fit in the box, or you do not get a loan. Rebuilding the small dollar lending business with banks is likely impossible. Recruiting and training them, the lenders, and building that function in community banking is likely impossible because a very large percentage of community banks did this kind of lending as a community service. It was never a big profit center for a community bank. Now, that it is effectively gone, what incentive is there to put the program back in place especially with all the regulatory risk involved and the immense challenge and cost in recruiting and training new small dollar lenders? The regulators appear to

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[7] *Id.*, at 31.
[8] *Id.*

have gotten what they wanted, no more fair lending violations, no more small dollar consumer loans either.

Thank you for your consideration.

Respectfully,

[redacted]

Judith I. Wawroski
Treasurer & CFO
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