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The Honorable Jelena McWilliams
Chairman
Federal Deposit Insurance Corporation
550 17th Street NW
Washington, DC 20429

November 13, 2018

Dear Chairman McWilliams:

The American Bankers Association[1] wishes to express our appreciation for your willingness to meet on October 10 with representatives from institutions subject to FDIC's rule 12 CFR §370, "recordkeeping for timely deposit insurance determination." As you will recall, the meeting focused on three critical issues:

- verification of "qualifying joint accounts" (per 12 CFR §330.9);
- means to assure compliance by third-party deposit providers; and
- exclusion from the recordkeeping requirements for small-balance deposit accounts.

The purpose of this letter is to follow up on that discussion on these issues.

Verification of "Qualifying Joint Accounts"

To satisfy the signature card requirement of 12 CFR §330.9(c)(1), we proposed that FDIC consider the systemic depositor identification processes now in place throughout the industry. As stated there,

> A joint deposit account shall be deemed to be a qualifying joint account, for purposes of this section, only if:
> (i) All co-owners of the funds in the account are "natural persons" …; and
> (ii) Each co-owner has personally signed a deposit account signature card; and
> (iii) Each co-owner possesses withdrawal rights on the same basis.

As we discussed, banks have long had manual processes to meet the signature card requirement set forth above, but they typically lack a systemic means to confirm signature card compliance across all accounts coded as joint accounts. At the same time, all banks have systemic depositor identification processes in place to review new and long-standing accounts to comply with the Bank Secrecy Act (P.L. 91-508) and anti-money laundering rules. Among other things, these processes confirm the identity of all co-owners of joint accounts, including the fact that these

[1] The American Bankers Association is the voice of the nation's $18 trillion banking industry, which is composed of small, regional and large banks that together employ more than two million people, safeguard over $13 trillion in deposits and extend nearly $10 trillion in loans.

individuals are natural persons. Against this background, where a bank's records indicate that an account is a joint account, a signature card that has not been located should not prevent the account holders – who may have a long history of using the account as a joint account – from receiving the full benefit of FDIC insurance coverage as a "qualifying joint account."

We submit that current regulation permits approval of this proposal. Specifically, the signature card requirement in 12 CFR §330.9 is satisfied by a combination of (i) banks' system records showing accounts coded as joint accounts, and (ii) ongoing depositor identification processes, for the following reasons:

- 12 CFR §330.5(a)(1) directs FDIC to presume that a banks' records are accurate in coding accounts as joint accounts.[2]
- FDIC's *Information Technology Functional Guide* provides latitude for covered institutions to rely on documents other than signature cards.[3]
- Even if FDIC were to consider banks' records ambiguous absent a review for signature cards, 12 CFR §330.9(c)(3) provides discretion to consider the evidence proposed here to make determinations.[4]

During our meeting, you asked whether banks' systemic depositor identification processes are sufficiently reliable to prevent unauthorized accounts. We respectfully submit that the signature card requirement is not intended – and is ill-suited – to address unauthorized accounts. Rather, §615(e) of the Fair Credit Reporting Act (U.5 U.S.C. §1681m(e)) and its implementing regulations[5] require banks to have in place policies and procedures to prevent accounts from being opened without customers' authorization.[6]

In contrast, the signature card requirement is intended to prevent depositor fraud against the FDIC's Deposit Insurance Fund. There has not been significant incidence of depositors trying to defraud the Fund even in past periods of elevated bank failures.

In fact, signature cards themselves are an insufficient defense against fraud, because a swindler who steals a valid form of customer identification can provide a signature card. Instead, signature

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[2] See 12 CFR §330.5(a)(1) ("[I]n determining the amount of insurance available to each depositor, the FDIC should presume that deposited funds are actually owned in the manner indicated on the deposit account records of the insured depository institution.")

[3] See FDIC's *Information Technology Functional Guide* released in September 2018, at §2.3.1 ("Institutions have flexibility in how they satisfy the signature card requirement… FDIC staff also has not interpreted the rule to require any particular format for the signature card. Staff believes that records in a variety of formats could satisfy the requirement.")

[4] See 12 CFR §330.9(c)(3) ("If the deposit account records are ambiguous or unclear as to the manner in which the deposit accounts are owned, then the FDIC may, in its sole discretion, consider evidence other than the deposit account records of the insured depository institution for the purpose of establishing the manner in which the funds are owned.")

[5] For example, FDIC's rule 12 CFR §334.90(J) on "duties regarding the detection, prevention, and mitigation of identity theft."

[6] Section 615(e) of the Fair Credit Reporting Act requires financial institutions to adopt policies to prevent identify theft, which includes the opening of accounts without the customer's authorization.

cards are part of a web of interlocking antifraud measures that banks are required to take. Systemic depositor identification processes also fail to provide a "silver bullet" against some forms of fraud, but we respectfully submit that they are sufficient to address the fraud against the Deposit Insurance Fund that animates the 12 CFR §330.9 signature card requirement.

Assuring Compliance by Third-Party Deposit Providers

When we met, concerns were expressed with regard to covered institutions' ability to develop means capable of assuring that depositor information will be acquired expediently from entities that hold deposit accounts with transactional features on behalf of others. The importance of quick access to such information in case of a bank resolution was underscored. We were encouraged to draft language to include in contracts with third-party deposit providers to assure that they would deliver the requisite information promptly in such a situation.

We are heeding that recommendation. A task force is currently drafting, for close review by other covered institutions, contract language that will enforce an obligation on these third parties to provide depositor information promptly if the bank should go into resolution.

We are proceeding on the understanding that the FDIC would not be willing to certify any such contract language. However, FDIC supervisors will inevitably review covered institutions' contracts with third-party deposit providers and make judgements as to whether the 12 CFR §370.5 provisions are satisfied. It would be highly disruptive to those bank customers if the contract language were ruled inadequate, and covered institutions had to rework it and recontract, perhaps iteratively, with these entities. Moreover, covered institutions' senior management may not be willing to certify compliance with the rules, as required in 12 CFR §370.10(a)(1)(ii), if there is not clear understanding that their third-party contracts are satisfactory. Therefore, covered institutions hope to work with FDIC staff to assure that their third-party depositor agreements are in line with FDIC expectations for 12 CFR §370.5.

Once acceptable contract language has been developed, covered institutions will be prepared to offer it to third-party deposit providers. It is not clear at this point how many of these parties will be willing to agree to the new strictures. We note the provisions of 12 §CFR 370.8(b), which allow a covered institution to apply for exceptions to the recordkeeping requirements in such cases. We will have to see whether there are enough takers to make these efforts worthwhile.

Exclusion from the Recordkeeping Requirements for Small-Balance Deposit Accounts

At our meeting, we proposed excluding small credit balance systems from the 12 CFR §370 requirement, and eliminating the debt flag requirement, on the ground that the cost to banks to tie these disparate systems into their deposit systems far outweighs the benefits. We understood you to be receptive to this proposal. As a result, many banks are now preparing exception requests along these lines.

We question, however, the efficiency of all covered institution having to submit requests for the same types of account, and FDIC staff time to review and rule on the multitude of requests. We suggest instead a programmatic solution whereby covered institutions as a group develop a list of types of accounts for which FDIC staff would consider blanket exceptions from the rule. The list

would include account types such as credit card overpayments, home equity line of credit overpayments, mortgage servicing accounts (MSAs), and tax and insurance (T&I) escrow balances. Individual institutions would also note other types of accounts that warrant this treatment. We would encourage FDIC staff to take note of such other applications to see if there are other types of account that warrant universal exceptions.

Conclusion

Covered institutions have been working diligently to implement the rule since its adoption, yet the April 2020 deadline looms large, only a year and a half away. Expedient resolution of each of the issues we brought to you is essential to support these implementation efforts.

Moreover, we must stress that covered institutions' senior executives are going to be hesitant to accept the contingent liability of certifying compliance with the rule, as per 12 CFR §370.10(a)(1)(ii), if there is not complete certainty as to what is required of their institutions. To this end, resolution of these and all other issues must be spelled out in wording to make absolutely clear what is expected.

We have been grateful for the responsiveness and openness of FDIC staff to questions from covered institutions. We thank you for your time and attention to these important matters. We look forward to continuing to work with you and FDIC staff to overcome the challenges of implementing this new rule.

Sincerely,

Robert W. Strand

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American Bankers Association

Cc: Mr. Chad Davis
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