American Bankers Association
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October 10, 2018

Mr. Thomas Lyons
Section Chief
Policy and Program Development
Federal Deposit Insurance Corporation
550 17th Street, NW
Washington, DC 20429

Re: *Proposed Retirement of Certain Financial Institution Letters*

Dear Mr. Lyons:

The American Bankers Association[1] (ABA) appreciates the opportunity to provide comments on the FDIC's proposed retirement of certain financial institution letters.[2] Pursuant to a commitment found in the March 2017 EGRPRA final report,[3] FDIC reports that it has identified and proposed for elimination 374 Financial Institution Letters (FILs) that were issued between 1995 and 2017 that pertain to risk management and supervision, believed to be outdated or that convey information that is still in effect but is available elsewhere. This is over half of the risk management supervision-related FILs issued between 1995 and 2017.

ABA supports the FDIC's effort to retire these FILs, which we understand to be an effort to streamline better the information available to bankers and the public. We also appreciate that a similar review of consumer compliance-related FILs is underway.[4] Pursuant to that effort we encourage you to consider the following as exemplary of policy issues involved with some of the FILs.

[1] The American Bankers Association is the voice of the nation's $17 trillion banking industry, which is composed of small, regional and large banks that together employ more than 2 million people, safeguard $13 trillion in deposits and extend nearly $10 trillion in loans.
[2] Fed. Deposit Ins. Corp. (FDIC), Fin. Institution Letter FIL-46-2018, FDIC Seeks Comment on Proposed Retirement of Certain Financial Institution Letters. (Sept. 10, 2018). Linked here: https://www.fdic.gov/news/news/financial/2018/fil18046.pdf
[3] See FFIEC Joint Report to Congress Pursuant to the Economic Growth and Regulatory Paperwork Reduction Act 7 (Mar. 2017) ("The agencies are aware that regulatory burden does not emanate only from statutes and regulations, but often comes from processes and procedures related to examinations and supervisory oversight… ***In addition, the agencies plan to review interagency guidance, such as policy statements, to update and streamline guidance***.") (emphasis added), https://www.ffiec.gov/pdf/2017_FFIEC_EGRPRA_Joint-Report_to_Congress.pdf.
[4] *See Hearing on the Implementation of the Economic Growth, Regulatory Relief, and Consumer Protection Act before the Senate Committee on Banking, Housing, and Urban Affairs* (Oct. 2, 2018) (Statement of Jelena McWilliams, Chairman, FDIC), https://www.fdic.gov/news/news/speeches/spoct0218.html.

Overdraft Payment Supervisory Guidance (FIL-81-2010)

In 2010, the FDIC issued an FIL that imposed supervisory expectations with respect to bank overdraft payment programs (Overdraft FIL).[5] As we noted in 2010, the use of a financial institution letter to impose new regulatory requirements, particularly obligations that add significant compliance burden and limit customer choice, was tantamount to *ultra vires* rulemaking by the FDIC.[6]

The Overdraft FIL has tended to reduce customer access to overdraft services by imposing expected daily limits on overdraft fees and limiting access to overdraft services for certain customers, among other provisions.[7] The FDIC issued these supervisory expectations even though the existing regulatory framework already empowered customers to make informed and responsible account management choices when seeking, declining, or changing overdraft coverage. In 2009, the Board of Governors of the Federal Reserve System (Board) amended Regulation E to require bank customers to opt in to overdraft protection services before a bank could impose a fee for an overdraft resulting from a point of sale debit card or ATM transaction. In addition, the Board amended Regulation DD in the same year to require banks to provide customers with clear disclosures on periodic statements of all overdraft fees and by requiring that institutions only disclose funds available for immediate use when disclosing automated account balances to a customer.

Despite these amendments—and without any demonstration that further regulation of overdraft services was necessary or desirable—the FDIC issued the Overdraft FIL. The FDIC should withdraw this guidance announced in FIL-81-210.

Direct Deposit Advance Guidance

We repeat our call for the FDIC to rescind its 2013 Guidance on Supervisory Concerns and Expectations Regarding Deposit Advance Products (DDA Guidance).[8] The DDA Guidance effectively blocked from the regulated banking system a sustainable small dollar credit option valued by many customers, forcing all but one bank that offered the product to exit the market and discouraging any new entrants.

DDA services, as they were offered, permitted eligible customers, for a fee, to borrow funds that were deposited directly into the customer's account. Banks underwrote the advances using information derived from the customer's relationship with the bank, including the customer's history of incoming credits. Because of these underwriting efficiencies, banks could offer the

[5] Fed. Deposit Ins. Corp. (FDIC), Fin. Institution Letter FIL-81-2010, Overdraft Payment Programs and Consumer Protection (Nov. 24, 2010).
[6] *See* Letter from Virginia O'Neill, Am. Bankers Ass'n (ABA), to FDIC 1 (Sept. 22, 2010), https://www.aba.com/archive/Comment_Letter_Archive/Comment%20Letter%20Archive/Overdraft92210.pdf.
[7] The FIL imposed an expectation that, if a customer's account was overdrawn on more than six occasions over a 12-month period, the bank would contact the customer in person or by telephone. The FIL also imposed an expectation that a bank would institute a limit on the number of transactions that the bank would pay into overdraft each day.
[8] Final Guidance, Guidance on Supervisory Concerns and Expectations Regarding Deposit Advance Products, 78 Fed. Reg. 70,552 (Nov. 26, 2013). ABA urged then-Chairman Gruenberg to rescind the guidance in a letter sent on October 12, 2017. Letter from Virginia O'Neill, ABA, to Martin J. Gruenberg, Chairman, FDIC (Oct. 12, 2017), https://www.aba.com/Advocacy/commentletters/Documents/Ltr-Gruenberg-DepositAdvance-2017.pdf.

product at competitive rates. Knowledge of the customer's borrowing history also allowed banks to set reasonable limits on product use, without the need to resort to arbitrary and non-tailored limits. Customers appreciated that they could quickly access funds in a convenient manner (including from the customer's online bank account) and at a lower cost than competing non-bank short-term credit products.[9]

In November 2013, raising unfounded and undemonstrated safety and soundness concerns, the FDIC and the Office of the Comptroller of the Currency (OCC) each published identical guidance that expressed the agencies' "expectations" that banks would follow a prescriptive set of underwriting requirements in offering these credits, including the imposition of arbitrary cooling off periods on customers' use of the product, inconsistent with the variable reality of life and customer credit needs. There was, however, no evidence offered to suggest that the operation of DDA programs presented operational, credit, or reputational risks that were not addressed adequately by existing supervisory programs and regulation. As ABA noted at the time, the agencies' assertion of safety and soundness concerns was a thinly disguised attempt to engage in consumer financial regulation—the authority for which had been transferred to the Bureau of Consumer Financial Protection (BCFP)—and impose additional, unnecessary, and consumer-unfriendly requirements on a legal and functioning product, which, however, agency leadership disfavored.[10]

In October 2017, following BCFP regulatory action, the OCC rescinded its guidance on DDA services. In rescinding the guidance, the OCC expressed its concern that "in the years since the agency issued the guidance, it has . . . become difficult for banks to serve consumers' need for short-term, small-dollar credit,"[11] and that "consumers who would prefer to rely on banks and thrifts for these products may be forced to rely on less regulated lenders and be exposed to the risk of consumer harm and expense."[12] Consequently, the OCC guidance "may even hurt the very consumers it is intended to help, the most marginalized, unbanked and underbanked portions of our society."[13]

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[9] Customer reviews of deposit advance products were overwhelmingly positive, as demonstrated by the following results of surveys conducted by banks that offered the product:

- One bank's survey of its deposit advance customers found that 88% of customers were satisfied or very satisfied with the program. Of those customers who had also used a similar service offered by a nonbank, 95% preferred the bank's product.
- A second bank's survey of its deposit advance customers found that customers rated their experience well (4.62 on a 5-point scale), and the overwhelming majority (80%) were "very likely" to use the service again.
- In a third bank's survey, 90% of its deposit advance customers rated their experience with the product as "good" or "excellent," and 91% of customers planned to continue to use the product in the year after the survey was conducted.

[10] Letter from Richard Riese, ABA, to Office of the Comptroller of the Currency 9 (Aug. 4, 2011), http://www.aba.com/Advocacy/commentletters/Documents/OCCGuidanceLetter8411.pdf.

[11] News Release, Office of the Comptroller of the Currency, Acting Comptroller of the Currency Rescinds Deposit Advance Product Guidance 1 (Oct. 5, 2017) [hereinafter, OCC News Release].

[12] Rescission of Guidance on Supervisory Concerns and Expectations Regarding Deposit Advance Products, Docket ID OCC-2017-0019, at 3 (released Oct. 5, 2017) [hereinafter, OCC Guidance Rescission].

[13] OCC News Release, *supra* note 11, at 1. The OCC also stated that it sought to avoid subjecting OCC-regulated banks to underwriting requirements and cooling-off periods that were "inconsistent" with the requirements in a final rule issued by the BCFP earlier on the same day. OCC Guidance Rescission, *supra* note 12, at 2-3 (referencing Bureau of Consumer Fin. Protection, Final Rule, Payday, Vehicle Title, and Certain High-Cost Installment Loans, 82 Fed. Reg. 54,472 (Nov. 17, 2017) (codified at 12 C.F.R. § 1041.3(f)).

As we stated in our letter of October 12, 2017 (cited above), we believe that the OCC's concerns apply similarly to the FDIC's DDA Guidance. The DDA Guidance imposes the same underwriting and cooling-off requirements that are present in the OCC's guidance and that the OCC found may restrict access to bank-provided small dollar credit. We urge the FDIC to rescind the DDA Guidance.

Guidance for Managing Third-Party Risk (FIL-44-2008)

In the past decade, technological advances have impacted how banks develop and deploy new financial products and services. Increasingly, banks are leveraging the efficiency and expertise of specialized technology providers to offer products and services to customers. Banks also rely on partnering nonbank financial technology firms to provide important back-office support. When banks partner with such firms, customers can benefit by receiving innovative products delivered through a channel they trust.

Bank-nonbank partnerships are subject to third-party risk management guidance issued by the federal banking regulators, including FDIC FIL-44-2008 (June 6, 2008).[14] While the guidance documents of the several agencies are similar, they are not identical. In all cases, the guidance documents apply broadly to a bank's third-party relationships—from armored car services and outside consultants to cloud providers and partnerships with online lenders.

FIL-44-2008 predates significant leaps in technology as well as the emergence of a variety of new providers of services. These changes have impacted the financial services landscape and the types of third-party partnerships that banks are exploring today. As banks have evaluated potential partnerships, questions have emerged regarding how the agencies' third-party risk management guidance applies, particularly with respect to a bank's risk assessment and due diligence processes.

To address these issues, we recommend that the FDIC work through the Federal Financial Institutions Examination Council (FFIEC) to update the guidance and reduce the potential for inconsistent supervisory treatment and mixed policy signals regarding bank engagement with nonbank partners, particularly those offering new technological solutions. Consistent with the recommendation of the U.S. Department of the Treasury, we believe that the FDIC and the Federal banking regulators should, in coordination, review current third-party guidance through a notice and comment process.[15] The issuance of joint guidance is one way to promote such desirable consistency.

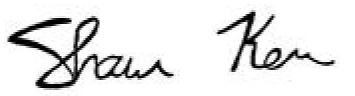
Conclusion

ABA appreciates the FDIC's work to retire FILs that convey redundant or outdated information. Further, we hope you will consider revisiting the policies found in the FILs, such as those that

[14] FDIC FIL-44-2008 (June 6, 2008), Federal Reserve SR Letter 13-19 (December 5, 2013), OCC Bulletin 2013-29 (October 13, 2013), and BCFP Bulletin 2012-03 (April 13, 2012) and Compliance Bulletin and Policy Guidance 2016-02 (Oct. 19, 2016).
[15] U.S. Dep't of the Treasury, A Financial System That Creates Economic Opportunities: Nonbank Financials, Fintech, and Innovation (July 2018), https://home.treasury.gov/sites/default/files/2018-07/A-Financial-System-that-Creates-Economic-Opportunities---Nonbank-Financi....pdf.

we have articulated. Should you have any questions, please do not hesitate to contact the undersigned at skern@aba.com or (202) 663-5253.

Sincerely,



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