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Via E-mail (regs.comments@occ.treas.gov)

Legislative and Regulatory Activities Division
Office of the Comptroller of the Currency
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Robert E. Feldman
Executive Secretary
Federal Deposit Insurance Corporation
550 17th Street, NW
Washington, DC 20429

Re: Guidance on Deposit Advance Products
OCC Docket ID OCC-2013-0005; FDIC Docket ID FDIC-2013-10101

Ladies and Gentlemen:

We represent a number of banks that provide financial products to customers with less than stellar credit, including a bank that formerly provided deposit advance products addressed in the proposed Guidance on Deposit Advance Products, 78 FR 25268 (Apr. 30, 2013), and 78 FR 25353 (Apr. 30, 2013) (together, the "Guidance"), published by the Federal Deposit Insurance Corporation (the "FDIC") and the Office of the Comptroller of the Currency (the "OCC" and, together with the FDIC, the "Agencies"), respectively.[1] We are submitting this comment letter on our own initiative, and not on behalf of any of our clients. We are taking this unusual step because we believe that the Guidance threatens to set two extremely dangerous precedents: *First,* we believe that, by adopting "Guidance" with the practical effect of consumer protection regulations, the Agencies would usurp the proper authority of the Consumer Financial Protection Bureau (the "CFPB") under the Dodd-Frank Wall Street Reform and Consumer Protection Act (the "Dodd-Frank Act"), Pub. L. No. 111-203, 124 Stat. 1376. *Second,* we think that the Guidance lacks the proper analysis and evidentiary support for "UDAAP" rules designed to protect against acts and practices that are "unfair," "deceptive" or "abusive" within the meaning of the Dodd-Frank Act. We appreciate the opportunity to comment before the Guidance becomes effective.

[1] The phrase "Proposed Guidance" refers to the Guidance in its proposed form and the phrase "Final Guidance" refers to the Guidance in its final form.

Background

Deposit advance products are currently offered by a small number of banks. However, where available, they serve as a convenient and lower-cost alternative to payday loans and deposit account overdraft fees. We are aware that at least one deposit advance program generated remarkable levels of customer satisfaction, with virtually no complaints over the life of the program (which involved over 100,000 customers) and impressive survey results.

The day before the Proposed Guidance was first released, the CFPB disseminated its White Paper of Initial Data Findings on Payday Loans and Deposit Advance Products. *See http://files.consumerfinance.gov/f/201304_cfpb_payday-dap-whitepaper.pdf*. The CFPB White Paper contains considerable information about deposit advance products but represents a preliminary study and does not reach any policy conclusions about the net impact of deposit advances on consumers.

The Proposed Guidance does not contain any statistical data comparable to the information in the CFPB White Paper nor does it contain any information at all about how or why borrowers use deposit advances. Nevertheless, the Proposed Guidance details a series of requirements for deposit advance products, including a prohibition against more than a single deposit advance loan to a consumer in any two-month period and elaborate underwriting requirements.[2] 78 FR at 25271-25272; 78 FR at 25356-25357. We think it fair to say that the foregoing requirements are fundamentally inconsistent with the typical deposit advance product described in the Proposed Guidance, and their effect and apparent purpose accordingly are to prohibit banks from offering deposit advance products altogether.

The Guidance reflects some limited concern about safety and soundness issues but does not state that any banks providing deposit advances have run into trouble with such products. Nor are we aware of any banks that have encountered safety and soundness problems with deposit advance programs. Thus, we read the focus of the Guidance to be on reputational and compliance concerns.

Without citing the proscriptions in Sections 1031 and 1036 of the Dodd-Frank Act, 12 U.S.C. §§ 5531 and 5536, on "unfair," "deceptive" and "abusive" practices, the Guidance clearly intends to articulate standards required to avoid such conduct. Under Section 1031, a practice is not "unfair" if any consumer injury resulting from the practice is outweighed by countervailing benefits to

[2] Underwriting requirements include the following: (1) The customer must have had a deposit account with the bank for at least six months. (2) Customers with any delinquent or adversely classified credits should be ineligible. (3) The bank should analyze the customer's financial capability, giving consideration to the customer's ability to repay a loan without needing to borrow repeatedly from any source, including re-borrowing, to meet necessary expenses. (4) A customer's deposit advance credit limit should not be increased without a full underwriting assessment and any increase should not be automatic but should be initiated by a customer's request. (5) The bank should reevaluate the customer's eligibility and capacity for the product no less often than every six months and identify risk that could negatively affect the customer's eligibility, such as repeated overdrafts. *Id.*

consumers or to competition, and a practice is not "abusive" unless it "takes unreasonable advantage" of the consumer, which it cannot do if the consumer benefits outweigh any consumer injury.

Propriety of Guidance and Adequacy of Record

As a threshold matter, we submit that it is inappropriate for the Agencies to issue UDAAP-centered Guidance on deposit advance products and premature for **any** agency (whether the FDIC, OCC, CFPB or FTC) to issue guidance or regulations at this time. While the Proposed "Guidance" does not use the term "rule" or "regulation" and speaks in terms of what banks "should" do rather than what they "shall" or "must" do, *see* 78 FR at 25272; 78 FR at 25357, we think it clear that banks subject to the Guidance will interpret its directives as binding norms they must follow. This is particularly the case in light of the powerful enforcement mechanisms available to the Agencies under Section 8 of the Federal Deposit Insurance Act (the "FDIA"), 12 U.S.C. § 1818, including the power to require restitution and impose civil money penalties of up to $25,000 per day for violations that are part of a pattern of misconduct.

Congress has provided the CFPB—not the OCC or the FDIC—with rulemaking authority under the Dodd-Frank Act and the UDAAP proscriptions contained in Section 1031.[3] Moreover, nothing in the National Bank Act or the FDIA empowers the Agencies to adopt UDAAP rules. Accordingly, the Agencies have no power or authority to adopt UDAAP regulations and should not rush to adopt UDAAP "guidance" that will have the same practical effect as formal regulations. This is particularly the case here, where the CFPB is actively engaged in researching deposit advance products and how they are used. Any UDAAP-based rules or comparable guidance on deposit advance products should be adopted by the CFPB, not the Agencies, and at the **conclusion** of a formal study, not preceding any serious review of the uses and impacts of deposit advances.

Given that the Guidance will have the same practical effect as formal rules, we believe that the Agencies should provide the kind of analysis and evidentiary support for the Guidance that would be required for such rules. Under the Administrative Procedures Act (the "APA"), agency rules must not be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. 5 U.S.C. § 706(2)(A). "Normally, an agency rule would be arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (invalidating agency rule-making under the "arbitrary and capricious" standard because the

[3] Dodd-Frank's prohibitions against "unfair" and "deceptive" acts and practices are mirrored by Section 5 of the Federal Trade Commission ("FTC") Act, 15 U.S.C. § 45. Prior to the adoption of Dodd-Frank, the Federal Reserve Board had authority to adopt regulations for banks under Section 5 of the FTC Act. *See* former Section 18(f)(1) of the FTC Act, 15 U.S.C. § 57a(f)(1) (repealed). At present, only the FTC—and neither the OCC, FDIC, nor the Federal Reserve Board—has authority to adopt regulations under Section 5 of the FTC Act. *See* 15 U.S.C. §§ 46(g), 57a.

agency failed to provide clear and convincing reasons for its action). Moreover, the agency must provide findings supported by "substantial evidence on the record considered as a whole." *Id.,* quoting S. Rep. No. 1301, 89th Cong., 2d Sess., 8 (1966); H. R. Rep. No. 1776, 89th Cong., 2d Sess., 21 (1966). We submit that the Guidance does not meet these standards. The Agencies make reference to the consumer costs of deposit advance products but nowhere address the compensating benefits of such products. Accordingly, the Agencies thus far have "entirely failed to consider an important aspect of the problem" or to provide "substantial evidence" supporting the extreme limitations they seek to impose.

Not only is **any** Agency Guidance unjustified, the substance of the Proposed Guidance is also problematic. As an initial matter, the popularity of deposit advance programs suggests that many consumers believe that the benefits of the product outweigh the costs. Further, the way these products are structured, generally with full repayment of advances required each payday, affords borrowers the ability to "just say no" if they do not perceive that the benefits of the product outweigh the costs.[4] The Agencies should certainly be cautious about depriving consumers of products that they overwhelmingly view to be in their interest. Acting precipitously to eliminate these products from the market without conducting a serious cost-benefit analysis is clearly a poor policy choice.

Not only is the Proposed Guidance troubling due to its threatened impact on targeted deposit advance products, it is problematic due to its likely impact on other products. We are writing separately on behalf of a bank that does **not** offer the kind of deposit advance product the Agencies seem to be targeting to detail the threat the Guidance poses to products that even the most vociferous critics of (the targeted) deposit advance products would likely endorse.

For the reasons set forth above and in our other comment letter, we respectfully request that the Agencies eschew moving forward with the Guidance. Thank you for your consideration of our views.

Sincerely,

Jeremy T. Rosenblum

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[4] We note that a practice can only be "unfair" if it causes or is likely to cause substantial injury which is not reasonably avoidable. And it can only be "abusive" in this context if it takes advantage of a lack of understanding on the part of the consumer or the inability of the consumer to protect his or her interests, something else not addressed by the Agencies in the Proposed Guidance. *See* Section 1031(c) and (d) of Dodd-Frank, 12 U.S.C. § 5531(c) and (d).