UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

MINNESOTA BANKERS ASSOCIATION **and** **LAKE CENTRAL BANK,** **Plaintiffs,** **v.** **FEDERAL DEPOSIT INSURANCE CORPORATION and MARTIN J. GRUENBERG, in his official capacity as Chairman of the Federal Deposit Insurance Corporation,** **Defendants.**	**Case No. 23-cv-2177-PAM-ECW**

DEFENDANTS' MOTION TO DISMISS PURSUANT TO
FEDERAL RULES OF CIVIL PROCEDURE 12(b)(1) AND 12(b)(6)

By and through the undersigned counsel, Defendants Federal Deposit Insurance Corporation ("FDIC") and Martin J. Gruenberg, in his official capacity as Chairman of the FDIC (collectively, "Defendants"), respectfully move for dismissal of Plaintiffs Minnesota Bankers Association and Lake Central Bank (collectively, "Plaintiffs") Complaint pursuant to Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6). In support of this motion, Defendants respectfully refer the Court to the accompanying memorandum of law.

DATED: September 18, 2023

Respectfully submitted,

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Defendants Federal Deposit Insurance Corporation ("FDIC") and Martin J. Gruenberg, in his official capacity as Chairman (collectively, "Defendants"), respectfully submit this memorandum of law in support of their motion to dismiss the Complaint pursuant to Federal Rule of Civil Procedure 12(b)(1) and Federal Rule of Civil Procedure 12(b)(6).

On July 20, 2023, Plaintiffs Minnesota Bankers Association and Lake Central Bank (collectively, "Plaintiffs") filed suit against the FDIC. Plaintiffs seek declaratory and injunctive relief designed to remove the possibility of future enforcement actions related to the practice of charging banking customers multiple non-sufficient funds ("NSF") fees for the same transaction. To accomplish this, they ask this Court to invalidate FDIC supervisory guidance through the Administrative Procedure Act, 5 U.S.C. §§ 701-706 ("APA"), despite that statute's inapplicability to non-final agency actions.

The supervisory guidance is exactly what it appears to be—*guidance*. It advises the banking industry about the risks associated with this practice, focusing on how it may, in certain circumstances, run afoul of existing laws banning unfair or deceptive acts or practices. The guidance also provides examples of risk mitigation measures and discusses the agency's supervisory priorities given these risks. It does not ban this practice, it does not create new obligations or independent legal consequences, and it does not serve as a basis for future enforcement actions.

Several distinct grounds support dismissal of Plaintiffs' claims. First, Plaintiffs ask the Court to invalidate the wrong guidance document, Financial Institutions Letter

40-2022: *Supervisory Guidance on Multiple Re-Presentment NSF Fees* ("FIL 40"). The FDIC revised and replaced FIL 40 with FIL 32-2023 ("FIL 32") in June 2023, a month before the filing of this lawsuit. For purposes of clarity, this motion to dismiss focuses on FIL 32, the operative guidance document. The same arguments apply to both versions of the guidance. Second, aside from their reference to the wrong guidance, this case should be dismissed for lack of subject matter jurisdiction pursuant to Federal Rule of Civil Procedure 12(b)(1) because Plaintiffs lack constitutional standing. Plaintiffs' alleged injuries cannot be redressed by the relief requested in the Complaint, as Plaintiffs' preexisting legal obligations remain intact irrespective of the supervisory guidance's publication. Third, the Complaint should be dismissed pursuant to Federal Rule of Civil Procedure 12(b)(6), because the guidance does not constitute "final agency action" and is therefore unreviewable under the APA. In APA parlance, a Financial Institution Letter ("FIL") is a "general statement[] of policy," not a "legislative rule" under 5 U.S.C. § 553(b)(4)(A). Fourth, for similar reasons, Plaintiffs' challenge is unripe for judicial review. Fifth, the issuance of supervisory guidance is committed to agency discretion by law under 5 U.S.C. § 701(a)(2).

BACKGROUND

A. FDIC Oversight of Banks and Issuance of Supervisory Guidance

Under the Federal Deposit Insurance Act, the FDIC acts as the primary federal regulator for certain state-chartered banks.[1] In its regulatory capacity, the FDIC

[1] 12 U.S.C. §§ 1817(a), 1819, 1820(b).

prescribes standards to promote banks' safety and soundness by "regulation or guideline,"[2] examines banks, and prepares examination reports.[3] During the examination process, the FDIC may determine that "any insured depository institution . . . is engaging or has engaged . . . in an unsafe or unsound practice in conducting the business of such depository institution, or is violating or has violated . . . a law, rule, or regulation." The FDIC may institute administrative proceedings if its informal recommendations are not followed.[4]

The FDIC issues supervisory guidance in the form of Financial Institution Letters on safety and soundness issues, consumer protection matters, and other topics. It issues dozens of FILs, addressed to the Chief Executive Officers of the over 3,000 FDIC supervised institutions, each year. They announce new regulations and policies, new FDIC publications, and other matters of interest to the banking industry. The FDIC does not hold out FILs as binding rules, but instead issues them as guidance to its regulated banks; there are over 700 FILs on the agency's website dating back to 1995.[5]

The FDIC reaffirmed its view on supervisory guidance in 2021 with 12 C.F.R. Part 302, *Role of Supervisory Guidance*, a final rule published in the Federal Register.[6] This rule codified a 2018 Statement restating well-established law that supervisory

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[2] 12 U.S.C. § 1831p-1(d)(1).
[3] 12 U.S.C. §§ 1818(b), (c), (d), (e), (i), 1820(b).
[4] *See* 12 U.S.C. § 1818(b)(1). Instituting administrative proceedings provides a right to a hearing. *Id*.
[5] *See Financial Institution Letters*, FDIC, https://www.fdic.gov/news/financial-institution-letters/index.html (last visited Aug. 11, 2023).
[6] *See* 12 C.F.R. Part 302, App. A.

guidance does not create legal obligations or carry the "force and effect of law."[7] Instead, this Rule explains, guidance "outlines the agencies' supervisory expectations or priorities and articulates the agencies' general views regarding practices for a given subject area."[8]

B. Unfair or Deceptive Acts or Practices

Section 5 of the Federal Trade Commission Act prohibits ''unfair or deceptive acts or practices in or affecting commerce.''[9] The Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank Act") prohibits banks from "engaging in an unfair, deceptive, or abusive act or practice" in connection with a consumer financial product or service.[10]

In publicly available supervisory guidance that has remained unchanged since 2004, the FDIC outlines the standards the agency references in determining what is unfair or deceptive.[11] As that guidance explains, an act or practice may violate the Federal Trade Commission Act if it is either unfair *or* deceptive. An act or practice is unfair when it: 1) causes or is likely to cause substantial injury to consumers that they cannot reasonably avoid; and 2) is not outweighed by countervailing benefits to consumers or to competition.[12] Deceptive conduct is a "representation, omission, or practice . . . likely to

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[7] *Id*.
[8] *Id*.
[9] 15 U.S.C. § 45(a)(1).
[10] 12 U.S.C. § 5531(a).
[11] *See Unfair or Deceptive Acts or Practices by State-Chartered Banks*, FDIC (March 11, 2004) https://www.fdic.gov/news/financial-institution-letters/2004/fil2604a.html.
[12] *See* 15 U.S.C. § 45(n); *see also* 12 U.S.C. § 5531(c).

mislead a consumer acting reasonably under the circumstances and is likely to affect a consumer's conduct or decision regarding a product or service."[13]

Under section 8 of the Federal Deposit Insurance Act, the FDIC has authority to take appropriate action when unfair or deceptive acts or practices are discovered.[14] Examiners may cite these practices during the examination process.[15] In determining whether or not to cite a violation, the agencies look to official interpretations of unfair or deceptive acts or practices and the overall body of law, including factually similar cases.[16]

C. Regulatory Guidance on Multiple NSF Re-Presentment Fees

The FDIC first referenced this practice in March 2022, in its annual issuance of *Consumer Compliance Supervisory Highlights*. This publication seeks to enhance transparency by providing examples of practices that may be useful to institutions in mitigating risks, discussing regulatory developments, and providing an overview of consumer complaint trends.[17] The March 2022 *Supervisory Highlights* advised financial institutions that "while case-specific facts would determine whether a practice is in

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[13] *See supra* note 11.
[14] 12 U.S.C. § 1818.
[15] *See Risk Management Manual of Examination Policies*, FDIC, 13.1-2 (2023) (examiners may pursue informal or formal procedures to address "weak operating practices, deteriorating financial conditions, or apparent violations of laws or regulations" uncovered during an exam).
[16] Source cited *supra* note 11.
[17] FDIC, *Consumer Compliance Supervisory Highlights*, FIL 13-2023 (Apr. 5, 2023), https://www.fdic.gov/news/financial-institution-letters/2023/fil23013.html#:~:text=The%20FDIC's%20Consumer%20Compliance%20Supervisory,interest%20to%20the%20banking%20industry.

violation of a law or regulation," "[d]isclosure and fee practices for re-presentments may result in heightened risk of violations of Section 5 of the Federal Trade Commission Act."[18]

In August 2022, the FDIC issued FIL 40, *Supervisory Guidance on Multiple Re-Presentment NSF Fees*.[19] FIL 40 begins by explaining that the FDIC is "issuing guidance to ensure that supervised institutions are aware of the consumer compliance risks associated with assessing multiple non-sufficient funds (NSF) fees" and is "sharing its supervisory approach where a violation of law is identified."[20] After outlining the potential risks, the guidance provides examples of risk mitigation practices and encourages institutions to "review their practices and disclosures."[21] The guidance then outlines the expectations to correct self-identified NSF fee issues and notes that "[i]f examiners identify violations of law due to re-presentment NSF fee practices that have not been self-identified and fully corrected . . . the FDIC will *evaluate* appropriate supervisory or enforcement actions . . . *where appropriate*."[22] The FDIC revised and replaced FIL 40 in June 2023 with FIL 32. The updated guidance clarifies that where

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[18] FDIC, *Consumer Compliance Supervisory Highlights* at 8 (Mar. 2022), https://www.fdic.gov/regulations/examinations/consumer-compliance-supervisory-highlights/documents/ccs-highlights-march2022.pdf.
[19] FDIC, *Supervisory Guidance on Multiple Re-Presentment NSF Fees*, FIL-40-2022 (Aug. 18, 2022), https://www.fdic.gov/news/financial-institution-letters/2022/fil22040a.pdf ("FIL 40").
[20] FIL 40 at 1.
[21] *Id*. at 2.
[22] *Id*. at 4 (emphasis added).

multiple NSF fee issues are present, the FDIC will consider the likelihood of substantial consumer harm from the practice when determining whether restitution is appropriate.[23]

ARGUMENT

I. STANDARD OF REVIEW

The FDIC moves to dismiss the Complaint pursuant to Federal Rule of Civil Procedure 12(b)(1) for lack of subject matter jurisdiction and Rule 12(b)(6) for failure to state a claim upon which relief can be granted.

A. Federal Rule of Civil Procedure 12(b)(1)

A motion to dismiss under Federal Rule of Civil Procedure 12(b)(1) requires the Court to decide whether it has subject matter jurisdiction over each claim in the complaint. *See Osborn v. United States*, 918 F.2d 724, 729 (8th Cir. 1990). The plaintiff bears the burden of establishing that subject matter jurisdiction exists. *See Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994). If a Rule 12(b)(1) motion cannot be decided on the face of the complaint, district courts may look beyond the plaintiff's jurisdictional allegations and "weigh the evidence" to determine whether subject matter jurisdiction exists. *Disability Support All. v. Heartwood Enter., LLC*, 885 F.3d 543, 547 (8th Cir. 2018); *accord Johnson v. United States*, 534 F.3d 958, 964 (8th Cir. 2008) ("Trial courts have 'wide discretion to allow affidavits, other documents, and a

[23] *FDIC Clarifying Supervisory Approach Regarding Supervisory Guidance on Multiple Re-Presentment NSF Fees,* FIL 32 at 3 (June 16, 2023), https://www.fdic.gov/news/financial-institution-letters/2023/fil23032a.pdf ("FIL 32"). FIL 32 also removed the sentence "Failing to provide restitution for harmed customers when data on re-presentments is reasonably available will not be considered full corrective action." *See* FIL 40 at 4; FIL 32 at 4.

limited evidentiary hearing to resolve disputed jurisdictional facts under Rule 12(b)(1).'" (internal citation omitted)). The Supreme Court has instructed courts to resolve threshold issues of subject matter jurisdiction before evaluating the merits. *See Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94-95 (1998).

B. Federal Rule of Civil Procedure 12(b)(6)

A motion to dismiss under Rule 12(b)(6) tests whether the complaint pleads a plausible claim for relief. *See Olmsted Med. Ctr. v. Continental Cas. Co.*, 65 F.4th 1005, 1008 (8th Cir. 2023). To withstand dismissal, the complaint must include "[f]actual allegations [adequate] to raise a right to relief above the speculative level," with "enough heft" to set forth "a plausible entitlement to relief." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 545, 559 (2007). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). "[W]here the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged—but it has not 'shown'—'that the pleader is entitled to relief.'" *Id.* at 679 (alteration omitted) (quoting Fed. R. Civ. P. 8(a)(2). "Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Id.* at 678. Furthermore, dismissal is warranted if, assuming the truth of the factual allegations of the plaintiff's complaint, there is a dispositive legal issue that precludes relief. *See Neitzke v. Williams*, 490 U.S. 319, 326 (1989).

II. THE COURT SHOULD DISMISS FOR LACK OF JURISDICTION.

A. Plaintiffs Lack Standing to Challenge the FDIC's Guidance.

Plaintiffs' Complaint should be dismissed under Rule 12(b)(1) for lack of subject matter jurisdiction because Plaintiffs lack standing to sue the FDIC. A plaintiff must make a threefold showing to demonstrate standing under Article III of the Constitution: an "injury in fact," a showing that the injuries are "fairly traceable" to the defendant's conduct, and third, redressability. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560-61 (1992). Plaintiffs must demonstrate that it is "likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Id*. at 561 (citation omitted). The Court should dismiss this case because Plaintiffs cannot show redressability.

1. Plaintiffs' Claimed Injuries Are Not Redressable.

As a threshold requirement, Plaintiffs must show a "substantial likelihood" of redressability. *Duke Power Co. v. Carolina Envtl. Study Grp.*, 438 U.S. 59, 75 n.20 (1978); *see also Steel Co.*, 523 U.S. at 104 ("[T]he party invoking federal jurisdiction bears the burden of establishing its existence . . . ."). In the administrative context, an injury may be redressable if "some rule stands in the way" of a desired outcome, and a favorable decision "will remove the obstacle." *Noem v. Haaland*, 41 F.4th 1013, 1017 (8th Cir. 2022). No such "rule" stands in Plaintiffs way here and no favorable decision will remove the "obstacle" they seek to avoid.

Plaintiffs ask the Court to vacate FIL 40[24] in a transparent effort to avoid the possibility of future enforcement actions related to charging multiple NSF fees, regardless of the risks posed by those practices. A favorable decision, however, will not remove this possibility, as Plaintiffs' legal obligations under the Federal Trade Commission Act and Dodd-Frank Act will remain in force even if the Court strikes down FIL 32, the updated version of FIL 40. *See* 15 U.S.C. § 45(a)(1); 12 U.S.C. § 5531(a).

In addition to complying with the law, financial institutions are required to abide by the safety and soundness standards set forth in § 1831p-1 and its implementing regulations. *See, e.g.*, 12 C.F.R. Part 364, App. A, ¶ II.A (requiring "internal controls and information systems . . . appropriate to the size of the institution and the nature, scope and risk of its activities," that provide for "effective risk assessment"). Vacating FIL 32 would not alleviate Plaintiffs' obligation to minimize risk. *See Town of Babylon v. Fed. Hous. Fin. Agency*, 790 F. Supp. 2d 47, 56 (E.D.N.Y. 2011) (redressability not met, as withdrawal of OCC supervisory guidance would not alter banks' independent obligation to minimize risk), *aff'd,* 699 F.3d 221 (2d Cir. 2012).

FIL 32 cautions financial institutions that assessing multiple NSF fees may pose elevated risks, and suggests potential measures for mitigating those risks. *See* FIL 32 at 1-3. Nothing in the guidance *requires* banks to discontinue assessing multiple NSF fees; rather, the clear intent of the FDIC's guidance is to *advise* financial institutions about the potential risks associated with assessing these fees.

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[24] FIL 32 replaced FIL 40 in June, 2023. *See supra* at Background Section C; FIL 32 at 1.

In other words, FIL 32 is a statement of policy that does not *declare* a particular practice risky, unfair, or deceptive. It simply *alerts* the banking industry of risks associated with a particular practice. FIL 32's withdrawal would not change financial institutions' obligation to comply with the law and to minimize their risks, and it does not change the FDIC's authority to redress violations of those obligations through the administrative processes established under the Federal Deposit Insurance Act.

III. PLAINTIFFS DO NOT STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED.

Even if this Court had jurisdiction, it should dismiss the Complaint for failure to state a claim under Rule 12(b)(6). Plaintiffs do not identify any final agency action within the purview of the APA. Further, the agency action at issue is committed to agency discretion by law under 5 U.S.C. § 701(a)(2).

A. Plaintiffs Do Not Identify Final Agency Action.

The Supreme Court has held that agency action is "final" only when it 1) marks the "consummation of the agency's decisionmaking process" and 2) determines "rights or obligations" or that "legal consequences will flow" from the action. *Bennett v. Spear*, 520 U.S. 154, 177–78 (1997). FIL 32 does not meet the second prong of this analysis, where courts focus on the impacts of agency action and the agency's own expressed intent. *See Molycorp, Inc. v. EPA*, 197 F.3d 543, 545 (D.C. Cir. 1999). Generally, an agency does not inflict injury "merely by expressing its view of the law." *Sisseton-Wahpeton Oyate of Lake Traverse Rsrv. v. U.S. Corps of Eng'rs*, 888 F.3d 906, 915 (8th Cir. 2018) (quoting *AT&T Co. v. EEOC*, 270 F.3d 973, 976 (D.C. Cir. 2001)); *see also*

Holistic Candlers & Consumers Ass'n v. FDA, 664 F.3d 940, 944 (D.C. Cir. 2012) (agency warning that regulatory action may follow if appellants failed to act was not a final agency action).

In short, FIL 32 does not impose rights or obligations, does not give rise to legal consequences, and was not intended as a binding legislative rule. It is a general statement of policy. Accordingly, FIL 32 does not constitute final agency action and it is not subject to review under the APA. 5 U.S.C. § 704.

1. FIL 32 Does Not "Impose Rights and Obligations."

Financial institutions have preexisting obligations to comply with the law and applicable regulations. *See* supra Background Sections A, B. FIL 32 does not change these already existing obligations, but rather communicates anecdotal examples of where the FDIC determined that certain bank's NSF fee practices were unfair or deceptive in violation of the Federal Trade Commission Act and/or the Dodd-Frank Act.

In other words, the FIL does not impose new legal obligations. *See Sisseton-Wahpeton*, 888 F.3d at 915; *AT&T Co.*, 270 F.3d at 975 (no injury where an "agency merely expresses its view of what the law requires of a party"); *see also Fairbanks N. Star Borough v. U.S. Army Corps of Eng'rs*, 543 F.3d 586, 594 (9th Cir. 2008) (in any future enforcement action, plaintiff would face liability for noncompliance with an underlying legal obligation, not for disagreement with a statement announcing the agency's position).

2. The FIL Does Not Contain Binding Language.

In the final agency action analysis, courts also examine whether the language used by the agency is binding or more advisory in nature. *Accord Segarra v. Fed. Rsrv. Bank of N.Y.*, 17 F. Supp. 3d 304, 313 (S.D.N.Y. 2014) ("Although the letter at times speaks of what banks 'should' do, nowhere does it say what they 'must' or 'will' do. Instead, it 'encourages' banking institutions to ensure sufficient resources are dedicated to compliance programs . . . ."); *aff'd*, 802 F.3d 409 (2d Cir. 2015), and 617 F. App'x 106 (2d Cir. 2015).

Plaintiffs' Complaint frequently references the new "mandates" or legal obligations that FIL 40[25] supposedly creates. *See* Compl. ¶¶ 3, 7, 12, 13, 18, 63, 68, 77, Doc. 1. FIL 32, however, does not use any binding language. Instead, the guidance *advises* financial institutions "to review their practices and disclosures" in order to "reduce the potential risk of consumer harm and avoid potential violations of law." *See* FIL 32 at 2. The FIL then goes on to provide a list of "risk-mitigating activities" the FDIC has observed during its past supervisory activities. *Id*. at 2-3. Such advisement, along with a list of recommended actions to minimize risk does not amount to a mandate from which "legal consequences" will flow. *See Holistic Candlers*, 664 F.3d at 944 (no legal consequences flowing from FDA warning letter advising that "[f]ailure to promptly correct these deviations *may* result in regulatory action . . . ."); *Nat'l Ass'n of Home Builders v. Norton*, 415 F.3d 8, 14 (D.C. Cir. 2005) ("recommended" measures do not

[25] Although Plaintiffs refer almost exclusively to FIL 40, it alleges that "FIL 32 *did not* revise FIL 40's mandate…." Compl. ¶ 7. FIL 32 replaced FIL 40. *See* FIL 32 at 1.

amount to "legal consequences"); *Mass. Mfg. Extension P'ship v. Locke*, 723 F. Supp. 2d 27, 40 (D.D.C. 2010) (a "recommended procedure" does not purport to codify legal obligations).

Expressing a view that a practice results in heightened risks and encouraging risk mitigation does not amount to a mandate. *See Holistic Candlers*, 664 F.3d at 944 (citing FDA Manual, § 4–1–1) (warning letter advising appellants to take prompt corrective action or potentially face regulatory action was "only 'informal and advisory' and did 'not commit FDA to taking enforcement action.'"); *Ctr. for Auto Safety v. Nat'l Highway Traffic Safety Admin.*, 452 F.3d 798, 809 (D.C. Cir. 2006) ("NHTSA has not commanded, required, ordered, or dictated . . . [a]nd it does not matter that agency officials have *encouraged* automakers to comply with the guidelines."); *Reliable Automatic Sprinkler Co. v. Consumer Prod. Safety Comm'n*, 324 F.3d 726, 733 (D.C. Cir. 2003) (agency's letter not final when it "merely stated an intention" to make a preliminary determination that a product presented a safety hazard); *Food & Water Watch v. EPA*, 5 F. Supp. 3d 62, 83 (D.D.C. 2013) (statement that agency "encourages and expects" conduct does not create binding legal requirements and therefore does not constitute final agency action).

The few uses of supposed "mandatory" language in FIL 32 do not create new requirements, but rather restate already existing legal obligations. *See, e.g.*, FIL 32 at 3 (referring to situations in which disclosures are inadequate or the fees are not reasonably avoidable: "*If* institutions self-identify re-presentment NSF fee *issues*, the FDIC expects supervised financial institutions to: [t]ake full corrective action") (emphasis added).

Similarly FIL 32 does not "vow" enforcement action but rather notes that, consistent with the FDIC's regulatory responsibilities, "[i]f examiners identify violations of law . . . the FDIC will *evaluate* appropriate supervisory or enforcement actions." *Id.* at 4 (emphasis added).

3. FIL 32 Does Not Carry "Legal Consequences."

Notwithstanding Plaintiffs' fears of future, hypothetical agency action, FIL 32 does not create "legal consequences" for financial institutions. *Bennett*, 520 U.S. at 177-78. It is a general statement of policy, couched as advisory rather than mandatory, advising financial institutions of risks and sharing risk mitigation practices. The FIL does not dictate specific requirements or prohibitions.

i. FIL 32 Specifies That Any Enforcement Action Would Be Evaluated Under Specific Facts and Circumstances.

Neither FIL 40 nor FIL 32 declares specific conduct unfair or deceptive as Plaintiffs allege. To the contrary, FIL 32 makes clear that any future enforcement action would be evaluated under the specific facts and circumstances present. *See, e.g.*, FIL 32 at 1 ("specific facts and circumstances ultimately determine whether a practice violates a law or regulation"); *see also* FIL 40 at 1. The background provided for both FILs further underscores this point, noting that the FDIC—prior to the existence of either FIL 32 or FIL 40—"identified violations of law" when disclosures did not "fully or clearly describe the institution's re-presentment practice." *See* FIL 32 at 1; FIL 40 at 1.

Advising financial institutions that a particular practice may result in heightened risks of a violation of law or regulation—but also making clear that a bank's specific

circumstances ultimately determine whether that occurs—does not impose any "legal consequences." *See NRDC v. EPA*, 559 F.3d 561, 565 (D.C. Cir. 2009) (agency's listing of "examples" of events that "may" trigger certain treatment, combined with the statement that events would be evaluated "on a case-to-case basis" was not sufficient to trigger "legal consequences"); *Chem. Mfrs. Ass'n v. EPA*, 26 F. Supp. 2d 180, 185 (D.D.C. 1998) (a statement of principles "that can be tailored to particular fact-bound situations, are considered strong evidence of an agency's intent not to undertake final action").

ii. The Possibility of Future Enforcement Actions Does Not Create "Legal Consequences."

Plaintiffs allege that FIL 40 "mandates" certain action "under the direct threat of civil penalties and enforcement actions." Compl. ¶ 12. Setting aside the FDIC's clear intent to evaluate any action on a case-by-case basis, the possibility of future enforcement actions does not impose "legal consequences" in the here and now. *See Rochester Tel. Corp. v. United States*, 307 U.S. 125, 130 (1939) (order was not reviewable because it only impacted plaintiff's "rights adversely on the contingency of future administrative action"); *DRG Funding Corp. v. Sec'y of Hous. & Urb. Dev.*, 76 F.3d 1212, 1214 (D.C. Cir. 1996) (courts have categorized orders as "nonfinal" when rights are only impacted in a future administrative action).

Further, neither FIL threatens enforcement actions on the basis of noncompliance with the supervisory guidance. To the contrary, the guidance is intended to provide exactly that—*guidance*—to assist financial institutions in *avoiding* potential enforcement

action. The guidance seeks to ensure that if financial institutions are engaged in a practice that involves heightened risks of a violation of law or regulation, they are aware of risk mitigation practices they can employ to avoid those violations and obviate the need for future enforcement action. *See, e.g.*, FIL 32 at 2 ("The FDIC has observed various risk-mitigating activities that financial institutions have taken to reduce the potential risk of consumer harm and avoid potential violations of law . . . ."). In any event, banks are protected from indiscriminate enforcement action through a detailed adjudicatory process, including the right to a hearing, prior to any final agency action by the FDIC in an enforcement case. *See supra* Background Sections A, B.

At bottom, the recommendations contained in FIL 32 are not mandates and do not operate as requirements. The possibility of future enforcement actions resulting from engagement in a practice that carries heightened risks without employing risk mitigation efforts does not amount to a "legal consequence" flowing from the guidance itself. *See Indep. Equip. Dealers Ass'n v. EPA*, 372 F.3d 420, 428 (D.C. Cir. 2004) (the threat of future administrative action is "insufficient to bring an agency's conduct under our purview").

4. The FILs Were Not Intended to be Rules.

Both FILs expressly state that the supervisory guidance is intended "to ensure that supervised institutions are aware of the consumer compliance risks associated" with assessing multiple NSF fees and that the FDIC is therefore "sharing its supervisory approach where a violation of law is identified." FIL 32 at 1; FIL 40 at 1. Indeed, both FILs are labeled as "guidance." *See id*.

When determining whether an agency has issued a "binding norm" or "merely a statement of policy," courts examine the action's impact—whether the agency imposed rights and obligations or created legal obligations—as well as the agency's own "expressed intentions." *See The Wilderness Soc'y v. Norton*, 434 F.3d 584, 595 (D.C. Cir. 2006) (quoting *CropLife Am. v. EPA*, 329 F.3d 876, 883 (D.C. Cir. 2003) ("The second line of analysis focuses on the agency's expressed intentions.")); *see also Ctr. for Auto Safety*, 452 F.3d at 806–07 ("The language used by an agency is an important consideration in such determinations.").

In determining the "expressed intentions" of the agency, courts look at 1) the agency's "own characterization" of the statement; 2) whether the statement was published in the Federal Register or the Code of Federal Regulations; and 3) whether the statement has binding effects, on either private parties or the agency itself. *See Nat'l Min. Ass'n v. Sec'y of Labor*, 589 F.3d 1368, 1371 (11th Cir. 2009); *Ctr. for Auto Safety*, 452 F.3d at 806–07; *Molycorp, Inc.*, 197 F.3d at 545.

FIL 32 (along with its predecessor FIL 40) is merely a statement of policy. The expressed intentions of the agency are to help financial institutions stay aware of emerging risks and adopt effective risk mitigation practices. The FDIC consistently characterized the FIL as "guidance," it published neither version in the Federal Register or the Code of Federal Regulations, and it designed the FIL to avoid creating binding effects or imposing legal consequences. *See Nat'l Min. Ass'n*, 589 F.3d at 1371; *Ctr. for Auto Safety*, 452 F.3d at 806–07; *Molycorp, Inc.*, 197 F.3d at 545.

Public policy considerations strongly support this approach. Deeming a guidance document to be "final agency action" subject to judicial review would stifle informal communication between government agencies and regulated entities. *See, e.g.*, *Indep. Equip. Dealers Ass'n*, 372 F.3d at 428 ("informal communications between agencies and their regulated communities" "are vital to the smooth operation of both government and business" and should not be "muzzle[d]" by the threat of judicial review); *Nat'l Automatic Laundry & Cleaning Council v. Shultz*, 443 F.2d 689, 699-700 (D.C. Cir. 1971) ("apprising persons informally as to their rights and liabilities" in advisory opinions "should, to the greatest extent possible, be available to the public as a matter of routine"). These forms of communication are particularly important in the supervision of insured depository institutions, where supervision "is an iterative process of comment by the regulators and response by the bank" that is "relatively informal and more or less continuous." *In re Subpoena Served upon Comptroller of the Currency*, 967 F.2d 630, 633-34 (D.C. Cir. 1992)*; see also United States v. Phila. Nat'l Bank*, 374 U.S. 321, 329 (1963) (federal bank regulators "maintain virtually a day-to-day surveillance of the American banking system").

B. The FILs Are Not Arbitrary or Capricious.

In Count II of their Complaint, Plaintiffs allege that the issuance of FIL 40 constituted arbitrary and capricious agency action. However the "arbitrary and capricious" standard governs final agency action, and neither FIL 40 nor its replacement, FIL 32, qualifies as such. *See* 5 U.S.C. §§ 704, 706(2); *see also Radack v. U.S. Dep't of*

Just., 402 F. Supp. 2d 99, 103 (D.D.C. 2005) (court may set aside "final agency actions" under section 706). Count II should therefore be dismissed.

C. The FDIC Acted Within Its Authority.

The Court should likewise dismiss Count III for failure to state a claim. Plaintiffs allege that the FDIC, through FIL 40, exceeded its statutory authority by defining specific acts or practices to be deceptive. However the "exceeding statutory authority" theory applies only to final agency action and neither FIL qualifies as such for the reasons explained above. 5 U.S.C. §§ 704, 706(2). Further, FIL 32 does not define specific conduct to be unfair or deceptive, but rather makes clear that "specific facts and circumstances ultimately determine whether a practice violates a law or regulation." FIL 32 at 1.

Moreover, the FDIC has broad statutory authority to examine the affairs of institutions it supervises, indeed it is one of the FDIC's primary responsibilities as set forth by Congress. *See* 12 U.S.C. § 1820(b)(2). The FDIC's discretion to investigate and pursue administrative enforcement actions spans a similar range. *See, e.g.*, 12 U.S.C. § 1818(b)-(e), (i). Both authorities necessarily include the power to define the scope of these exams or enforcement actions. *See Cook v. SEC*, 664 F. Supp. 2d 997, 999 (D. Minn. 2009); *see also United States v. Gaubert*, 499 U.S. 315, 330 (1991) ("Although the statutes provided only for formal proceedings, there is nothing in the language or structure of the statutes that prevented the regulators from invoking less formal means of supervision of financial institutions. Not only was there no statutory or regulatory mandate which compelled the regulators to act in a particular way, but there was no

prohibition against the use of supervisory mechanisms not specifically set forth in statute or regulation."); *Gillis v. HHS*, 759 F.2d 565, 576 (6th Cir. 1985) ("The mechanism by and extent to which [an agency] 'monitors' as well as 'enforces' compliance fall[s] squarely within the agency's exercise of discretion.").

D. Plaintiffs Cannot Use the APA to Subvert the FDIC's Discretionary Supervisory Choices.

Plaintiffs cannot, through the guise of attacking FIL 40, constrain the FDIC's discretion to address unsafe and unsound banking practices using the tools available to it, including, where appropriate, administrative enforcement actions. It is well settled that federal agencies' supervisory decisions "traditionally" have been "committed to [the agency's] absolute discretion." *Heckler v. Chaney*, 470 U.S. 821, 831-32 (1985) (collecting cases). The APA extends this tradition by expressly exempting agency action from judicial review when it is "committed to agency discretion by law." 5 U.S.C. § 701(a)(2); *see also Heckler*, 470 U.S. at 832 ("[W]e believe that the Congress . . . did not intend to alter [through the APA] that tradition [of agency supervisory discretion]."). Both FILs epitomize the FDIC's exercise of such discretion. They "advise the public prospectively of the manner in which the agency proposes to exercise a discretionary power"—namely, its supervisory approach to risks associated with certain NSF-fee re-presentment practices. *See Lincoln v. Vigil*, 508 U.S. 182, 197 (1993). Because the FDIC "is far better equipped than the courts to deal with the many variables involved in the proper ordering of its [supervisory] priorities," *Heckler*, 470 U.S. at 831-32—and because Congress has not "indicated an intent to circumscribe" the FDIC's discretion in

the manner Plaintiffs suggest, *id.* at 834-35[26]—701(a)(2) independently renders both FILs unreviewable.

Developing an agency's supervisory priorities requires "a complicated balancing of a number of factors which are peculiarly within [an agency's] expertise." *See id.* at 831. This rationale applies just as forcefully—if not more forcefully—to FDIC guidance highlighting risks associated with certain banking practices, providing examples of risk mitigation measures, and discussing the agency's supervisory priorities. Developing these guidelines requires the FDIC to weigh many factors, including which supervisory topics "agency resources are best spent on," in what settings "the agency is likely to succeed" in promoting safety, soundness, and stability in the banking system, and, if necessary, which enforcement actions "best fit[] the agency's overall policies." *See id.* at 831-32. These decisions fall squarely within agency actions traditionally rendered unreviewable under the APA.

FIL 32 does not commit the FDIC to any supervisory-related course of action. Even if it suggests certain actions the FDIC might take, this fact "does not necessarily lead to the conclusion that courts are the most appropriate body to police this aspect of [the FDIC's] performance." *See Heckler*, 470 U.S. at 834. "That decision is in the first instance for Congress." *Id.* And because Congress has expressed no intent to cabin the

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[26] The Federal Deposit Insurance Act provides the FDIC with broad discretionary authority to prescribe supervisory standards through regulation or guideline. *See* 12 U.S.C. § 1831p-1(a), (d).

FDIC's supervisory choices in the manner Plaintiffs seek, the Complaint warrants dismissal pursuant to § 701(a)(2).

IV. PLAINTIFFS' CHALLENGE REMAINS UNRIPE FOR JUDICIAL REVIEW.

A. Lack of Final Agency Action Necessarily Renders Plaintiffs' Claims Unripe.

Plaintiffs' claims remain unripe because they are not final agency actions. *See Minn. Auto Dealers Ass'n v. Minn. by & through Minn. Pollution Control Agency*, 520 F. Supp. 3d 1126, 1140 (D. Minn. 2021) ("In the administrative context, when determining whether an issue is fit for judicial review, courts may consider whether the issues are based on final agency action . . . ."). "[S]ubstantial overlap, if not interchangeability," exists between "notions of finality and ripeness." *Solar Turbines Inc. v. Seif*, 879 F.2d 1073, 1081 (3d Cir. 1989). Therefore, courts hold that APA disputes are "not fit" for judicial review if they "do[] not involve final agency action." *Holistic Candlers & Consumers Ass'n v. FDA*, 664 F.3d 940, 944 n.4 (D.C. Cir. 2012); *see also FTC v. Standard Oil Co.*, 449 U.S. 232 (1980) (incorporating ripeness criteria into final agency action standard). Because neither FIL represents a "final agency action," *see supra* Section III.A., judicial review remains premature.

B. Counts II and IV Do Not Independently Satisfy Any Ripeness Criteria.

Even if FIL 32 constituted final agency action, Counts II and IV remain unripe. Courts confronting ripeness questions consider "both the 'fitness of the issues for judicial decision' and 'the hardship to the parties of withholding court consideration.'" *Neb. Pub. Power Dist. v. MidAm. Energy Co.*, 234 F.3d 1032, 1038 (8th Cir. 2000) (quoting *Abbott*

Labs. v. Gardner, 387 U.S. 136, 149 (1967)). In the administrative context, courts also assess "the extent to which judicial intervention would interfere with administrative action." *See Nat'l Right to Life Political Action Comm. v. Connor*, 323 F.3d 684, 692-93 (8th Cir. 2003); *see also Ohio Forestry Ass'n v. Sierra Club*, 523 U.S. 726 (1998). All three factors counsel against finding Counts II and IV ripe for judicial review.

i. Counts II and IV Focus on Events That May Never Occur.

The fitness prong "safeguards against judicial review of hypothetical or speculative disagreements." *Neb. Pub. Power Dist.*, 234 F.3d at 1038. It weighs "questions of finality, definiteness, and the extent to which resolution of the challenge depends upon facts that may not yet be sufficiently developed." *Parrish v. Dayton*, 761 F.3d 873, 875 (8th Cir. 2014).

The FDIC uses FILs to communicate with, and issue guidance to, supervised financial institutions. These "tentative," non-binding policy statements are not, standing alone, "definitive" agency pronouncements falling within the bailiwick of arbitrary-and-capricious review. *See Abbott Labs.*, 387 U.S. at 151.

Holding FIL 32 reviewable under an arbitrary-and-capricious standard would "severely compromise[] the interests the ripeness doctrine protects," *see Am. Petrol. Inst. v. EPA*, 683 F.3d 382, 387 (D.C. Cir. 2012) (internal quotations omitted)—denying the FDIC a "full opportunity" to arrive at final agency decisions reflecting "its expertise and to correct errors or modify positions in the course of a proceeding," *see id*. (quoting *Pub. Citizen Health Research Grp. v. FDA*, 740 F.2d 21, 31 (D.C. Cir. 1984)); *see also McKart v. United States*, 395 U.S. 185, 194 (1969) (stating the same). Similarly, judicial

review may become "unnecessary" should supervised institutions eventually "convince the agency to alter a tentative position." *Am. Petrol. Inst.*, 683 F.3d at 387. Both FILs envision this precise scenario; they are filled with caveated language reflecting their tentative character. *See supra* Section III.A.2. FIL 32's superseding of FIL 40 underscores this point, showing that the FDIC will refine its supervisory approach as it gathers more information across its supervisory activities.

Count IV likewise hinges on the FDIC applying FIL 32 to unknown facts in hypothetical future administrative proceedings. It implies that FIL 32, even if considered supervisory guidance, prescribes FDIC enforcement action. This argument is circular; supervisory guidance, by definition, lacks the force and effect of law and noncompliance can *never* form the basis of an administrative charge. *See* 12 C.F.R. Part 302, App. A ("the FDIC will not issue an enforcement action on the basis of, a 'violation' of or 'noncompliance' with supervisory guidance"). Nevertheless, several procedural steps must take place before this *could* happen: (i) the FDIC must conduct an exam, (ii) the FDIC must review the institution's NSF fee practices, (iii) the FDIC must determine that those practices comprise an actionable violation of law, (iv) the FDIC must raise its concerns with the institution through an informal or formal supervisory action, (v) the institution must dispute or challenge the FDIC's supervisory findings, and (vi) the FDIC must reject the institution's challenge.

ii. Withholding Judicial Review Would Not Harm Plaintiffs.

The hardship prong asks whether delayed review "inflicts *significant* practical harm" on the plaintiff. *Parrish*, 761 F.3d at 875 (emphasis added). Speculative or

abstract hardship is not enough. *Pub. Water Supply Dist. No. 10 of Cass Cty. v. City of Peculiar*, 345 F.3d 570, 573 (8th Cir. 2003). Though "harm" encompasses "heightened uncertainty and resulting behavior modification that may result from delayed resolution," courts weigh these effects against the "immediacy and the size of the threatened harm." *Neb. Pub. Power Dist.*, 234 F.3d at 1038.

FIL 32 does not commit FDIC examiners to any specific supervisory determination. At most, it notifies financial institutions about an area of supervisory focus that, following exhaustive examination and administrative processes, *might* lead the FDIC to seek corrective action through an established administrative process. Accordingly, any present hardship suffered by Plaintiffs or their members remains unproven and speculative.

Even if Plaintiffs could identify some present hardship, claims of "significant" hardship remain illusory. Plaintiffs fear that the FILs impose the "threat of enforcement." *See* Compl. ¶¶ 28-29. But the "threat of enforcement" cannot constitute "significant" hardship; concluding otherwise would allow institutions to subvert the FDIC's supervisory process before it begins. Exposing the FDIC's risk-based discretionary choices to judicial review before any administrative action takes place runs counter to the ripeness doctrine's core purpose.

Moreover, every FDIC-supervised institution retains a right to further review if, at some point, the FDIC takes final agency action based on FIL 32. *See generally* 12 U.S.C. § 1818(h) (describing conditions for appeal of enforcement decisions); 12 U.S.C. § 4806(a)-(b) (mandating that the FDIC develop an intra-agency appellate process for

material supervisory determinations); FIL-42-2017, Revised Guidelines for Appeals of Material Supervisory Determinations (Sept. 6, 2017) (implementing § 4806(a)-(b)).[27] But because the FDIC has not taken final agency action—and might not ever do so—dismissal is warranted.

iii. Judicial Review Would Interfere with the FDIC's Administrative Actions.

Plaintiffs' requested remedies carry consequences extending beyond this case. Granting Plaintiffs their sought-after relief—for example, an injunction "permanently enjoining [the FILs'] application or enforcement," Compl., Prayer for Relief, ¶ E—would interfere with the FDIC's supervisory activities across the country. As explained above, the FDIC can bring enforcement actions for violations of law—including related to NSF issues—pursuant to 12 U.S.C. § 1818. Plaintiffs' requested relief would not change that. But their requested relief *would* frustrate the FDIC's efforts to ensure that regulated entities have clear guidance on consumer compliance risks and ways to mitigate those risks. Likewise, finding Plaintiffs' claims ripe at this juncture would incentivize supervised institutions to preempt the FDIC's administrative-review processes through potentially unnecessary judicial intervention. *See generally* 12 U.S.C. § 4806(a)-(b); 12 C.F.R. Part 308.

[27] https://www.fdic.gov/news/financial-institution-letters/2017/fil17042.pdf

CONCLUSION

For the foregoing reasons, Defendants respectfully request that Plaintiffs' Complaint be dismissed.

DATED: September 18, 2023

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UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

MINNESOTA BANKERS ASSOCIATION **and** **LAKE CENTRAL BANK,** **Plaintiffs,** **v.** **FEDERAL DEPOSIT INSURANCE CORPORATION and MARTIN J. GRUENBERG, in his official capacity as Chairman of the Federal Deposit Insurance Corporation,** **Defendants.**	**Case No. 23-cv-2177-PAM-ECW**

CERTIFICATE OF COMPLIANCE

The undersigned attorney for Defendants Federal Deposit Insurance Corporation and Martin J. Gruenberg certifies this memorandum complies with the type-volume limitation of D. Minn. LR 7.1(f) and the type size limitation of D. Minn. LR 7.1(h). The memorandum has 6,908 words of type, font size 13. The memorandum was prepared using

Microsoft Word, which includes all text, including headings, footnotes, and quotations in the word count.

DATED: September 18, 2023

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