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) **PLAINTIFFS' MEMORANDUM IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS**

INTRODUCTION

Many banks charge nonsufficient funds ("NSF") fees when a customer's account lacks adequate funds to cover a payment. (Am. Compl. [ECF No. 13] ¶ 37.) Pursuant to deposit agreements with their customers, some banks charge NSF fees each time a merchant submits a deficiently funded item for payment, including when the item is a re-presentment of a previously declined item. (*See id.* ¶¶ 37–38.)

Only a small fraction of consumer debit transactions raise the potential for re-presentment, which then rests with merchants—not banks—to initiate. (*Id.* ¶¶ 38–39.) Nonetheless, according to the FDIC, re-presentment NSF fees charged by financial institutions create "an elevated risk of violations of law and harm to consumers." (Am. Compl. Ex. B ("FIL 32") at 2.)

This case challenges the FDIC's overreach in response to that supposed risk: imposition of new mandatory consumer disclosure requirements for multiple re-presentment NSF fees, identification of specific NSF fee practices as unfair and deceptive under Section 5 of the Federal Trade Commission Act ("FTC Act"), and issuance of blanket retroactive restitution orders to all supervised banks. (*See id.* at 2–5.)

The Court should vacate FIL 32[1] and enjoin its enforcement. First, FIL 32 was issued without observing the procedural requirements of the Administrative Procedures Act ("APA")—namely, notice and comment rulemaking. Second, it is arbitrary and capricious agency action. Third, it exceeds the FDIC's statutory authority. Lastly, it is contrary to existing law.

BACKGROUND

As the primary federal regulator for state-chartered banks that do not join the Federal Reserve System, the FDIC directly supervises and examines thousands of financial institutions for operational safety and soundness, as well as for compliance with consumer protection laws. (Am. Compl. ¶ 35.) The FDIC conducts consumer compliance examinations of supervised banks at regular intervals—every 12 to 36 months depending on the strength of institutional ratings. (*Id.* ¶ 89.) When a consumer compliance

[1] On August 18, 2022, the FDIC issued FIL 40. (Am. Compl. Ex. A.) On June 16, 2023, the FDIC issued FIL 32 to "clarify" and "reflect its current supervisory approach." (*Id.* ¶¶ 2–3, Ex. B.) On its website, the FDIC characterizes FIL 32 as "updating and reissuing" FIL 40 to "clarify" and "reflect its current supervisory approach," and states that FIL 40 is "inactive" and therefore "rescinded by the FDIC." (*Id.* ¶¶ 3-4.) Plaintiffs seek declaratory and injunctive relief as to FIL 32 and, to the extent still operative, FIL 40. (*Id.* ¶ 6.)

examination yields evidence that a supervised bank "is engaging or has engaged . . . in an unsafe or unsound practice . . . or is violating or has violated . . . a law, rule, or regulation," the FDIC has the authority to pursue restitution orders and civil penalties through administrative enforcement proceedings. 12 U.S.C. § 1818(b)(1).

An intricate network of duly enacted federal statutes and regulations governs the disclosures that financial institutions provide to their customers. All are silent on financial institution consumer disclosure requirements specific to multiple re-presentment NSF fees.

For example, Regulation DD, which implements the Truth in Savings Act, *id.* §§ 4301–4313 ("TISA"), generically requires disclosure of "fees associated with checks returned unpaid." 12 C.F.R. pt. 1030, supp. I, cmt. 1030.4(b)(4) (official interpretation of 12 C.F.R. § 1030.4(b)(4)). And Regulation E, which implements the Electronic Fund Transfer Act, 15 U.S.C. §§ 1693–1693r ("EFT Act"), provides that account overdraft fees "may, but need not, be disclosed" by financial institutions. 12 C.F.R. pt. 1005, supp. I, cmt. 7(b)(5) (official interpretation of 12 C.F.R. § 1005.7(b)(5)). Neither TISA nor the EFT Act entrusts any legislative rulemaking authority to the FDIC, instead delegating that power to the Consumer Financial Protection Bureau ("CFPB"). 12 U.S.C. § 4308; 15 U.S.C. § 1693b; *see* 12 U.S.C. § 5481(12)(C), (P); 12 C.F.R. § 1001.1.

A prior rulemaking under Regulation E expressly declined to impose re-presentment NSF fee disclosures on financial institutions. To the contrary, the final regulation required *merchants* to provide notice and obtain consumer authorization before attempting to collect fees for previously returned items. *See* 12 C.F.R. § 1005.3(b)(3). Commentary to the rule further clarifies that "[t]he authorization requirement does not apply to any fees assessed by the consumer's account-holding financial institution when it returns the unpaid underlying [electronic fund transfer] or check or pays the amount of an overdraft." 12 C.F.R. pt. 1005, supp. I, cmt. 3(b)(3).

Meanwhile, the FTC Act broadly prohibits "unfair or deceptive acts or practices in or affecting [interstate] commerce." 15 U.S.C. § 45(a) ("UDAP"). Congress conferred UDAP rulemaking authority exclusively on the Federal Trade Commission ("FTC") or other persons designated to "act in behalf of the [FTC] in any part of the rulemaking process." *Id.* § 57a(a)(1), (d)(2)(A). As a result, only the FTC or its designee may prescribe "[r]ules which define with specificity acts or practices which are unfair or deceptive." *Id.* § 57a(a)(1)(B). Although the FDIC retains UDAP enforcement authority over its supervised financial institutions, 12 U.S.C. § 1818(b)(1), nothing in the FTC Act authorizes the FDIC to issue legislative rules that define specific practices as unfair or deceptive.

The Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank Act") also prohibits financial product and service providers from "committing or engaging in an unfair, deceptive, or abusive act or practice." 12 U.S.C. § 5531(a) ("UDAAP"). Rulemaking authority to identify specific unlawful acts or practices and to prescribe consumer disclosure requirements is delegated exclusively to the CFPB. *Id.* §§ 5531(b), 5532(a).

A. The FDIC Issued FIL 40 to Regulate Re-Presentment Fees.

The FDIC first publicly identified UDAP concerns with multiple re-presentment NSF fees in its March 2022 Consumer Compliance Supervisory Highlights. (Am. Compl. Ex. C ("2022 Supervisory Highlights"); *see also* Defs.' Mem. [ECF No. 19] at 5 ("The

FDIC first referenced this practice in March 2022").) The 2022 Supervisory Highlights summarized trends from the FDIC's previous individualized findings in enforcement actions and "observed" several "risk-mitigating activities that financial institutions have taken to reduce potential risk of consumer harm and avoid potential violations of Section 5 of the FTC Act." (2022 Supervisory Highlights at 12.)

With no legal authority to promulgate administrative regulations for consumer disclosure or UDAP laws directly, the FDIC unlawfully took matters into its own hands. Under the guise of its general supervisory authority, on August 18, 2022, the FDIC issued Financial Institution Letter 40-2022: Supervisory Guidance on Multiple Re-Presentment NSF Fees. (Am. Compl. Ex. A ("FIL 40").)

Without undertaking notice and comment rulemaking, FIL 40 instructed all supervised financial institutions to self-evaluate their practices for alleged "risks arising from multiple re-presentment NSF fees." (*Id.* at 2.) First, FIL 40 warned of potential deceptive practices under the FTC Act and Dodd-Frank Act. Citing recent compliance examinations, the FDIC explained that "if a financial institution assesses multiple NSF fees arising from the same transaction, but disclosures do not adequately advise customers of this practice, the misrepresentation and omission of this information from the institution's disclosures is material." (*Id.*) The FDIC then decreed that "if this information is not disclosed clearly and conspicuously to customers, the material omission of this information is considered to be deceptive pursuant to Section 5 of the FTC Act." (*Id.* at 2–3.)

Second, FIL 40 cautioned against unfair practices under the FTC Act and Dodd-Frank Act. "While revising disclosures may address the risk of deception," the FDIC noted, "doing so may not fully address the unfairness risks." (*Id.* at 3.) In other words, the FDIC called into question whether charging re-presentment NSF fees can ever comply with the FTC Act. As a discrete example, the FDIC indicated that "a risk of unfairness may be present"—regardless of clear and conspicuous disclosures—"if multiple NSF fees are assessed for the same transaction in a short period of time without sufficient notice or opportunity for customers to bring their account to a positive balance in order to avoid the assessment of additional NSF fees." (*Id.*) The FDIC ignored 12 C.F.R. § 1005.3(b)(3), which requires *merchants* to provide notice and obtain consumer authorization before attempting to collect fees for previously returned items.

After identifying these risks, FIL 40 outlined certain mitigating steps for financial institutions to take, which include (in this order): eliminating NSF fees altogether; eliminating multiple re-presentment NSF fees; reviewing and revising disclosures, policies, procedures, and monitoring activities related to re-presented payments; clearly and conspicuously disclosing the amount and terms of NSF fees charged to customers; and reviewing customer notification or alert practices relating to NSF transactions and the timing of fees assessed. (FIL 40 at 3–4.)

The FDIC specified that if a bank continues charging multiple re-presentment NSF fees, then clear and conspicuous disclosures must include the following: (1) "Information on whether multiple fees may be assessed in connection with a single transaction when a merchant submits the same transaction multiple times for payment"; (2) "The frequency with which such fees can be assessed"; and (3) "The maximum number of fees that can be assessed in connection with a single transaction." (*Id.* at 4.) None of these requirements appear anywhere else in federal law.

If financial institutions "self-identify re-presentment NSF fee issues," then "the FDIC expects supervised financial institutions" to take certain actions, including "providing restitution to harmed customers, consistent with the restitution approach described in [FIL 40]"; "promptly correct[ing] NSF fee disclosures and account agreements" and distributing them to all customers; considering "whether additional risk mitigation practices are needed"; and "monitoring ongoing activities and customer feedback to ensure full and lasting corrective action." (*Id.*)

The "restitution approach" originally described in FIL 40—which finds no basis in any existing statute or regulation—requires a lookback review of check and ACH payment data to identify re-presented NSF fees that may have been charged and to make plenary restitution payments to each affected customer. (*See id.* at 4–5.) The FDIC initially warned in FIL 40 that "[f]ailing to provide restitution for harmed customers when data on re-presentments is reasonably available will not be considered full corrective action." (*Id.* at 5.)

B. The FDIC Issued FIL 32 to "Clarify" FIL 40.

In June 2023, the FDIC issued Financial Institution Letter 32-2023: FDIC Clarifying Supervisory Approach Regarding Supervisory Guidance on Multiple Re-Presentment NSF Fees. (Am. Compl. Ex. B ("FIL 32") at 1.) On its website, the FDIC characterizes FIL 32 as "updating and reissuing" FIL 40 to "clarify" and "reflect its current supervisory approach," and states that FIL 40 is "inactive" and therefore "rescinded by the FDIC." (Am. Compl. ¶¶ 3–4.)[2]

In its highlights on the release of FIL 32, the FDIC conceded that the decision to revise was based on "additional data about the amount of consumer harm associated with the issue at particular institutions and ongoing and extensive challenges in accurately identifying harmed parties," which confirms that notice and comment is needed. (*Id.* ¶ 79.) The FDIC then indicated that its "current supervisory approach" regarding the issue is "to not request an institution to conduct a lookback review absent the likelihood of substantial consumer harm." (*Id.*) The term "substantial consumer harm" is left undefined and provides no guidance to supervised financial institutions as to when a lookback review is required. (*See* FIL 32 at 3–4 & n.4.)

Revisions aside, FIL 32 still contains the statement that "[i]f institutions self-identify re-presentment NSF fee issues, the FDIC expects supervised financial institutions to . . . [t]ake full corrective action, including providing restitution to harmed customers, consistent with the restitution approach described in this guidance." (*Id.* at 3.) FIL 32 also continues to threaten enforcement actions for banks that have not "fully corrected" multiple re-presentment NSF fee practices by their next compliance examination. (*Id.*)

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[2] *See* **Attachment A** to the Declaration of David R. Marshall, which is a redline document comparing FIL 40 to FIL 32.

In concluding with its supervisory approach to enforcing FIL 32, the FDIC made clear it "will focus on identifying re-presentment related issues and ensuring correction of deficiencies and remediation to harmed customers, where appropriate." (*Id.*)

Apparently identifying the significance of its conduct, the FDIC created a potential safe harbor by explaining that it "will generally not cite UDAP violations that have been self-identified and fully corrected prior to the start of a consumer compliance examination." (*Id.*) Yet, by using the qualifying word "generally," the FDIC reserved the right to bring enforcement actions against any bank, including those that "[t]ake full corrective action." (*See id.*) The inverse of the FDIC's tepid assurance then, of course, is that "[i]f examiners identify violations of law due to re-presentment NSF fee practices that have not been self-identified and fully corrected prior to a consumer compliance examination, the FDIC *will* evaluate appropriate supervisory or enforcement actions, including civil money penalties and restitution, where appropriate." (*Id.* at 4 (emphasis added).)

In sum, FIL 32 informs supervised financial institutions of the precise content that disclosures for multiple re-presentment NSF fees need to contain, and that failure to conform will categorically be considered a violation of the FTC Act. FIL 32 directs banks to self-evaluate their practices and make plenary restitution to affected customers or face consequences upon their next consumer compliance examination. Supervised institutions must now weigh the risks between adhering to FIL 32's mandates and the threat of enforcement actions from the FDIC.

C. The FDIC has Acted to Enforce the FILs.

Under its own recently adopted binding regulations, the FDIC claims "supervisory guidance does not have the force and effect of law, and the FDIC does not take enforcement actions based on supervisory guidance." 12 C.F.R. pt. 302, Appendix A. Supervisory guidance is supposed to be limited to "general views regarding appropriate practices for a given subject area." *Id.* However, for evidence that the FDIC enforces the FILs as law in violation of its internal regulations, one need look no further than the FDIC's March 2023 Consumer Compliance Supervisory Highlights. (Am. Compl. Ex. D ("2023 Supervisory Highlights").) There, the FDIC disclosed that its enforcement actions under Section 5 of the FTC Act now arise "most frequently when financial institutions charged multiple non-sufficient funds (NSF) fees for the re-presentment of the same transaction and disclosures did not fully or clearly describe the financial institution's re-presentment practice." (*Id.* at 3.) These statistics prove that the FDIC is following through on its promise to enforce the new and binding regulatory mandates in the FILs.

D. Because Plaintiffs Have Been Harmed by the FILs, They Commenced this Lawsuit.

Faced with the threat of enforcement proceedings and additional compliance costs from the FILs, Plaintiffs commenced this action under the APA. Plaintiffs seek vacatur of FIL 32, a declaratory judgment, and injunctive relief against its future application or enforcement. In its initial memorandum in support of its motion to dismiss, the FDIC asserts that FIL 32 "revised and replaced FIL 40" and is "the operative guidance document." (ECF No. 10 at 2.) The FDIC website also characterizes FIL 32 as "updating and reissuing" FIL 40 to "clarify" and "reflect its current supervisory approach," and states that FIL 40 is "inactive" and therefore "rescinded by the FDIC." (Am. Compl. ¶¶ 3–4.) Plaintiffs subsequently amended their Complaint to make clear that this case challenges FIL 32 (and, to the extent still operative, FIL 40). (*See id.* ¶ 6.)

ARGUMENT

Defendants assert that the Amended Complaint should be dismissed for lack of jurisdiction and failure to state a claim upon which relief can be granted. But the premise for all of the FDIC's arguments—that Plaintiffs challenge mere administrative guidance on existing legal requirements—is mistaken. Because Plaintiffs have standing, plausibly plead claims under the APA, and present claims that are ripe for judicial review, the Court should deny the motion to dismiss.

I. STANDING.

A. Standard on a Motion to Dismiss.

Standing requires an injury in fact, fairly traceable to the challenged conduct, that is likely redressable by a favorable judicial decision. *Spokeo, Inc. v. Robins*, 578 U.S. 330, 339 (2016). On a motion to dismiss based on standing, a district court "must accept as true all material allegations of the complaint, and must construe the complaint in favor of the complaining party." *Nat'l Wildlife Fed'n v. Agric. Stabilization and Conservation Serv.*, 901 F.2d 673, 677 (8th Cir. 1990) (internal quotation marks and citation omitted); *see also Lujan v. Defs. of Wildlife*, 504 U.S. 555, 561 (1991) (clarifying the differences between analyzing standing at the motion to dismiss stage versus the summary judgment stage). Put differently, when addressing standing questions, courts "'assume that on the merits the plaintiffs would be successful in their claims.'" *Am. Farm Bureau Fed'n v. EPA*, 836 F.3d 963, 968 (8th Cir. 2016) (quoting *Muir v. Navy Fed. Credit Union*, 529 F.3d 1100, 1106 (D.C. Cir. 2008)). General factual allegations of injury resulting from the challenged conduct establish standing. *Jones v. Jegley*, 947 F.3d 1100, 1103–04 (8th Cir. 2020).

B. Plaintiffs' Injuries are Redressable.

Defendants contend that Plaintiffs' injuries are not redressable because "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." (Defs.' Mem. at 11.)

Here, Plaintiffs assert a variety of injuries from the issuance of the FILs. First, they assert procedural injury from Defendants' failure to follow the APA's notice and comment procedures. For such injuries, "the redressability standard is relaxed." *Sierra Club v. Clinton*, 689 F. Supp. 2d 1147, 1155 (D. Minn. 2010).

Iowa League of Cities v. EPA thoroughly explains procedural redressability and is directly on point here:

> [T]he violation of a procedural right can constitute an injury in fact so long as the procedures in question are designed to protect some threatened concrete interest of [the petitioner] that is the ultimate basis of [its] standing. The League's members have a concrete interest not only in being able to meet their regulatory responsibilities but in avoiding regulatory obligations above and beyond those that can be statutorily imposed upon them. Notice and comment procedures for EPA rulemaking under the CWA were undoubtedly designed to protect the concrete interests of such regulated entities by ensuring that they are treated with fairness and transparency

> after due consideration and industry participation. Thus, the League has established an injury in fact related to the EPA's purported procedural deficiencies.
>
> Causation and redressability, and therefore standing to assert this procedural challenge, follow from these conclusions. Where a challenger is the subject of agency action, there is ordinarily little question that the action . . . has caused him injury, and that a judgment preventing . . . the action will redress it.

711 F.3d 844, 870–71 (8th Cir. 2013) (internal citations and quotations omitted).

Plaintiffs assert other injuries as well. Plaintiff MBA asserts that it, and its members, including Lake Central Bank, have faced increased compliance costs responding to the FILs. (Am. Compl. ¶¶ 28.) The increased compliance costs have frustrated MBA's purpose by diverting resources away from its growth-focused educational and advocacy initiatives. (*Id.*) Lake Central asserts that it has spent time and resources updating its disclosures to respond to the FILs. (*Id.* ¶ 32.) All financial institutions have compliance examinations by the FDIC and thus face a possible FDIC enforcement action with respect to standards outlined in FIL 32 regarding re-presentment fees. (*See id.* ¶ 34.)

These asserted injuries are redressable by vacating FIL 32. For instance, vacating FIL 32 will save Plaintiffs money as they will no longer need to continue the ongoing monitoring regarding re-presentment fees. Additionally, vacating FIL 32 will eliminate costs related to new disclosures, additional procedures and processes, and other actions associated with responding to FIL 32. Vacating it will also eliminate the risk of penalties in enforcement actions by the FDIC for failing to pay restitution. By vacating FIL 32, the Court would ease uncertainty among banks who have not paid any restitution and have not changed their practices (regardless of whether they have updated their disclosures). *U.S. Army Corps of Engineers v. Hawkes Co., Inc.*, 578 U.S. 590, 600 (2016) (providing that regulated entities need not wait for the regulator to "drop the hammer" before challenging). Finally, declaring FIL 32 improperly issued would give banks who faced supervisory findings or enforcement actions due to their failure to comply with the original requirements standing to challenge those findings.

C. The Cases Cited by Defendants are Distinguishable.

The cases cited by Defendants to support its standing argument are distinguishable. Defendants cite *Duke Power Co. v. Carolina Envtl. Study Grp.*, 438 U.S. 59 (1978). However, *Duke* involved an appeal where "the parties had engaged in extensive discovery" and the district court had conducted an evidentiary hearing on whether the issues were ripe for adjudication and whether appellees had standing. *Id.* at 67–68. Here, the Court must accept the allegations in the Amended Complaint as true.

Noem v. Haaland is also distinguishable. 41 F.4th 1013 (8th Cir. 2022). In *Noem*, the Governor of South Dakota applied for a permit to conduct a Fourth of July fireworks display at Mount Rushmore. *Id.* at 1015. The Governor sought a declaration that the statutes granting the Park Service permitting authority were unconstitutional. *Id.* at 1015–16. The Court held that the requested relief would not redress the Governor's ability to hold a Fourth of July fireworks show at Mount Rushmore because the Governor did not have the right to use fireworks in the first instance and thus striking down the Park Service's permitting power would make it harder for the Governor to obtain a permit. *Id.* at 1017–18. In addition, the time for a fireworks show had passed. *Id.*

Defendants cite *Town of Babylon v. Federal Housing Finance Agency*, for the proposition that Plaintiffs' purported obligations to minimize risk render their injuries non-redressable. 790 F. Supp. 2d 47, 56 (E.D.N.Y. 2011). In *Town of Babylon*, the plaintiff had created a program to finance homeowners' improvements to reduce energy ("PACE" program). *Id.* at 51. Under the PACE program, Babylon's financing included a first priority lien against the property. *Id.* Two years later, Fannie Mae and Freddie Mac became concerned with PACE programs that created first priority liens. *Id.* In response, the Office of the Comptroller issued a "Supervisory Guidance" on its website to "alert national banks to concerns and regulatory expectations." *Id.* at 52. Banks "were not directed to take any specific action," but "advised that they were to consider steps to mitigate their exposures in order to protect their collateral." *Id.* The guidance suggested "requiring increased collateral and reducing loan to value limits," but "no particular action was required." *Id.*

The town of Babylon sued, alleging, among other things, that various federal agencies violated the Administrative Procedures Act when issuing letters, bulletins, and other guidance relating to PACE programs. The Eastern District of New York held that Babylon failed to show redressability. *Id.* at 55. It explained that "even if the court were to grant the requested relief . . . such action would not require banks to authorize mortgages subject to [the PACE programs]. *Id.* This is because "banks would still be required, both by OCC regulation and their own prudence, to consider all financial factors, including the existence of first priority liens, in determining whether to grant particular mortgages." *Id.* The court noted that "it is worth repeating that the July 6 Bulletin did not direct banks to refuse to grant mortgages on properties encumbered with first-priority PACE loans. Rather, it merely suggested that such liens be the subject of consideration, and noted a variety of steps that might be considered in the mortgage decision making process." *Id.* at 55–56.

Unlike *Town of Babylon*, where the supervisory guidance did "not require bank action," FIL 32 "expects supervised financial institutions to . . . take full corrective action, including providing restitution to harmed customers . . . [and] monitor ongoing activities and customer feedback to ensure full and lasting corrective action." It also identifies "risk mitigation practices" where it outlines several activities the FDIC "has observed."

D. The Statutes Cited by Defendants do not Support the Defendants' Argument.

1. 12 U.S.C. § 5531(a)

Under 12 U.S.C. § 5531(a), the CFPB, not the FDIC, is given authority "to prevent a covered person or service provider from committing or engaging in an unfair, deceptive, or abusive act or practice under Federal law in connection with any transaction with a consumer for a consumer financial product or service, or the offering of a consumer financial product or service." The statute specifically allows for "rulemaking." *Id.* ("The Bureau may prescribe rules applicable to a covered person or service provider identifying as unlawful unfair, deceptive, or abusive acts or practices in connection with any transaction with a consumer for a consumer financial product or service, or the offering of a consumer financial product or service. Rules under this section may include requirements for the purpose of preventing such acts or practices."). Thus, this statute does not support the FDIC's argument.

2. 12 C.F.R. Part 364, App. A, ¶ II.A

Appendix A of 12 C.F.R Part 364 does not help Defendants. Nothing in the reports or audits require full corrective action, including paying restitution, that the FDIC requires in FIL 32. Nor do they permit enforcement action by the FDIC. Part 364 creates standards for establishing safety and soundness. Appendix A to Part 364 provides that the FDIC, and other agencies, are required to "establish three types of standards: (1) [o]perational and managerial standards; (2) compensation standards; and (3) such standards relating to asset quality, earnings, and stock valuation as they determine to be appropriate." 12 C.F.R. pt. 364, App. A. I(i). Nothing in the guidelines—nor the statute they are based on—relates to compliance matters. Any compliance related risks identified by the FDIC associated with charging re-presentment NSF fees do not rise to the level of "unsafe and unsound banking practices." *See id.* Hard as it may try, the FDIC cannot wrap FIL 32 in the cloak of safety and soundness to justify its issuance. That cloak is indeed broad, but it is not all encompassing. As described in its Risk Management Manual of Examination Policies, the FDIC judges a financial intuition's safety and soundness based on a compilation of six criteria: Capital, Assets, Management, Earnings, Liquidity, and Sensitivity to Market Risk (generally abbreviated as CAMELS). *See* 62 Fed. Reg. 752 (Jan. 6, 1997). Indeed, FIL 32 does not reference safety and soundness or 12 C.F.R. Part 364, App. A.

While not specifically defined by Congress, "unsafe and unsound practice" is "generally viewed as conduct deemed contrary to accepted standards of banking operations which might result in abnormal risk or loss to a banking institution or shareholder." *First Nat'l Bank of Eden v. Dep't of Treasury*, 568 F.2d 610, 611 n.2 (8th Cir. 1978). "The imprudent act must pose an abnormal risk to the financial stability of the banking institution. . . . Contingent, remote harms that could ultimately result in a minor financial loss to the institution are insufficient to pose the danger that warrants cease and desist proceedings." *Matter of Seidman*, 37 F.3d 911, 928–29 (3d Cir. 1994) (cleaned up).

Finally, 12 C.F.R. Part 364, Appendix A, does not set forth an obligation for institutions to "minimize risk" as the FDIC asserts. It requires institutions to "assess" "consider," "evaluate," and "manage" risk, and to develop "internal controls and information systems that are appropriate to the size of the institution and the nature, scope and risk of its activities."

For these reasons, 12 C.F.R. Part 364, App. A, ¶ II.A, does not support Defendants standing argument.

3. 15 U.S.C. § 45(a)(1)

In passing, the FDIC cites 15 U.S.C. § 45(a)(1) for the proposition that Plaintiffs' legal obligations under the FTC Act and Dodd-Frank Act will remain in force even if the Court strikes down FIL 32. To be sure, Plaintiffs' legal obligations under those two Acts will remain in force, but those Acts do not define the items in FIL 32 as unfair or deceptive trade practices. To the contrary, FIL 32 dictates that if a bank charges multiple re-presentment NSF fees but does not "adequately advise customers of this practice" by failing to adopt the new disclosure requirements, then the omission "is considered to be deceptive." Moreover, FIL 32 suggests that "multiple NSF fees . . . assessed for the same transaction in a short period of time without sufficient notice or opportunity for customers to bring their account to a positive balance" may always be considered unfair. These are not identified in the FTC or Dodd-Frank Acts. The key here is that the FDIC lacks the authority to issue legislative rules that define specific unfair or deceptive acts or practices. *See* 12 U.S.C. § 1818; 15 U.S.C. § 57a. Therefore, this statute is not instructive.

II. THE AMENDED COMPLAINT PLEADS PLAUSIBLE APA CLAIMS.

A. Standard on a Motion to Dismiss.

A complaint need only contain "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). On a motion to dismiss, a district court "must accept as true all material allegations of the complaint, and must construe the complaint in favor of the complaining party." *Warth v. Seldin*, 422 U.S. 490, 501 (1975); *Nat'l Wildlife Fed'n*, 901 F.2d at 677.

The FDIC contends that the Amended Complaint fails to plausibly allege that FIL 32 qualifies as final agency action and otherwise falls within its general discretion to establish enforcement priorities. Defendants' argument should be rejected.

B. FIL 32 is Final Agency Action.

Federal courts may review "final agency action for which there is no other adequate remedy in a court." 5 U.S.C. § 704. "The APA 'evinces Congress' intention and understanding that judicial review should be widely available to challenge the actions of federal administrative officials.'" *Hawkes Co. v. U.S. Army Corps of Eng'rs*, 782 F.3d 994, 999 (8th Cir. 2015) (quoting *Califano v. Sanders*, 430 U.S. 99, 104 (1977)).

Final agency action requires two conditions. First, the action must be the "consummation of the agency's decisionmaking process." *Sisseton-Wahpeton Oyate of Lake Traverse Res. V. Corps of Eng'rs*, 888 F.3d 906, 915 (8th Cir. 2018) (quoting *Bennett v. Spear*, 520 U.S. 154, 177–78 (1997)). Second, the action "must be one by which rights or obligations have been determined, or from which legal consequences will flow." *Id.* (internal quotation marks omitted).

The FDIC concedes that FIL 32 is "agency action" and does not dispute that it represents the consummation of its decisionmaking process. (Defs.' Mem. at 11.) Instead, the FDIC contends only that FIL 32 does not impose obligations or create legal consequences. (*Id.*)

FIL 32 imposes legal obligations. The FDIC devotes only two paragraphs to this argument, claiming that regulated financial institutions have preexisting obligations to comply with the FTC and Dodd-Frank Acts, and that FIL 32 does not change these obligations. (Defs.' Mem. at 12–13.)

Agency action determines obligations when it "either compel[s] affirmative action or prohibit[s] otherwise lawful action." *Sisseton-Wahpeton Oyate*, 888 F.3d at 915. FIL 32 compels new affirmative actions not previously required by the FTC and Dodd-Frank Acts. First, it creates new disclosure obligations that banks must include if they elect to charge re-presentment NSF fees, effectively amending Regulations E and DD. (FIL 32 at 3.) Second, it states that if a bank fails to make the newly created disclosures, then the FDIC will consider the omission to be deceptive under the FTC Act. (*Id.* at 2.) Third, it states that if a bank self-identifies re-presentment NSF fee issues (presumably based on the FDICs assumptions and assertions in the guidance), then the FDIC expects regulated financial institutions to promptly correct their disclosures and account agreements and take full corrective action, up to and including restitution to harmed customers. (*Id.* at 3.) None of these obligations arise from pre-existing law.[3]

"Courts consistently hold that an agency's guidance documents binding it and its staff to a legal position . . . determine rights and obligations, thus meeting the second prong of *Bennett*." *Texas v. EEOC*, 933 F.3d 433, 441 (5th Cir. 2019). In *Chamber of Commerce of the United States of America v. CFPB*, --- F. Supp. 3d ----, 2023 WL 5835951, at *5 (E.D. Tex. Sept. 8, 2023), the district court held that an update to the CFPB's consumer compliance examination manual was final agency action. The district court explained that the CFPB had "adopt[ed] a new 'legal position' on the breadth of the UDAAP prohibition, binding agency officials to that position in deciding how to examine companies." *Id.*

FIL 32 also prohibits otherwise lawful action. The FDIC argues that even if a bank revises its disclosures, that still may not be enough to avoid an unfairness violation if multiple NSF fees are charged within a short time without an opportunity for the consumer to bring their account to a positive balance. (FIL 32 at 2.) However, that practice was never previously identified as unlawful—despite the FDIC enforcing the FTC Act for decades—until the FILs were released. Moreover, unlike *Star Borough v. U.S. Army Corps*

[3] The FDIC claims that "agencies look to official interpretations of unfair or deceptive acts or practices and the overall body of law, including factually similar cases," to determine whether to cite a UDAP violation. (Defs.' Mem. at 5.) Notably, the FDIC has not identified a single authority that identified re-presentment NSF fees as a UDAP violation, confirming that the FDIC has created a new UDAP violation under FIL 32.

of Eng'rs, 543 F.3d 586, 594 (9th Cir. 2008), Plaintiffs here would face liability for disagreement with the specific mandates in FIL 32, not for a generalized failure to comply with the FTC and Dodd-Frank Acts.

FIL 32 contains binding language. When an agency expresses its position, it speaks in mandatory terms. *Iowa League of Cities*, 711 F.3d at 864. FIL 32 sets out detailed disclosure requirements for financial institutions to adopt if they elect to charge NSF fees. (FIL 32 at 3.) The FDIC then states that if "disclosures do not adequately advise customers of this practice," then "the misrepresentation and omission of this information from the institution's disclosures is material." (*Id.*) FIL 32 goes on to dictate that "if this information is not disclosed clearly and conspicuously to customers, the material omission of this information *is considered to be deceptive* pursuant to Section 5 of the FTC Act." (*Id.* at 2 (emphasis added).) The FDIC's position clearly states that re-presentment fees assessed within a short period of time without an opportunity for a consumer to bring their account to a positive balance is an unfair practice. Even if a bank revises its disclosures, "doing so may not fully address the unfairness risk." (*Id.*)

Worse yet, for financial institutions that "self-identify re-presentment NSF fee issues," the FDIC "expects supervised financial institutions to . . . take full corrective action, including providing restitution to harmed customers . . . promptly correct NSF fee disclosures . . . [and] monitor ongoing activities and customer feedback to ensure full and lasting corrective action." (*Id.* at 3.) And the FDIC promises that it "will take appropriate action." (*Id.*); *see also Cmty. Nutrition Inst. v. Young*, 818 F.2d 943, 946 (D.C. Cir. 1987) ("[W]e have, for example, found decisive the choice between the words 'will' and 'may.'").

The inclusion of boilerplate language that violations will be evaluated on a case-by-case basis or under specific facts and circumstances is inconsequential when the FDIC identifies specific conduct that it believes violates the law and then promises to evaluate enforcement actions based on that view if a bank declines to voluntarily comply. *See Appalachian Power Co. v. EPA*, 208 F.3d 1015, 1023 (D.C. Cir. 2000) (dismissing boilerplate language about agency paper being intended solely as guidance where rest of the document issued binding directives); *Iowa League of Cities*, 711 F.3d at 865 ("In effect, the EPA asks us to agree that when it couches an interdiction within a pro forma reference to state discretion, the prohibition is somehow transformed into something less than a prohibition. We decline to accept such Orwellian Newspeak.")

FIL 32 creates legal consequences. As an initial matter, if the Court concludes that FIL 32 imposes legal obligations, then the legal consequences analysis is unnecessary. *See Sisseton-Wahpeton Oyate*, 888 F.3d at 915 (explaining that final agency action "must be one by which rights or obligations have been determined, *or* from which legal consequences will flow" (emphasis added)).

The FDIC makes two arguments on this point: first, that enforcement action will be evaluated under specific facts and circumstances and thus is insufficient to trigger direct legal consequences, and second, that the potential for future enforcement action is not enough to create legal consequences. (Defs.' Mem. at 15–17.)

The first argument is nothing more than a rehash of the FDIC's previous argument that FIL 32 is nonbinding guidance rather than substantive regulation. "The most important factor in determining whether an agency action is one from which legal consequences will flow concerns the actual legal effect (or lack thereof) of the agency action in question on regulated entities." *Scenic Am., Inc. v. U.S. Dep't of Transp.*, 836 F.3d 42, 56 (D.C. Cir. 2016) (citation and internal quotation marks omitted).

The number of cited violations included in the FDIC's 2023 Supervisory Highlights clearly indicates that legal consequences have flowed to supervised institutions based on the practices discussed in FIL 40 and FIL 32. And these enforcement numbers are from calendar year 2022, prior to the revision of FIL 40 in the form of FIL 32.

The FDIC's second argument that "the possibility of future enforcement actions" is insufficient to create legal consequences must also be rejected. (Defs.' Mem. at 10, 16.)

"[T]he APA provides for judicial review of all final agency actions, not just those that impose a self-executing sanction." *Sackett v. EPA*, 566 U.S. 120, 129 (2012). "[I]f the agency has issued 'a definitive statement of its position, determining the rights and obligations of the parties,' that action is final for purposes of judicial review despite the 'possibility of further proceedings in the agency' to resolve subsidiary issues." *Sierra Club v. U.S. Army Corps of Eng'rs*, 446 F.3d 808, 813 (8th Cir. 2006) (quoting *Bell v. New Jersey*, 461 U.S. 773, 779–80 (1983)). "A document will have practical binding effect before it is actually applied if the affected private parties are reasonably led to believe that failure to conform will bring adverse consequences . . . ." *Gen. Elec. Co. v. EPA*, 290 F.3d 377, 383 (D.C. Cir. 2002) (quoting Robert A. Anthony, *Interpretive Rules, Policy Statements, Guidances, Manuals, and the Like—Should Federal Agencies Use Them to Bind the Public?*, 41 Duke L.J. 1311, 1328 (1992)).

"[P]arties need not await enforcement proceedings before challenging final agency action where such proceedings carry the risk of 'serious criminal and civil penalties.'" *U.S. Army Corps of Eng'rs*, 578 U.S. at 600 ("[Plaintiffs] need not assume such risks while waiting for [the agency] to 'drop the hammer' in order to have their day in court." (quoting *Sackett*, 566 U.S. at 127)). "Judicially reviewable agency actions normally affect a regulated party's possible legal liability; these consequences tend to expose parties to civil or criminal liability for non-compliance with the agency's view of the law or offer a shelter from liability if the regulated party complies." *La. State v. U.S. Army Corps of Eng'rs*, 834 F.3d 574, 583 (5th Cir. 2016); *see also Ipsen Biopharmaceuticals, Inc. v. Azar*, 943 F.3d 953, 957 (D.C. Cir. 2019) (holding that under the applicable statutory and regulatory scheme the "increased risk of prosecution and penalties constitutes a 'legal consequence' under *Bennett* . . .").

FIL 32 increases the risk of potential enforcement actions against regulated financial institutions, which would result in civil penalties and restitution orders. The FIL mandates new disclosure obligations, requires restitution for affected customers, and specifically defines new UDAP violations. It also provides a safe harbor for compliance by explaining that the FDIC "will generally not cite UDAP violations" for financial institutions that self-identify and correct the NSF fee issues identified in FIL 32 prior to their next consumer compliance examination. *See Texas*, 933 F.3d at 442 ("That the agency's action . . . creates safe harbors demonstrates that legal consequences flow from it, even when the agency lacks authority to promulgate substantive regulations implementing the statute it administers."); *Gen. Elec. Co.*, 290 F.3d at 383 (explaining that when "the language of the document is such that private parties can rely on it as a norm or safe harbor by which to shape their actions, it can be binding as a practical matter").

The FDIC's subjective intent for FIL 32 is not determinative. The FDIC's intent for its own agency action is not entitled to *Chevron* deference. The Eighth Circuit has adopted a *de novo* standard when distinguishing between legislative rules and other types of agency action. *Iowa League of Cities*, 711 F.3d at 872. "[G]iven the breadth of the definition of agency action, *see* 5 U.S.C. § 551(13), there will be many final agency actions that do not take the form of rules." *San Francisco Herring Ass'n v. U.S. Dep't of Interior*, 946 F.3d 564, 579 (9th Cir. 2019); *see also Hawkes Co.*, 782 F.3d at 1000 (collecting cases where agency actions other than rules were deemed subject to judicial review as final).

Courts routinely determine "guidance" like FIL 32 qualifies as final agency action. Examples include: A list of questions and answers posted by the agency on its website, *Nat'l Council for Adoption v. Blinken*, 4 F.4th 106, 108–09 (D.C. Cir. 2021); Online Frequently Asked Question by CMS, *Children's Health Care v. Centers for Medicare & Medicaid Services*, 900 F.3d 1022, 1024–25 (8th Cir. 2018); two letters sent by the EPA to a Senator, *Iowa League of Cities*, 711 F.3d at 854–55; an IRS Notice, *Mann Constr., Inc. v. United States*, 27 F.4th 1138, 1142 (6th Cir. 2022); a memorandum regarding DACA, *Texas v. United States*, 50 F. 4th 498, 508 (5th Cir. 2022); a "Guidance Document" regarding risk assessments issued by the EPA, *Gen. Elec. Co.*, 290 F.3d at 382; and a "Directive" issued by OSHA requiring implementation of specific procedures, *Chamber of Commerce of U.S. v. U.S. Dept. of Labor*, 174 F.3d 206, 208 (D.C. Cir. 1999). "To place any great weight on [an agency's own characterization of the action] potentially could permit an agency to disguise its promulgations through superficial formality, regardless of the brute force of reality." *Iowa League of Cities*, 711 F.3d at 862.

For the reasons explained above, no matter how the FDIC labels FIL 32, the legal obligations and consequences that follow make it final agency action subject to judicial review.

The FDIC's "public policy" argument about APA review "stifl[ing] informal communication between government agencies and regulated entities" is irrelevant. (Defs.' Mem. at 19.) The FDIC simply assumes FIL 32 is informal guidance rather than binding final agency action. If the Court concludes that FIL 32 is final agency action and sets it aside accordingly, then it will not stifle the FDIC's ability to continue with actual informal communications to its regulated financial institutions.

The FDIC's final quip about supervision of insured depository institutions being "an iterative process of comment by the regulators and response by the bank" that is "relatively informal and more or less continuous" is ironic in this context. (*Id.* (citing *In re Subpoena Served upon Comptroller of the Currency*, 967 F.2d 630, 633–34 (D.C. Cir. 1992).) Both FIL 40 and FIL 32 were issued without any notice to or input from regulated financial institutions—the chief reason this suit is necessary.

C. FIL 32 Can Be Challenged as Arbitrary and Capricious.

The FDIC's only argument here is that FIL 32 is not final agency action and therefore is not subject to challenge as arbitrary and capricious. Because FIL 32 is final agency action, as explained above, the Court should deny the motion to dismiss Count II.

D. The FDIC's General Supervisory Authority Is Irrelevant.

The FDIC asserts that Count III fails to state a claim because the FDIC has "broad statutory authority to examine the affairs of institutions it supervises." (Defs.' Mem. at 20.) It is true that the FDIC has authority to examine the affairs of financial institutes, conduct examinations, or administer enforcement actions. *See* 12 U.S.C. §§ 1818, 1820. But these statutes do not give the FDIC the authority to issue final agency action that imposes new obligations and creates legal consequences, as outlined above. Notably, the cases cited by the FDIC are not applicable. *See, e.g.*, *United States v. Gaubert*, 499 U.S. 315, 316 (1991) (involving the meaning of "discretionary function" under 28 U.S.C. § 2680(a) and thus not involving APA claims); *Cook v. U.S. Sec. & Exch. Comm'n*, 664 F. Supp. 2d 997, 997 (D. Minn. 2009) (involving a motion to stay an SEC investigation, where no underlying complaint had been filed and thus not involving APA claims); *Gillis v. U.S. Dept. of Health & Human Services*, 759 F.2d 565, 575 (6th Cir. 1985) (holding that plaintiffs failed to state an APA claim under 5 U.S.C. § 706(1), where plaintiffs alleged *inaction* by a federal agency to carry out its monitoring and enforcement duties).

Similarly, the FDIC's argument that it is simply exercising its authority to address unsafe and unsound banking practices fails. (*See* Defs.' Mem. at 21–23.) Nowhere does the FDIC ground FIL 32 in the statutes granting it enforcement authority related to "unsafe or unsound practice[s]." Moreover, unsafe and unsound practice is not a concept in consumer compliance. *See* 12 U.S.C. 1818(b)–(e), (i). Courts have concluded that the unsafe and unsound practices provision "refers *only* to practices that threaten the financial integrity of the institution," *Johnson v OTS*, 81 F.3d 195, 204 (D.C. Cir. 1996) (emphasis added), and "conduct deemed contrary to accepted standards of banking operations which might result in abnormal risk or loss to a banking institution or shareholder," *Nw. Nat. Bank, Fayetteville, Ark. v. U.S. Dept. of the Treasury Office of the Comptroller of the Currency*, 917 F.2d 1111, 1115 (8th Cir. 1990) (internal quotations omitted). As explained in Section I.D.2, the FDIC judges a financial intuition's safety and soundness based the CAMELS criteria: Capital, Assets, Management, Earnings, Liquidity, and Sensitivity to Market Risk. *See* 62 Fed. Reg. 752 (Jan. 6, 1997) (explaining the CAMELS criteria); *see also Builders Bank v. Fed. Deposit Ins. Corp.*, 846 F.3d 272, 276 (7th Cir. 2017) (same). Contrary to the situation here, safety and soundness focuses on the health of the banking institution. *See, e.g.*, *Michael v. F.D.I.C.*, 687 F.3d 337, 352 (7th Cir. 2012) (explaining that an unsafe or unsound banking practice "potentially exposes the *bank* to an abnormal risk of loss or harm contrary to prudent banking practices" (emphasis added)); *Seidman*, 37 F.3d at 927 (explaining that unsafe and unsound practices include "paying excessive dividends, disregarding a borrower's ability to repay, careless control of expenses, excessive advertising, and inadequate liquidity"—all of which focus on the institution's soundness).

Here, the FDIC has not explained how FIL 32 falls within the purview of regulating "unsafe and unsound practice," which focuses on accepted standards of banking *operations*—not on alleged UDAP compliance-related violations. *See* 12 U.S.C. § 1818. Regardless, accepting the factual allegations as true on a motion to dismiss, the practices outlined in FIL 32 are not accepted banking standards. (*See* Am. Compl. ¶ 34.) Notably, the FDIC cites case law that is neither procedurally nor substantively relevant. *See, e.g.*, *Lincoln v. Vigil*, 508 U.S. 182, 191–92 (1993) (affirming grant of summary judgment for agency by holding that an agency's allocation of funds received from a lump-sum appropriation is an "administrative decision traditionally regarded as committed to agency discretion"); *Heckler v. Chaney*, 470 U.S. 821, 837–38 (1985) (affirming grant of summary judgment for FDA by holding that the FDA's decision not to pursue enforcement actions requested by death-row inmates was discretionary and thus unreviewable).

III. PLAINTIFFS' CLAIMS ARE RIPE FOR JUDICIAL REVIEW.

A. Standard on a Motion to Dismiss.

The ripeness doctrine requires that, before a court may assume jurisdiction over a case, there must be "'a real, substantial controversy between parties having adverse legal interests, a dispute definite and concrete, not hypothetical or abstract.'" *Parrish v. Dayton*, No. 13-1348 (MJD/AJB), 2013 WL 12073796, at *4 (D. Minn. July 28, 2013), *aff'd*, 761 F.3d 873 (8th Cir. 2014) (quoting *Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 298 (1979). "A claim is not ripe for adjudication if it rests upon contingent future events that may not occur as anticipated, or indeed may not occur at all." *Id.* "Ripeness is peculiarly a question of timing and is governed by the situation at the time of review, rather than the situation at the time of the events under review." *Iowa League of Cities*, 711 F.3d at 867.

B. The Claims are Ripe.

Defendants advance two ripeness arguments. First, Defendants contend that all the claims are unripe because there is no final agency action. Second, Defendants argue that

Counts II (Arbitrary and Capricious Agency Action) and IV (Agency Action Contrary to Law) fail to independently satisfy ripeness criteria. The FDIC is wrong on both fronts.

As a general matter, this case is ripe for review for the same reasons Plaintiffs' have constitutional standing. "Part of the doctrine is subsumed into the Article III requirement of standing, which requires a petitioner to allege *inter alia* an injury-in-fact that is 'imminent' or 'certainly impending.'" *Am. Petroleum Inst. v. E.P.A.*, 683 F.3d 382, 386 (D.C. Cir. 2012) (quoting *Nat'l Treasury Emps. Union v. United States*, 101 F.3d 1423, 1427–28 (D.C. Cir. 1996); *see also Am. Farm Bureau*, 836 F.3d at 969 (explaining that for essentially the same reasons that plaintiffs have constitutional standing, "the decision is ripe for review.").

To the extent it is different, the issues are ripe. A party seeking review must show both "the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration." *Iowa League of Cities*, 711 F.3d at 867. Plaintiffs have shown both here.

Fitness. Whether FIL 32 is a legislative rule is a legal question that is fit for determination. *Id.* at 868 (finding fitness where the legal issue is "whether the statements are simply reminders of preexisting regulatory requirements or whether they create new regulatory obligations."). This is because the Court does not need to wait for facts to determine whether FIL 32 is a legislative rule.

Whether FIL 32 is a legislative rule is critical to all Counts, including Counts II and IV. Moreover, FIL 32 does not depend on the factual circumstances of each individual bank. Instead, FIL 32 has set a standard and, if that standard is not met, the FDIC "will take appropriate action."

Hardship. Plaintiffs suffer hardship because they have had to immediately alter their behavior and comply with FIL 32. Otherwise, they risk enforcement action by the FDIC. *Id.* at 868 (finding hardship where "League members must either immediately alter their behavior or play an expensive game of Russian roulette with taxpayer money, investing significant resources in designing and utilizing processes that—if these letters are in effect new legislative rules—were viable before the publication of the letters but will be rejected when the letters are applied as written.").

Moreover, this issue is important to the entire banking industry and requiring the industry to move forward without knowing whether FIL 32 is valid is a hardship. *See Pac. Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm'n*, 461 U.S. 190, 201–02 (1983) ("To require the industry to proceed without knowing whether the moratorium is valid would impose a palpable and considerable hardship on the utilities, and may ultimately work harm on the citizens of California.")

Count II. In urging the Court to conclude that Count II is unripe, Defendants cite *Am. Petroleum Inst.*, 683 F.3d at 386. But *American Petroleum* involved a unique set of circumstances. In *America Petroleum*, plaintiffs challenged a final rule by the EPA. *Id.* at 385–86. In response, the EPA entered into a settlement with plaintiffs, agreeing to propose a new rule and to take final action on that new proposed rule by a certain date. *Id.* at 386. The EPA proposed the new rule during the litigation, which, if adopted as it stood, would "narrow the legal issues involved in this dispute and provide a more final and concrete setting." *Id.* at 387. In these limited circumstances, the court found the issues unripe.

American Petroleum is fundamentally different than the issues presented here. First, the parties do not agree that the FDIC has issued a final rule—this legal issue is disputed and ripe for determination, as outlined above. Moreover, the parties have not entered into a similar settlement agreement, wherein the FDIC must propose a rule and appropriately go through notice and comment under the APA. And the FDIC has not issued a proposed rule that it intends to take through appropriate APA procedures. Further, in this case, the FDIC lacks the power under the statute to even prescribe rules under the FTC Act—the claimed authority for FIL 32.

Count IV. As to Count IV, the Eighth Circuit has held that lack of enforcement does not make an issue unripe. In *Am. Farm Bureau*, intervenors argued that the dispute was not ripe because the federal agency had not yet made a final decision about whether to release certain information. 836 F.3d at 969. The Eighth Circuit rejected that argument, explaining that the agency had decided to release the information, but had agreed to delay doing so until the litigation resolved. *Id.*

Here, in FIL 32, the FDIC has committed that it "will take appropriate action" where the items it identified in FIL 32 are not "fully corrected." (FIL at 3.) Compliance examinations are certain and thus the standard outlined in FIL 32 will be applied to Plaintiffs. Accordingly, regardless of the Court's determination on final action, FDIC enforcement is impending, which violates its own supervisory guidance. FDIC, *Formal and Informal Enforcement Actions Manual*, June 2022, Chapter 3 – Unsafe or Unsound

Practices and Conditions/Distinguishing Between Laws, Regulations, and Guidance, available at https://www.fdic.gov/regulations/examinations/enforcement-actions/complete-manual.pdf ("[T]he agencies do not take enforcement action based on supervisory guidance.") (last visited February 9, 2024).

CONCLUSION

For the reasons above, Plaintiffs respectfully request that the Court deny Defendants' motion to dismiss.

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