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VIA email – regs.comments@occ.treas.gov

May 30, 2013

Legislative and Regulatory Activities Division
Office of the Comptroller of the Currency
400 7th Street, SW., Suite 3E-218
Mail Stop 9W-11
Washington, D.C. 20219

Re: Docket ID OCC-2013-0005 – Proposed Guidance on Deposit Advance Products

Dear Sir or Madam:

This comment letter is submitted by the Consumer Bankers Association,¹ The Financial Services Roundtable,² and The Clearing House³ (collectively the “Associations”) in response to proposed

¹ The Consumer Bankers Association is the only national financial trade group focused exclusively on retail banking and personal financial services — banking services geared toward consumers and small businesses. As the recognized voice on retail banking issues, CBA provides leadership, education, research, and federal representation for its members. CBA members include the nation’s largest bank holding companies as well as regional and super-community banks that collectively hold two-thirds of the total assets of depository institutions.

² The Financial Services Roundtable represents 100 of the largest integrated financial services companies providing banking, insurance, and investment products and services to the American consumer. Member companies participate through the Chief Executive Officer and other senior executives nominated by the CEO. Roundtable member companies provide fuel for America's economic engine, accounting directly for \$92.7 trillion in managed assets, \$1.2 trillion in revenue, and 2.3 million jobs.

³ Established in 1853, The Clearing House is the nation’s oldest payments company and banking association. The Clearing House is owned by 21 of the largest commercial banks in America, which employ 1.4 million people domestically and hold more than half of all U.S. deposits. The Payments Company within The Clearing House clears and settles approximately \$2 trillion daily, representing nearly half of the U.S. volume of ACH, wire and check image transactions. The Clearing House Association is a nonpartisan advocacy organization within The Clearing House that represents, through regulatory comment letters, amicus briefs and white papers, the interests of its owner banks on a variety of systemically important bank policy issues.

supervisory guidance (“Proposal”) regarding deposit advance products, which was published in the *Federal Register* on April 30, 2013, by the Office of the Comptroller of the Currency (“OCC” or “Agency”). The Associations strongly support effective consumer protections and, specifically, the principles of choice, transparency and fairness in customer relationships. We appreciate the opportunity to share our suggestions and work with the OCC, and others, as it considers the issues related to deposit advance products.

The OCC is proposing to clarify the application of safe and sound banking practices and consumer protection in connection with bank-offered deposit advance products. The Proposal details the principles the OCC expects its supervised financial institutions to follow in connection with deposit advance products in order to manage the reputational, compliance, legal and credit risks, which the OCC perceives to be associated with these products. Specifically, the guidance seeks to address a number of issues, including eligibility standards, disclosures, product limitations, monitoring and risk assessments, and management oversight. The Proposal includes a withdrawal of the OCC’s previously proposed guidance on Deposit-Related Products published on June 8, 2011.⁴

Discussion

There has always been a need for small-dollar, short-term credit and, historically, the OCC and other prudential regulators have encouraged depository institutions to meet this particular consumer credit need. Some banks have chosen to offer a deposit advance product as a means of meeting their customers’ need for short term small dollar lending. These providers have responded by developing products carefully designed to ensure strong safeguards at reasonable prices. As discussed below, bank-offered deposit advance programs are well understood and well-liked by consumers who use them, and are an important source of credit for consumers’ short-term liquidity needs. Accordingly, **we urge the OCC to withdraw the proposed guidance** and to work with all stakeholders including consumers, depository institutions, other prudential regulators and the Consumer Financial Protection Bureau (“CFPB” or “Bureau”) to develop a sound data-based foundation for a comprehensive supervisory approach that avoids unintended adverse impact on both consumers and banks.

As written, the guidance will severely limit the ability of banks to offer deposit advance products, leaving most with little choice but to exit, or never enter, the short-term credit market. In the absence of bank-offered deposit advance products, consumers will be pushed out of the traditional banking system and into more expensive and often less regulated alternatives such as non-depository payday loans, pawn brokers, title loans and other sources of short-term, small-dollar lending. Additionally, without reasonable alternatives, consumers will pay higher prices for short-term liquidity or may face increased delinquency, late payment, nonsufficient fund, and returned check fees.

⁴ 76 FR 33409.

Furthermore, consumers benefit from the competition that banks add to the market for short-term, small-dollar credit products. More providers in the market will ensure greater competition and innovation, which will ultimately lower the cost of short-term, small-dollar credit for consumers. Overly restrictive supervisory guidance of bank-offered deposit advance products will lead to less competition and an increase in prices.⁵ The Associations believe it is contrary to the intent of the proposed guidance to force further monetary constraints on the consumers it intends to help. We believe this to be especially true for designing products and services that will allow the under-banked and unbanked greater access to mainstream banking opportunities.

Safety and Soundness Concerns

The Proposal indicates that the OCC is concerned bank-offered deposit advance products can pose significant safety and soundness risks for banks. However, there is little evidence to support the premise that these products pose such risks. Further, we believe that using safety and soundness as the basis for market intervention without clear evidence of risk or careful consideration of the consequences to consumers is a bad precedent and contrary to the policy objective of the prudential regulators to support development of innovative, fair and transparent financial products and services by insured financial institutions.

Additionally, it is clear the OCC is attempting to effectively regulate consumer protections through supervisory guidance. However, the function of interpretive guidance is to clarify or explain existing law and should not be used to impose new, substantive regulatory requirements.⁶ Hence, we are concerned the OCC is circumventing proper administrative procedures. We are also concerned that the OCC is assuming consumer protection authority transferred to the CFPB under the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank Act").⁷

It is important to note some banks have offered deposit advance products for many years with little or no safety and soundness concerns and we are unsure as to the basis for the OCC's concern over institutional safety and soundness. Close regulatory examination of these products

⁵ According to study conducted the Center for Financial Services Innovation entitled *A Fundamental Need: Small-Dollar, Short-Term Credit* (2008), continued market competition and product innovation would be advantageous in expanding small-dollar, short-term lending and may ultimately help lower the cost of these products for both providers and consumers.

⁶ 5 U.S.C. §553(b)(A)-(B) (2010) provides a statutory exemption from the notice-and-comment requirements set forth in the Administrative Procedures Act ("APA") for agencies with respect to "interpretative rules, general statements of policy." In *Prof'ls & Patients for Customized Care v. Shalala*, 56 F.3d 592, 595 (5th Cir. 1995) the court noted that "if a rule is 'substantive' the [APA] exemption is inapplicable, and the full panoply of notice-and-comment-requirements must be adhered to scrupulously"; see also *Hemp Indus. Ass'n v. DEA*, 333 F.3d 1082, 1087 (9th Cir. 2003) (noting that "courts have struggled with identifying the difference between legislative rules and interpretive rules," but have generally arrived to the conclusion that "interpretive rules merely explain, but do not add to, the substantive law that already exists in the form of a statute or legislative rule") (citing to *Yesler Yerrace Community Council v. Cisneros*, 37 F.3d 442, 449 (9th Cir. 1994)). The Court also noted that "[l]egislative rules, on the other hand, create rights, impose obligations, or effect a change in existing law pursuant to authority delegated by Congress." *Id.*

⁷ Pub. Law 111-203.

has yielded relatively positive results and, importantly, demonstrated that close working relationships between banks and regulators can result in the development of prudent and fair products. Moreover, as discussed below, bank-offered deposit advance products involve materially less risk of harm to consumers than similar products offered by non-depository providers.

Reputational Risk

The media coverage of “payday lending products” incorrectly associates bank-offered deposit advance products with traditional payday lending, with little or no distinction in how bank-offered product features allow for greater consumer protection and better customer pricing. There appears to be widespread misunderstanding about how the products work and how consumers use them responsibly to manage their financial needs. Additionally, many consumer groups have unjustifiably raised concerns over bank-offered deposit advance products. Similar to press accounts, these groups have likened the deposit advance products to non-depository payday lending and have all but ignored the significant positive features in product design and utility.

However, there is little evidence of consumer dissatisfaction with bank-offered deposit advance products. To the contrary, consumer satisfaction with these products is often very high with below normal complaint rates. For example, in one bank’s recent survey of deposit advance customers, 90 percent of respondents rated their overall experience with the product as “good” or “excellent.” In another survey by a different bank, the customer satisfaction rating ranked higher for the bank’s deposit advance product than any other product offered by that bank. Similarly, in yet another bank’s survey, more than 95 percent of customers said they were “satisfied” or “highly satisfied” with the product.

Complaint levels for deposit advance products are extremely low across the board. One bank offering the product registered just 41 complaints over the course of a year, representing just .018 percent of all active users of that bank’s deposit advance product. This percentage equates to roughly one in every 5,500 users. Whether taken together or considered separately, the high customer satisfaction ratings and low levels of customer complaint for deposit advance products refute claims that these products pose significant reputational risk.

Credit Risk

Deposit advance products have been around for many years, most notably through one of the most challenging economic cycles of the last century, and losses remain within an acceptable risk tolerance. Even if default rates were high, which they are not, there would be little to no credit risk as these products represent a very small percentage of the bank’s total lending portfolio.

Furthermore, there is no evidence that bank-offered deposit advance products have significantly greater annualized customer default rates than other product types customers may use for short-term cash flow needs such as credit cards and personal unsecured lines of credit. Like all products, banks have implemented a number of policies and controls for deposit advance products to manage risk including limits on advance size and duration of use.

Legal risk

Banks need to take into account all applicable federal and state laws as well as banking regulations when developing products and services. Banks do this whenever they are developing new products. To ensure compliance for all products and services, banks have regular exams and audits. The Associations believe that deposit advance products carry no greater legal risk than any other product or service. As discussed in greater detail below, deposit advance products rank high in customer satisfaction including high ratings for transparency and ease of use.

Consumer Protection – Level Playing Field

Title X of the Dodd–Frank Act created the CFPB to specifically address issues of consumer protection surrounding financial products. To ensure equal protections across all financial products and services, the CFPB’s authority to promulgate consumer protection rules extends to all providers of financial services and products including depository and non-depository institutions (e.g. payday lenders) – authority that the prudential regulators do not have. Accordingly, *only the CFPB can ensure that consistent rules are applied across the entire financial services industry*. Unilateral action by the OCC is contrary to Congressional intent in creating the CFPB and directing that agency to regulate consumer financial services whether offered by banks or nonbanks. Absent across-the-board standards, consumers will be pushed into services that offer fewer protections and come at significantly greater costs. Indeed, even within the realm of federal prudential banking supervision, banks of different charters will apply inconsistent standards with regards to deposit advance products.

As evidenced by its recent study,⁸ the Bureau is in the process of collecting and analyzing sizable data on payday loans and deposit advance products. The goal of this effort is to develop a clear understanding of how consumers use these products. The CFPB’s initial findings do not draw any conclusions as to what, if any, consumer protection issues exist, and we believe the study should be completed before any conclusions about deposit advance products are made. Further, the findings also did not consider the benefits of these products, which have been discussed in various reports.⁹ The Associations believe more work is needed to fully understand the complexity of this market. We urge the OCC to allow the CFPB to continue its analysis of all relevant data and complete a cost-benefit study before implementing guidance that could be detrimental to consumers. Consistent with the intent of the Dodd-Frank Act in ensuring a level

⁸ *Payday Loans and Deposit Advance Products, A White Paper of Initial Data Findings*. Consumer Financial Protection Bureau (April 24, 2013).

⁹ See, *An Analysis of Consumer’s Use of Payday Loans*, Gregory Elliehausen, Division of research and Statistics, Board of Governors of the Federal Reserve System (2009) – Survey results of consumer use of payday lending indicated that most customers used payday loans as a short-term source of financing. Also see, *Payday Lenders: Heroes or Villains?* Adair Morse, Graduate School of Business, University of Chicago (January 2007) - An assessment of the impact of payday lenders on disaster-struck communities concluded communities struck by natural disasters are more resilient and their community welfare improves as result of the availability of payday advances. Also see, *Payday Holiday: How Households Fare after Payday Credit Bans*. Donald P. Morgan and Michael R. Strain (2008) - An assessment of states with payday lending bans concluded that consumer financial problems saw significant increases when compared to states without similar restrictions.

playing field, the Associations also encourage the OCC to collaborate with the CFPB and other prudential regulators in the issuance of any guidance or regulations on short term credit products.

Deposit Advance and Payday Loans – A Comparison

It is important to note the differences between bank-offered deposit advance products and the services offered by non-depository payday lenders. Unlike payday loans, deposit advance loans have built-in controls designed to limit the usage of the product. These controls include limits on loan amounts, automatic repayment through a linked depository account and “cooling” periods, all designed to keep customers from relying too heavily on the product and to ensure the customer’s ability to repay the loan.

Existing Customer Relationship

An important distinction between deposit advance products and payday loans is the relationship that exists between the customer and the bank. Consumers who use bank-offered deposit advance products already have a customer relationship with the bank, which is not found with traditional payday lending. Deposit advance is an integrated feature added to the customer’s existing checking account and is not a stand-alone product. These services are only available to established customers who have maintained checking accounts in good standing with regularly scheduled direct deposits for a minimally prescribed period of time and are not available to consumers who do not have an existing customer relationship. The maintenance of this relationship is of the utmost importance to a bank. Without a positive banking experience, customers would look elsewhere to meet financial needs and banks would not only lose the opportunity to service the customer’s short-term liquidity needs, but also the chance to establish or maintain a long-term banking relationship.

Account Security

Bank-offered deposit advance products offer customers greater account security. With these products, customers do not have to provide sensitive bank information to third party financial service providers, opening the door to the possible compromise of sensitive financial information. Accordingly, all personal account information is kept in house, providing a significant security advantage to non-depository services.

Disclosures

The Associations strongly support clear and conspicuous disclosures for all financial products and services that assist consumers in making informed decisions about managing their finances. Our members that provide deposits advance products adhere to strict disclosure standards - all product terms are made clearly and fully transparent to customers prior to product use. At a minimum, all deposits advance providers are bound by applicable federal laws and the customer is typically required to sign a separate, detailed terms and conditions document to activate a deposit advance line of credit. Additionally, providers repeatedly disclose to their customers that deposit advance products can be an expensive form of credit that is designed for short-term borrowing needs and not long-term use. Customers are also regularly reminded that other credit alternatives may be cheaper and better suited for their financial needs.

Banks that offer deposit advance products continue to provide consumers with clear disclosures needed to calculate and understand the product they are using for their short term liquidity needs. In customer surveys conducted by banks offering deposit advance products, customers overwhelmingly indicated they fully understand the terms of use for the product including pricing, repayment schedules and duration. For example, one bank's survey of its pilot product asked customers on a scale from 1-10 how clear explanations were regarding how an advance is calculated and how and when it is to be repaid. The overall score for the program was 9.13 out of a possible 10 giving all term and pricing explanations a "very clear" ranking.

Loan Size Limitations

All depository institutions currently offering deposit advance products have limits on the amount a consumer may borrow. Although it varies from bank to bank, advances are generally limited to the lesser of a specific amount or a percentage of the total amount of a customer's monthly direct deposits. These limits ensure that there is money available to the customer for other monthly expenses after the advance is paid. In contrast, payday loans are not based on or repaid through a pre-existing deposit relationship and payday lenders do not consider whether a particular loan will completely deplete a consumer's monthly income.

Cooling Off Periods

As discussed more fully below, all bank-offered deposit advance products impose a mandatory cooling-off period to ensure customers do not depend on the product to meet their monthly financial needs. These periods are imposed to ensure deposit advance products are used for the intended purpose, namely, short-term liquidity. To manage the risk that the consumer will become reliant, a customer typically will be able to access a deposit advance product for a limited period of time at the end of which they would be required to repay the outstanding balance or completely stop using the product. Other usage limits are tied to excessive overdrafts and sustained negative checking account balances. It is worth noting that banks continue to adjust this cooling-off period as they continue to better understand trends in customer utilization.

Pricing

Deposit advance products are often criticized for their seemingly high costs when considering the relatively small size of the credit extended. However, in order for any product to be sustainable, it must be delivered in a cost-effective manner for both the provider and the customer. Previous small dollar lending programs, such as the one suggested by the FDIC,¹⁰ have not been widely adopted by the industry because the costs to administer the programs outweigh the revenues and, hence, are not sustainable.

Furthermore, the expense of providing an open-end line of credit is nearly the same irrespective of the amount outstanding. For example, a bank incurs almost the same cost when extending a line of credit in the amount of \$300 as it does when extending a \$30,000 line of credit. Costs include credit origination, technology infrastructure investments, payment processing, possible delinquency and collection efforts, and disbursement. These necessary operational costs are reflected in the pricing of deposit advance products. Furthermore, the fees associated with deposit advances are typically lower than those charged by traditional payday lenders. Most

¹⁰ FDIC's Small-Dollar Loan Pilot Program - 2008

deposit advance products are priced based on a percentage of the amount advanced and do not include additional costs to the consumer such as application fees, annual fees, over-limit fees, rollover or re-write fees and late payment fees.

Underwriting

The OCC expresses the view that banks currently offering deposit advance products do not typically analyze the customer's ability to repay the advance and asserts banks base their decisions to grant deposit advance credit solely on the amount and frequency of customer deposits, not on the traditional underwriting that characterizes lines of credit ("LOC"). The OCC suggests this lack of underwriting results in consumers repeatedly taking out advances they are unable to fully repay, creating a debt cycle the Agency refers to as the "churning" of loans. The OCC has proposed underwriting expectations for supervised banks designed to ensure deposit advance products are consistent with consumer eligibility and criteria for other bank loans. These criteria should ensure credit can be repaid according to the product terms, while allowing the borrower to meet typical and recurring necessary expenses.

Under the proposed guidance, a bank would be required to monitor the consumer's use of a deposit advance product and repetitive use would be viewed as evidence of weak underwriting. To comply with the guidance, policies relating to the underwriting of deposit advance products must be written and approved by the bank's board of directors and must be consistent with a bank's general underwriting and risk appetite. Providers are also expected to document a sufficient customer relationship of no less than six months prior to providing a deposit advance to the consumer. The guidance would further prohibit consumers with delinquencies from eligibility. The bank must also analyze the customer's financial capacity with these products, including income levels and deposit inflows and outflows in addition to applying traditional underwriting criteria to determine eligibility.

The Associations believe the proposed guidelines are flawed for several reasons. First, the guidance would require banks to use traditional underwriting and, in addition, overlay a cash flow analysis. Such analysis is not well suited to deposit advances and would increase the cost of offering the product. Requiring a bank to complete a cash flow analysis on the customer's checking account, involves mapping all recurring inflows against all outflows of a single checking account to determine a borrower's financial capacity. This analysis assumes that non-recurring inflows are not legitimate forms of income and also assumes all outflows are non-discretionary. This type of analysis is not used for other credit underwriting in the ordinary course of business because a bank is not able to assess its predictive power, which is a key aspect of safe and sound underwriting practices.

The second reason the proposed guidelines are flawed is that they assume consumers use their checking accounts to build reserves or savings as opposed to using them as transactional accounts, an assumption that is contrary to the very purpose of the account. Accordingly, even a high income consumer with no debt and a very high credit score may not qualify as checking accounts are not typically where consumers keep excess funds.

Third, the application of traditional underwriting would require banks to pull consumer credit reports to assess a customer's ability to repay. Under the Proposal, banks would need to make credit report inquiries at least every six months to ensure a customer continues to have the ability to repay all advances made. This process of making multiple inquiries could have a detrimental effect on a one's credit score and, in turn, would cause, not prevent, harm to the customer by possibly limiting access to other forms of credit.

Accordingly, the guidance would impose more stringent underwriting standards on deposit advance products than on any other bank product today. If the guidance is adopted as proposed, very few of the current deposit advance customers would be eligible and it would be nearly impossible for banks to continue to offer these products. Deposit advance products are hybrid products combining elements of depository payments and lending, thus requiring new and innovative models of evaluation. The Proposal does not take into account the hybrid nature of the product and leans too far in the direction of classifying it as a traditional credit product.

We firmly believe the proposal will effectively push consumers out of the banking system and succeed in sending them to non-depository alternatives that are more expensive and offer fewer consumer protections. The Associations recommend the OCC work closely with the CFPB, the other prudential regulators and the industry to develop alternative underwriting standards that would allow for consumer protection and product sustainability, which are core to the development of responsible, regulated credit products.

Continued Access to Credit

As previously discussed, all bank-offered deposit advance products impose a mandatory cooling off period to ensure customers do not become dependent on the product to meet their monthly financial needs. Under the proposed guidelines, the OCC would expect each deposit advance to be repaid in full before the bank can extend another deposit advance. The guidance also discourages a bank from offering more than one advance per monthly statement cycle.

Deposit advance products are LOCs and the proposed guidelines are inconsistent with the structure of that type of lending. For example, a credit card issuer would not tell a cardholder that they can only use their credit card once a month. As open-end LOCs, deposit advance products provide value: quick, immediate access to the exact amount needed (*e.g.* \$100 to help pay a bill that is coming due and avoid the risk it will result in an overdraft fee). If a customer can only use it once a month, that customer will likely take a larger amount than is needed "just in case," which will result in higher costs overall.

Under the proposal, the OCC would expect providers to impose a cooling-off period of at least one monthly statement cycle after the repayment of a deposit advance before the consumer can obtain another advance. However, the Associations do not believe the guidance will address the issue of repeat use that the OCC is attempting to solve. If a consumer has a short-term liquidity need and is unable to access funds from their depository institution, he or she will turn to other sources of short-term liquidity such as payday lenders, pawn shops and title loans until they are again able to access deposit advance funds. These consumers will face other burdens such as over-drafting their account, delaying payments that could result in late fees and detrimental hits

to their credit score, or foregoing needed non-discretionary expenses. Additionally, mandatory cooling off periods may cause customers to borrow more than they need monthly to ensure they don't "miss a turn" at borrowing the following month. This artificial constraint on consumer behavior and the market fails to respect the consumer's needs and choices.

Conclusion

In conclusion, the Associations strongly encourage the OCC to withdraw its guidance and seek more practical solutions to help the industry build the right foundation for short-term lending needs. We appreciate the opportunity to comment on the proposed supervisory guidelines and we welcome the opportunity to work with the OCC and other federal regulators to ensure consumers have access to the best possible financial products and services available. However, as written, the proposed guidelines would likely preclude the ability of any OCC-supervised institution to provide deposit advance products, which may ultimately result in steering consumers to less consumer friendly alternatives to fund their short-term liquidity needs.

Finally, we disagree with the notion that deposit advance products present safety and soundness concerns for OCC-supervised banks and contend that issues of consumer protection should be coordinated with the CFPB. The Associations urge the OCC to defer to the data driven, industry-wide research currently underway at the Bureau. This is the only approach that will provide consistent guidelines to national banks, state-chartered banks and non-depository institutions, in other words, uniform protections for consumers and a level playing field for providers.

Sincerely,

Consumer Bankers Association

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