



CENTER FOR CAPITAL MARKETS
COMPETITIVENESS

DAVID T. HIRSCHMANN
PRESIDENT AND CHIEF EXECUTIVE OFFICER

1615 H STREET, NW
WASHINGTON, DC 20062-2000
(202) 463-5609 | (202) 463-3129 FAX

May 30, 2013

Mr. Robert E. Feldman
Executive Secretary
Federal Deposit Insurance Corporation
550 17th Street, NW
Washington, DC 20429

Office of the Comptroller of the Currency
Legislative and Regulatory Activities Division
400 Seventh Street, SW
Washington, DC 20219

Re: “Proposed Guidance on Deposit Advance Products,” FDIC 6714-01-P “Proposed Guidance on Deposit Advance Products; Withdrawal of Proposed Guidance on Deposit-Related Consumer Credit Products” OCC Docket ID OCC-2013-005

Dear Mr. Feldman and To Whom It May Concern:

These comments are submitted on behalf of the U.S. Chamber of Commerce Center for Capital Markets Competitiveness (“CCMC”). The U.S. Chamber of Commerce (the “Chamber”) is the world’s largest business federation, representing the interests of more than three million companies of every size, sector, and region. The Chamber created CCMC to promote a modern and effective regulatory structure for capital markets to fully function in a 21st century economy.

CCMC appreciates the opportunity to submit these comments in connection with the above-referenced requests for comments by the Federal Deposit Insurance Corporation (“FDIC”) and Office of the Comptroller of the Currency (“OCC”) regarding new proposed guidance relating to deposit advance products.

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In two previous letters to the Consumer Financial Protection Bureau (“CFPB”), the Chamber has cautioned against the use of the supervision process to impose new regulatory standards outside of the normal rulemaking process.¹ Unfortunately, the proposed guidance at issue here exemplifies our concerns about the misuse of the supervision process as a means to circumvent the legal requirements for promulgation of a consumer protection rule. This approach eliminates legal protections against arbitrary and unjustified rules, but also circumvents rulemaking standards that specifically require consideration of the costs of regulation, particularly “the potential reduction in access by consumers to consumer financial products or services” (12 U.S.C. § 5512(b)(2)(A)(i)). For these reasons, the agencies should withdraw the proposed guidance and, to the extent regulation is deemed appropriate, participate in the rulemaking proceeding that the CFPB has already announced that it plans to initiate.

Background

On April 24, 2013, the CFPB issued a white paper reporting its initial findings regarding “Payday Loans and Deposit Advance Products.”² It concluded that those findings “raise substantial consumer protection concerns,” and identified areas for further study.³ The CFPB concluded that “[t]he potential consumer harm and the data gathered to date are persuasive that further attention is warranted to protect consumers. Based on the facts uncovered through our ongoing work in this area, the CFPB expects to use its authorities to provide such protections.”⁴

The very next day, the OCC and FDIC issued the proposed supervisory guidance. The Board of Governors of the Federal Reserve System (the “Board”) issued a statement “emphasiz[ing]” the “consumer risks associated with deposit advance products in light of” the CFPB’s report.⁵ And the CFPB issued a press release observing that “[t]he statements by the Board, and the FDIC and the OCC, are based in large part on many of the same concerns motivating the CFPB’s ongoing work in this area. As the CFPB study makes clear, the data gathered thus far indicates

¹ Available at <http://www.centerforcapitalmarkets.com/wp-content/uploads/2010/04/2012-7.2-CFPB-Letter1.pdf> and <http://www.centerforcapitalmarkets.com/wp-content/uploads/2010/04/2013-2-14-CFPB-supervision-letter.pdf>.

² Available at http://files.consumerfinance.gov/f/201304_cfpb_payday-dap-whitepaper.pdf.

³ *Id.* at 44.

⁴ *Id.* at 45.

⁵ “Statement on Deposit Advance Products,” available at <http://www.federalreserve.gov/bankinforeg/caletters/CA13-07attachment.pdf>.

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that further attention is needed to protect consumers.”⁶ The CFPB went on to state that it “expects to use its authorities to provide protections to consumers once further analysis of the short-term, high-cost loan market is complete.”⁷

A review of the proposed guidance confirms that its focus is consumer protection concerns. Although there are cursory references to “safety and soundness risks,” the discussion of consumer protection is longer and more detailed. And the detailed specifications for underwriting policies track the consumer protection concerns outlined in the CFPB white paper.⁸

The practical effect of the guidance, if implemented will be that most banks will stop offering these products, forcing consumers to look elsewhere for the credit they need.

Discussion

The decision by the OCC and FDIC to issue “guidance” rather than defer to the rulemaking proceeding planned by the CFPB is an example of the all-too-frequent practice of agencies avoiding the procedural and substantive standards specified by Congress to guide the rulemaking process by applying the “guidance” label to what are effectively mandatory rules.

First, consumer protection concerns are the principal motivating factor behind the proposed guidance. The Federal Reserve and the CFPB recognize that fact. And the text of the guidance confirms it.

Second, by failing to utilize the rulemaking procedure enacted by Congress specifically to address consumer protection matters, the agencies circumvented a number of important procedural and substantive checks on agency authority, including:

⁶ “CFPB statement on deposit advance product announcements by banking regulators,” available at <http://www.consumerfinance.gov/pressreleases/cfpb-statement-on-deposit-advance-product-announcements-by-banking-regulators/>.

⁷ *Id.*

⁸ This is confirmed by comparing the proposed guidance with the OCC’s earlier proposal, which was quite general and did not contain the specific standards set forth in the new proposal. See 76 Fed. Reg. 33409, 33412-13 (2011).

- The obligation to explain how the agency addressed comments in formulating the final rule.
- The specific requirements that the CFPB address
 - “the potential benefits and costs to consumers and [regulated entities], including the potential reduction of access by consumers to consumer financial products and services” (12 U.S.C. § 5512(b)(2)(A)(i))—a matter unaddressed in any meaningful way the proposed guidance. Certainly there is no data in the CFPB study or in the proposed guidance addressing the actual impact on the availability of consumer credit;
 - “the impact of proposed rules on [regulated entities]” (12 U.S.C. § 5512(b)(2)(A)(ii))—another topic on which no data was discussed; and
 - the impact of the proposed rule on small business, including the availability of credit for small businesses (Section 1100G of the Dodd-Frank Act)—also unaddressed by the proposed guidance.
- The availability of judicial review to ensure that a rule is not arbitrary, capricious, or otherwise not in accordance with law.
- Application of the same rules to similarly-situated businesses in a clear, transparent manner.

Third, the CFPB has stated repeatedly that it has not yet gathered sufficient information to initiate a regulatory proceeding. The white paper’s conclusion explained:

The CFPB intends to continue its inquiry into small dollar lending products to better understand the factors contributing to the sustained use of these products by many consumers and the light to moderate use by others. We will analyze the effectiveness of limitations, such as cooling-off periods, in curbing sustained use and other

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harms. Separately, we are analyzing borrowing activity by consumers using online payday loans.⁹

The CFPB's statement regarding the guidance states that it "expects to use its authorities to provide protections to consumers *once further analysis of the short-term, high-cost loan market is complete.*"¹⁰

If the CFPB, which is the only entity to produce a report on the topic, does not believe it has gathered sufficient information to initiate a rulemaking, then it is difficult to understand how the agencies could have sufficient information to prescribe the detailed underwriting specifications contained in the proposed guidance. Certainly the proposals do not indicate that the agencies have engaged in their own information gathering. For that reason alone, the proposed guidance should be withdrawn.

Fourth, the fundamental purpose of creating the CFPB was to centralize consumer protection regulation and to ensure that companies providing similar consumer financial products and services are subject to the same regulatory standards so that differences in government regulation do not confer competitive advantages or disadvantages and do not leave consumers subject to duplicative or conflicting levels of regulatory protection. The proposed guidance has precisely that effect—because it circumvents the regulatory process that Congress created to address such issues on a market-wide basis.

For all of these reasons, the proposed guidance should be withdrawn.

Thank you for your consideration of these comments. We would be happy to discuss these issues further with your staff.

Sincerely,



David Hirschmann

⁹ White Paper at 44.

¹⁰ "CFPB statement on deposit advance product announcements by banking regulators," available at <http://www.consumerfinance.gov/pressreleases/cfpb-statement-on-deposit-advance-product-announcements-by-banking-regulators/>.