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. 23-2177

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

Plaintiffs Minnesota Bankers Association ("MBA") and Lake Central Bank ("Lake Central") submit this Complaint for declaratory and injunctive relief under the judicial review provisions of the Administrative Procedure Act, 5 U.S.C. §§ 701–706 ("APA"), against Defendants Federal Deposit Insurance Corporation and Chairman Martin J. Gruenberg (collectively, "FDIC").

INTRODUCTION

1. In August 2022, the FDIC issued Financial Institutions Letter 40-2022: Supervisory Guidance on Multiple Re-Presentment NSF Fees ("FIL 40"). FIL 40 is attached as **Exhibit A**.

2. Despite ostensible classification as "Supervisory Guidance," FIL 40 is a legislative rule promulgated without adherence to essential administrative procedures. It is also arbitrary and capricious agency action that exceeds the FDIC's statutory authority.

3. Without undertaking notice and comment rulemaking, the FDIC issued FIL 40 to more than 5,000 financial institutions under its direct supervision, mandating them to retroactively self-evaluate their practices for "risks" arising from the charging of multiple non-sufficient funds ("NSF") fees on what the FDIC characterizes as the "same unpaid transaction."

4. If a supervised bank self-identifies "re-presentment NSF fee issues," then the FDIC "expects" the institution to "[t]ake full corrective action," up to and including, but not limited to, "providing revised disclosures and agreements to all customers" and "restitution to harmed customers."

5. FIL 40 also "encourages" financial institutions to adopt detailed "risk mitigation practices," including, but not limited to, "[e]liminating NSF fees" and new disclosure and customer notification or alert requirements for NSF fees, that go well beyond existing federal statutes and regulations governing disclosures for consumer deposit accounts and Automated Clearinghouse ("ACH") transactions.

6. For banks that do not self-identify and fully correct the newly suspect re-presentment NSF fee practices before their next consumer compliance examination, FIL 40 vows enforcement actions under Section 5 of the Federal Trade Commission Act ("FTC Act"), 15 U.S.C. § 45, which prohibits unfair and deceptive acts or practices

(“UDAP”). FIL 40 threatens civil monetary penalties and restitution orders against noncompliant financial institutions.

7. On June 16, 2023, the FDIC issued Financial Institutions Letter 32-2023: FDIC Clarifying Supervisory Approach Regarding Supervisory Guidance on Multiple Re-Presentment NSF Fees (“FIL 32”) in a purported attempt to “clarify” certain aspects of FIL 40: namely, the restitution supervised institutions remain required to provide. FIL 32 is attached as **Exhibit B**. FIL 32 states that the FDIC’s “current supervisory approach” regarding the issue is “to not request an institution to conduct a lookback review absent the likelihood of substantial consumer harm.” FIL 32 does not define “substantial consumer harm.” FIL 32 also changed a footnote in FIL 40 to remove the statement that “[f]ailing to provide restitution for harmed customers when data on re-presentments is reasonably available will not be considered full corrective action.” However, FIL 32 *did not* revise FIL 40’s mandate that “the FDIC expects supervised financial institutions to . . . take full corrective action, including providing restitution to harmed customers, consistent with the restitution approach described in this guidance.”

8. Importantly, even though the Federal Trade Commission (“FTC”) holds exclusive authority to define specific acts or practices that qualify as UDAP violations, 15 U.S.C. § 57a(a)(1)(B), FIL 40 nonetheless establishes and defines two re-presentment NSF fee practices that will trigger FDIC enforcement actions under the FTC Act.

9. First, FIL 40 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.”

10. Second, regardless of disclosures given to consumers, FIL 40 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. Even following the FDIC's new disclosure requirements does not protect an institution from an "unfairness" claim by the FDIC.

11. FIL 40 obligates the FDIC to enforce its terms: the "supervisory response will focus on identifying re-presentment related issues and *ensuring* correction of deficiencies and remediation to harmed customers, when appropriate." The FDIC "*will* evaluate appropriate supervisory or enforcement actions" based on the new re-presentment NSF fee rules established in FIL 40.

12. Although the FDIC may evaluate and sanction UDAP violations committed by supervised financial institutions on a case-by-case basis, the FDIC cannot mandate sweeping new notice or alert and disclosure obligations, deem specific conduct unfair or deceptive, or retroactively enforce these new mandates by requiring restitution under the direct threat of civil penalties and enforcement actions.

13. The combination of those factors leads to only one conclusion: FIL 40, even as revised by FIL 32, is a legislative rule that imposes new legal obligations on regulated financial institutions and commits the FDIC to take enforcement actions under specific circumstances related to the new obligations.

14. Because the sole method to promulgate a legislative rule is through notice and comment rulemaking, 5 U.S.C. § 553(b), the FDIC violated the APA by failing to observe procedures required by law. *See* 5 U.S.C. § 706(2)(D).

15. Bypassing input from the public and regulated financial institutions before issuing FIL 40 likewise resulted in arbitrary and capricious agency action. *See* 5 U.S.C. § 706(2)(A). In the three-and-a-half pages comprising FIL 40, the FDIC provided only cursory justification for its novel positions and never grappled with the serious regulatory, practical, and reliance concerns raised by its abrupt shift in policy on multiple re-presentment NSF fees.

16. FIL 40 also exceeds the FDIC's statutory authority. *See* 5 U.S.C. § 706(2)(C). No provision of federal law imbues the FDIC with authority to promulgate rules identifying specific UDAP violations or rules governing disclosure requirements for consumer deposit accounts and ACH transactions.

17. Finally, and in the alternative, the FDIC's use and enforcement of FIL 40 is contrary to the FDIC's own binding regulations that prohibit enforcement actions based on supervisory guidance. *See* 5 U.S.C. § 706(2)(A); 12 C.F.R. pt. 302, Appendix A.

18. FIL 40, even as revised by FIL 32, imposes new legal obligations that impact all FDIC-supervised banks. It also requires the FDIC to take actions that violate its statutory authority or, alternatively, its own properly adopted enforcement regulations, resulting in harm to all FDIC-supervised banks. The numerous APA and other violations implicated here warrant complete vacatur of FIL 40 and a permanent injunction against its future application or enforcement.

JURISDICTION AND VENUE

19. This Court has subject matter jurisdiction under 28 U.S.C. §§ 1331, 1346, and 1361, as well as 5 U.S.C. §§ 702–703.

20. This Court is authorized to award the requested declaratory and injunctive relief under 5 U.S.C. § 706, 28 U.S.C. § 1361, and 28 U.S.C. §§ 2201–2202.

21. Venue is proper in this district under 28 U.S.C. § 1391(e) because this is an action against an officer of the United States, Plaintiffs MBA and Lake Central reside in this district and no real property is involved, and a substantial part of the events or omissions giving rise to the claims occurred here.

PARTIES

22. Plaintiff Minnesota Bankers Association is a trade association that represents 281 commercial banks, trust companies, and savings associations that have an official branch office in the state of Minnesota. More than 95% of Minnesota chartered banks and savings associations belong to the MBA. To accomplish its mission of providing leadership, services, and support to ensure a vital, growing financial industry, the MBA provides educational opportunities and advocates for its members before policymakers at the state and federal levels.

23. MBA members supervised and examined by the FDIC, including Lake Central, charged or continue to charge multiple re-presentment NSF fees and now face increased compliance costs and potential enforcement actions due to FIL 40. The MBA has associational standing to sue on behalf of its members.

24. In addition, since the FDIC issued FIL 40, the MBA has expended significant resources to communicate and meet with its member institutions regarding the impact of and response to the unexpected new regulatory mandates.

25. These activities have frustrated the MBA's mission by diverting resources away from its growth-focused educational and advocacy initiatives towards ensuring member compliance with FIL 40. The MBA has direct organizational standing.

26. Plaintiff Lake Central Bank is a Minnesota state-chartered commercial bank with its main office located in Annandale, Minnesota. Lake Central is an MBA member principally supervised and examined by the FDIC.

27. Lake Central pays or returns transactions presented to it for payment and charges an NSF fee for any transaction returned unpaid. This would include a transaction that meets the definition in FIL 40 of a re-presentment. Lake Central provided notice to its depositors regarding its re-presentment NSF fee practices and subsequently updated its disclosures to clarify the same.

28. When the FDIC issued FIL 40, Lake Central, like most if not all FDIC-supervised banks, lacked an automated process to reliably identify re-presentments, whether an initial or subsequent re-presentment. As a result, Lake Central, like many other banks, continues to charge what FIL 40 would characterize as multiple re-presentment fees. Lake Central did not provide restitution to any of its customers, which could have involved the considerable difficulty and expense inherent in manually identifying the specific transactions that could require restitution under FIL 40. Lake Central is now concerned the FDIC may pursue an enforcement action for failure to "[t]ake full corrective action" during its next compliance examination. The issuance of FIL 32 does nothing to alleviate this concern.

29. The threat of enforcement against Lake Central is representative of the concern shared by thousands of banks across the country under the FDIC's supervision, all of which have been impacted by the new regulatory mandates in FIL 40.

30. Defendant FDIC is an executive agency of the United States subject to the APA. *See* 5 U.S.C. § 105; 12 U.S.C. § 1811(a). According to its website, the FDIC directly supervises and examines more than 5,000 banks and savings associations for operational safety and soundness and compliance with consumer protection laws. It acts as the primary federal regulator for state-chartered banks that do not opt to join the Federal Reserve System.

31. Defendant Martin J. Gruenberg is Chairman of the Board of Directors of the FDIC and is sued in his official capacity.

FACTUAL BACKGROUND

I. Re-Presentment

32. Many financial institutions charge NSF fees when a check or ACH item is presented for payment without adequate funds in a customer's account.

33. When a financial institution declines a payment for insufficient funds, the merchant receives a notice of declination and then may resubmit the transaction for payment. Merchants that resubmit payments are subject to laws, regulations, and self-regulatory requirements related to re-representment, and only do so properly when done in full compliance with them. Merchants can, and often do, decide to take other collection actions to recover the funds or choose to take the loss.

34. According to findings outlined in a rulemaking related to Payday, Vehicle Title, and Certain High-Cost Installment Loans ("Covered Loans") by the Consumer Financial Protection Bureau ("CFPB"), "the average return rate for debit transactions in the ACH network across all industries was just 1.36 percent." 82 Fed. Reg. 54,472, 54,725 (Nov. 17, 2017). In other words, only 1.36 percent of debit transactions have the potential to be re-presented. The CFPB indicated that based on the data it reviewed, in most industries, there are not "high rates of re-presentment," and the 1.36 percent is "more likely to simply constitute the typical rejection rate for initial presentments." *Id.* at 54,741.

35. Merchants are subject to various requirements for checks or electronic debits related to providing notices, disclosures, or other forms of communication to their customers for such payments, which may include notices related to re-presentment and the merchants' charges for such. Merchants control whether a transaction is re-presented when returned unpaid and know and understand the notices, disclosures, and agreements they have provided to the consumer, as well as the consumer's knowledge and expectations regarding whether a returned payment will be re-presented and, if so, how. Each merchant may have its own unique policies, procedures, and practices related to re-presentment.

36. The merchants who re-present transactions control and have varying practices related to how, or whether, any declined payment is re-presented. For example, merchants may have broad or narrow payment authorizations; decide the timing (one day after, two days after, etc.), frequency, and amount of the payment to re-present (some

merchants split the original payment into multiple smaller payments rather than the same identical payment); and decide how often to re-present payments that are declined when re-presented. All these practices are in the control of the merchant, and each merchant may choose to do something different.

37. Only when the merchant who controls re-presentment, and the consumer information it provides related to its own practices related to re-presentment, chooses to re-present a declined payment is the payment presented again to the financial institution for a new decision to pay it or decline payment. The financial institution generally will treat the new transaction as a new item for processing purposes, consistent with the Uniform Commercial Code and the Nacha Operating Rules & Guidelines ("Nacha Rules") governing ACH transactions. The financial institution is obligated by these laws and regulations, as well as its deposit agreement with its customer, to pay or decline payment transactions presented by the merchant.

38. Pursuant to disclosures in deposit agreements with their customers, some financial institutions charge NSF fees each time an item is submitted for payment without adequate funds in the customer's account, including when the item is a re-presentment of a previous item.

39. According to the FDIC, multiple re-presentment NSF fees charged by financial institutions create "an elevated risk of violations of law and harm to consumers." The CFPB rulemaking, by contrast, which expressly utilized the CFPB's statutory authority "to identify and prevent unfair, deceptive, or abusive acts or practices" related to Covered Loans, focused on regulating merchants rather than financial

institutions. 82 Fed. Reg. at 54,472. This included rules for merchants related to authorizations, disclosures, notices or alerts, maximum times an item may be re-presented, and other aspects of re-presented payments for Covered Loans.

40. FIL 40 calls into question financial institutions' ability to charge multiple re-presentment NSF fees and imposes detailed new notification or alert and disclosure obligations beyond existing requirements of federal statutes and regulations.

II. Required Disclosures for Consumer Deposit Accounts and ACH Transactions

41. The primary federal statutory scheme governing disclosures for consumer deposit accounts is the Truth-in-Savings Act, 12 U.S.C. §§ 4301–4313 ("TISA"), which is implemented by Regulation DD, 12 C.F.R. pt. 1030.

42. Regulation DD requires depository institutions to include in their account-opening disclosures "[t]he amount of any fee that may be imposed in connection with the account (or explanation of how the fee will be determined) and the conditions under which the fee may be imposed." 12 C.F.R. § 1030.4(b)(4).

43. The official interpretation of Regulation DD further mentions "fees associated with checks returned unpaid" as among the fees required to be disclosed but makes no mention of re-presented checks or ACH entries. 12 C.F.R. pt. 1030, supp. I, cmt. 1030.4(b)(4) (official interpretation of 12 C.F.R. § 1030.4(b)(4)).

44. Appendix B to Regulation DD contains model clauses and sample forms for banks to utilize in crafting compliant disclosures, none of which includes language regarding the treatment of re-presented items.

45. As originally adopted, the Board of Governors of the Federal Reserve System (the "Federal Reserve") held authority to promulgate rules to implement TISA. The Federal Reserve promulgated Regulation DD.

46. Under the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 ("Dodd-Frank"), Congress transferred primary rulemaking authority for TISA to the CFPB. *See* 12 U.S.C. § 4308. While the FDIC retains authority to enforce TISA over certain state-charted banks that fall outside the CFPB's supervisory purview, nothing in TISA entrusts any legislative rulemaking authority to the FDIC.

47. Electronic fund transfers, including ACH entries, are governed by the Electronic Fund Transfer Act, 15 U.S.C. §§ 1693–1693r ("EFT Act"), which is implemented by Regulation E, 12 C.F.R. pt. 1005.

48. Although Regulation E contains numerous disclosures that a financial institution must make in connection with electronic fund transfers, it does not require disclosures for NSF or similar fees. In fact, the official interpretation to Regulation E's fee disclosure section states, "An institution is required to disclose all fees for [electronic fund transfers] or the right to make them. Other fees (for example, minimum-balance fees, stop-payment fees, or account overdrafts) may, but need not, be disclosed." *See* 12 C.F.R. pt. 1005, supp. I, cmt. 7(b)(5) (official interpretation of 12 C.F.R. § 1005.7(b)(5)).

49. Just as with TISA, the Federal Reserve was the original agency authorized to promulgate rules to implement the EFT Act. The Federal Reserve promulgated Regulation E.

50. Again, Dodd-Frank transferred primary rulemaking authority for the EFT Act to the CFPB. *See* 15 U.S.C. § 1693b(a). Nothing in the EFT Act entrusts any legislative rulemaking authority to the FDIC.

51. In prior rulemakings, the Federal Reserve has reviewed the subject of re-presentments and related NSF and collection fees in the context of Regulation DD and Regulation E, but on no occasion did it opt to change the requirements applicable to financial institutions in assessing and disclosing such fees.[1]

52. In addition, after initially choosing not to use its authority to explicitly cover merchants in Regulation E for certain re-presented check transactions, the Federal Reserve identified "concerns . . . about the uniformity and adequacy of some of the notices to consumers" and exercised its authority to cover merchants for purposes of authorization for the transactions, as well as notice required by merchants related to the transactions. Electronic Fund Transfers, 69 Fed. Reg. 55,996, 55,996 (proposed Sept. 17, 2004).

53. The language added to the rule and its commentary clearly require the merchant—not the financial institution—to "obtain a consumer's authorization for each transfer" and "provide a notice" regarding both converted check transactions and any separate transaction to collect the returned item fee. 12 C.F.R. § 1005.3(b)(2), (b)(3). Comment 1 to 12 C.F.R. § 1005.3(b)(3) further clarifies that "[t]he authorization required

[1] Electronic Fund Transfers, 65 Fed. Reg. 40,061 (proposed June 29, 2000); Electronic Fund Transfers, 66 Fed. Reg. 15,187 (Mar. 16, 2001); Electronic Fund Transfers, 69 Fed. Reg. 55,996 (proposed Sept. 17, 2004); Electronic Fund Transfers, 71 Fed. Reg. 1,638 (Jan. 10, 2006).

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."

III. UDAP Authority Under the FTC Act

54. The FTC Act declares unlawful "unfair or deceptive acts or practices in or affecting interstate commerce." 15 U.S.C. § 45(a). Congress conferred UDAP rulemaking authority exclusively on the FTC or other persons designated to "act in behalf of the [FTC] in any part of the rulemaking process." 15 U.S.C. § 57a(a)(1), (d)(2)(A).

55. The FTC may prescribe "interpretive rules and general statements of policy with respect to unfair or deceptive acts or practices," as well as legislative "[r]ules which define with specificity acts or practices which are unfair or deceptive." 15 U.S.C. § 57a(a)(1).

56. In exercising its legislative rulemaking authority to define specific unlawful acts or practices, the FTC must follow the notice and comment rulemaking procedures established by the APA. 15 U.S.C. § 57a(b)(1) (directing the FTC to "proceed in accordance with [5 U.S.C. § 553]"). The FTC must also adhere to certain additional administrative procedures unique to the FTC Act. *Id.*

57. While the FDIC retains UDAP enforcement authority over its supervised financial institutions, 12 U.S.C. § 1818, nothing in the FTC Act authorizes the FDIC to issue legislative rules that define specific unfair or deceptive acts or practices.

IV. The FDIC Issued FIL 40 in Violation of the APA

58. The FDIC publicly identified UDAP concerns with multiple re-presentment NSF fees for the first time in its March 2022 Consumer Compliance Supervisory Highlights ("2022 Supervisory Highlights"). The 2022 Supervisory Highlights are attached as **Exhibit C**.

59. The 2022 Supervisory Highlights summarized trends from the FDIC's previous individualized findings from enforcement actions based on multiple NSF fees 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."

60. In August 2022, with the nominal label of "Supervisory Guidance," the FDIC issued FIL 40 with instructions to all its supervised financial institutions to self-evaluate their practices for four potential "risks arising from multiple re-presentment NSF fees."

61. First, FIL 40 warns of potential deceptive practices under the FTC 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." 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."

62. Second, FIL 40 cautions against unfair practices under the FTC Act. "While revising disclosures may address the risk of deception," the FDIC noted, "doing so may not fully address the unfairness risks." 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."

63. The first two risks identified in FIL 40 impose new legal obligations on regulated financial institutions and commit the FDIC to enforce its requirements in specific circumstances. They also exceed the statutory authority of the FDIC to promulgate rules that define specific unfair or deceptive acts or practices.

64. Third, FIL 40 admonishes banks to monitor and manage third parties involved in check and ACH transaction processing to avoid further UDAP risks. The FDIC declared that "institutions are responsible for identifying and controlling risks arising from third-party relationships to the same extent as if the third-party activity was handled within the institution."

65. Fourth, FIL 40 points out that re-presentment NSF fee practices may result in heightened litigation risk from consumers.

66. After identifying these risks, FIL 40 outlines 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.

67. The FDIC specified that 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."

68. The re-presentment NSF fee disclosure requirements mandated by FIL 40 impose new legal obligations on regulated financial institutions and exceed the FDIC's statutory authority to promulgate disclosure rules for consumer deposit accounts and ACH transactions.

69. 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."

70. The "restitution approach" described in FIL 40—which finds no basis in any existing statute or regulation, even as amended by FIL 32—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. The FDIC originally 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."

71. In an attempt to "clarify" when a lookback is required, the FDIC issued FIL 32. The FDIC stated in its highlights related to the release of FIL 32 that in the ten months since FIL 40 was issued, it had collected "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." 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." The FDIC stated that conclusion in a footnote to the updated and revised version of FIL 40. Ironically, if the FDIC considers this change in supervisory approach to be material or significant, the use of announcing it through a footnote would be something considered deceptive in other contexts.

72. The backpedaling in FIL 32 by the FDIC highlights the errors with the original issuance of FIL 40, and, within less than a year, creates additional violations of law. FIL 32 revises only a small part of the rules issued in FIL 40 and does so in a way that provides no meaningful relief to the institutions it regulates. The FDIC relies on a

footnote (Footnote 4) to announce its revised supervisory policy regarding lookbacks and multiple fees related to re-presentment. In the footnote, the FDIC indicates it "does not intend" to require a lookback "absent a likelihood of substantial consumer harm." By use of the qualifying terms "does not intend" and "likelihood," the FDIC leaves open that it may require a lookback at any time or even where there is truly no substantial consumer harm. The FDIC may believe there is a likelihood based on some unknown set of data, from prior examinations or otherwise, and still require a lookback. It also may require a lookback in any event.

73. FIL 32 also muddies the waters on exactly what supervised institutions are expected to do in order to demonstrate "full corrective action" prior to their next compliance exam. FIL 32 removed FIL 40's Footnote 4 statement that "[f]ailure to provide restitution for harmed customers when data on re-presentment is reasonably available will not be considered full corrective action." However, FIL 32 did not replace this with a clear statement that the determination of whether restitution was required would be made by the FDIC upon the next compliance examination. Rather, FIL 40, as revised, still contains the statement that "[i]f institutions self-identify re-presentment NSF fee issues, the FDIC expects supervised financial institutions to . . . take full corrective action, including providing restitution to harmed customers, consistent with the restitution approach described in this guidance." In addition, FIL 40 still states, "[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."

74. Supervised institutions must now weigh the risks in deciding whether to perform any self-assessment and make any restitution prior to their next compliance exam. If they opt not to do so, will they be penalized by the FDIC for not taking any action, in addition to any restitution the FDIC decides to "request"? Or alternatively, what will happen to a supervised institution that determines in good faith that there is no likelihood of substantial consumer harm, but the FDIC later disagrees?

75. The use of "substantial consumer harm" also provides no clarity to the FDIC's supervised institutions. The FDIC, jointly with the Federal Reserve, provided guidance on "substantial injury" as it relates to unfairness and UDAP in FIL-26-2004 ("FIL 26").[2] The use of "substantial consumer harm" instead of "substantial injury" likely means that the two terms are not interchangeable. For the sake of argument, even if they are, the prior guidance in FIL 26 does not help supervised institutions. FIL 26 states that "[s]ubstantial injury usually involves monetary harm," can be "a small amount of harm to a large number of people," and may exist if the injury "raises a significant risk of concrete harm." Is charging multiple NSF fees on re-presentments a "concrete harm," and given its systems and procedures, is there not a "significant risk"? Given institutions apply the same rules to the same types of accounts, how does an institution determine if its fee is a "small amount"? And given that it would be imposed in all cases for multiple

[2] Available at https://www.fdic.gov/news/financial-institution-letters/2004/fil2604a.html.

re-presentments, how is it not a "likelihood" that it impacts a "large number of people"? In the end, FIL 32 does nothing to alleviate any fear of required restitution, civil money penalties, and enforcement actions if not done prior to the next examination.

76. FIL 32 also highlights how FIL 40, as originally issued and as revised, ignores FIL 26 as it relates to the FDIC's (and other agencies') guidance on unfairness. The changes in FIL 32 focus solely on "substantial consumer harm." Unfairness as outlined in FIL 26 requires "substantial injury" that consumers cannot reasonably avoid, and "[t]he injury must not be outweighed by countervailing benefits to consumers or to competition." FIL 40 and FIL 32 both recite these three parts of the evaluation but fail to indicate that the unfairness conclusion requires "a careful analysis of the facts and circumstances" related to each instance as indicated in FIL 26. Further, FIL 40 and FIL 32 disregard FIL 26's "benefits test," which includes a consideration of "costs incurred for remedies or measures to prevent the injury." It appears that in the ten short months since the original issuance of FIL 40, the FDIC has learned that changes to complex core processing systems are very likely cost-prohibitive, if not impossible, a fact that would have been identified during a proper notice and comment rulemaking on the subject. FIL 40 and FIL 32 jump to conclusions on unfairness and do so universally without any provision for careful case-by-case analysis and no clear rule or threshold related to topic.

77. The restitution duties created by FIL 40 and FIL 32 impose new legal obligations on regulated financial institutions and commit the FDIC to enforce its requirements. They also exceed the statutory authority of the FDIC.

78. In concluding with its supervisory approach to enforcing FIL 40, as revised, 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."

79. As a half-measure of cold comfort, the FDIC noted it "will generally not cite UDAP violations that have been self-identified and fully corrected prior to the start of a consumer compliance examination." 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" as described in FIL 40. That qualification seems particularly unfair to banks as they determine their response to the sudden directives imposed by FIL 40.

80. The inverse of the FDIC's tepid assurance, 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."

81. By tying enforcement to consumer compliance examinations, FIL 40 assigns an immediate timeframe for the new regulatory edicts to take effect. According to its examination manual, the FDIC conducts consumer compliance examinations of supervised banks at regular intervals every 12 to 36 months depending on the strength of institutional ratings.

82. In sum, without any scrutiny under the rigors of notice and comment rulemaking, FIL 40 levies a binding regulatory ultimatum to more than 5,000 banks: identify and correct re-presentment NSF practices and disclosures and make customer restitution within (at most) the next one to three years or face consequences.

83. The FDIC's enforcement statistics since issuing FIL 40 prove as much. In its March 2023 Consumer Compliance Supervisory Highlights ("2023 Supervisory Highlights"), the FDIC admitted 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." The 2023 Supervisory Highlights are attached as **Exhibit D**.

84. Even more acutely, in the 2023 Supervisory Highlights, Section 5 of the FTC Act made the FDIC's list of most frequently cited violations, a list which is typically dominated by TISA (and Regulation DD), the Truth-In-Lending-Act (and Regulation Z), the Fair Debt Collection Practices Act (and Regulation F), the EFT Act (and Regulation E), and the Real Estate Settlement Procedures Act (and Regulation X). These statistics make apparent that the FDIC is following through on its promise to enforce the new and binding regulatory mandates littered throughout FIL 40.

85. FIL 40 is a legislative rule promulgated without observance of notice and comment rulemaking procedures required by law and therefore violates the APA.

86. In the alternative, if FIL 40 is supervisory guidance, then the FDIC has violated its own regulations by bringing enforcement actions based on what is supposed

to be nonbinding "general views regarding appropriate practices for a given subject area." 12 C.F.R. pt. 302, Appendix A. "[S]upervisory guidance does not have the force and effect of law, and the FDIC does not take enforcement actions based on supervisory guidance." *Id.*

87. The FDIC will undoubtedly argue that it is doing nothing more than exercising UDAP enforcement authority it already possesses, and therefore no further action or authority is needed. However, that argument fails because the FDIC is not enforcing a previously existing, properly issued UDAP rule. Instead, the FDIC has created a new specifically defined UDAP violation through FIL 40. This new UDAP violation is based on a bank's material omission of information that the FDIC now deems necessary, namely the new re-presentment disclosure language. There cannot be a deceptive UDAP violation without a material omission, and there cannot be a material omission without the FDIC's mandatory disclosure requirements.

88. FIL 40 also represents a significant deviation from the FDIC's previously established approach to UDAP enforcement. Historically, when exercising its UDAP enforcement authority, the FDIC has engaged in "careful analysis of the facts and circumstances," consistent with FIL 26. In issuing FIL 40, rather than continue evaluating potential UDAP violations resulting from multiple NSF fee practices on a case-by-case basis, the FDIC instead essentially issued a blanket enforcement action against all its supervised financial institutions without the benefit of that "careful analysis."

89. In issuing FIL 40, the FDIC has also changed course from its typical practice of issuing UDAP-related guidance through the notice and comment process.

Though certainly not an exhaustive list, examples of this include the final Joint Guidance on Overdraft Protection Programs issued as FIL-11-2005,[3] the Interagency Guidance on Nontraditional Mortgage Product Risks issued as FIL-89-2006,[4] the Interagency Statement on Subprime Mortgage Lending issued as FIL-62-2007,[5] the final Overdraft Payment Supervisory Guidance issued as FIL-81-2010,[6] the final Guidance on Supervisory Concerns and Expectations Regarding Deposit Advance Products published at 78 Fed. Reg. 70,552 (and subsequently rescinded in 2020 by FIL-58-2020), and the final Interagency Guidance for Responsible Small-Dollar Loans issued as FIL-58-2020.[7]

90. In fact, less than three months before the issuance of FIL 40, the FDIC published a final rule through the notice and comment process which prohibited specific false advertising activities relating to the misuse of the FDIC logo to make misrepresentations about deposit insurance. *See* False Advertising, Misrepresentation of Insured Status, and Misuse of the FDIC's Name or Logo, 87 Fed. Reg. 33,415 (June 2, 2022). In addition to other statutes, the FDIC opined in this final rule that the prohibited conduct may also violate Section 5 of the FTC Act. *Id.* at 33,417. Why the FDIC

[3] Available at https://www.federalreserve.gov/boarddocs/press/bcreg/2005/20050218/attachment.pdf.

[4] Available at https://www.fdic.gov/news/financial-institution-letters/2006/fil06089.html.

[5] Available at https://www.fdic.gov/news/financial-institution-letters/2007/fil07062.html.

[6] Available at https://www.fdic.gov/news/financial-institution-letters/2010/fil10081.html.

[7] Available at https://www.fdic.gov/news/financial-institution-letters/2020/fil20058.html.

determined only a few short months later that its next missive concerning UDAP violations did not warrant the same treatment is unknown.

91. In a further departure from common practice, in issuing FIL 40, the FDIC chose to act alone rather than take the time and effort to formulate a joint approach to be applied to all banks. The federal banking agencies frequently coordinate to issue joint guidance applicable to all federally regulated banks, particularly where it concerns statutes or rules that each agency has separate authority to enforce (such as Section 5 of the FTC Act). The language of FIL-58-2020 referenced above makes specific note of this: "The agencies have previously adopted separate (and different) guidance regarding small-dollar loans. By adopting the interagency guidance, the agencies are providing uniform principles for all financial institutions."

92. Because the FDIC never sought input from the public, its regulated financial institutions, or even its fellow federal banking regulators, FIL 40 ignores important considerations for regulating re-presentment NSF fees and discards years of reliance interests. Had FIL 40 proceeded through notice and comment rulemaking, financial institutions would have raised, at minimum, the following concerns now left entirely unaddressed by the FDIC.

93. The FDIC failed to consider re-presentment facts and statistics that would have allowed it to properly identify the actual practices that cause concern and the best party and method to address the concern. As noted above, the CFPB rulemaking related to Covered Loans identified specific re-presentment practices that were unfair, deceptive, or abusive; identified the party (the merchants) in the best position to address the

practice; and prescribed the limits, disclosures, and notice or alerts required of the party. The CFPB concluded that existing practices were sufficient other than for the Covered Loan industry and chose not to further regulate other industries or products (including financial institutions not engaged in Covered Loans).

94. The FDIC failed to consider that FIL 40 imposes disclosure requirements that go beyond the existing requirements in Regulation DD and Regulation E.

95. Neither regulation imposes specific requirements for disclosures of multiple re-presentment NSF fee practices. Indeed, Regulation E expressly does not require overdraft fee disclosures at all. The multiple re-presentment fee disclosures required by FIL 40 are so specific that a reasonable bank would not infer from the language and examples provided in Regulation DD and Regulation E that such detail is required.

96. The FDIC failed to perform the small business review required as part of the rulemaking process. *See* 5 U.S.C. §§ 603–604. This review would have identified the costs and benefits related to FIL 40; all the parties involved in a re-presented payment transaction; the party in the best position to provide disclosures and notice or alerts to the consumer before an item is re-presented for payment; the specific practices that may be unfair or deceptive; all the current laws, regulations, and self-regulatory requirements related to re-presentment; and many other topics required in that review. Any such review would likely have resulted in findings like that made by the CFPB in its Covered Loans rulemaking, which recognized that merchants, not financial institutions, control the practices related to re-presentment that cause consumer harm and are potentially unfair or deceptive. It would have also identified, as indicated in Footnote 4 to FIL 32, that

financial institutions' "core processing systems" would require extensive and costly changes in order to "accurately" identify "re-presented transactions" in their many frequencies and forms. This would have lent further support to the solution to the perceived harm sitting with the merchants rather than the financial institutions. It would have also identified the methods and ways merchants notify and alert consumers related to re-presentment, potentially leading to a different view on whether consumers could reasonably avoid any alleged harm, as well as the costs to be incurred as part of the cost/benefit analysis required for practices to be considered unfair.

97. The FDIC failed to consider that banks are generally obligated to process re-presented payments and either pay them or return them in accordance with the laws and procedures applicable to the payment type. Because FIL 40 calls into question whether financial institutions can charge multiple NSF fees on a re-presented check or ACH entry on unfairness grounds, many banks, concerned about the risk of an enforcement action, are now reticent to collect fees for a service that the law still requires them to perform. The Uniform Commercial Code obligates banks to process checks validly presented by their merchant depositors or risk a claim of wrongful dishonor. Similarly, absent a suitable excuse, banks acting as originating depository institutions pursuant to the Nacha Rules must transmit each ACH entry originated by merchant depositors, and banks acting as receiving depository institutions must process and pay (or return) each ACH entry received.

98. In characterizing re-presentments as part of the same transaction as the original presentment of the check or ACH entry, the FDIC failed to consider that, for

purposes of payment processing under the Uniform Commercial Code and the Nacha Rules, each presentment is treated as a unique "item" rather than an extension of one continuous transaction. What a consumer perceives to be one transaction between the consumer and the applicable merchant can in fact be made up of multiple transactions involving the consumer, the merchant, and the bank when unpacked behind the scenes. Merchant practices, such as splitting a single payment into multiple smaller payments when re-presented, often make it impossible for the financial institution to evaluate if a payment is a re-presentment.

99. The FDIC failed to consider that banks lack control over merchants.

100. Merchants—not financial institutions—are primarily responsible for re-presenting declined payments. Banks simply process the transactions in the ordinary course of business. As indicated earlier, a recent rulemaking by the CFPB reinforces that the merchant originating the payment is in the best (and perhaps only) logical position to control re-presentment activity and therefore should be the responsible gatekeepers for such activity. In an April 2016 report examining the payment practices of payday lenders, the CFPB looked closely at the consumer impact of aggressive ACH re-presentment practices utilized by payday lenders.[8] The CFPB then published a rule which, when finalized in 2017, (a) clearly acknowledged that re-presentments by the lenders were resulting in multiple NSF fees charged by depository institutions and (b) tacitly acknowledged that the lenders originating the re-presentments, not the depository

[8] Available at https://files.consumerfinance.gov/f/201604_cfpb_online-payday-loan-payments.pdf.

institutions processing them, were in the best position to minimize harm to consumers by prohibiting the lenders from continuing to withdraw loan payments if the previous two attempts had been returned for insufficient funds unless the lender obtained a new authorization from the consumer. *See generally* Covered Loans, 82 Fed. Reg. 54,472. In fact, as cited in the final rule's commentary, "some [commenters] said that if the issue is the high fees that are charged, then the Bureau should pursue that problem separately rather than by adopting this rule." *Id.* at 54,723. The CFPB did not do so, but instead opted to promulgate the rule restricting the behavior of the payday lenders.

101. The Federal Reserve has examined similar issues relating to the relationship between the consumer, the merchant, and the depository institution. In two pairs of proposed and final staff interpretations issued between 2001 and 2006, the Federal Reserve concluded that the merchant should generally be responsible for notifying the consumer if the merchant planned to electronically re-present a consumer's returned check or electronically collect an NSF fee from the consumer via ACH debit for a returned check.[9]

102. The FDIC failed to consider that banks are necessarily dependent upon automated systems, which may not have sufficient information to identify a payment as a re-presentment, a second re-presentment, etc. The time and cost associated with changing the systems to capture such information is considerable, and, as noted below, those changes are generally within the control of third-party vendors, not the banks.

[9] *See* proposed and final rules cited *supra* note 1.

103. Processing payment orders and charging NSF fees is heavily automated through core processing software and centralized payment systems critically important to the operation of a modern depository institution. Individual checks and ACH entries are not manually inspected, nor are fees manually entered.

104. Few bank technology vendors currently offer functionality to flag re-presented payments or allow a bank discretion over whether to assess an NSF fee. Thus, banks must generally resort to manually inspecting payments after the fact and reversing any fees that were automatically applied.

105. Ironically, FIL 40 identifies third-party dependency as a risk associated with charging re-presentment NSF fees, alleging that banks bear responsibility to keep their third parties in compliance. But FIL 40 fails to acknowledge either the suddenness of this determination without allowing third parties time to adapt their functionality, or the unavoidable lack of leverage individual institutions have over such third parties in the first place. FIL 40 was issued without the benefit of learning about the "ongoing and extensive challenges observed in accurately identifying re-presented transactions through core processing systems" outlined in Footnote 4 to FIL 32. These challenges are not new, and the FDIC would have learned about them during notice and comment rulemaking. The FDIC would have also learned the core processing systems are unlikely to be changed such that they truly identify what the FDIC considers re-presentments of the "same transaction," given all the parties, systems, and processes involved. In reality, the merchants are the only party that can control the timing, method, accuracy, number, amount, prior notice or alert to the consumer, and all other fundamental aspects of re-

presentment for a returned item. Had the FDIC learned this during the notice and comment period for a rulemaking, it could have considered these facts when decreeing its new rules and requirements, and any effective date for such rules and requirements.

106. The FDIC failed to consider that even if the relevant systems had functionality to provide information on re-presentment, the merchant may not make the correct entries necessary to identify the payment as a re-presentment. *See, e.g.*, Covered Loans, 82 Fed. Reg. at 54,728 n.985. The Nacha Rules require that merchants originating re-presented entries follow a certain set of coding requirements, depending on the type of payment. Yet the consumer's bank, acting as the Receiving Depository Financial Institution, has no knowledge about the circumstances of the ACH entry or whether it was originated in compliance with the Nacha Rules. These coding requirements are sometimes missed or disregarded by originators, meaning the only way to accurately identify re-presented ACH payments is through manual entry review and comparison.

107. The FDIC failed to consider the reasonable opportunities available for consumers to avoid harm from re-presented payments, including, but not limited to, the merchants' disclosures, notices, and alerts the consumer receives regarding payments presented, returned, and re-presented.

108. The near-uniform practice among banks today is to offer their customers online and mobile banking functionality that gives 24-hour, on-demand access to their account balance and transaction history. Many banks also offer notification services that send mobile or email alerts to customers when an account balance is low or a payment is rejected, thereby giving them an opportunity to transfer funds or contact the merchant

attempting to debit their account. It is now increasingly unlikely that customers lack reliable access to computers or mobile devices to utilize these account status tools.

109. The FDIC failed to consider the reliance interests created by previous regulations, supervisory activities, and enforcement actions.

110. In all its years of in-depth supervisory activities, the FDIC cannot possibly claim a lack of awareness that financial institutions charged multiple NSF fees for re-presented transactions. The FDIC has also reviewed deposit agreement disclosures and has enforced Regulation DD and Regulation E for decades. The Federal Reserve and the CFPB have both issued rules and guidance concerning Regulation DD and Regulation E, and the FDIC, the Federal Reserve, and the CFPB have all conducted in-depth studies on overdraft and NSF activities and their impact on consumers. By no means an exhaustive list, examples in addition to those already referenced include the Joint Guidance on Overdraft Protection Programs published in 2005,[10] the 2008 FDIC Study of Bank Overdraft Programs,[11] the CFPB's 2013 Study of Overdraft Programs,[12] and the CFPB's Consumer Financial Protection Circular 2022-06 addressing unanticipated overdraft fee assessment practices.[13] Despite ample awareness and opportunity, no federal banking

[10] 70 Fed. Reg. 9,127 (Feb. 24, 2005).

[11] Available at https://www.fdic.gov/bank/analytical/overdraft/FDIC138_Report_Final_v508.pdf.

[12] Available at https://files.consumerfinance.gov/f/201306_cfpb_whitepaper_overdraft-practices.pdf.

[13] Available at https://files.consumerfinance.gov/f/documents/cfpb_unanticipated-overdraft-fee-assessment-practices_circular_2022-10.pdf.

regulator has acted to amend its regulations to address any concerns with re-presentment NSF fees. Only now has the FDIC elected to raise concerns with the specific wording of re-presentment NSF fee disclosures, which is generally guided by the model language provided in Appendix B to Regulation DD. In short, financial institutions relied on the FDIC's lack of supervisory objection to their disclosures and practices, as well as the regulators' and the payment system's more-than-tacit acceptance and facilitation of the practice of re-presentments.

111. FIL 40 mentions, and representatives from the FDIC have stated publicly, that one primary driver behind the issuance of FIL 40 was to warn banks regarding potential litigation risk associated with insufficient disclosures concerning re-presentment NSF fee practices. If this were true, the substance of FIL 40 could have been reduced to two or three simple paragraphs, none of which would need to include retroactive penalties or threats of enforcement actions.

112. The restitution requirements prescribed by FIL 40 are also arbitrary. The required lookback period was not defined, but as suggested by Footnote 4 of FIL 40, was instead determined on a case-by-case basis based upon how much historical transaction data the bank may be able to access (which each bank will need to determine on its own and then be able to justify come its next compliance exam). As revised by FIL 32, Footnote 4 states that "[t]he FDIC has generally accepted a two-year lookback period for restitution where institutions have been unable to reasonably access accurate ACH data for re-presented transactions." As discussed above, the footnote also now states that the

FDIC "does not intend" to require "lookback[s] . . . absent a likelihood of substantial consumer harm."

113. While as originally written or as revised this may seem like a reasonable approach initially, the result is an entirely uneven application of FIL 40's most costly requirement among impacted banks. The lack of clarity about "substantial consumer harm" and use of "does not intend" provides no assurance a lookback will not be required. A bank that is required to conduct a lookback has no assurance that it can use the two-year period. This is based on both the use of the term "generally," which implies the result may differ in any event, and the apparently unbridled discretion afforded an examiner to determine whether the institution is unable to "reasonably access" the data. Why should one bank have to review and pay restitution on five years of customer transactions simply because the vendor who maintains their transaction records happens to retain five years of data that is "reasonably" accessible, while the bank across the street need only review and pay restitution for two years of transactions, or none? For an edict supposedly prefaced on eliminating unfairness, FIL 40 certainly puts its own audience on unfair footing.

114. The failure to address these important considerations for regulating re-presentment NSF fees or to offer a reasoned explanation for the changes renders FIL 40 arbitrary and capricious agency action. The need to issue FIL 32 to make revisions based on uncovering "ongoing and extensive challenges" faced by its regulated financial institutions is a further indication of the arbitrary and capricious nature of FIL 40, followed by the same for FIL 32.

115. Critical among the procedural protections embedded in the APA is the requirement that final legislative rules be published in the Federal Register no less than 30 days prior to the date on which they are to be effective. *See* 5 U.S.C. § 553(d). For rules requiring time-consuming or cumbersome compliance efforts, final rules also frequently include “compliance dates” further in the future, leaving reasonable interim time for regulated institutions to take the necessary steps to bring their practices into compliance with the new rule.

116. Even when issuing guidance, the FDIC has in the past included buffer time to allow its regulated institutions to make changes to disclosures or take other compliance steps that naturally require time and planning to implement. For example, in the final Overdraft Payment Supervisory Guidance issued as FIL-81-2010, the FDIC gave banks approximately seven months to implement the FDIC’s new risk mitigation suggestions as they applied to overdraft programs (which, like FIL 40, involved revising disclosures, coordinating with third-party vendors, and updating operational procedures).

117. Financial institutions are accustomed to operating in a heavily regulated environment with ever-changing rules. Had the FDIC followed the APA’s notice and comment rulemaking requirements (assuming only for the sake of argument it has authority to do so in this circumstance), FDIC-regulated financial institutions undoubtedly would have taken the necessary steps to review and revise their practices and disclosures appropriately to comply with any new requirements promptly and in good faith. By introducing FIL 40 without warning and with retroactive applicability, the FDIC

robbed its regulated financial institutions of this opportunity to comply in good faith, opting instead to simply declare them predatory and extract penance accordingly.

118. Fundamental principles of administrative law prohibit the FDIC from issuing sweeping new binding regulations for vast swaths of the financial industry—on pain of substantial civil penalties and restitution awards—under the guise of ill-defined and hastily considered supervisory guidance. The APA demands more.

COUNT I
Administrative Procedure Act, 5 U.S.C. § 706(2)(D)
Lack of Notice and Comment

119. Plaintiffs reassert the allegations in the preceding paragraphs.

120. FIL 40 is a legislative rule that the FDIC could only issue, if at all, through notice and comment rulemaking under the APA and the FTC Act. *See* 5 U.S.C. § 553(b); 15 U.S.C. § 57a(b).

121. FIL 40 is not an interpretative rule, general policy statement, or an agency rule of organization, procedure, or practice exempt from notice and comment rulemaking.

122. The FDIC failed to issue FIL 40 through notice and comment rulemaking.

123. FIL 40 was promulgated without observance of procedure required by law and must be set aside.

COUNT II
Administrative Procedure Act, 5 U.S.C. § 706(2)(A)
Arbitrary and Capricious Agency Action

124. Plaintiffs reassert the allegations in the preceding paragraphs.

125. In issuing FIL 40, the FDIC failed to consider several important aspects of regulating multiple re-presentment NSF fees, including inconsistency between its new

policy and Regulation DD and Regulation E, the nondiscretionary function of financial institutions when charging NSF fees, and the opportunities for consumers to prevent re-presented payments altogether.

126. The FDIC also invalidated years of reliance on existing regulations and supervision. FIL 40 never so much as acknowledged a departure from decades of accepted practices—much less offered a reasoned explanation for the sudden changes.

127. FIL 40 is arbitrary and capricious agency action and must be set aside.

COUNT III
Administrative Procedure Act, 5 U.S.C. § 706(2)(C)
Agency Action Exceeds Statutory Authority

128. Plaintiffs reassert the allegations in the preceding paragraphs.

129. The FDIC lacks statutory authority to "define with specificity acts or practices which are unfair or deceptive," 15 U.S.C. § 57a(a)(1)(B), a power reserved exclusively to the FTC or its authorized designee.

130. FIL 40 defines specific acts or practices relating to multiple re-presentment NSF fees that the FDIC may consider unfair or deceptive for enforcement actions brought under the FTC Act.

131. FIL 40 was issued solely by the FDIC without authorization from the FTC.

132. The FDIC is not vested with legislative rulemaking authority under TISA, the EFT Act, or any other federal statute to prescribe disclosure or restitution requirements for consumer deposit accounts or ACH transactions.

133. FIL 40 exceeds the statutory authority conferred on the FDIC and must be set aside.

COUNT IV
Administrative Procedure Act, 5 U.S.C. § 702(2)(A)
Agency Action Contrary to Law

134. Plaintiffs reassert the allegations in the preceding paragraphs.

135. In the alternative, if FIL 40 is supervisory guidance, the FDIC has violated its own regulations that prohibit enforcement actions based on supervisory guidance under 12 C.F.R. pt. 302, Appendix A.

136. FIL 40 is contrary to law and must be set aside.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs respectfully request that the Court enter judgment in their favor as follows:

A. Declaring that FIL 40 is a legislative rule issued without observance of procedure required by law;

B. Declaring that FIL 40 is arbitrary, capricious, and an abuse of discretion;

C. Declaring that FIL 40 exceeds the FDIC's statutory authority;

D. In the alternative, declaring that FIL 40 is contrary to 12 C.F.R. pt. 302, Appendix A;

E. Vacating FIL 40 and permanently enjoining its application or enforcement;

F. Awarding Plaintiffs their reasonable attorneys' fees and costs; and

G. Granting such other relief as the Court deems just and equitable.

Dated: July 20, 2023

/s/ David R. Marshall

David R. Marshall (#0184457)
Leah C. Janus (#0337365)
Matthew P. Kopp (#0401253)
W. Thomas Wheeler (#0400805)
FREDRIKSON & BYRON, P.A.
60 South Sixth Street, Suite 1500
Minneapolis, MN 55402-4400
Telephone: (612) 492-7000
dmarshall@fredlaw.com
ljanus@fredlaw.com
mkopp@fredlaw.com
twheeler@fredlaw.com

Attorneys for Plaintiffs