UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

COMMUNITY FINANCIAL SERVICES ASSOCIATION OF AMERICA, LTD., et al.,	)	
Plaintiffs,	)	CIVIL ACTION
v.	)	Case No. 14-953 (GK)
FEDERAL DEPOSIT INSURANCE CORPORATION, et al.,	)	
Defendants.	)	

MEMORANDUM IN SUPPORT OF FEDERAL DEPOSIT INSURANCE CORPORATION'S MOTION TO DISMISS AMENDED COMPLAINT FOR LACK OF SUBJECT MATTER JURISDICTION, OR FOR FAILURE TO STATE A CLAIM

TABLE OF CONTENTS

BACKGROUND 2

A. FDIC Oversight of Banks 2

B. Customer Identification Program 3

C. Third-Party Relationships 4

D. Plaintiffs' Amended Complaint 10

ARGUMENT 10

I. STANDARD OF REVIEW 10

II. THE COURT SHOULD DISMISS FOR LACK OF JURISDICTION 12

A. Plaintiffs Have No Standing to Challenge the FDIC's Guidance. 12

1. Plaintiffs' Alleged Injuries Are Not Traceable to the FDIC. 12

2. Plaintiffs' Injuries Are Not Redressable in this Case. 16

B. The Court Should Dismiss for Lack of Prudential Standing. 20

C. The September 2013 and July 2014 FILs Moot Plaintiffs' Challenge in Pertinent Part. 22

III. PLAINTIFFS DO NOT STATE A CLAIM. 23

A. Plaintiffs Do Not Identify Final Agency Action. 23

1. The Documents Did Not "Impose Rights and Obligations." 24

a. The 2008-2012 Documents Do Not Contain Binding Language 24

b. The 2008-2012 Documents Did Not Change FDIC Policy And Thus Were Not Final Agency Action. 27

c. The Documents Did Not Have "Legal Consequences." 29

2. The 2008-2012 Documents Were Not Intended to be Rules. 33

B. Plaintiffs' Allegations of a "*De Facto* Rule" Do Not State a Claim. 36

C. The FDIC Did Not Reinterpret Any Previously-Issued Regulation.....37

D. The FDIC Acted Within Its Authority. 38

E. The 2008-2012 Documents Are Not Arbitrary or Capricious.....41

F. The FDIC Did Not Violate Plaintiffs' Due Process Rights.....42

G. The Court Has No Jurisdiction to Enjoin Enforcement Actions. 43

CONCLUSION 45

TABLE OF AUTHORITIES

CASES

Abhe & Svoboda, Inc. v. Chao,
508 F.3d 1052 (D.C. Cir. 2007) 3

Aerosource, Inc. v. Slater,
142 F.3d 572 (3d Cir. 1998) 32

Air Brake Sys., Inc. v. Mineta,
357 F.3d 632 (6th Cir. 2004) 32

Air Line Pilots Ass'n v. Northwest Airlines, Inc.,
199 F.3d 477 (D.C. Cir. 1999) 22

Alaska Professional Hunters Ass'n v. FAA,
177 F.3d 1030 (D.C. Cir. 1999) 37

Allen v. Wright,
468 U.S. 737 (1984) 14

Asbetec Constr. Servs. v. EPA,
849 F.2d 765 (2d Cir. 1988) 32

Ashcroft v. Iqbal,
556 U.S. 570 (2009) 11, 16, 39

Association of Private Sector Colleges & Univs. v. Duncan,
681 F.3d 427 (D.C. Cir. 2012) 13

Baird v. Snowbarger,
744 F. Supp. 2d 279 (D.D.C. 2010) 11

Bell Atl. Corp. v. Twombly,
550 U.S. 544 (2007) 11, 16

Bennett v. Spear,
520 U.S. 154 (1997) 24, 29

Block v. Meese,
793 F.3d 1303 (D.C. Cir. 1986) 15

Bloomberg L.P. v. CFTC,
949 F. Supp. 2d 91 (D.D.C. 2013) 14

Broadgate Inc. v. USCIS,
730 F. Supp. 2d 240 (D.D.C. 2010) 27, 34

Brock v. Cathedral Bluffs Shale Oil Co.,
796 F.2d 533 (D.C. Cir. 1986) 26

**Center for Auto Safety v. NHTSA*,
452 F.3d 798 (D.C. Cir. 2006) ..... *passim*

Chemical Manufacturers Association v. EPA,
26 F. Supp. 2d 180 (D.D.C. 1998) 29

Chrebet v. County of Nassau,
--- F. Supp. 2d ---, 2014 WL 2527225 (E.D.N.Y. June 5, 2014) 42

Clarke v. Securities Indus. Ass'n,
479 U.S. 388 (1987) 20

Community for Creative Non-Violence v. Pierce,
814 F.2d 663 (D.C. Cir. 1987) 20

Competitive Enter. Inst. v. NHTSA,
901 F.2d 107 (D.C. Cir. 1990) 20

Cousin v. OTS,
73 F.3d 1242 (2d Cir. 1996) 41

DRG Funding Corp. v. HUD,
76 F.3d 1212 (D.C. Cir. 1996) 30

DaimlerChrysler Corp. v. Cuno,
547 U.S. 332 (2006) 15

Deutsche Bank Nat'l Trust Co. v. FDIC,
717 F.3d 189 (D.C. Cir. 2013) 21

Doe v. United States Dep't of Justice,
753 F.2d 1092 (D.C. Cir. 1985) 43

Doherty v. United States,
94 F.2d 495 (8th Cir. 1983) 21

Duke Power Co. v. Carolina Env'tl Study Group,
438 U.S. 59 (1978) 16, 20

FDIC v. Bank of Coushatta,
930 F.2d 1122 (5th Cir. 1991) 44

FHLBB v. Rowe,
284 F.2d 274 (D.C. Cir. 1960) 44

FTC v. Standard Oil Co.,
449 U.S. 232 (1980) 37

**Food & Water Watch v. EPA*,
--- F. Supp. 2d ---, 2013 WL 6513826 (D.D.C. Dec. 13, 2013) 26, 30

Freedom Republicans, Inc. v. FEC,
13 F.3d 412 (D.C. Cir. 1994) 14

Frontier State Bank v. FDIC,
702 F.3d 588 (10th Cir. 2012) 44

Fund for Animals v. Williams,
391 F. Supp. 2d 191 (D.D.C. 2005) 36

General Motors Corp. v. EPA,
363 F.3d 442 (D.C. Cir. 2004) 28

Grand Lodge of Fraternal Order of Police v. Ashcroft,
185 F. Supp.2d 9 (D.D.C.2001) 11

Groos Nat'l Bank v. OCC,
573 F.2d 889 (5th Cir. 1978) 44

Gunter v. Hutcheson,
674 F.2d 862 (11th Cir. 1982) 21

Hazardous Waste Treatment Council v. Thomas,
885 F.2d 918 (D.C. Cir. 1989) 21

Hindes v. FDIC,
137 F.3d 148 (3d Cir. 1998) 45

**Holistic Candlers & Consumers Association v. FDA*,
664 F.3d 940 (D.C. Cir. 2012) 26

Holistic Candlers & Consumer Ass'n v. FDA,
770 F. Supp. 2d 156 (D.D.C. 2011) 36

Holt Cargo Sys. Inc., v. Delaware River Port Auth.,

20 F. Supp. 2d 803 (E.D. Pa. 1998) 42

Home Builders Ass'n v. U.S. Army Corps of Eng'rs,
335 F.3d 607 (7th Cir. 2003) 30

In re Shollenburg,
FDIC-00-88e, 2003 WL 1986896 (FDIC Mar. 11, 2013) 41

**Independent Equipment Dealers Ass'n v. EPA*,
372 F.3d 420 (D.C. Cir. 2004) 27, 30, 35

**Industrial Safety Equipment Association v. EPA*,
837 F.2d 1115 (D.C. Cir. 1988) 31, 32

Invention Submission Co. v. Rogan,
357 F.3d 452 (4th Cir. 2004) 32

Investment Co. Inst. v. FDIC,
728 F.2d 518 (D.C. Cir. 1984) 44

Jones v. OCC,
983 F. Supp. 197 (D.D.C. 1997) 44

Kaempe v. Myers,
367 F.3d 958 (D.C. Cir. 2004) 11

Lepelletier v. FDIC,
164 F.3d 37 (D.C. Cir. 1999) 22

Long Term Care Pharmacy Alliance v. Leavitt,
530 F. Supp. 2d 173 (D.D.C. 2008) 14

**Lujan v. Defenders of Wildlife*,
504 U.S. 555 (1992) 12, 13

Massachusetts Credit Unions Share Ins. Corp. v. NCUA,
693 F. Supp. 1225 (D.D.C. 1988) 14

Massachusetts Manufacturing Extension Partnership v. Locke,
723 F. Supp. 2d 27 (D.D.C. 2010) 29

Mendoza v. Perez,
754 F.2d 1002 (D.C. Cir. 2014) 28

NRDC v. EPA,

859 F.2d 156 (D.C. Cir. 1988) 43

NRDC v. EPA,
559 F.3d 561 (D.C. Cir. 2009) 26, 31

NRDC v. FHFA,
815 F. Supp. 2d 630 (S.D.N.Y. 2011) 18

**National Ass'n of Home Builders v. Norton*,
415 F.3d 8 (D.C. Cir. 2005) 26, 27, 29, 35

National Automatic Laundry and Cleaning Council v. Shultz,
443 F.2d 689 (D.C. Cir. 1971) 35

National Maritime Union v. Dole,
1987 WL 10495 (D.D.C. Apr. 27, 1987) 15, 17

**National Mining Ass'n v. McCarthy*,
--- F.3d ---, 2014 WL 3377245 (D.C. Cir. July 11, 2014) 25, 29

**National Wrestling Coaches Ass'n v. Department of Educ.*,
366 F.3d 930 (D.C. Cir. 2004) 12, 13, 14, 16

National Wrestling Coaches v. U.S. Dep't of Educ.,
263 F. Supp. 2d 82 (D.D.C. 2003) 14

O'Bannon v. Town Court Nursing Ctr.,
447 U.S. 773 (1980). 43

Paralyzed Veterans of America v. D.C. Arena L.P.,
117 F.3d 579 (D.C. Cir. 1997) 37

Paul v. Davis,
424 U.S. 693 (1976) 43

Peoples Nat'l Bank v. OCC,
227 F. Supp. 2d 645 (E.D. Tex. 2002) 45

Pete v. City of Oakland,
2011 WL 863550 (N.D. Cal. Mar. 10, 2011) 42

RSM Prod. Corp. v. Freshfields Bruckhaus Deringer U.S. LLP,
682 F.3d 1043 (D.C. Cir. 2012) 39

RTC v. Ryan,

801 F. Supp. 1545 (S.D. Miss. 1992)..... 45

Radack v. United States Dep't of Justice,
402 F. Supp. 2d 99 (D.D.C. 2005)..... 42

Reliable Automatic Sprinkler Co. v. CPSC,
324 F.3d 726 (D.C. Cir. 2003)..... 23, 26

**Renal Physicians Ass'n v. HHS*,
489 F.3d 1267 (D.C. Cir. 2007)..... 16, 20

Ridder v. OTS,
146 F.3d 1035 (D.C. Cir. 1997)..... 43

Royster-Clark Agribusiness, Inc. v. Johnson,
391 F. Supp. 2d 21 (D.D.C. 2005)..... 26

Safe Energy Coalition v. NRC,
866 F.2d 1473 (D.C. Cir. 1989)..... 22

Slate v. Public Defender Serv.,
--- F. Supp. 2d ---, 2014 WL 1315238 (D.D.C. Apr. 2, 2014)..... 3

Stewart v. National Educ. Ass'n,
471 F.3d 169 (D.C. Cir. 2006)..... 11

Swanson Group Mfg. LLC v. Salazar,
951 F. Supp. 2d 75 (D.D.C. 2013)..... 34

Syncor Int'l Corp. v. Shalala,
127 F.3d 90 (D.C. Cir. 1997)..... 34

TOMAC v. Norton,
433 F.3d 852 (D.C. Cir. 2006)..... 39

**Town of Babylon v. FHFA*,
699 F.3d 221 (2d Cir. 2012)..... 16, 18

Tozzi v. U.S. Department of Health & Human Services,
271 F.3d 301 (D.C. Cir. 2001)..... 15

Transmission Access Policy Study Group v. FERC,
225 F.3d 667 (D.C. Cir. 2000)..... 38

Trudeau v. Federal Trade Comm'n,

456 F.3d 178 (D.C .Cir. 2006) 11

U.S. Ecology, Inc. v. U.S. Dep't of Interior,
231 F.3d 20 (D.C. Cir. 2000) 11

United Liberty Life Ins. Co. v. Ryan,
985 F.2d 1320 (6th Cir. 1993) 44

United States v. Florida East Coast Ry.,
410 U.S. 224 (1973) 43

United Techs. Corp. v. EPA,
821 F.2d 714 (D.C. Cir. 1987). 38

STATUTES

5 U.S.C. § 553 34

5 U.S.C. § 701 44

5 U.S.C. § 704 ..... 1, 23, 42

5 U.S.C. § 706 42

12 U.S.C. § 1817 2

12 U.S.C. § 1818 ..... 2, 3, 43

12 U.S.C. § 1819 2

12 U.S.C. § 1820 ..... 2, 44

12 U.S.C. § 1831p-1 ..... *passim*

12 U.S.C. § 5581 41

31 U.S.C. § 5318 ..... 3, 18

REGULATIONS

12 C.F.R. § 326.8 3

12 C.F.R. § 353.3 ..... 3, 18

12 C.F.R. Part 208, App. A 41

12 C.F.R. Part 30, App. C 41

12 C.F.R. Part 364 App. A 18

31 C.F.R. § 1020.220 ..... 3, 18

61 Fed. Reg. 67021, 67027 (Dec. 19, 1996) 41

78 Fed. Reg. 25268, 25268 (Apr. 30, 2013) 9, 35

78 Fed. Reg. 70552 (Nov. 26, 2013) 10

RULES

Rule 12(b)(1) 10

Rule 12(b)(6) 3, 10, 23

OTHER AUTHORITIES

FDIC Compliance Manual (June 2006) 4, 5

FDIC Memorandum, "Guidelines for Payday Lending" (July 2, 2003) 6, 28, 35

FDIC Risk Management Manual (February 2005) 4, 6

FIL-127-2008, "Guidance on Payment Processor Relationships" (Nov. 7, 2008) ..... *passim*

FIL-14-2005, "Payday Lending Programs: Revised Examination Guidance" (Mar. 2, 2005) 6, 28

FIL-3-2012, "Revised Guidance on Payment Processor Relationships" (Jan. 31, 2012) ..... *passim*

FIL-34-2005, "Guidance on Customer Identification Programs" (Apr. 28, 2005) 3

FIL-41-2014, "FDIC Clarifying Supervisory Approach to Institutions Establishing Account Relationships with Third-Party Payment Processors" (July 28, 2014) 7, 9, 19, 34

FIL-43-2013, “FDIC Supervisory Approach to Payment Processing Relationships With Merchant Clients That Engage in Higher-Risk Activities” (Sept. 27, 2013) 8, 9, 19, 33

FIL-44-2008, "Guidance for Managing Third-Party Risk" (June 6, 2008) ..... *passim*

FIL-52-2006, " Guidance for Financial Institutions on the Use of Foreign-Based Third-Party Service Providers" (June 21, 2006) 38

FYI, "Payday Lending" (Jan. 29, 2003) 5, 28, 38

Supervisory Insights, "“Managing Risks in Third-Party Payment Processor Relationships” (Summer 2011) ..... *passim*

Supervisory Insights, "Third-Party Arrangements: Elevating Risk Awareness"

(Summer 2007) ..... *passim*

Plaintiffs in this matter are payday lenders who claim to have lost banking relationships with a number of federally- and state-chartered banks. Plaintiffs seek injunctive and declaratory relief against the FDIC and other agencies. The Amended Complaint ("Am. Compl.") is misdirected: the banks, not federal banking regulators, terminated those business relationships, and Plaintiffs have no standing to contest the FDIC's guidance documents cautioning banks about high-risk relationships (including, but not limited to, relationships with payday lenders). The Amended Complaint does not allege any injuries that are traceable to FDIC acts, nor does it allege harms that are redressable in this action. Nor do Plaintiffs have prudential standing, as the pertinent section of the Federal Deposit Insurance Act was intended to promote interests—such as the safety and soundness of banks—that have nothing to do with the interests Plaintiffs advance here.

Furthermore, the FDIC's guidance documents cannot be challenged under the Administrative Procedure Act because they do not constitute "final agency action" under 5 U.S.C. § 704. Those documents simply warned banks that certain third-party relationships could pose risks and set forth suggested due diligence processes for analyzing those risks, along with strategies for minimizing risks. As such, they did not establish rights or obligations or pose legal consequences. Nor did they change FDIC policy: the FDIC's position regarding the risks of financial institutions' relationships with third parties such as payday lenders was set forth long before the guidance documents at issue were published. Furthermore, even if those documents could be challenged as final agency action, this challenge would be moot in light of subsequent guidance documents that Plaintiffs neglected to cite. Those new documents withdraw references to specific industries and clarify that banks with appropriate controls are not barred from entering into relationships with third parties that are in compliance with applicable laws.

Plaintiffs' other challenges likewise have no merit: the FDIC acted within its authority in issuing guidance documents on the risks of third-party relationships that did not reinterpret any of the FDIC's regulations, and those documents did not violate due process. The Amended Complaint should be dismissed.

BACKGROUND

A. FDIC Oversight of Banks

Under the Federal Deposit Insurance Act (FDI Act), the FDIC acts as the primary federal regulator for certain state-chartered banks. 12 U.S.C. §§ 1817(a), 1819, 1820(b). In that capacity, it examines banks and prepares examination reports, and brings enforcement actions against institutions and affiliated parties that violate laws or regulations or engage in unsafe and unsound practices. *Id.* §§ 1818(b), (c), (d), (e), (i), 1820(b). The FDIC prescribes standards to promote the banks' safety and soundness, and may do so by "regulation or guideline." *Id.* § 1831p-1(d)(1).

The FDIC issues Financial Institution Letters (FILs) on safety and soundness issues, consumer protection matters, and other topics. FILs are addressed, *inter alia*, to the Chief Executive Officers of FDIC-supervised institutions. They announce new regulations and policies, new FDIC publications, and other matters of interest to the banking industry. The FDIC issues dozens of FILs each year and makes them publicly available. *See* http://www.fdic.gov/news/news/financial/2014/. There are over 1,000 FILs on the FDIC website on subjects ranging from vacation policies to open-source software risk management. The FDIC does not hold out FILs as binding rules; it issues them as guidance to its regulated banks.

The FDIC may pursue enforcement proceedings against banks that fail to properly manage relationships with third parties.[1] Contested administrative enforcement proceedings are

[1] *See, e.g.*, Exhibit A, *In re Bay Cities Bank*, FDIC-13-026b (May 20, 2013) (consent order requiring cessation of third party payment processors (TPPP) relationships until bank submits approved TPPP

conducted on the record under the Administrative Procedure Act, and final orders arising from those proceedings may be appealed to a federal circuit court of appeals. 12 U.S.C. § 1818(h)(2).

B. Customer Identification Program

Section 326 of the Bank Secrecy Act (BSA), as amended by the Patriot Act in 2001, requires banks to take certain due diligence steps with regard to customer relationships. 31 U.S.C. § 5318(*l*). Specifically, section 326 requires banks to establish and maintain a Customer Identification Program (CIP) for verifying the identities of accountholders and maintaining the verification records. *Id.* The FDIC and the Department of the Treasury have issued regulations regarding section 326. 12 C.F.R. § 326.8; 31 C.F.R. § 1020.220.[2]

The FDIC has also issued guidance on the CIP. *See* FIL-34-2005, Exhibit E. Specifically, the FDIC has advised that banks should "develop procedures to account for all relevant risks" posed by its customer relationships. *Id.* at 1. To that end, banks should retain identity verification documents where needed to manage risks—"for example, to facilitate investigating potential fraud." *Id.* at 7. The FDIC's guidance also noted that the "customer" for these purposes does not always have a direct relationship with the bank; banks are required to evaluate the true customer even when a third-party intermediary, such as an agent or pension plan administrator, nominally has the deposit relationship. *Id.* at 2-4.

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oversight plan); Exhibit B, *In re Meridian Bank*, FDIC 12-367b (Oct. 19, 2012 (same; requiring due diligence on TPPPs); Exhibit C, *In re Metro Phoenix Bank*, FDIC 111-083b (June 21, 2011) (same); Exhibit D, *In re First California Bank*, FDIC-13-046b and FDIC 13-047k (May 28, 2013) (deceptive practices through the marketing and promotion of prepaid debit cards and products and implementation of error resolution procedures by third parties).

Exhibits A-V are public records appropriate for judicial notice and properly considered under Rule 12(b)(6). *Abhe & Svoboda, Inc. v. Chao*, 508 F.3d 1052, 1059 (D.C. Cir. 2007). Furthermore, Exhibits N-Q are referenced in the Amended Complaint and central to Plaintiffs' claims, and they may be considered on that ground as well. *Slate v. Public Defender Serv.*, --- F. Supp. 2d ---, 2014 WL 1315238, *4 (D.D.C. Apr. 2, 2014).

[2] The BSA also requires banks to report actual or suspected violations of law by bank customers, *see* 31 U.S.C. § 5318(g), and the FDIC's implementing regulations show that banks are expected to monitor customer activity to detect such violations. 12 C.F.R. § 353.3(c).

C. Third-Party Relationships

The FDIC has long provided guidance and other statements to banks on their third-party relationships and advised them on the management of risks arising from those relationships. The FDIC's Risk Management Manual, updated as of February 2005, advised that examiners need to scrutinize banks' third-party relationships because banks may be equally responsible for the acts of third parties in some situations:

> Situations occasionally arise where the safety and soundness of an insured depository institution is materially affected by transactions, contracts or business arrangements with parties that are not affiliated with the institution. When such situations arise, it is necessary for the FDIC to examine the other side of the transaction. The potential impact of these business relationships on the insured depository institution necessitates a complete understanding of the nature of the transaction and relationship and its effect on the insured institution. . . . It is important that examiners are aware of material transactions, service contracts, or other business arrangements that could have a material effect on an insured bank.

Exhibit F at 20. The FDICs Compliance Manual, updated as of June 2006, contained similar guidance:

> Banks should have procedures in place to assure that their employees and third-party contractors, as well as other individuals and entities with whom they do business, avoid engaging in unfair or deceptive acts or practices. Examiners should evaluate how the bank monitors the activities of third party contractors, vendors and service providers to ensure that they comply with the FTC's prohibition on unfair or deceptive acts. . . . [Examiners should determine whether] the bank [has] implemented and maintained effective risk and supervisory controls to select and manage third-party contractors or service providers.

Exhibit G at VII-1.7. A June 2007 FDIC article in the journal *Supervisory Insights* added more detail, advising banks that their third-party relationships may pose risks, and "[f]ailure to manage these risks can expose a financial institution to regulatory action, financial loss, litigation, and reputational damage." Exhibit H at 4. Risks identified included "strategic risk," "reputation risk," "compliance risk," "transaction risk," and "credit risk," and "reputation risk" was defined to include risks from unrelated activities involving the third party:

> ***Reputation risk*** is the risk arising from negative public opinion. Dissatisfied customers, breaches of an institution's policies or standards, and violations of law can potentially harm the reputation of a financial institution in the community it serves. Negative publicity involving the third party, even if it is not related to the specific third-party arrangement, presents reputation risk to a financial institution.

Exhibit H at 5. The article also noted that banks may be liable for third parties' violations of laws or regulations. *Id.* at 4 ("[C]ompliance examiners may find legal problems with how a third party is managing a credit card operation. Those legal problems could result in substantial liability for the bank that could, in turn, affect its capital position."). The article went on to suggest that banks assess risks and perform due diligence on the third parties at the outset of the relationship, and monitor the third party's activities. *Id.* at 9-10. "[A]ppropriate corrective actions, including enforcement actions," the FDIC warned, "may be pursued for deficiencies related to a third-party relationship that pose significant safety and soundness concerns or result in violations of applicable federal or state laws or regulations." *Id.* at 10.

The FDIC has also historically issued guidance to banks on payday lending, and that guidance has addressed the risks, including reputational risks, posed by involvement in third parties' payday lending programs. In January 2003, for example, the FDIC published an article in the electronic journal *FYI*, noting that banks that maintain such third-party relationships may be exposed to "substantial legal and reputational risks," and "must adequately identify, measure, monitor, and control the attendant risks." Exhibit I at 4-5. The FDIC stated in a press release that it had developed a draft guidance document which "addresse[d] guidelines for . . . managing risks associated with third-party relationships," and invited comments on the draft. Exhibit J. The final guidelines were issued on July 2, 2003, delineating the risks arising from involvement with third-party payday lenders:

> The existence of third party arrangements [regarding payday lending] may, when not properly managed, significantly increase institutions' transaction, legal, and

> reputation risks. . . . [I]nstitutions face increased reputation risks when they enter into certain arrangements with payday lenders, including arrangements to originate loans on terms that could not be offered directly by the payday lender.

Exhibit K at 2-3 (emphasis added). The guidelines recommended due diligence on such third parties and monitoring of the relationships. *Id.* at 4; *see also* Exhibit L (March 2, 2005 FIL-14-2005, expanding the list of compliance issues); Exhibit M at 68-70 (2005 Risk Management Manual as of February 2, 2005, raising identical concerns about "legal and reputation risk").

The FDIC has continued to issue guidance on banks' third-party relationships in recent years. A series of documents—three FILs and another *Supervisory Insights* article—have set forth the risks associated with third-party relationships, including third-party payment processor (TPPP) relationships, and recommendations for managing those risks. *See* "Guidance for Managing Third-Party Risk," FIL-44-2008 (June 6, 2008); Exhibit N; "Guidance on Payment Processor Relationships," FIL-127-2008 (Nov. 7, 2008), Exhibit O; "Managing Risks in Third-Party Payment Processor Relationships," *Supervisory Insights* 3-12 (Summer 2011), Exhibit P; "Revised Guidance on Payment Processor Relationships," FIL-3-2012 (Jan. 31, 2012), Exhibit Q (collectively, "2008-12 documents"). The FDIC explained that TPPPs create and deposit remotely created checks (RCCs) or originate Automated Clearing House (ACH) debits on behalf of merchant customers, using deposit accounts (in their own name or in their clients' names) to process transactions. *See, e.g.*, Exhibit O at 1. Those practices create risk management challenges because the checking and ACH activities are routed through banks, and the banks therefore bear the risks of those merchants' activity even though they have no direct customer relationship with the merchants—increasing the need for due diligence and monitoring. Exhibit P at 3.[3]

[3] The first FIL did not identify any specific merchants or industries as potentially high-risk clients; the other documents mentioned payday lenders, along with other types of businesses. Exhibit O at 2 n.1 (three types of business identified, including "on-line payday lenders."); Exhibit P at 7 (30 types of merchants identified, including "PayDay Loans"); Exhibit Q at 1 n.1 (10 types of merchants identified,

Like the 2007 *Supervisory Insights* article, the 2008-2012 documents identified certain "risks arising from third-party relationships," including "strategic risk," "reputation risk," "operational risk," "transaction risk," and "credit risk," and advised that institutions implement risk management programs to oversee those relationships. Exhibit N at 2-4; *see also* Exhibit O at 1; Exhibit P at 3; Exhibit Q at 1-2. The FDIC echoed the 2007 article in defining "reputation risk" as "the risk arising from negative public opinion" when third-party relationships "result in dissatisfied customers, interactions not consistent with institution policies, inappropriate recommendations, security breaches resulting in the disclosure of customer information, [or] violations of law and regulation," and noting that "any negative publicity involving the third party, whether or not the publicity is related to the institution's use of the third party, could result in reputation risk." Exhibit N at 3; *see also* Exhibit O at 2. The FDIC also stressed, as before, that failing to manage relationships with TPPPs could give rise to liability for banks if the bank's lack of oversight is perceived as facilitating fraudulent or illegal activity. Exhibit Q at 2 ("Financial institutions that fail to adequately manage these relationships may be viewed as facilitating a payment processor's or merchant client's fraudulent or unlawful activity and, thus, may be liable for such acts or practices."); *see also* Exhibit P at 6 (Federal Reserve Board regulation shifts liability for unauthorized RCCs to banks, making it more important for banks to "perform enhanced due diligence on those customers depositing RCCs"); Exhibit N at 3. Accordingly, consistent with its prior statements, the FDIC advised that bank management should conduct due diligence on the third parties the bank deals with, and monitor those

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including "payday or subprime loans"; FIL states that "this list is not all-inclusive"). Citing examples of specific types of higher-risk business customers is consistent with industry practice for financial services providers. *See, e.g.*, https://www.paypal.com/us/webapps/mpp/ua/acceptableuse-full; https://support.google.com/wallet/business/answer/75724. The FDIC has since withdrawn the examples of specific high-risk merchants, though the remainder of those FILs was unaffected. Exhibit T.

relationships. Exhibit N at 4-10; *see also* Exhibit O at 2-3; Exhibit P at 9-11; Exhibit Q at 3-5.[4] The FDIC's guidance did *not* impose rules or requirements:

> The guidelines should not be considered a set of mandatory procedures, but management should ensure that sufficient procedures and policies are in place to control the risks associated with a particular third-party relationship.

Exhibit N at 2; *see also* Exhibit O at 4 ("The FDIC supports financial institutions' participation in payment systems to serve the needs of legitimate payment processors and their merchant clients," but oversight is necessary to control the risks associated with those activities); Exhibit Q at 6 (stating that "financial institutions provide legitimate services for payment processors and their merchant clients," but emphasizing the need to oversee those services in order to mitigate the risk to the institutions). Nor was the listing of risks "all-inclusive," and the FDIC did not deem any or all of those risks applicable to every third-party relationship. Exhibit N at 2.

Another guidance document, FIL-43-2013, issued September 27, 2013 (September 2013 FIL), again urged banks to conduct due diligence on and monitor TPPPs and their clients. "FDIC Supervisory Approach to Payment Processing Relationships With Merchant Clients That Engage in Higher-Risk Activities," FIL-43-2013, Exhibit R. The FDIC made it clear that these relationships were neither prohibited nor discouraged, given adequate controls:

> Financial institutions that properly manage these relationships and risks are neither prohibited nor discouraged from providing payment processing services to customers operating in compliance with applicable federal and state law. . . . The focus of FDIC examinations is to assess whether [banks] are adequately

[4] The FDIC also identified warning signs for potential questionable activity, including complaints about inappropriate use of personal information and about misleading claims, high return rates (indicative of unauthorized transactions), excessive fee income (indicating undue reliance on returned items for income), use of multiple banks for processing payments (indicating efforts to avoid detection of high levels of returns, and fallback deposit accounts in the event of terminations), and intentional solicitation of relationships with troubled institutions. Exhibit P at 7-9; *see also* Exhibit O at 1-2; Exhibit Q at 2-3. Appropriate responses to such conduct may include the filing of a Suspicious Activity Report, requiring processors to cease doing business for a particular merchant, or terminating the relationship outright. Exhibit O at 3; Exhibit Q at 3. Failure to control risk from third-party relationships, the FDIC warned, could lead to enforcement action. Exhibit N at 11; *see also* Exhibit P at 11; Exhibit Q at 2.

> overseeing activities and transactions they process and appropriately managing and mitigating related risks. **Those that are operating with the appropriate systems and controls will not be criticized for providing payment processing services to businesses operating in compliance with applicable law.**

Id. (emphasis added). The FDIC stated that it expects institutions to "perform proper risk assessments, conduct due diligence sufficient to ascertain that the merchants are operating in accordance with applicable law, and maintain appropriate systems to monitor these relationships over time." *Id.* Identification of the risks and necessary controls was all the more needed because "some payment processors or merchants may target institutions that are unfamiliar with the related risks or that lack proper due diligence or controls to manage these risks." *Id.* [5]

Finally, on July 28, 2014, the FDIC issued FIL-41-2014, further clarifying its guidance on TPPP relationships and eliminating the lists of specific higher-risk industries mentioned in the 2008-2012 documents. Exhibit T. The FDIC noted that the examples of merchants identified as associated with "higher-risk activity" may have "creat[ed] the misperception that the listed examples of merchant categories were prohibited or discouraged," and clarified, again, that "insured institutions that properly manage customer relationships are neither prohibited nor discouraged from providing services to customers operating in compliance with applicable federal and state law." *Id.* at 1. The prior guidance regarding these relationships remained in effect, and "[w]here an institution is following the outstanding guidance, the institution will not be criticized for establishing and maintaining account relationships with TPPPs." *Id.* [6]

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[5] *See, e.g.*, Exhibit S, *In re SunFirst Bank*, FDIC-10-845b (Nov. 9, 2010) (troubled, now failed, bank targeted by unlawful TPPPs); *see also* Brett Wolf, *FDIC SunFirst action a reminder of third-party processor risk to banks*, Reuters, Jan. 7, 2011, http://blogs.reuters.com/financial-regulatory-forum/2011/01/07/fdic-sunfirst-action-a-reminder-of-third-party-processors-risk-to-banks-complinet/.

[6] The FDIC has also sought comments on a related issue recently. In a Federal Register notice published on April 30, 2013, the FDIC published, and invited comments on, a "Proposed Guidance on Deposit Advance Products," defined as "a small-dollar, short-term loan that a depository institution (bank) makes available to a customer whose deposit account reflects recurring direct deposits," charging fees rather than interest. 78 Fed. Reg. 25268, 25268-69 (Apr. 30, 2013). After the comment period, the FDIC

D. Plaintiffs' Amended Complaint

Plaintiffs filed this suit on June 5, 2014, and filed an Amended Complaint on July 30, 2014. Plaintiffs allege that the 2008-2012 documents were issued as part of a "campaign against the payday lending industry," and claim in conclusory fashion that various payday lenders have lost banking relationships. Am. Compl. ¶ 8. Plaintiffs assert that the 2008-2012 documents should have been promulgated through notice-and-comment rulemaking, *id.* ¶¶ 71-75,[7] and seek a declaration that those documents are invalid, and an injunction against regulators applying or relying on those documents with respect to payday lenders. *Id.* at 39-41.[8]

ARGUMENT

I. STANDARD OF REVIEW

The FDIC moves to dismiss the Amended Complaint pursuant to Rule 12(b)(1) for lack of subject matter jurisdiction, and pursuant to Rule 12(b)(6) for failure to state a claim upon which relief can be granted. In evaluating a motion under either rule, this Court presumes the

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published its final "Guidance on Supervisory Concerns and Expectations Regarding Deposit Advance Products." 78 Fed. Reg. 70552 (Nov. 26, 2013). Risks associated with "deposit advance products" included credit risk and "reputation risk" in the community. *Id.* at 70555. The FDIC also expressed concerns about institutions' involvement with third parties to conduct this type of lending. *Id.* ("[T]hird-party arrangements may, when not properly managed, significantly increase institutions' legal, operational and reputation risks. . . . Other potential risks arise from or are heightened by the involvement of a third party, particularly if the third party will receive a portion of the fees."); *see also id.* at 70557 ("[E]xaminers will review the risks associated with all material third-party relationships.").

[7] Notably absent from the Amended Complaint are any references to the September 2013 and July 2014 FILs, though Plaintiffs commented on the latter to the press. Mark Holan, *Ease the squeeze: FDIC clarifies guidelines related to Operation Choke Point*, Washington Business Journal, July 29, 2014, http://www.bizjournals.com/washington/blog/2014/07/fdic-clarifies-payment-guidelines.html.

[8] The Amended Complaint also contains various conclusory allegations about a Department of Justice ("DOJ") initiative known as "Operation Choke Point," but does not explain the relevance of that initiative. Plaintiffs cite a congressional staff report claiming that Operation Choke Point began in the spring of 2013, *see* Exhibit U at 2, but the only FDIC acts specifically alleged in the Amended Complaint (issuance of the FILs and 2011 *Supervisory Insights* article) occurred in 2008, 2011, and 2012. Plaintiffs allege no facts showing that the FDIC issued any FILs or other policy documents "in concert" with DOJ or any other agency, *see* Am. Compl ¶ 56, and an agency's routine cooperation with law enforcement efforts is not actionable. The speculation and conclusory assertions Plaintiffs offer regarding Operation Choke Point do not make it relevant here.

truth of factual allegations in the complaint and draws all reasonable inferences in the plaintiff's favor, *see Stewart v. National Educ. Ass'n*, 471 F.3d 169, 173 (D.C. Cir. 2006), though it need not accept "a legal conclusion couched as a factual allegation" or inferences unsupported by the facts set forth in the complaint. *Trudeau v. FTC*, 456 F.3d 178, 193 (D.C. Cir. 2006).

Plaintiffs bear the burden of establishing jurisdiction in response to a motion to dismiss under Rule 12(b)(1). *U.S. Ecology, Inc. v. U.S. Dep't of Interior*, 231 F.3d 20, 24 (D.C. Cir. 2000). "[P]laintiff's factual allegations in the complaint . . . will bear closer scrutiny in resolving a 12(b)(1) motion than in resolving a 12(b)(6) motion for failure to state a claim." *Grand Lodge of Fraternal Order of Police v. Ashcroft*, 185 F. Supp.2d 9, 13-14 (D.D.C. 2001). By contrast, to survive a Rule 12(b)(6) motion, a complaint must "contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 677 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007)). To be "plausible on its face," the complaint must plead "factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal*, 556 U.S. at 678. Nor is it sufficient to plead facts in conclusory terms. *Twombly*, 550 U.S. at 570 ("Threadbare recitals of the elements of the cause of action, supported by mere conclusory statements, do not suffice."). Courts may look beyond the complaint to consider documents referenced therein in deciding a Rule 12(b)(6) motion. *Baird v. Snowbarger*, 744 F. Supp. 2d 279, 287 n.2 (D.D.C. 2010) ("[W]e may consider . . . documents referenced in the complaint or central to the plaintiff's claim . . . without converting this motion to one for summary judgment.") (citations omitted). The allegations of the complaint need not be taken as true when contradicted by documents referenced therein, or subject to judicial notice. *Kaempe v. Myers*, 367 F.3d 958, 963 (D.C. Cir. 2004).

II. THE COURT SHOULD DISMISS FOR LACK OF JURISDICTION.

A. Plaintiffs Have No Standing to Challenge the FDIC's Guidance.

The Amended Complaint should be dismissed under Rule 12(b)(1) for lack of subject matter jurisdiction because Plaintiffs have no standing to sue the FDIC. A plaintiff must make a threefold showing to demonstrate standing under Article III of the Constitution. First, the plaintiff must show an "injury in fact." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). Second, the plaintiff must show that its injuries are "fairly traceable" to the defendant's conduct, "and not the result of the independent action of some third party not before the court." *Id.* at 560-61. Third, "it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." 504 U.S. at 561. Assuming *arguendo* that Plaintiffs have identified an "injury in fact," the Court should dismiss this case because Plaintiffs cannot show traceability or redressability. Specifically, the loss of business asserted by Plaintiffs is traceable only to the conduct of third parties, namely the banks with whom Plaintiffs had relationships. Nor would any relief available in this case redress Plaintiffs' alleged injuries.

1. Plaintiffs' Alleged Injuries Are Not Traceable to the FDIC.

Plaintiffs claim to have lost business relationships with various banks, but those injuries are not "fairly traceable" to any FDIC acts. The D.C. Circuit has recognized that government agencies cannot ordinarily be sued for the acts of the industries they regulate; when a plaintiff sues the government for injury arising out of the government's regulation of a third party, it is "substantially more difficult" to establish standing because proof of causation and redressability hinge on the independent choices of the regulated third party. *National Wrestling Coaches Ass'n v. Department of Educ.*, 366 F.3d 930, 938 (D.C. Cir. 2004). "[M]ere 'unadorned speculation' as to the existence of a relationship between the challenged government action and the third-party conduct 'will not suffice to invoke the federal judicial power.'" *Id.* (quoting *Simon v. Eastern Ky.*

Welfare Rights Org., 426 U.S. 26, 44 (1976)); *see also Ass'n of Private Sector Colls. & Univs. v. Duncan*, 681 F.3d 427, 457-58 (D.C. Cir. 2012) (where agency statements "neither require nor forbid any action on the part of" plaintiff, and plaintiff is not "the object of the government action or inaction," standing "is ordinarily substantially more difficult to establish").

Only "occasionally" is standing shown "in cases challenging government action on the basis of third party conduct." *National Wrestling Coaches*, 366 F.3d at 940; *see also Lujan*, 504 U.S. at 562 ("When ... a plaintiff's asserted injury arises from the government's allegedly unlawful regulation (or lack of regulation) of *someone else*, much more is needed. . . . [W]hen the plaintiff is not himself the object of the government action or inaction he challenges, standing is not precluded, but it is ordinarily substantially more difficult to establish.") (emphasis in original) (citations omitted). Such a plaintiff must show either that the agency "permit[ted] or authorize[d] third-party conduct that would otherwise be illegal," or that the government's conduct was a "substantial factor" in causing that third-party conduct. *National Wrestling Coaches*, 366 F.3d at 940-41. Nothing in the Amended Complaint suggests that the termination of Plaintiffs' banking relationships (which are generally governed by a written contract terminable by the banks without cause) would have been illegal absent FDIC authorization, and the Amended Complaint alleges no FDIC conduct as a "substantial factor" in those terminations.

In particular, courts applying this standing analysis have consistently refused to hold that a third party's decision to terminate or decline a relationship with the plaintiffs gives rise to standing to sue the third party's regulators, even if the regulators supported the decision. In *National Wrestling Coaches*, for instance, the plaintiffs alleged that Title IX, and its requirement of gender proportionality in athletics funding, led to the elimination of men's wrestling teams at various universities. The court found that theory too speculative, pointing out that the documents

attached to the complaint cited a variety of factors that affected the universities' funding decisions, and thus the "formidable evidence" of causation required for traceability was not present. 366 F.3d at 942-43. As the trial court in *National Wrestling Coaches* found, "even if the Court granted the relief requested, plaintiffs and their opponents would still be arguing their respective positions to educational institutions . . . which would, in turn, continue to make discretionary determinations" based on a wide variety of factors. *National Wrestling Coaches v. U.S. Dep't of Educ.*, 263 F. Supp. 2d 82, 111 (D.D.C. 2003). In *Simon*, likewise, the plaintiffs alleged that the Treasury Department, by issuing a Revenue Ruling contemplating favorable tax treatment for hospitals that deny services to indigents, had "encouraged" hospitals to reject indigent services, but the Supreme Court rejected that theory: "It is purely speculative whether the denials of service . . . fairly can be traced to petitioners' 'encouragement' or instead result from decisions made by the hospitals without regard to the tax implications," and thus the plaintiffs could not make the "substantially more difficult" showing required for third-party standing. 426 U.S. at 42-43; *see also Allen v. Wright*, 468 U.S. 737, 758-59 (1984) (segregated public schools not "fairly traceable" to tax exemptions for private schools: the independent decisionmaking of third parties (other parents) in the causal chain made it impossible to attribute the result to government actors); *Freedom Republicans, Inc. v. FEC*, 13 F.3d 412, 419 (D.C. Cir. 1994) (actions that harmed plaintiffs were "not fairly traceable to any encouragement on the part of the government, but appear[] instead to be the result of decisions made by" another actor).[9]

[9] *See also Bloomberg L.P. v. CFTC*, 949 F. Supp. 2d 91 (D.D.C. 2013) (challenge to regulation setting futures' minimum liquidation times as likely to discourage trading with plaintiffs too speculative to support standing, as traders can impose their own time requirements);); *Long Term Care Pharmacy Alliance v. Leavitt*, 530 F. Supp. 2d 173, 181 (D.D.C. 2008) (no standing where "plaintiffs have failed to provide sufficient facts to support their contention that the [third-party conduct] is actually motivated by [agency action]"); *Massachusetts Credit Union Share Ins. Corp. v. NCUA*, 693 F. Supp. 1225, 1229 (D.D.C. 1988) (no standing where plaintiff did not specifically allege that it lost business relationships "as a consequence of" agency action); *National Maritime Union v. Dole*, 1987 WL 10495, *5 (D.D.C. Apr.

Here, Plaintiffs claim to have lost business relationships, but offer bare speculation as to the FDIC's supposed role in causing those events. Plaintiffs cite the 2008-2012 documents, but allege no facts supporting Plaintiffs' theory that the issuance of those documents caused any banks to terminate their relationships with Plaintiffs. Plaintiffs refer to statements from the banks in question (though they do not attach any of the correspondence evidencing those statements), but none of the statements cite the 2008-2012 documents.[10] Such speculation does not confer standing. *See DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 345 (2006) ("[A] party seeking federal jurisdiction cannot rely on . . . speculative inferences to connect his injury to the challenged actions of the defendant.").

As for the supposed regulatory pressure on the banks to terminate their relationships with payday lenders, Plaintiffs cite no examples of *FDIC* pressure. The FDIC was the primary federal regulator for only four of the banks at issue, two of which stated that they were "unable to effectively manage [payday lenders'] Account(s) on a level consistent with the heightened scrutiny required by [their] regulators." Am. Compl. ¶ 65. "Scrutiny" is not the same as "pressure"; not even Plaintiffs claim that the FDIC is barred from applying "scrutiny" to banks' third-party relationships when monitoring the safety and soundness of those banks' operations. The Amended Complaint does not make *any* claims about the basis of the other two

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27, 1987) (agency action was "only one of a myriad number of factors" influencing third parties' conduct); *cf. Tozzi v. U.S. Department of Health & Human Services*, 271 F.3d 301 (D.C. Cir. 2001) (third-party action shown to be "direct result" of agency action); *Block v. Meese*, 793 F.3d 1303, 1308 (D.C. Cir. 1986) (record contained evidence that third parties would have purchased plaintiff's film absent agency designation of film as "political propaganda").

[10] Furthermore, even assuming that the institutions in question considered the 2008-2012 documents in deciding whether to end their dealings with Plaintiffs, such an attenuated causal relationship is far too indirect to support standing. The FILs in question do not prohibit banks from doing business with payday lenders. Rather, they enumerate features or characteristics of third-party relationships that may pose an elevated risk to banks, and set forth various due diligence steps that banks are encouraged to take in order to satisfy themselves that any particular relationship does not pose such a risk. A bank's consideration of those features, and its application of the due diligence process described, is wholly within the bank's discretion, and the bank's conclusion as to the wisdom of maintaining any particular relationship represents an independent decision far removed from any government acts.

terminations, *see id.* ¶ 65, and its conclusory assertions, unsupported by specific facts, about the terminations arising from a "coordinated . . . campaign of backroom pressure tactics," *see, e.g.*, Am. Compl. ¶ 78, do not state a claim under *Iqbal* and *Twombly*. 556 U.S. at 678; 550 U.S. at 570. Nor do Plaintiffs allege that any bank cited the 2008-2012 documents as the basis for the termination of deposit relationships. As Plaintiffs cite no FDIC conduct, they cannot show the "formidable evidence of causation" required to show standing in these circumstances, *see National Wrestling Coaches*, 366 F.3d at 941-942, and no standing exists here.[11]

2. Plaintiffs' Injuries Are Not Redressable in this Case.

Nor are Plaintiffs' alleged injuries redressable in this lawsuit. A plaintiff must show a "substantial likelihood" of redressability, *see Duke Power Co. v. Carolina Env'tl Study Group*, 438 U.S. 59, 75 n.20 (1978); *see also Town of Babylon v. FHFA*, 699 F.3d 221, 229 (2d Cir. 2012) (plaintiff suing agency over actions affecting third party must show that "favorable action by the regulating agency is likely to result in favorable action by the regulated [third] party"); *Renal Physicians Ass'n v. HHS*, 489 F.3d 1267, 1273 (D.C. Cir. 2007) (redressability requires facts "sufficient to demonstrate a substantial likelihood that the third party directly injuring the

[11] Nor does the Amended Complaint address other factors that could have influenced any particular bank's decision to terminate its relationship with a particular lender, including but not limited to (1) multiple class-action lawsuits filed by consumer groups against banks for allegedly processing illegal transactions on behalf of certain payday lenders, *see, e.g.*, *Booth v. BMO Harris Bank*, 13-cv-5968 (E.D. Pa.); *Moss v. BMO Harris Bank*, 13-cv-5438 (E.D.N.Y.); *Parm v. BMO Harris Bank*, 13-cv-3326 (N.D. Ga); (2) public lawsuits and enforcement actions undertaken by various federal government entities, *see, e.g.*, http://www.ftc.gov/ news-events/media-resources/consumer-finance/payday-lending (FTC enforcement actions); Charlene Crowell, *CFPB fines payday lender Ace Cash Express $10 million*, New Pittsburgh Courier, July 27, 2014, http://newpittsburghcourieronline.com/2014/ 07/27/cfpb-fines-payday-lender-ace-cash-express-10-million/; and (3) actions by state agencies in states where payday lending is prohibited, *see, e.g.*, Rachel Abrams, *New York State Makes New Efforts to Combat Payday Lenders*, N.Y. Times, Apr. 29, 2014, http://dealbook.nytimes.com/2014/04/29/embargo-new-york-makes-new-efforts-to-combat-payday-lenders/; "Madigan Cracks Down on Unlicensed, Predatory Payday Lenders," http://www.illinoisattorneygeneral.gov/pressroom/ 2014_04/20140408.html; http://www.dfs.ny.gov/ about/press2013/pr130806-link1.pdf (New York State agency bulletin, asking banks to help "create a new set of model safeguards and procedures to choke off ACH access to the 35 illegal lenders DFS's investigation has identified to date, as well as the broader payday lending industry").

plaintiff would cease doing so as a result of the relief the plaintiff sought"); *National Maritime Union*, 1987 WL 10495, *6 (redressability is a "rigorous requirement," and "Plaintiff's burden is even greater in third-party causation cases").

Plaintiffs cannot make the requisite showing on redressability. Even if this Court granted their requested relief, namely invalidation of the 2008-2012 documents, that would not compel the third-party banks to reestablish their relationships with Plaintiffs, and Plaintiffs allege no facts to suggest that the banks are being deterred by the FILs from resuming those relationships. Indeed, such an allegation would make no sense, given the plain language of the documents in question. Those documents advise banks regarding certain types of third-party relationships that may, depending on certain factors, pose elevated risks, and suggest certain steps for managing those risks. Nothing in those documents requires banks to sever their relationships with payday lenders or any other third parties; the clear message of the FDIC's guidance is that banks that cannot effectively manage the risks identified should not maintain those relationships.[12] If, as Plaintiffs claim, certain banks appear to have concluded that they cannot manage those risks effectively and would rather terminate the relationships than create the necessary controls, that is the banks' choice, and invalidating the 2008-2012 documents would not change those decisions or alter the bare fact that these types of relationships pose risks. Nothing in the Amended

[12] Indeed, FIL-3-2012 states:

> Deposit relationships with payment processors expose financial institutions to risks not customarily present in relationships with other commercial customers. These include increased operational, strategic, credit, compliance, and transaction risks. In addition, financial institutions should consider the potential for legal, reputational, and other risks, including risks associated with a high or increasing number of customer complaints and returned items, and the potential for claims of unfair or deceptive practices. **Financial institutions that fail to adequately manage these relationships may be viewed as facilitating a payment processor's or merchant client's fraudulent or unlawful activity and, thus, may be liable for such acts or practices.** In such cases, the financial institution and responsible individuals have been subject to a variety of enforcement and other actions.

Exhibit Q at 2 (emphasis in original).

Complaint indicates a "substantial likelihood" that those relationships would resume. *See Town of Babylon*, 699 F.3d at 230 (no third-party standing where vacating the OCC's directive would leave banks "entirely free to treat [plaintiffs] on an unfavorable basis," and the complaint nowhere alleged that the banks would act differently in that event); *NRDC v. FHFA*, 815 F. Supp. 2d 630, 638-39 (S.D.N.Y. 2011) (speculation that vacating agency bulletin would cause banks to resume lending practice not sufficient to show redressability).

Nor would invalidating those documents affect preexisting requirements. Banks are required to abide by safety and soundness standards set forth in § 1831p-1 and in the implementing regulations. *See, e.g.*, 12 C.F.R. Part 364 App. A, ¶ II.A (requiring "internal controls and information systems . . . appropriate to the size of the institution and the nature, scope and risk of its activities," that provide for "effective risk assessment"). Banks must also conduct due diligence under Section 326 of the Bank Secrecy Act and its implementing regulations, which require banks to develop and maintain a Customer Identification Program, and establish monitoring to detect unlawful customer activities. *See* 31 U.S.C. § 5318(g), (*l*); 12 C.F.R. § 353.3(c); 31 C.F.R. § 1020.220. Developing a CIP helps banks verify accountholders' identities, mitigating the potential liability and risk of providing financial services to an unscrupulous customer. Banks, in short, would be required to assess risks associated with deposit relationships whether or not the FDIC had issued the documents at issue here.[13]

Any doubt that the FILs were intended to encourage banks to manage their risks, not to deny banking services to specific industries, was removed when the FDIC issued FIL-43-2013 on September 27, 2013, clarifying that banks may conduct relationships with law-abiding businesses provided that they manage the risks of those relationships properly:

[13] Furthermore, assuming *arguendo* that Operation Choke Point has any relevance here, invalidating the FILs would in no way prevent DOJ from pursuing that initiative, and any harms incurred as a result of Operation Choke Point are therefore not redressable in this suit.

> Facilitating payment processing for merchant customers engaged in higher-risk activities can pose risks to financial institutions and requires due diligence and monitoring, as detailed in prior FDIC and interagency guidance and other information. **Financial institutions that properly manage these relationships and risks are neither prohibited nor discouraged from providing payment processing services to customers operating in compliance with applicable federal and state law**. . . .
> The focus of FDIC examinations is to assess whether financial institutions are adequately overseeing activities and transactions they process and appropriately managing and mitigating related risks. **Those that are operating with the appropriate systems and controls will not be criticized** for providing payment processing services to businesses operating in compliance with applicable law.

Exhibit R (emphasis added). FIL-41-2014 reiterated those points. Exhibit T. As both FILs explain, the guidance in the prior FILs and the 2011 article was intended to ensure that banks have "appropriate systems and controls" for managing relationships with high-risk businesses; institutions with proper systems in place to manage those risks could maintain those relationships. Plaintiffs have not challenged the two most recent FILs, and the "appropriate systems and controls" requirement will therefore be in place even if Plaintiffs prevail in this suit. Nor would withdrawal of the 2008-2012 guidance documents change the FDIC's longstanding warnings to banks about third-party relationships. *See* Exhibits F-M.

Thus, the relief requested in this suit would afford neither prospective relief—preventing future terminations of Plaintiffs' banking relationships—nor retroactive relief, i.e., the restoration of already terminated relationships. As to prospective relief, Plaintiffs purport to be law-abiding payday lenders, *see, e.g.*, Am. Compl. ¶ 58, and the FDIC's guidance makes it clear that banks with appropriate controls may provide services to third parties who comply with the applicable laws. Invalidating the 2008-2012 documents would not change that position, and thus it would not make banks any more likely to enter into, or maintain, relationships with payday lenders in the future. In other words, any terminations of these relationships by banks necessarily represent a business judgment that (a) maintaining "the appropriate systems and controls" is too difficult

for the banks, or (b) the lender is not, in fact, in compliance with applicable laws. Withdrawal of the documents would not materially change the banks' judgments on either of those issues.

As for retroactive relief, Plaintiffs allege no facts showing that invalidation of the 2008-2012 documents would cause banks to reestablish already-terminated relationships, as already noted. Mere speculation about such a result is insufficient to establish redressability. *Duke Power*, 438 U.S. at 75 n. 20; *compare Renal Physicians*, 489 F.3d at 1276 (plaintiff failed to allege that "even a single" third party would pay plaintiff's members more if the challenged regulation were stricken); *Community for Creative Non-Violence v. Pierce*, 814 F.2d 663, 669 (D.C. Cir. 1987) (to show redressability, plaintiff cannot merely allege that requested relief will "remove one influence possibly motivating third parties' injurious actions"). Hence, no relief that could be granted in this suit would redress the injuries Plaintiffs claim. Plaintiffs cannot make the "heightened showing" required here, *see Renal Physicians*, 489 F.3d at 1273, and the Court should dismiss the Amended Complaint for lack of standing.[14]

B. The Court Should Dismiss for Lack of Prudential Standing.

Even assuming *arguendo* that Plaintiffs have standing under Article III, the Amended Complaint should be dismissed because Plaintiffs fail to meet prudential standing requirements. To demonstrate prudential standing, Plaintiffs must show that they are within the "zone of interests" protected by a given statute. *Competitive Enter. Inst. v. NHTSA*, 901 F.2d 107, 122 (D.C. Cir. 1990). A plaintiff is not within that "zone" if its interests "are so marginally related to or inconsistent with the purposes implicit in the statute that it cannot reasonably be assumed that Congress intended to permit the suit." *Clarke v. Securities Indus. Ass'n*, 479 U.S. 388, 399 (1987); *see also Hazardous Waste Treatment Council v. Thomas*, 885 F.2d 918, 922 (D.C. Cir.

[14] Plaintiffs also request an injunction against "informal pressure" on banks to terminate these relationships, Am. Compl. at 54, but, as noted above, Plaintiffs allege no such "pressure" by the FDIC, and accordingly any such injunction entered against the FDIC would not redress Plaintiffs' alleged harms.

1989) (prudential standing if plaintiff's interest "coincide[s] with the protected interests").

Here, the FDIC issued FILs and published the 2011 *Supervisory Insights* article pursuant to its powers (*inter alia*) to promote banks' safety and soundness, 12 U.S.C. § 1831p-1, and Plaintiffs' interests are not even "marginally" related to the interests at issue in § 1831p-1, nor are Plaintiffs among those ordinarily expected to police that section's requirements. That section is entitled "Standards for safety and soundness" and directs federal banking agencies to promulgate "operational and managerial standards," "by regulation or guideline," for regulated financial institutions. The purpose of that section is plainly to promote the stability of the banking system and discourage practices that could undermine banks' safety and soundness, consistent with the broader purpose of the FDI Act. *See, e.g.*, *Gunter v. Hutcheson*, 674 F.2d 862, 869 (11th Cir. 1982) (purpose of FDI Act is to "protect and stabilize the national banking system"); *Doherty v. United States*, 94 F.2d 495, 497 (8th Cir. 1938) ("manifest purpose" of Act is "stabilizing or promoting the stability of banks"). Those interests are not implicated here.

The 2008-2012 documents follow § 1831p-1's lead, as they are directed at protecting banks' safety and soundness by helping them manage their risks. *See, e.g.*, Exhibit N at 1 ("This guidance includes a description of potential risks arising from third-party relationships, and provides information on identifying and managing risks associated with financial institutions' business relationships with third parties."); Exhibit P at 12. Plaintiffs cannot show that the pertinent statutory provision or the 2008-2012 documents were issued to protect the interests they advance here, or that those interests "coincide" with the goal of stabilizing the banking system. Thus, Plaintiffs lack prudential standing, and dismissal is warranted.[15]

[15] Prudential standing ordinarily bars litigants from asserting the rights of others. Thus, to the extent Plaintiffs seek to represent financial institutions governed by the 2008-2012 documents, they have no standing to do so. *See Deutsche Bank Nat'l Trust Co. v. FDIC*, 717 F.3d 189, 194 (D.C. Cir. 2013) (intervenors "are effectively seeking to enforce the rights of third parties (here, the FDIC), which the

C. The September 2013 and July 2014 FILs Moot Plaintiffs' Challenge in Pertinent Part.

Furthermore, even if it were true that the 2008-2012 documents forced financial institutions to terminate their relationships with payday lenders, the issuance of FIL-43-2013 and FIL-41-2014 rendered Plaintiffs' challenge moot. Both of those FILs stated that banks with appropriate controls in place may continue to do business with TPPPs representing payday lenders or other industries previously identified as higher-risk, so long as the transactions in question are in compliance with applicable law, and FIL-41-2014 underscored the point by eliminating the examples of merchants so identified. Plaintiffs' challenge to the prior documents therefore no longer presents a live controversy.

"A case is rendered moot when events so unfold as to preclude the possibility of meaningful relief." *Safe Energy Coalition v. NRC*, 866 F.2d 1473, 1476 (D.C. Cir. 1989); *see also Larsen v. U.S. Navy*, 525 F.3d 1, 4 (D.C. Cir. 2008) (abandonment of policy mooted challenge); *Air Line Pilots Ass'n v. Northwest Airlines, Inc.*, 199 F.3d 477, 486-87 (D.C. Cir. 1999) (removal of challenged clauses from agreement left no "present controversy"). Here, Plaintiffs argue that the FDIC cannot "deny banking services to lawful industries" and cannot adopt a "*de facto* rule against providing financial services to all payday lenders," and seek declaratory and injunctive relief on that basis. Am. Compl. ¶¶ 85, 99. But the September 2013 and July 2014 FILs make it clear that the FDIC is not directing banks to terminate relationships with payday lenders generally or Plaintiffs in particular. Indeed, following FIL-41-2014, the FDIC's guidance on TPPPs that Plaintiffs challenge no longer mentions payday lenders. Banks

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doctrine of prudential standing prohibits"). For such a third party to have prudential standing, the directly affected party must be unable to assert its own rights, *see Lepelletier v. FDIC*, 164 F.3d 37, 44 (D.C. Cir. 1999), and that is not the case here: banks can challenge FDIC actions themselves. (For instance, if any bank were the subject of an FDIC enforcement action, the bank would be able to contest that action in administrative proceedings, and seek review in federal court if necessary.)

are responsible for deciding whether to enter into third-party relationships. If a bank decides that it cannot effectively manage the risks of a relationship with a payday lender and terminates that relationship, that is (and has always been) the bank's choice.

In light of those two FILs, the remedy Plaintiffs seek, namely the invalidation of the 2008-2012 documents, would afford Plaintiffs no meaningful relief. The Amended Complaint protests, at length, the identification of payday lenders as higher-risk merchants, *see, e.g.*, Am. Compl. ¶¶ 44-46, but payday lenders are no longer so identified. Plaintiffs also assert that those documents are the basis for regulators' warnings that banks "face adverse regulatory action . . . if they continue to do business with payday lenders," *id.* ¶ 55, but plainly those documents, as clarified by the two most recent FILs, can no longer support those warnings, assuming *arguendo* that they were ever given. Invalidation of documents that simply offer banks broad advice about managing risk—risks that the banks are already required to manage—would do nothing to advance Plaintiffs' interests, and their challenge to those documents is moot.

III. PLAINTIFFS DO NOT STATE A CLAIM.

Assuming *arguendo* that this Court has jurisdiction, it should dismiss the Amended Complaint for failure to state a claim. Plaintiffs have not alleged that the FDIC has taken final agency action reviewable under the APA, nor have they articulated any other actionable claim.

A. Plaintiffs Do Not Identify Final Agency Action.

The Court should dismiss the Amended Complaint because it identifies no "final agency action" within the purview of the APA. The 2008-2012 documents do not qualify as final agency action, as they do not set forth rights or obligations and have no binding legal consequences. Thus, they are not subject to review under the APA. 5 U.S.C. § 704.[16]

[16] Failure to allege final agency action is considered a defect in the pleading, rather than a jurisdictional defect. *See, e.g.*, *Reliable Automatic Sprinkler Co. v. CPSC*, 324 F.3d 726, 731 (D.C. Cir. 2003).

The Supreme Court has held that agency action is "final" only when it determines "rights and obligations," or "legal consequences will flow" from the action. *Bennett v. Spear*, 520 U.S. 154, 177-78 (1997). Courts conducting that analysis address the effects of agency action, including "whether the agency has (1) imposed any rights and obligations, or (2) genuinely left the agency and its decisionmakers free to exercise discretion." *Center for Auto Safety v. NHTSA*, 452 F.3d 798, 806 (D.C. Cir. 2006) (citations omitted), along with the agency's expressed intent. *Id.* at 806-07 (examining "(1) the agency's own characterization of the action; (2) whether the action was published in the Federal Register or the Code of Federal Regulations; and (3) whether the action has binding effects on private parties or on the agency"). A "general statement of policy" does not constitute final agency action. *Id.* at 807. Because they do not impose rights or obligations and were not intended as rules, the 2008-2012 documents are not final agency action.

1. The Documents Did Not "Impose Rights and Obligations."

The challenged documents plainly do not "impose rights and obligations." They are couched as advisory rather than mandatory, do not represent a new policy, and carry no "legal consequences." They therefore do not constitute "final agency action."

a. <u>The 2008-2012 Documents Do Not Contain Binding Language.</u>

First, the language of the 2008-2012 documents makes it clear that they do not impose any rights or obligations. FIL-44-2008 states that "[t]he guidelines should not be considered a set of mandatory procedures, but management should ensure that sufficient procedures and policies are in place to control the risks associated with a particular third-party relationship." Exhibit N at 1.[17] Consistent with that statement, each of the documents addresses steps that financial

[17] The 2011 *Supervisory Insights* article does not even constitute "guidance." Exhibit P at 2 ("The views expressed in *Supervisory Insights* are those of the authors and do not necessarily reflect official positions of the Federal Deposit Insurance Corporation. In particular, articles should not be construed as definitive regulatory or supervisory guidance.").

institutions "should" or "may" take. *See, e.g.*, *id.* at 1 ("This guidance provides a general framework that boards of directors and senior management *may* use to provide appropriate oversight and risk management of significant third-party relationships.") (emphasis added). Exhibit O at 1 ("Payment processors pose greater money laundering and fraud risk if they do not have an effective means of verifying their merchant clients' identities and business practices. In these cases, financial institutions *should* perform enhanced due diligence and heightened account monitoring.") (emphasis added). FIL-44-2008 contains no fewer than 72 steps that banks "should" take and 13 that they "may" take (in 11 pages of text); FIL-127-2008 specifies 19 "shoulds" and 2 "mays" in 4 pages, and FIL-3-2012 identifies another 32 "shoulds" and 2 "mays" in its 6 pages. Exhibits N-O, Q. The 2011 *Supervisory Insights* article adds another 21 "should" statements and 4 "may" statements in 10 pages. Exhibit P. Many of the measures that banks "should" or "may" take are repeated several times in these documents. The few "must" statements in those documents do not amount to substantive requirements.[18] The explicit disclaimer of binding or mandatory effect, and the use of advisory rather than directive language, makes it plain that the 2008-2012 documents are general statements of policy that do not determine rights or obligations or carry legal consequences. *See National Mining Ass'n v. McCarthy*, --- F.3d ---, 2014 WL 3377245, *6 (D.C. Cir. July 11, 2014) (guidance stating that it "does not impose legally binding requirements" and is "not intended to direct the activities of any other Federal, State or local agency," but rather is merely general statement of policy); *Center for Auto Safety*, 452 F.3d at 809 ("NHTSA has not commanded, required, ordered, or

[18] *See* Exhibit N at 5 ("Following an assessment of risks and a decision to proceed with a plan to establish a third-party relationship, management must select a qualified entity to implement the activity or program."); *id.* at 8 ("Any nonpublic personal information on the institution's customers must be handled in a manner consistent with the institution's own privacy policy and in accordance with applicable privacy laws and regulations."); Exhibit Q at 2 ("Financial institutions must recognize and understand the businesses and customers with which they have relationships and the liability risk for facilitating or aiding and abetting consumer unfairness or deception under Section 5 of the Federal Trade Commission Act.").

dictated. . . . It does not matter that agency officials have *encouraged* automakers to comply with the guidelines.”).

Similar language has led other courts to conclude that agency statements were conditional or advisory and did not constitute final agency action. In *Holistic Candlers & Consumers Association v. FDA*, 664 F.3d 940 (D.C. Cir. 2012), for instance, the court held that certain letters did not constitute final agency action because they were merely a prelude to potential enforcement. *Id.* at 944. The court found the agency’s use of “should” and “may” significant:

> The letters tell the manufacturers that they “*should* take prompt action to correct” the identified deviations . . . and state that “‘[f]ailure to promptly correct these deviations *may* result in regulatory action being initiated.” It is plain, therefore, that “[n]o legal consequences flow from the agency's conduct to date, for there has been no order compelling [the appellants] to do anything.”

Id. (quoting *Reliable Automatic Sprinkler*, 324 F.3d at 732); *see also NRDC v. EPA*, 559 F.3d 561, 565 (D.C. Cir. 2009) (deeming unreviewable agency statements that certain events “may” be excluded from scope of rule); *Brock v. Cathedral Bluffs Shale Oil Co.*, 796 F.2d 533, 538 (D.C. Cir. 1986) (noting that prior decisions had “given decisive weight to the agency's choice between the words ‘may’ and ‘will’”); *Food & Water Watch v. EPA*, --- F. Supp. 2d ---, 2013 WL 6513826, *13 (D.D.C. Dec. 13, 2013) (statement that agency “encourages and expects” conduct does not constitute final agency action); *Royster-Clark Agribusiness, Inc. v. Johnson*, 391 F. Supp. 2d 21, 28 (D.D.C. 2005) (statements that agency “may” act do not give rise to “legal consequences”). The language of the 2008-2012 documents, and the express disclaimer of binding intent, belie any argument that those documents constitute “final agency action.”[19]

Furthermore, as discussed above, Plaintiffs do not allege specific facts showing that the

[19] For similar reasons, the 2008-2012 documents do not create binding norms for the FDIC itself, as they do not “cabin the agency’s discretion.” *Home Builders*, 415 F.3d at 16. Those documents advise that enforcement action “may be appropriate” for banks that failure to manage risk, *see, e.g.*, Exhibit O at 11, but such general statements do not circumscribe the FDIC’s enforcement decisionmaking.

FDIC has applied the 2008-2012 documents in a manner that converts them into binding rules. Courts have sometimes found that, when an agency uses seemingly non-binding guidance documents as binding norms for the entities it regulates, those documents constitute rules and are reviewable as final agency action, *see Center for Auto Safety*, 452 F.3d at 807, but nowhere does the Amended Complaint allege that the banks in question cited the documents as the reasons for the termination of Plaintiffs' banking relationships, let alone that the FDIC, or any other Defendant, pointed to the FILs as creating rules with the force of law. Because the 2008-2012 documents are not "binding on [their] face or in practice," *id.*, they are not final agency action.

b. The 2008-2012 Documents Did Not Change FDIC Policy And Thus Were Not Final Agency Action.

The 2008-2012 documents cannot be viewed as final agency action for a separate reason: they were entirely consistent with prior FDIC statements on banks' third-party relationships, and as such did not announce a new policy. For that reason, the issuance of those documents was not final agency action under the APA.

Courts have emphasized that, for guidance documents to be viewed as final agency action under the APA, they must establish a "new substantive rule." *See, e.g.*, *Broadgate Inc. v. USCIS*, 730 F. Supp. 2d 240, 245 (D.D.C. 2010); *see also Center for Auto Safety*, 452 F.3d at 434, 435 (guidelines "do not . . . establish new rights and obligations for automakers" when automakers "adhered to those practices long before NHTSA issued the 1998 policy guidelines"). Absent a "change in the legal obligations of a party," there is no final agency action. *National Ass'n of Home Builders v. Norton*, 415 F.3d 8, 15 (D.C. Cir. 2005); *see also Independent Equipment Dealers Ass'n v. EPA*, 372 F.3d 420, 428 (D.C. Cir. 2004) ("By *restating* EPA's established interpretation of the certificate of conformity regulation, the EPA Letter tread no new ground. It left the world just as it found it, and thus cannot be fairly described as implementing,

interpreting, or prescribing law or policy."); *General Motors Corp. v. EPA*, 363 F.3d 442, 449 (D.C. Cir. 2004) (letters not final agency action because they "reflect neither a new interpretation nor a new policy" and do not "impose new substantive rights or obligations on field personnel").

The 2008-2012 documents do not represent the first FDIC statement on these issues, nor do they indicate a new FDIC policy. Rather, they indicate a continuation of the FDIC's longstanding views on banks' relationships with third parties, namely that those relationships pose significant risks, including credit, operational, compliance, and reputation risks; such involvement should proceed only with due diligence and ongoing monitoring. *See, e.g.*, Exhibits F-M. The concerns in those documents about associating with third parties were expressed in terms that were virtually identical to the 2008-2012 documents challenged in this suit.[20] Plaintiffs' assertions that these documents "create[] new legal consequences of establishing and maintaining relationships with online payday lenders" are factually meritless, because nothing about the "consequences" of those relationships was new.[21] Plaintiffs also assert that the 2008-2012 documents' concerns about reputation risk arising from third-party conduct were "novel,"

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[20] *Compare* Exhibit I at 4 (*FYI* article, warning that "participation in these [third-party] arrangements may expose insured depository institutions to substantial legal and reputational risks," as well as "operational risks, such as a heightened risk of transactional error or fraud"); Exhibit K at 2-3 (July 2, 2003 Guidelines, stating that "institutions face increased reputation risks when they enter into certain arrangements" with third parties, and that "agents or employees may misrepresent information about the loans or increase credit risk by failing to adhere to established underwriting guidelines."); Exhibit L at 2, 3 (FIL-14-2005, stating that "[e]xaminers should also consider the degree of legal or reputational risk associated with the payday business line, especially as it relates to third-party agreements"); Exhibit H at 4 (2007 article, stating that "[f]ailure to manage" third-party relationship risks "can expose a financial institution to regulatory action, financial loss, litigation, and reputational damage") *with* Exhibit N at 2-4 (identifying "risks arising from third-party relationships," including "strategic risk," "reputation risk," "operational risk," "transaction risk," and "credit risk"); Exhibit O at 2 (failure to manage TPPP relationships may pose "strategic, credit, compliance, and transaction risks," as well as "legal, reputation, and other risks"); Exhibit P at 3 ("Deposit relationships with payment processors can expose financial institutions to risks not present in typical commercial customer relationships, including greater strategic, credit, compliance, transaction, legal, and reputation risk."); Exhibit O at 2 (warning of "operational, strategic, credit, compliance, and transaction risks" as well as "legal, reputational, and other risks").

[21] Nor could Plaintiffs challenge the older documents at this point, as the six-year statute of limitations for APA suits has expired. *Mendoza v. Perez*, 754 F.2d 1002 (D.C. Cir. 2014).

see Am. Compl. ¶¶ 9, 99, but that argument likewise rings hollow, as the FDIC had already raised that same concern in multiple publications; indeed, the 2007 *Supervisory Insights* article expresses it in virtually identical terms. Exhibit E at 5 ("Negative publicity involving the third party, even if it is not related to the specific third-party arrangement, presents reputation risk to a financial institution."). Because nothing material to Plaintiffs' Amended Complaint was articulated as a "new substantive rule" in the documents Plaintiffs challenge, those documents do not represent final agency action.

c. The Documents Did Not Have "Legal Consequences."

The issuance of the 2008-2012 documents did not constitute "final agency action" for another reason: nothing in those documents had "legal consequences" for financial institutions or anyone else. *Bennett*, 520 U.S. at 177-78. Those documents indicated in broad terms that financial institutions need to manage the risks associated with third-party relationships, including TPPPs, but did not set out specific requirements or prohibitions.

Agency guidance that contains a set of principles or recommendations, but does not impose binding requirements, does not have "legal consequences" for these purposes. In *Chemical Manufacturers Association v. EPA*, 26 F. Supp. 2d 180 (D.D.C. 1998), for example, this Court held that a document that "does not fashion binding rules but rather enunciates principles that can be tailored to particular fact-bound situations" is not final agency action. *Id.* at 185. Similarly, in *Massachusetts Manufacturing Extension Partnership v. Locke*, 723 F. Supp. 2d 27 (D.D.C. 2010), this Court found that a "recommended procedure" that "did not purport to codify legal obligations or even offer definitive guidance" did not have "legal consequences." *Id.* at 40. "Recommended" measures, the D.C. Circuit has held, do not carry "legal consequences." *Home Builders*, 415 F.3d at 14; *see also National Mining Ass'n*, 2014 WL 3377245, *6 (guidance that "does not tell regulated parties what they must do or may not do in order to avoid

liability" is merely a general statement of policy); *Home Builders Ass'n v. U.S. Army Corps of Eng'rs*, 335 F.3d 607, 619 (7th Cir. 2003) (document establishing "procedural framework" is not final agency action); *Food & Water Watch*, 2013 WL 6513826, *13 (document that "does not legally require any conduct, but rather serves as an informational tool" is not final agency action). Courts have similarly recognized that agency conduct that affects the plaintiff only "on the contingency of future administrative action" does not constitute final agency action. *DRG Funding Corp. v. HUD*, 76 F.3d 1212, 1214 (D.C. Cir. 1996); *see also Independent Equipment Dealers*, 372 F.3d at 428 (mere possibility of future enforcement action does not create "legal consequences").

The 2008-2012 documents do not impose "legal consequences," as they give financial institutions considerable flexibility in the management of risks arising from third-party relationships. FIL-44-2008, for example, deems itself a "resource" and states that it articulates a set of "principles" that banks should "consider" as they determine the scope of their risk management programs:

> Management should consider the principles addressed in this guidance and ensure that appropriate procedures are in place, taking into account the complexity and risk potential for each of its third-party relationships. **The precise use of a risk management process is dependent upon the nature of the third-party relationship, the scope and magnitude of the activity, and the risk identified.**

Exhibit N at 1 (emphasis added). The 2011 *Supervisory Insights* article stated, similarly, that the FDIC's statements on risk management were a "framework for prudently managing relationships with third-party payment processors," and such a program "should implement risk mitigation policies and procedures that include *appropriate* oversight and controls *commensurate with the risk and complexity of the activities*." Exhibit P at 9, 12 (emphasis added); *see also* Exhibit O at 4 (same). In other words, the scope and granularity of any financial institution's risk management

process depends on a variety of factors; the FDIC does not require any particular approach. *Compare NRDC*, 559 F.3d at 565 (agency's listing of "examples" of events that "may" trigger certain treatments, and its statement that events would be evaluated "on a case-to-case basis," was not sufficiently definite to trigger "legal consequences").[22]

Nor does agency advice that merely discourages, but does not prohibit, the agency's regulated entities from doing business with a third party have "legal consequences" for that third party. In *Industrial Safety Equipment Association v. EPA*, 837 F.2d 1115 (D.C. Cir. 1988), the court held that an agency document stating that certain asbestos-protection respirators were recommended for use by employers, while others were "*not* recommended" (emphasis in

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[22] Plaintiffs' complaints about specific aspects of those documents as requiring termination of third-party relationships in specific circumstances are no better grounded. Plaintiffs note a statement in FIL-3-2012 that high return rates are "often" evidence of fraud, and argue that the FIL should have acknowledged that there may be legitimate reasons for high return rates. Am. Compl. ¶ 59. The relevant context, however, shows that the FDIC was suggesting that banks view high return rates as a warning sign, not as a scarlet letter:

> **Financial institutions also should be alert** to an increase in consumer complaints about payment processors and/or merchant clients or an increase in the amount of returns or charge backs, all of which **may** suggest that the originating merchant **may** be engaged in unfair or deceptive practices or **may** be inappropriately obtaining or using consumers' personal account information to create unauthorized RCCs or ACH debits. . . . Financial institutions that initiate transactions for payment processors should implement systems to **monitor** for higher rates of returns or charge backs and/or high levels of RCCs or ACH debits returned as unauthorized or due to insufficient funds, all of which often indicate fraudulent activity.

Exhibit Q (emphasis added). The FDIC advised banks to *watch* TPPPs with high return rates, because such rates *may* indicate questionable activity; it did not tell banks to cut off relationships with such processors. Similarly, Plaintiffs argue that "[r]esponsible payday lenders . . . are lumped in together with payday lenders that establish relationships with multiple financial institutions in order to obscure fraudulent activities," Am. Compl. ¶ 60, but the FDIC did not "lump" any groups "together" when it advised banks to be aware of that issue:

> Financial institutions **should be alert** for payment processors that use more than one financial institution to process merchant client payments or that have a history of moving from one financial institution to another within a short period. Processors **may** use multiple financial institutions because they recognize that one or more of the relationships **may** be terminated as a result of suspicious activity.

Exhibit O at 1 (emphasis added). Again, the FDIC advised that these practices "may" indicate fraud, not "always" or "invariably," and told banks to be "alert." The discretionary nature of the guidance in these documents shows that the FDIC's recommendations for managing risks did not have "legal consequences."

original) did not have legal consequences: it "establishes no rule that the regulated industry must obey," and "any effect it might have on respirator manufacturers is indirect and arises from the reactions and choices of industry customers and workers." *Id.* at 1121. Likewise, in *Aerosource, Inc. v. Slater*, 142 F.3d 572 (3d Cir. 1998), the agency had issued a warning to the aviation community about problems with a repair contractor's work, and the court held that the warning did not have "legal consequences" for the contractor, as the contractor was not required to "comply with any directive" and no one was barred from doing business with it. *Id.* at 581; *see also Air Brake Sys., Inc. v. Mineta*, 357 F.3d 632, 645-46 (6th Cir. 2004) (agency letters stating that specific company's brake system did not comply with agency standard were not final agency action); *Asbetec Constr. Servs. v. EPA*, 849 F.2d 765, 768-69 (2d Cir. 1988) (compliance order was not final agency action, even if order led to plaintiff's "diminished opportunities" to obtain contracts; the order did not affect the plaintiff's duties or obligations).

It is notable that the agency documents in the above-cited cases dealt with the plaintiffs much more specifically than the documents challenged here; the publications either singled out specific companies by name or identified their products in terms that left no ambiguity. Here, by contrast, the 2008-2012 documents identify no specific payday lenders or distinct subset of the payday lending industry that banks are required, or even encouraged, to avoid. *A fortiori*, any bank decisions to suspend or terminate relationships with specific lenders (or processors acting on their behalf) are attributable to the banks, not to the FDIC. The documents therefore did not have "legal consequences." *See also Invention Submission Co. v. Rogan*, 357 F.3d 452, 459-60 (4th Cir. 2004) (advertising campaign warning the public about "invention promotion scams" that did not single out any particular company was not final agency action, as any resulting decisions not to do business with the plaintiff "are attributable to independent responses and

choices of third parties and cannot be imputed" to the agency) (citations omitted).

The 2008-2012 documents did not have "legal consequences" because they do not operate as requirements. Rather, they were intended as guidelines to help banks manage the risks arising from third-party relationships, and to assist them in detecting, and avoiding, payday lenders that commit, or are likely to commit, unlawful or unethical acts. As Plaintiffs themselves repeatedly acknowledge, there is no shortage of bad actors in the payday lending industry. *See* Am. Compl. ¶¶ 7, 49 (noting "payday lenders . . . engaged in fraudulent or otherwise unlawful practices"); *id.* ¶ 60 (acknowledging "payday lenders that establish relationships with multiple financial institutions in order to obscure fraudulent activities"); *id.* ¶ 85, 104, 121, 140, 155 (noting "payday lenders that engage in fraudulent or other wrongful practices"); *see also* Jessica Silver-Greenberg, *New York Prosecutors Charge Payday Loan Firms With Usury*, N.Y. Times, Aug. 11, 2014, http://dealbook.nytimes.com/2014/08/11/new-york-prosecutors-charge-payday-lenders-with-usury/. The FDIC took reasonable steps to help financial institutions detect those bad actors and manage risk accordingly, but institutions retained flexibility and discretion in maintaining those relationships. Nothing about the 2008-2012 documents, therefore, had "legal consequences."

2. The 2008-2012 Documents Were Not Intended to be Rules.

It is equally clear, under the second *Center for Auto Safety* "line of inquiry," that the 2008-2012 documents are not "final agency action" because they were not intended as such. The FDIC expressly characterized the initial June 2008 FIL as advisory rather than binding, *see* Exhibit N at 1 ("The guidelines should not be considered a set of mandatory procedures . . ."), a characterization that none of the subsequent FILs calls into question. Indeed, the title of each FIL characterizes it as "guidance." Exhibits O, Q. The September 2013 and July 2014 FILs reinforce that understanding. Exhibit R ("Financial institutions that properly manage these relationships

and risks are neither prohibited nor discouraged from providing payment processing services to customers operating in compliance with applicable federal and state law. . . . [F]inancial institutions that engage or plan to engage in these activities should review this guidance."); Exhibit T (same). None of these documents, of course, was published as a rule in the Federal Register or the Code of Federal Regulations, *see Center for Auto Safety*, 452 F.3d at 807, and as set forth above, the documents are couched as advisory statements rather than as binding rules. Thus, they do not constitute "final agency action," and Plaintiffs have not stated a claim under the APA. *See also Broadgate*, 730 F. Supp. 2d at 245 (document's description of itself as providing "guidance" favors conclusion that it is not a "rule").

Furthermore, and for the same reasons, Plaintiffs' allegations in Count I of the Amended Complaint that the 2008-2012 documents are invalid because they were not subjected to the APA's notice and comment process, *see* Am. Compl. ¶¶ 81-86, do not state a claim because those documents were simply "general statements of policy" exempt from notice and comment. 5 U.S.C. § 553(b)(A). "Final agency action" analysis, with its requirement that challenged actions articulate binding legal norms, mirrors the "general statement of policy" inquiry. *See, e.g.*, *Center for Auto Safety*, 452 F.3d at 807-08 (no final agency action because "[t]he guidelines are nothing more than general policy statements with no legal force"); *Syncor Int'l Corp. v. Shalala*, 127 F.3d 90, 94 (D.C. Cir. 1997) (a document that "simply lets the public know [an agency's] current enforcement or adjudicatory approach" is a "general statement of policy"); *Swanson Group Mfg. LLC v. Salazar*, 951 F. Supp. 2d 75, 87 (D.D.C. 2013) ("[O]nce an agency action qualifies as a 'binding' rule requiring notice and comment, it must also necessarily qualify as a "final" agency action."). Because the FILs operate as "general statements of policy" rather than as a binding rule, as discussed above (and the 2011 article does not even set forth FDIC policy,

see n.18 *supra*), they are not subject to the APA's notice-and-comment requirements, and Count I does not state a claim.[23]

Public policy considerations strongly support this approach. Deeming guidance materials "final agency action" subject to judicial review would run counter to the principle that agencies should be encouraged to communicate informally with regulated entities. *See, e.g.*, *Independent Equipment Dealers*, 372 F.3d at 428 ("informal communications between agencies and their regulated communities" are "vital to the smooth operation of both government and business," and should not be "muzzled" by the threat of judicial review); *National Automatic Laundry and Cleaning Council v. Shultz*, 443 F.2d 689, 699 (D.C. Cir. 1971) (agencies should not be discouraged from "apprising persons informally as to their rights and liabilities"). The FDIC's cautionary statements to financial institutions that relationships with third parties may, depending on the nature of those third parties' clientele, bear some risk qualifies as the sort of informal guidance that courts should promote, not chill.

Finally, contrary to Plaintiffs' claims that the FDIC has attempted to "avoid the public and judicial accountability inherent in . . . notice and comment rule-making procedures," the FDIC has invited comments on closely related issues, specifically on its Guidelines on Payday Lending in 2003, and on its Guidance on Deposit Advance Products in 2013. Exhibit K; 78 Fed. Reg. at 25268. Both of those publications addressed payday lending practices and financial institutions' relationships with third parties, and both address "reputation risks" as a hazard of doing business in this area, cautioning financial institutions that involvement in payday lending,

[23] To whatever extent Plaintiffs intended to argue that financial institutions view the 2008-2012 documents as binding regardless of the regulators' intent, that does not transform them into rules. *See Center for Auto Safety*, 452 F.3d at 811 ("It may be that, to the extent that they actually prescribe anything, the agency's guidelines have been voluntarily followed by automakers and have become a *de facto* industry standard for how to conduct regional recalls. But this does not demonstrate that the guidelines have had *legal consequences*."); *Home Builders*, 415 F.3d at 16 (voluntary adoption of protocols by third parties does not make them rules for purposes of the APA).

whether directly or through third parties, could adversely affect their standing in the community. Plaintiffs therefore have had an opportunity to comment on these issues. As such, their accusations about "avoid[ing] accountability" do not hold water.[24]

B. Plaintiffs' Allegations of a "*De Facto* Rule" Do Not State a Claim.

Plaintiffs have also alleged that the FDIC, "through its informal, coercive communications with banks, created a *de facto* rule against providing financial services to all payday lenders," Am. Compl. ¶ 85, but Plaintiffs cannot evade the "final agency action" requirement so easily. *See Center for Auto Safety*, 452 F.3d at 798 ("*de facto* rule" theory is simply an "alternative way[] of viewing the question" of final agency action). A "*de facto* rule" is a "binding norm that could not properly be promulgated absent the notice-and-comment rulemaking required by [the APA]," *see id.* at 806, and it would be absurd to view a smattering of informal communications with banks as a "binding norm" that should be subject to notice-and-comment rulemaking. Plaintiffs allege a total of 36 lost relationships across the entire banking industry, and identify regulatory pressure in only three of those instances. The remaining terminations were based solely on the banks' risk concerns, or were not accompanied by any explanation. Am. Compl. ¶¶ 65-74.[25] Plaintiff CFSA represents 42 payday lenders, each of whom, presumably, has dozens if not hundreds of banking relationships across the country. Plaintiffs do not allege that the majority, or even a substantial minority, of these relationships

[24] The FDIC notes that, because it has not taken any final agency action in this matter, it cannot compile an administrative record. Agencies prepare an administrative record to document their decisionmaking process as to final decisions reviewable under the APA, and where there has been no final agency action, no administrative record ordinarily exists. *See, e.g.*, *Holistic Candlers & Consumer Ass'n v. FDA*, 770 F. Supp. 2d 156, 162 n.9 (D.D.C. 2011); *Fund for Animals v. Williams*, 391 F. Supp. 2d 191, 197 n.5 (D.D.C. 2005). Accordingly, the FDIC is not presently submitting a certified list of the contents of the administrative record pursuant to Local Rule 7(n).

[25] Plaintiffs also claim that "over 80 banking institutions have terminated their business relationships with CFSA members and other law-abiding payday lenders," Am. Compl. ¶ 7, but offer no specifics. Relative to the entire banking industry, this falls far short of establishing a "norm," and Plaintiffs tellingly offer neither a time frame for these alleged terminations nor the reasons given.

have been lost. The facts alleged in the Amended Complaint simply do not support the existence of a "binding norm" for purposes of the "*de facto* rule" theory.

Even if this small number of lost banking relationships could establish a "*de facto* rule," the Amended Complaint still would not state a claim against the FDIC. Plaintiffs cite *no* instances of regulatory "pressure" on banks whose primary federal regulator is the FDIC; indeed, Plaintiffs make no specific allegations of "coercive" FDIC communications with any bank, and their conclusory statements about a "campaign," unsupported by specific examples of FDIC conduct do not state a claim, as discussed above. (Plaintiffs do not even state when the alleged relationship disruptions occurred.) The Amended Complaint simply does not offer enough information to permit the conclusion that the FDIC pressured *any* bank at *any* time, let alone that the "pressure" continued past September 2013 (or past July 2014). The "pressure" allegations therefore do not state a claim that a "*de facto* rule" is currently in place (or ever was). Count I should therefore be dismissed. [26]

C. The FDIC Did Not Reinterpret Any Previously-Issued Regulation.

Plaintiffs' contention in Count II that the FDIC was required to follow notice-and-comment rulemaking when it raised concerns about reputation risk misses the mark. In certain circumstances, when an agency revises its interpretation of its own regulations, it must do so via notice-and-comment rulemaking. *See, e.g.*, *Alaska Professional Hunters Ass'n v. FAA*, 177 F.3d 1030, 1035-36 (D.C. Cir. 1999); *Paralyzed Veterans of America v. D.C. Arena L.P.*, 117 F.3d 579, 584 (D.C. Cir. 1997). But the 2008-2012 documents were not an interpretation, new or revised, of any regulations; rather, they were issued pursuant to (*inter alia*) the FDIC's powers to

[26] Furthermore, Plaintiffs have not alleged that any "pressure" by the FDIC constituted final agency action; the Amended Complaint does not allege that the "pressure" was exerted by an official with the authority to bind the FDIC. *See Center for Auto Safety*, 452 F.3d at 810. And any FDIC involvement in a Justice Department investigation of payday lenders is not actionable under the APA, as investigations are not final agency action. *FTC v. Standard Oil Co.*, 449 U.S. 232, 241 (1980).

promulgate standards for safety and soundness, "by regulation or guideline." *See* 12 U.S.C. § 1831p-1.[27] Nor did they change any prior definition of reputation risk: the FDIC had cautioned banks about the reputation risks arising from involvement with third parties, including payday lenders, for years, and had pointed specifically to the risks of associating with third parties that may separately be engaged in unlawful or unethical conduct. The FDIC's 2007 *Supervisory Insights* article on management of third-party relationship risk made precisely that point. Exhibit H at 5 ("Negative publicity involving the third party, even if it is not related to the specific third-party arrangement, presents reputation risk to a financial institution.").[28] The Court should dismiss Count II as factually wrong and legally defective.

D. The FDIC Acted Within Its Authority.

The Court should likewise dismiss Count III for failure to state a claim. Plaintiffs allege that the FDIC, in publishing the 2008-2012 documents, exceeded its statutory powers, *see* Am. Compl. ¶¶ 96-100. Plaintiffs are wrong.

The FDI Act confers on the FDIC broad authority to issue rules and other guidelines

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[27] Plaintiffs point to a previous FDIC FIL (FIL-52-2006), Exhibit V, addressing reputation risks arising from banks' relationships with foreign-based third party service providers ("FBTSPs"), but that FIL did not purport to interpret FDIC regulations either. Furthermore, Plaintiffs' assertion that reputation risk had previously referred "exclusively" to "the risk that a bank's business practices might cause harm to its reputation," Am. Compl. ¶ 41, is baseless. FIL-52-2006 itself states that "[f]inancial institutions are also responsible for risks associated with the activities of FBTSPs with which they contract," and does not limit those "activities" to those undertaken in the bank's name. Exhibit V at 2. At any rate, even assuming that FIL-52-2006 defines reputation risk differently from the documents at issue here, that does not make the subsequent FILs improper, as agencies can adopt different definitions of terms for different contexts. *See, e.g.*, *Transmission Access Policy Study Group v. FERC*, 225 F.3d 667, 696 (D.C. Cir. 2000); *United Techs. Corp. v. EPA*, 821 F.2d 714, 722-23 (D.C. Cir. 1987).

[28] The FDIC warned about reputation risks in similar terms in 2003:

> Depository institutions involved in payday lending also may enter arrangements with third parties to originate payday loans. These loans often involve fees and charges in excess of those the third party could otherwise charge under state law. . . . In addition, some suits also have alleged lender violations of various state and federal consumer protection laws in connection with these loans. **Thus, participation in these arrangements may expose insured depository institutions to substantial legal and reputational risks.**

Exhibit I.

regarding the operations of insured financial institutions in order to promote their safety and soundness. *See* 12 U.S.C. § 1831p-1. That section, entitled "Standards for safety and soundness," states that regulators may issue guidance in a broad range of areas:

> Each appropriate Federal banking agency shall, for all insured depository institutions, prescribe--
> **(1)** standards relating to--
> **(A)** internal controls, information systems, and internal audit systems, in accordance with section 1831m of this title;
> **(B)** loan documentation;
> **(C)** credit underwriting;
> **(D)** interest rate exposure;
> **(E)** asset growth; and
> **(F)** compensation, fees, and benefits, in accordance with subsection (c) of this section; and
> **(2)** such other operational and managerial standards as the agency determines to be appropriate.

Id. § 1831p-1(a); *see also id.* § 1831p-1(d) ("Standards under subsections (a), (b), and (c) of this section shall be prescribed by regulation *or guideline*."). The FDIC's guidance to financial institutions regarding third-party relationships falls well within this broad authority.[29]

Plaintiffs also complain that the 2008-2012 documents rest on "the vague and subjective standard of reputation risk," but those documents do not impose any FDIC standards for reputation risk; rather, they identify reputation risk as a potential *consequence* of institutions' failure to manage their relationships with third parties, and leave institutions free to make their

[29] Plaintiffs' only attempt to explain why the authority conferred by § 1831p-1 does not extend to guidance on payment processors is the assertion that the FDIC's powers "is informed and limited by customary practices and understandings in the area of banking and banking regulation." Am. Compl. ¶ 98. Plaintiffs point to no such "customary practices and understandings," however, and the conclusory assertion that such "practices and understandings" existed, and were violated here, does not state a claim. *RSM Prod. Corp. v. Freshfields Bruckhaus Deringer U.S. LLP*, 682 F.3d 1043, 1052 (D.C. Cir. 2012) ("[U]nsupported conclusory allegations are 'not entitled to be assumed true.'") (quoting *Iqbal*, 556 U.S. at 681)). As for Plaintiffs' argument that § 1831p-1 constitutes an "unconstitutional delegation of unbounded legislative power," Congress may delegate power to executive agencies as long as such delegation is done pursuant to "an intelligible principle to which the person or body authorized to act is directed to conform," *see TOMAC v. Norton*, 433 F.3d 852, 866 (D.C. Cir. 2006) (citations omitted). Here, the FDIC is directed to promulgate "operational and managerial standards" for financial institutions, which plainly constitutes an "intelligible principle" and refutes Plaintiffs' assertion that the FDIC's authority is "unbounded."

own determinations regarding what relationships pose that risk. FIL-44-2008 is an example:

> There are numerous risks that may arise from a financial institution's use of third parties. Some of the risks are associated with the underlying activity itself, similar to the risks faced by an institution directly conducting the activity. Other potential risks arise from or are heightened by the involvement of a third party. Failure to manage these risks can expose an institution to regulatory action, financial loss, litigation **and reputation damage**, and may even impair the institution's ability to establish new or service existing customer relationships.

Exhibit N at 2 (emphasis added). The FIL cites a long list (inclusive rather than exclusive) of risks associated with dealing with third parties, including strategic, reputation, operational, transaction, credit, and compliance risks, and explains that reputation risk "is the risk arising from negative public opinion." *Id.* at 3; *see also* Exhibit O at 2 ("Financial institutions that do not adequately manage these relationships may be viewed as facilitating fraudulent or unlawful activity by a payment processor or merchant client.").[30] The FILs therefore remind banks that if they engage in relationships with third-party actors that harm customers, improperly disclose confidential information, and violate governing laws and regulations, those relationships can harm the banks' standing in the community—whether or not the institutions had any involvement in or knowledge of those acts. The FILs do not, of course, state that all third-party relationships carry these risks, and assessing these risks is the job of the institution:

> Not all of the following risks will be applicable to every third-party relationship; however, complex or significant arrangements may have definable risks in most areas. [Bank] management should understand the nature of these risks in the context of the institution's current or planned use of third parties.

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[30] FIL-44-2008 elaborated on reputation risk:

> Third-party relationships that result in dissatisfied customers, interactions not consistent with institution policies, inappropriate recommendations, security breaches resulting in the disclosure of customer information, and violations of law and regulation are all examples that could harm the reputation and standing of the financial institution in the community it serves. Also, any negative publicity involving the third party, whether or not the publicity is related to the institution's use of the third party, could result in reputation risk.

Exhibit N at 3.

Exhibit N at 2.[31] Thus, Plaintiffs' charge that the FILs impose the FDIC's "subjective judgments about which industries are (or, in its view, should be) unpopular with the public" is a baseless exaggeration. The FILs make no generalizations about any industry; they state that, when institutions enter into relationships with third parties of *any* kind, they must weigh all the risks, including reputational risks, of being associated with those third parties. Nothing about that common-sense advice exceeds the FDIC's authority, and Count III does not state a claim.[32]

E. The 2008-2012 Documents Are Not Arbitrary or Capricious.

Plaintiffs' contention in Count IV that the 2008-2012 documents are "arbitrary and capricious," Am. Compl. ¶¶ 102-08, does not state a claim. The "arbitrary and capricious" standard governs final agency action, and those documents do not qualify as final agency action.

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[31] The other documents mirror FIL-44-2008 here as well. *See* Exhibit O at 1 ("Deposit relationships with payment processors expose financial institutions to risks not customarily present in relationships with other commercial customers. . . . [F]inancial institutions should consider the potential for legal, reputational, and other risks."); Exhibit Q at 2 (same).

[32] Equally untrue is Plaintiffs' assertion that the reputation risk concerns about third-party conduct identified in the 2008-2012 documents are "unknown to customary banking and banking regulation." Am. Compl. ¶ 99. *See, e.g.*, 12 C.F.R. Part 208, App. A(II)(b) (Federal Reserve monitors institutions' investments in affiliated companies because "experience has shown that banks stand behind the losses of affiliated institutions, such as joint ventures and associated companies, in order to protect the reputation of the organization as a whole"); 12 C.F.R. Part 30, App. C(I) (OCC guidelines on residential mortgage lending, warning of reputation risks for lending practices even for loans that a bank purchases rather than originates); *see also Cousin v. OTS*, 73 F.3d 1242, 1252 (2d Cir. 1996) (effect of bank officer's conduct on reputation of bank pertinent to enforcement action); *In re Shollenburg*, FDIC-00-88e, 2003 WL 1986896, *13 (FDIC Mar. 11, 2013) (same). The Uniform Financial Institutions Rating System (UFIRS), an examination rating scheme adopted by all banking regulators after notice and comment, includes reputation risk in two of its six examination areas, Asset Quality and Management, and does not limit that concept to risks arising from the institution's conduct. *See* 61 Fed. Reg. 67021, 67027 (Dec. 19, 1996). Also meritless is Plaintiffs' assertion that the UFIRS examination criteria are purely "objective," *see* Am. Compl. ¶ 36; the UFIRS acknowledges that a certain level of subjectivity is unavoidable in bank examinations. *Id.* at 67023 ("[T]he UFIRS has always contained elements of subjectivity and examiner judgment when assigning a rating, particularly as it relates to qualitative assessments of policies, practices, processes, and systems.").

Plaintiffs also suggest that "[t]he Dodd-Frank-Act transferred the Defendant agencies' consumer protection functions to CFPB" and that regulators other than the CFPB "no longer possess plenary consumer protection powers." Am. Compl. ¶ 38. In fact, the FDIC and other regulators retain broad authority to monitor, and conduct examinations for, compliance with consumer laws. 12 U.S.C. § 5581(c). At any rate, Plaintiffs' argument is irrelevant, as Plaintiffs identify no specific acts that exceeded the FDIC's consumer protection powers.

See 5 U.S.C. §§ 704, 706(2); *see also Radack v. United States Dep't of Justice*, 402 F. Supp. 2d 99, 103 (D.D.C. 2005) (court may set aside "final agency actions" under section 706). Count IV should therefore be dismissed.

F. The FDIC Did Not Violate Plaintiffs' Due Process Rights.

Plaintiffs' assertion in Count V that the FDIC violated their due process rights has no merit, and Count V should be dismissed for failure to state a claim. Plaintiffs assert in conclusory fashion that the FDIC "coerc[ed]" banks to end relationships with Plaintiffs, but, as discussed above, the four named banks primarily overseen by the FDIC did not claim "coercion" when they cut ties with Plaintiffs. Am. Compl. ¶¶ 65, 74. Accordingly, the premise of Count V fails.

Even assuming that the FDIC engaged in "coercion" of financial institutions to terminate their relationships with Plaintiffs, there would be no due process claim for the simple reason that Plaintiffs' business relationships with financial institutions are not property interests protected by the Due Process Clause, as courts have consistently held.[33] Equally meritless is Plaintiffs' argument that the FDIC "imposed" a "stigma" on "CFSA's members and other law-abiding, responsible payday lenders." Am. Compl. ¶ 112. The 2008-2012 documents did no such thing; they recognized (as do Plaintiffs) that some members of that industry violate the law and harm their customers and instructed financial institutions to monitor TPPPs whose clients include payday lenders, along with other types of merchants, as part of the institutions' risk management processes. If such general statements, without naming any specific members of the industry, constituted improper "stigmatizing," banking regulators would not be able to offer *any* advice to

[33] *See, e.g.*, *Stidham v. Texas Comm'n*, 418 F.3d 486, 492 n.9 (5th Cir. 2005) ("Stidham had no constitutionally protected property right in his business arrangements . . ."); *Chrebet v. County of Nassau*, --- F. Supp. 2d ---, 2014 WL 2527225, *8 (E.D.N.Y. June 5, 2014) (employer had no protected property interest in relationship with employee); *Pete v. City of Oakland*, 2011 WL 863550, *7 (N.D. Cal. Mar. 10, 2011) (disruption of business relationship "is not actionable as a due process violation"); *Holt Cargo Sys. Inc., v. Delaware River Port Auth.*, 20 F. Supp. 2d 803, 830 (E.D. Pa. 1998) ("[B]usiness relationships are not a protected property interest worthy of constitutional protection") (citations omitted).

financial institutions about managing risk in dealing with particular industries or groups. At any rate, bare assertions of harm to reputation do not give rise to due process claims either. *See, e.g.*, *Paul v. Davis*, 424 U.S. 693 (1976) (no constitutionally protected liberty interest in reputation absent accompanying loss of protected status or other property interest); *Doe v. United States Dep't of Justice*, 753 F.2d 1092, 1105-06 (D.C. Cir. 1985) (injury to reputation does not violate due process absent "a special, tangible relationship between the government and the individual").

Furthermore, Plaintiffs cannot challenge the FDIC's exercise of its regulatory authority on due process grounds, as the Due Process Clause "does not apply to the indirect adverse effects of government action." *O'Bannon v. Town Court Nursing Ctr.*, 447 U.S. 773, 789 (1980); *see also Ridder v. OTS*, 146 F.3d 1035, 1041 (D.C. Cir. 1997) (order restricting a holding company's use of its assets "had no direct effect on" the plaintiffs (former bank officers seeking to recover funds from the holding company, and any harm from the order was a "consequential result of a lawful action" by the agency, "and therefore was no due process violation").

Finally, to the extent Plaintiffs challenge the FILs or other general agency documents as violations of due process, that theory fails: generally applicable "policy-type rules or standards" are not the proper subject of a procedural due process challenge. *United States v. Florida East Coast Ry.*, 410 U.S. 224, 245 (1973); *see also NRDC v. EPA*, 859 F.2d 156, 194 (D.C. Cir. 1988) ("[D]ue process restrictions [are] not applicable to legislative activities of [an] administrative agency."). Count V should be dismissed.

G. The Court Has No Jurisdiction to Enjoin Enforcement Actions.

Finally, to the extent the Amended Complaint seeks to enjoin the FDIC from taking enforcement action based on a bank's failure to manage TPPP relationships, as the FDIC has done in the past, *see* n.1 *supra*, it is barred by 12 U.S.C. § 1818(i)(1). That section provides that "no court shall have jurisdiction to affect by injunction or otherwise" the FDIC's enforcement

actions, "or to review, modify, suspend, terminate, or set aside" such actions. Plaintiffs ask this Court to enjoin the FDIC from "implementing, applying, or taking any action whatsoever pursuant to" the 2008-2012 documents. Am. Compl. at 53. That would preclude the FDIC from requiring banks to correct unsafe and unsound practices pertaining to third-party relationships, and taking enforcement action if banks failed to address those concerns. Section 1818(i)(1) bars such injunctions. *See, e.g.*, *Groos Nat'l Bank v. OCC*, 573 F.2d 889, 895 (5th Cir. 1978) (court cannot issue declaratory judgment that would prevent agency from pursuing enforcement).

Similarly, to the extent the Amended Complaint seeks to restrain the FDIC from directing banks to terminate their relationships with payday lenders, it invites the sort of interference with the FDIC's bank examination functions that the APA expressly rejects. Agency decisions that are "committed to agency discretion by law" are not reviewable, *see* 5 U.S.C. § 701(a)(2), and courts have cited that provision in declining to second-guess banking regulators' supervisory decisions. *See, e.g.*, *Frontier State Bank v. FDIC*, 702 F.3d 588, 596 (10th Cir. 2012) (no review of FDIC directive setting capital levels); *United Liberty Life Ins. Co. v. Ryan*, 985 F.2d 1320, 1326 (6th Cir. 1993) (issuance of capital directive committed to agency discretion); *FDIC v. Bank of Coushatta*, 930 F.2d 1122, 1129 (5th Cir. 1991) (same); *Investment Co. Inst. v. FDIC*, 728 F.2d 518, 526 (D.C. Cir. 1984) (FDIC's supervisory duties would be disrupted by judicial review); *FHLBB v. Rowe*, 284 F.2d 274, 278 (D.C. Cir. 1960) (order on application for leave to organize savings and loan association not reviewable); *Jones v. OCC*, 983 F. Supp. 197, 203 (D.D.C. 1997) (approval of bank acquisition not reviewable) . Congress has committed supervision of certain banks to the FDIC's discretion, *see* 12 U.S.C. § 1820(b), and courts should not interfere with the FDIC's supervisory judgments. Furthermore, section 1818(i) precludes review of supervisory action whether or not an enforcement proceeding is pending at the time. *See Hindes*

*v. FDI*C, 137 F.3d 148, 164 (3d Cir. 1998) (no review of notification that FDIC considered bank undercapitalized); *Peoples Nat'l Bank v. OCC*, 227 F. Supp. 2d 645, 651 (E.D. Tex. 2002) (no review of examination findings); *RTC v. Ryan*, 801 F. Supp. 1545, 1550 (S.D. Miss. 1992) (court cannot interfere with supervisory action, whether or not enforcement has been sought to date).

Even if Plaintiffs' requested injunction were not barred as a matter of law, it would be overbroad and improper. Plaintiffs ask this Court to prohibit the FDIC, in perpetuity, from advising banks that they should terminate their relationships with *any* payday lenders, *see* Am. Compl. at 53-54, acknowledging all the while that certain payday lenders engage in "fraudulent or otherwise unlawful practices." Plaintiffs offer no reason why the FDIC should be permanently barred from advising banks to avoid doing business with the worst of the industry. Alternatively, Plaintiffs seek an injunction against any FDIC pressure to terminate relationships with Plaintiffs specifically, *see id.* at 54, asking this Court to declare not only that each of CFSA's 42 members is law-abiding and poses no risk to any bank, but also that this will always be true. Such an injunction would interfere with the FDIC's supervisory responsibilities and turn the Court into a *de facto* bank regulator.

CONCLUSION

Plaintiffs complain of being "stigmatized" and "lumped together" with payday lenders who commit fraud or harm consumers, and assert that the FDIC has undertaken a "campaign against the payday lending industry," but neither accusation is true. Rather, the FDIC has advised banks to know their customers and tread carefully in creating deposit accounts for certain third parties, including but not limited to TPPPs.

For the foregoing reasons, the Amended Complaint should be dismissed for lack of subject matter jurisdiction, or alternatively for failure to state a claim.

Respectfully submitted,

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