No. 24-2154

United States Court of Appeals
for the Eighth Circuit

Minnesota Bankers Association et. al,

Plaintiffs-Appellants,

v.

Federal Deposit Insurance Corp. et. al,

Defendants-Appellees.

APPEAL FROM DECISION OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MINNESOTA

CASE NO. 23-CV-2177-PAM-ECW

PRINCIPAL BRIEF OF APPELLANTS MINNESOTA BANKERS ASSOCIATION AND LAKE CENTRAL BANK

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Summary of the Case

Minnesota Bankers Association and Lake Central Bank ("Plaintiffs") seek to vacate the Federal Deposit Insurance Corporation's ("FDIC") procedurally and substantively unlawful declaration that inadequately disclosed or alerted non-sufficient funds ("NSF") fees arising from the re-presentment of the same unpaid transaction constitute an unfair or deceptive trade practice ("UDAP") in violation of Section 5 of the Federal Trade Commission ("FTC") Act. In other words, the FDIC declared that a long-standing bank industry practice is now a UDAP violation. The FDIC issued this unlawful declaration through Financial Institutions Letter 32-2023: FDIC Clarifying Supervisory Approach Regarding Supervisory Guidance on Multiple Re-Presentment NSF Fees ("FIL 32"). The FDIC promulgated FIL 32 without following the procedural requirements set forth in the Administrative Procedure Act ("APA"). Moreover, the FDIC lacks authority to define UDAP violations and therefore exceeded the scope of its enforcement authority under 12 U.S.C. §§ 1818(b)(1), (i).

Oral argument is necessary because this appeal presents an issue of nationwide importance. Plaintiffs request 20 minutes of oral argument per side.

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Jurisdictional Statement

A. The district court had subject matter jurisdiction over this case pursuant to 28 U.S.C. §§ 1331, 1346, and 1361, because the case involved the interpretation of a federal statute, and the federal government was a party to the case. The district court also had subject matter jurisdiction under the APA. 5 U.S.C. §§ 702–704.

B. This Court has appellate jurisdiction pursuant to 28 U.S.C. § 1291 because this is an appeal from the district court's final order and judgment dismissing Plaintiffs' Amended Complaint.

C. This appeal is timely because the district court entered its judgment on April 9, 2024, and Plaintiffs filed their notice of appeal less than 60 days later, on June 5, 2024. *See* Fed. R. App. P. 4(a).

D. This appeal is from a final order and judgment disposing of all claims.

Statement of Issues

1. Did the District Court err in deciding that FIL 32 is not final agency action under the Administrative Procedure Act?

   The most apposite cases are:

   - *Iowa League of Cities v. E.P.A.*, 711 F.3d 844 (8th Cir. 2013)
   - *U.S. Army Corps of Engineers v. Hawkes Co., Inc.*, 578 U.S. 590 (2016)
   - *Frozen Food Exp. v. United States*, 351 U.S. 40 (1956)
   - *Am. Hosp. Ass'n v. Becerra*, 4:23-CV-01110-P, 2024 WL 3075865 (N.D. Tex. June 20, 2024)

2. Did the District Court err in deciding that Plaintiffs' alleged substantive injuries are not redressable because, absent FIL 32, Plaintiffs have a pre-existing legal duty to make certain disclosures and issue certain alerts related to re-presentment NSF fees?

   The most apposite cases are:

   - *Iowa League of Cities v. E.P.A.*, 711 F.3d 844 (8th Cir. 2013)
   - *U.S. Army Corps of Engineers v. Hawkes Co., Inc.*, 578 U.S. 590 (2016)
   - *UnitedHealthcare Insurance Company v. Price*, 248 F. Supp. 3d 192 (D.D.C. 2017)

Statement of the Case

This case arises from the FDIC's declaration[1] (FIL 32), that a long-standing bank industry practice—*i.e.*, charging re-presentment NSF fees for the same unpaid transaction without providing certain disclosures and alerts—is now a UDAP violation. The FDIC defined this new deceptive trade practice through so-called "supervisory guidance" issued to its regulated financial institutions, including Plaintiffs.

However, FIL 32 is not mere "supervisory guidance." Rather, by its own express terms, FIL 32 creates expectations for the conduct of regulated financial institutions and sets forth consequences if those expectations are not met. Because FIL 32 "appears on its face to be binding," it constitutes final agency action. Because FIL 32 is final agency action, the FDIC was required to follow the procedural requirements set forth in the APA, which the FDIC failed to do.

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[1] On August 18, 2022, the FDIC issued Financial Institutions Letter 40-2022: Supervisory Guidance on Multiple Re-Presentment NSF Fees ("FIL 40"). (App. 49–52 R. Doc. 13-1.) On its website, the FDIC characterizes FIL 32 as "updating and reissuing" FIL 40 to "clarify" and "reflect its current supervisory approach." (App. 8 ¶ 3 R. Doc. 13, at ¶ 3.) In this litigation, the FDIC has taken the position that FIL 32 "revised and replaced FIL 40" and is "the operative guidance document." (App. 8 ¶ 5 R. Doc. 13, at ¶ 5.)

In addition, the FDIC exceeded its statutory authority when it issued FIL 32 because the FDIC does not have authority to define certain practices as "deceptive"—including re-presentment NSF fees.

I. Factual Background

On June 16, 2023, the FDIC issued FIL 32. (App. 54–57 R. Doc. 13, at 2–5 Add. 10–13.) FIL 32 states that the FDIC "expects" certain conduct:

> The Federal Deposit Insurance Corporation (FDIC) is issuing guidance to ensure that supervised institutions are aware of the consumer compliance risks associated with assessing multiple nonsufficient funds (NSF) fees arising from the re-presentment of the same unpaid transaction. **Additionally, the FDIC is sharing its supervisory approach where a violation of law is identified and full corrective action is *expected*.**

(App. 54. R. Doc. 13-2, at 2 Add. 10 (emphasis added).) FIL 32 "expects" regulated financial institutions to provide disclosures that "adequately advise customers" of re-presentment NSF fees. (App. 54–56 R. Doc. 13-2, at 2, 4 Add. 10, 12.) If disclosures are inadequate, then they are considered "material" misrepresentations and omissions that are "deceptive pursuant to Section 5 of the FTC Act," and may also be "unfair" pursuant to the Act. (App. 54–55 R. Doc. 13-2, at 2–3 Add. 10–11.) Section 5 of the FTC Act does not address NSF fees at all. Section 5 merely provides, in relevant part:

> Unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are hereby declared unlawful.[2]

15 U.S.C. § 45(a).

FIL 32 defines inadequate disclosures. First, disclosures are inadequate if they do not "[c]learly and conspicuously disclos[e] the amount of NSF fees to customers and when and how such fees will be imposed." (App. 56 R. Doc. 13-2, at 4 Add. 12.) Second, disclosures are inadequate if they do not provide "[i]nformation on whether multiple fees may be assessed in connection with a single transaction when a merchant submits the same transaction multiple times for payment." (*Id.*) Third, disclosures are inadequate if they do not state the "frequency with which such fees can be assessed." (*Id.*) Fourth, disclosures are inadequate if they do not identify the "maximum number of fees that can be assessed in connection with a single transaction." (*Id.*)

FIL 32 also defines inadequate alert practices. (*Id.*) FIL 32 states that "alert practices related to NSF transactions and the timing of fees" are inadequate if they

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[2] The deception must be material. *Federal Trade Commission Policy Statement on Deception*, 103 F.T.C. 174 (1984) (appended to *Cliffdale Assocs., Inc.*, 103 F.T.C. 110 (1984)); *see also Fed. Trade Comm'n v. LeadClick Media, LLC*, 838 F.3d 158, 168 (2d Cir. 2016) ("To prove a deceptive act or practice under § 5(a)(1), the FTC must show three elements: [1] a representation, omission, or practice, that [2] is likely to mislead consumers acting reasonably under the circumstances, and [3], the representation, omission, or practice is material." (internal quotation marks omitted)).

do not "ensure customers are provided with an ability to effectively avoid multiple fees for re-presented items." (*Id.*) FIL 32 provides that alert practices are inadequate if they do not ensure that customers can "restor[e] their account balance to a sufficient amount before subsequent NSF fees are assessed." (*Id.*) FIL 32 describes these inadequate disclosures and alert practices as "re-presentment NSF fee issues." (*Id.*)

FIL 32 "expects" regulated financial institutions to take corrective action regarding "re-presentment NSF fee issues":

> If institutions self-identify re-presentment NSF fee issues, the FDIC ***expects*** supervised financial institutions to:
>
> - Take full corrective action, including providing restitution to harmed customers, consistent with the restitution approach described in this guidance;
> - Promptly correct NSF fee disclosures and account agreements for both existing and new customers, including providing revised disclosures and agreements to all customers;[3]
> - Consider whether additional risk mitigation practices are needed to reduce potential unfairness risks; and
> - Monitor ongoing activities and customer feedback to ensure full and lasting corrective action.

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[3] FIL 32 provides that "[w]hile revising disclosures may address the risk of deception, doing so may not fully address the unfairness risks." (App. 55 R. Doc. 13-2, at 3 Add. 11.)

(*Id.* (emphasis added).)

FIL 32 states that examiners will apply FIL 32 during examinations and enforcement proceedings. Examiners "***will focus*** on identifying re-presentment related issues and ensuring correction of deficiencies and remediation to harmed customers, when appropriate." (*Id.* (emphasis added).) FIL 32 also provides that "[w]hen exercising supervisory and enforcement responsibilities regarding multiple re-presentment NSF fee practices, the FDIC ***will take*** appropriate action to address consumer harm and violations of law." (*Id.* (emphasis added).) Similarly, during the FDIC's review of "compliance management systems," examiners will cite UDAP violations unless such violations—as defined by FIL 32—"have been self-identified and fully corrected prior to the start of a consumer compliance examination." (*Id.*) In addition, examiners must "determine[e] the scope of any restitution" by "consider[ing] the likelihood of substantial consumer harm from the practice . . . ." (App. 56–57 R. Doc. 13-2, at 4–5 Add. 12–13.)

The FDIC concludes by stating that failure to comply will result in penalties:

> If examiners identify violations of law due to re-presentment NSF fee practices that have not been self-identified and fully corrected prior to a consumer compliance examination, the FDIC ***will evaluate appropriate supervisory or enforcement actions, including civil money penalties and restitution***, where appropriate.

(App. 57 R. Doc. 13-2, at 5 Add. 13 (emphasis added).)

The FDIC issued FIL 32 without notice and comment rulemaking. Instead, it was issued informally as "supervisory guidance."

A. Amended Complaint

On October 6, 2023, Plaintiffs filed the Amended Complaint, asserting four claims against the FDIC and its chairman. (App. 44–46 ¶¶ 127–144 R. Doc. 13, at ¶¶ 127–144.) First, FIL 32 violates the APA because the notice and comment requirements were not followed. (App. 44 ¶¶ 127–131 R. Doc. 13, at ¶¶ 127–131.) Second, FIL 32 violates the APA because it constitutes arbitrary and capricious agency action. (App. 45 ¶¶ 132–135 R. Doc. 13, at ¶¶ 132–135.) Third, FIL 32 violates the APA because it exceeds the FDIC's statutory authority. (App. 45–46 ¶¶ 136–141 R. Doc. 13, at ¶¶ 136–141.) Lastly, FIL 32 violates the APA because it is contrary to law. (App. 46 ¶¶ 142–144 R. Doc. 13, at ¶¶ 142–144.) The FDIC moved to dismiss.

B. Court's Dismissal Order

On April 8, 2024, the District Court dismissed the Amended Complaint. (App. 199–206 R. Doc. 34 Add. 1–8.) The District Court determined that Plaintiffs lack standing to challenge FIL 32. (App. 202–04 R. Doc. 34, at 4–6 Add. 4–6.) First, the District Court concluded that Plaintiffs' injuries are not redressable because "Plaintiffs remain obligated not to engage in deceptive and unfair practices and acts." (App. 203–04 R. Doc. 34, at 5–6 Add. 5–6.) In other words, the District Court

held that Plaintiffs would be subject to the mandates of FIL 32 even in the absence of FIL 32.

Second, the District Court determined that FIL 32 is not final agency action. (App. 205–06 R. Doc. 34, at 7–8 Add. 7–8.) The District Court relied on the FDIC's position that FIL 32 is "supervisory guidance," and on its own conclusion that "there are no legal consequences that flow from FIL 32 . . . ." (App. 205 R. Doc. 34, at 7 Add. 7.)

Plaintiffs appeal.

Summary of Argument

Plaintiffs have standing to challenge FIL 32. The District Court erred in concluding that FIL 32 is not a final agency action under the APA, and that Plaintiffs' alleged substantive injuries are not redressable. This Court should reverse the District Court's decision and vacate FIL 32.[4]

Argument

I. Standard of Review.

This Court reviews a dismissal based on standing de novo. *Nat'l Fed'n of Blind of Missouri v. Cross*, 184 F.3d 973, 979 (8th Cir. 1999). This Court also

[4] *National Council for Adoption v. Blinken*, 4 F.4th 106, 109–115 (D.C. Cir. 2021) (reversing District Court's decision that an answer to a frequently asked question was guidance, finding that the FAQ publication was a legislative rule, and ordering that the District Court vacate the rule based on failure to comply with the APA).

reviews "de novo whether an agency action is a final agency action for purposes of the APA." *Sisseton-Wahpeton Oyate of Lake Traverse Reservation v. United States Corps of Engineers*, 888 F.3d 906, 914 (8th Cir. 2018).

II. Plaintiffs Have Standing.

A litigant must have "Article III standing to bring his claim." *Iowa League of Cities v. E.P.A.*, 711 F.3d 844, 869 (8th Cir. 2013). A plaintiff has standing if it can demonstrate an (1) injury in fact, (2) a causal connection between that injury and the challenged conduct, and (3) the likelihood that a favorable decision by the court will redress the alleged injury. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992)). "The party seeking judicial review bears the burden of persuasion and must support each element with the manner and degree of evidence required at the successive stages of litigation." *Iowa League of Cities*, 711 F.3d at 869 (internal quotation marks omitted). At the motion to dismiss stage, "general factual allegations of injury" are sufficient. *Id.*

Courts must analyze standing as to both procedural and substantive challenges. *Iowa League of Cities*, 711 F.3d at 870. In procedural challenges, a party suffers a "concrete" injury when an agency issues a final rule without following the notice and comment procedures outlined in the APA. *See id.* at 870–71; *Sierra Club v. E.P.A.*, 699 F.3d 530, 533 (D.C. Cir. 2012) ("Having shown its members' redressable concrete interest, Sierra Club can assert violation of the APA's notice-

and-comment requirements, as those procedures are plainly designed to protect the sort of interest alleged."); *Chrysler Corp. v. Brown*, 441 U.S. 281, 316 (1979) ("In enacting the APA, Congress made a judgment that notions of fairness and informed administrative decisionmaking require that agency decisions be made only after affording interested persons notice and an opportunity to comment.").

For substantive challenges, a sufficient injury exists when a party suffers "concrete" and "actual or imminent" harm. *Iowa League of Cities*, 711 F.3d at 870. In this context, an injury in fact arises where a regulated entity is out of compliance with agency action and needs to "imminently rectify" its position, which will be "costly." *Id.*

The District Court found that Plaintiffs lacked standing under the third element—redressability. (App. 203–04 R. Doc. 34, at 5–6 Add. 5–6.) Specifically, the District Court held that Plaintiffs' procedural injuries are not redressable because FIL 32 is not final agency action under the APA. (App. 205–06 R. Doc. 34, at 7–8 Add. 7–8.) The District Court also held that Plaintiffs' substantive injuries are not redressable because Plaintiffs have a pre-existing obligation to not engage in UDAP violations. (App. 203–04 R. Doc. 34, at 5–6 Add. 5–6.)

A. FIL 32 is Final Agency Action.

The District Court determined that Plaintiffs' alleged procedural injuries are not redressable because FIL 32 is not final agency action. (App. 205–06 R. Doc. 34, at 7–8 Add. 7–8.) The District Court held as follows:

> The FDIC's policies provide that FIL 32 is not final agency action to which the APA applies, providing that "supervisory guidance does not have the force and effect of law" but rather merely "outlines the FDIC's supervisory expectations or priorities and articulates the FDIC's general views regarding appropriate practices for a given subject area." Statement Clarifying the Role of Supervisory Guidance, 12 C.F.R. § Pt. 302, App. A (Apr. 1, 2021). As discussed above, there are no legal consequences that flow from FIL 32—the FDIC will not institute any enforcement actions based on FIL 32, but rather will take action for violations of an institution's statutory obligations.
>
> Nor have Plaintiffs demonstrated that the FDIC applies FIL 32 in a way to indicate that it is binding. FIL 32 describes certain conduct that could, depending on the circumstances, violate the FTCA. FIL 32 does not state that charging multiple representment fees for the same transaction will violate the FTCA, but rather that doing so and failing to adequately disclose the practice may be a violation of the statute. Plaintiffs cannot point to any FDIC examination or decision that relies on FIL 32 as the basis for the agency's action. FIL 32 is not a final action to which the APA applies. Plaintiffs have not established that their alleged injury will be redressed by the relief they request, and they therefore lack standing.

(*Id.*)

1. Law

The APA provides a right to judicial review of "final agency action for which there is no other adequate remedy in a court." 5 U.S.C. § 704. For agency action to be "final," two conditions must be satisfied. *Bennett v Spear*, 520 U.S. 154, 177–78 (1997). First, "the action must mark the consummation of the agency's decisionmaking process—it must not be of a merely tentative or interlocutory nature." *Id.* (internal quotation marks omitted). Second, "the action must be one by which rights or obligations have been determined, or from which legal consequences will flow." *Id.* (internal quotation marks omitted). The central question on finality is "whether an agency announcement is binding on regulated entities or the agency." *Iowa League of Cities*, 711 F.3d at 862. "'[A]n agency pronouncement will be considered binding as a practical matter if it either appears on its face to be binding or is applied by the agency in a way that indicates it is binding.'" *Id.* at 862 (finding two letters to a Senator were binding in part because they "reflect[ed] a binding policy with respect to bacteria mixing zones" and "blending"); *Appalachian Power Co. v. E.P.A.*, 208 F.3d 1015, 1021–23 (D.C. Cir. 2000) (finding alleged guidance document "binding" in part because it "require[d]" an "adequate" monitoring system); *Gen. Elec. Co. v. EPA*, 290 F.3d 377, 383, 385 (D.C. Cir. 2002) (finding guidance document binding because "[o]n its face the Guidance Document imposes binding obligations upon applicants to submit applications that conform to the

Document . . .” including consideration of factors that “must be addressed”); *R.J. Reynolds Vapor Co. v. Food & Drug Admin.*, 65 F.4th 182, 193 (5th Cir. 2023) (finding memorandum binding on its face by mandating that permit applications contain “the *necessary* type of studies”); *Am. Hosp. Ass’n v. Becerra*, 4:23-CV-01110-P, 2024 WL 3075865, at *9 (N.D. Tex. June 20, 2024) (finding alleged guidance to be binding where it reminded covered entities to “comply with the HIPAA Rules” and then stated that they “must meet” certain conditions to comply with HIPAA that were previously unaddressed).

2. FIL 32 Appears on its Face to be Binding.

FIL 32 is a final agency action because it appears binding on its face. A document is binding on its face when it “speaks in mandatory terms.” *Iowa League of Cities*, 711 F.3d at 863–64 (finding that two letters sent by the EPA to a Senator were “binding”); *R.J. Reynolds Vapor*, 65 F.4th at 193 (finding memorandum binding on its face because of mandatory language); *Gen. Elec.*, 290 F.3d at 383 (“[T]he mandatory language of a document alone can be sufficient to render it binding[.]”); *Appalachian Power*, 208 F.3d at 1023 (finding a document binding on its face when it “[i]t commands, it requires, it orders, it dictates” from beginning to end).

(a) FIL 32 is binding on its face because it speaks in mandatory terms.

(1) First, FIL 32 identifies "re-presentment NSF fee issues."

FIL 32 identifies "re-presentment NSF fee issues." (App. 56 R. Doc. 13-2, at 4 Add. 12.) These "issues" include inadequate disclosures, which are defined by FIL 32 as follows: (1) disclosures that do not "[c]learly and conspicuously disclos[e] the amount of NSF fees to customers and when and how such fees will be imposed"; (2) disclosures that do not provide "[i]nformation on whether multiple fees may be assessed in connection with a single transaction when a merchant submits the same transaction multiple times for payment"; (3) disclosures that do not state the "frequency with which such fees can be assessed"; and (4) disclosures that do not identify the "maximum number of fees that can be assessed in connection with a single transaction." (*Id.*) FIL 32 provides that inadequate disclosures are "material." (App. 55 R. Doc. 13-2, at 3 Add. 11.)

"[R]e-presentment NSF fee issues" also include inadequate alert practices, which FIL 32 defines as alert practices that do not "*ensure* customers are provided with an ability to effectively avoid multiple fees for re-presented items, including restoring their account balance to a sufficient amount before subsequent NSF fees are assessed." (*Id.* (emphasis added).)

(2) Second, FIL 32 "expects" regulated financial institutions to correct the "re-presentment NSF fee issues."

FIL 32 "expects" regulated financial institutions to take full corrective action when "self-identify[ing] re-presentment NSF fee issues." (*Id.*) The introductory paragraph of FIL 32 states that "the FDIC is sharing its supervisory approach where a violation of law [as defined in FIL 32] is identified and full corrective action is ***expected***." (App. 54 R. Doc. 13-2, at 2 Add. 10 (emphasis added).) Indeed, FIL 32 "expects" corrective action:

> If institutions self-identify re-presentment NSF fee issues, the FDIC ***expects*** supervised financial institutions to:
>
> • Take full corrective action, including providing restitution to harmed customers, consistent with the restitution approach described in this guidance;
>
> • Promptly correct NSF fee disclosures and account agreements for both existing and new customers, including providing revised disclosures and agreements to all customers;[5]
>
> • Consider whether additional risk mitigation practices are needed to reduce potential unfairness risks; and
>
> • Monitor ongoing activities and customer feedback to ensure full and lasting corrective action.

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[5] As set forth above, FIL 32 provides that "[w]hile revising disclosures may address the risk of deception, doing so may not fully address the unfairness risks." (App. 55 R. Doc. 13-2, at 3 Add. 11.)

(App. 56 R. Doc. 13-2, at 4 Add. 12 (emphasis added).)

Courts routinely interpret the word "expect" as a mandatory term. *See, e.g.*, *City of Carter Lake v. Aetna Cas. & Sur. Co.*, 604 F.2d 1052, 1058–59 (8th Cir. 1979) (involving the interpretation of an insurance contract and holding that "the word 'expected' denotes that the actor knew or should have known that there was a substantial probability that certain consequences will result from his actions"); *W. Nat. Gas Co. v. Cities Serv. Gas Co.*, 223 A.2d 379, 383 (Del. 1966) (explaining that the word "expect" can mean to "consider (a person) obligated or in duty bound, as in the expression 'England expects every man to do his duty" and can mean to "require"); *Wattjes v. Faeth*, 40 N.E.2d 521, 524 (Ill. 1942) (interpreting a will and explaining that "[t]he words 'I expect all my real estate to be sold' are anticipatory and thus a directive); *Sillman v. Spokane Sav. & Loan Soc.*, 175 P. 296, 297 (Wash. 1918) (holding that "expect" means "demand"); *see also Ciba-Geigy Corp. v. U.S.E.P.A.*, 801 F.2d 430, 436 (D.C. Cir. 1986) ("Once the agency publicly articulates an unequivocal position, however, and expects regulated entities to alter their primary conduct to conform to that position, the agency has voluntarily relinquished the benefit of postponed judicial review.").[6]

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[6] According to Merriam-Webster, "expect" is defined as (1) "to consider probably or certain," (2) "to consider reasonable, due, or necessary," and (3) "to consider bound in duty or obligated." *Expect*, Merriam-Webster, https://www.merriam-webster.com/dictionary/expect (last visited July 23, 2024).

Moreover, FIL 32 provides that the FDIC "will" identify, evaluate, and take appropriate action in response to re-presentment NSF fees issues. (App. 56 R. Doc. 13-2, at 4 Add. 12.) The word "will" also is a mandatory term. *See, e.g.*, *Burgin v. Nix*, 899 F.2d 733, 735 (8th Cir. 1990) (noting that policy language providing that certain steps "will be taken" is "mandatory language"); *Am. Bus Ass'n v. U. S.*, 627 F.2d 525, 532 (D.C. Cir. 1980) (finding statement to be binding in part because it repeatedly stated that "the Commission *will*" act and was therefore "couched in terms of command").

(3) Third, FIL 32 threatens penalties for failing to correct the "re-presentment NSF fee issues."

FIL 32 states that penalties will be enforced for failure to comply with the "expect[ations]." FIL 32 warns that if regulated financial institutions do not correct the "issues," they will suffer legal consequences:

> If examiners identify violations of law due to re-presentment NSF fee practices that have not been self-identified and fully corrected prior to a consumer compliance examination, the FDIC ***will evaluate appropriate supervisory or enforcement actions, including civil money penalties and restitution***, where appropriate.

(App. 57 R. Doc. 13-2, at 5 Add. 13 (emphasis added).)

(b) FIL 32 Appears on its Face to Bind FDIC Examiners.

An agency document is considered binding if it has a "binding effect on regulated entities." *Iowa League of Cities*, 711 F.3d at 863; *see also Texas v. Equal*

Employment Opportunity Comm'n, 933 F.3d 433, 442 (5th Cir. 2019) ("[A]ctions that retract an agency's discretion to adopt a different view of the law are binding."); *Gen. Elec.*, 290 F.3d at 381 ("We conclude below that the Guidance Document should not have been issued without public notice and an opportunity for comment because the Document purports on its face to bind both applicants and the Agency."). This includes documents reflecting the agency's position upon which the agency will insist or base enforcement actions. *Iowa League of Cities*, 711 F.3d at 863. Importantly, the FDIC's designation of FIL 32 as "supervisory guidance" is not dispositive. *See, e.g.*, *id.* at 862 ("To place any great weight on [an agency's own characterization of the action or decision to publish the action in the Federal Register] potentially could permit an agency to disguise its promulgations through superficial formality, regardless of the brute force of reality."); *Am. Hosp. Ass'n*, 2024 WL 3075865, at *10 ("It's also worth noting that the moniker 'guidance document' changes nothing.").

Here, FIL 32 expressly states the FDIC's position:

- "[T]he FDIC is sharing its supervisory approach where a violation of law is identified and ***full corrective action is expected***."
- "The FDIC found that if this information is not disclosed clearly and conspicuously to customers, the material omission of this information ***is considered to be deceptive*** pursuant to Section 5 of the FTC Act."

- "In a number of consumer compliance examinations, the ***FDIC determined*** that if a financial institution assesses multiple NSF fees arising from the same transaction, but disclosures do not adequately advise customers of this practice, the misrepresentation and omission of this information from the institution's disclosures ***is material***."

(App. 54–55 R. Doc. 13-2, at 2–3 Add. 10–11; (emphases added).) These statements make clear that charging re-presentment NSF fees without the now-expected disclosures and alerts—as defined by FIL 32—are UDAP violations.

Moreover, the FDIC makes clear that FIL 32 will be applied in future compliance examinations:

- "***When exercising supervisory and enforcement responsibilities*** regarding multiple re-presentment NSF fee practices, the ***FDIC will take appropriate action*** to address consumer harm and violations of law."

- "The FDIC's ***supervisory response will focus on identifying re-presentment related issues and ensuring correction*** of deficiencies and remediation to harmed customers, when appropriate."

- "In addition, in determining the scope of any restitution requested, ***the FDIC will consider*** the likelihood of substantial consumer harm from the practice as well as an institution's record keeping practices and any challenges an institution may have with retrieving, reviewing, and analyzing transaction data or other information about the frequency and timing of representment fees."

- "If examiners identify violations of law due to re-presentment NSF fee practices that have not been self-identified and fully corrected prior to a consumer compliance examination, ***the FDIC will evaluate***

> appropriate supervisory or enforcement actions, including civil money penalties and restitution, where appropriate."

(App. 56–57 R. Doc. 13-2, at 4-5 Add. 12–13 (emphases added).)

(c) FIL 32 appears binding on its face because it creates safe harbors.

FIL 32 appears binding on its face because it creates safe harbors. When an agency's action creates a safe harbor, it demonstrates that legal consequences flow from that action. In *Texas v. EEOC*, the Fifth Circuit held that alleged "Guidance" was final agency action because it created safe harbors by informing "employers how to avoid Title VII disparate-impact liability" and by providing "best practices." 933 F.3d at 442–44 ("That the agency's action . . . creates safe harbors demonstrates that legal consequences flow from it, even when the agency lacks authority to promulgate substantive regulations implementing the statute it administers.").

Here, FIL 32 creates safe harbors. Like the alleged guidance document in *Texas v. EEOC*—which created a safe harbor by setting forth "best practices" to avoid liability—FIL 32 creates safe harbors by outlining five specific "risk-mitigating activities" to "avoid potential violations of law regarding multiple re-presentment NSF fee practices." (App. 55–56 R. Doc. 13-2, at 3–4 Add. 11–12.) FIL 32 also provides that regulated financial institutions can avoid liability by self-identifying re-presentment NSF fee issues and fully correcting them prior to the start of a consumer compliance examination. (App. 56 R. Doc. 13-2, at 4 Add. 12.) If they

do not do so, "the FDIC will evaluate appropriate supervisory or enforcement actions, including civil money penalties and restitution, where appropriate." (App. 57 R. Doc. 13-2, at 5 Add. 13.) FIL 32 further creates a safe harbor by accepting a two-year lookback period "where institutions have been unable to reasonably access accurate ACH data for re-presented transactions." (App. 57 n.4 R. Doc. 13-2, at 5 n.4 Add. 13 n.4.) These safe harbors confirm that FIL 32 imposes legal consequences.

(d) FIL 32 appears binding on its face because it expands the scope of UDAP violations under the FTC Act.

FIL 32 is final agency action because it purports to define specific conduct as a new type of deceptive trade practice. "Expanding the footprint of a regulation by imposing new requirements, rather than simply interpreting the legal norms Congress or the agency itself has previously created, is the hallmark of legislative rules." *Iowa League of Cities*, 711 F.3d at 873. It is strong evidence that a guidance document is actually a legislative rule when it seeks to prohibit certain conduct that has never been regulated before. *See, e.g.*, *Children's Health Care v. Centers for Medicare & Medicaid Services*, 900 F.3d 1022, 1026 (8th Cir. 2018) (finding online frequently asked questions by CMS to be final agency action where the plain language "impos[ed] new reporting requirements for private insurance payments" and thus "expanded the footprint" of the governing statute); *Nat'l Council for Adoption v. Blinken*, 4 F.4th 106, 114 (D.C. Cir. 2021) (finding alleged guidance to

be a legislative rule in part because the "State had never before announced a categorical prohibition on the two types of soft referrals the Guidance prohibits").

Section 5 of the FTC Act does not address NSF fees. Therefore, FIL 32's creation of new requirements (and a determination that the requirements are material) is an unlawful expansion of the FTC Act.

(e) The only pragmatic interpretation of FIL 32 is that it is final agency action.

Courts analyze whether agency action is final using a "flexible" and "pragmatic" approach. *Abbott Lab'ys v. Gardner*, 387 U.S. 136, 149–50 (1967) *abrogated on other grounds by Califano v. Sanders*, 430 U.S. 99 (1977); *see also U.S. Army Corps of Engineers v. Hawkes Co., Inc.*, 578 U.S. 590, 599 (2016) (noting the "pragmatic approach . . . to finality" (internal quotation marks omitted)). The pragmatic approach analyzes "whether the agency's position is definitive and whether it has a direct and immediate . . . effect on the day-to-day business of the parties challenging the action." *Ciba-Geigy Corp.*, 801 F.2d at 436 (internal quotation marks omitted).

In *Frozen Food Express v. United States*, the Supreme Court considered the finality of an order issued by the Interstate Commerce Commission ("Commission"). 351 U.S. 40, 41 (1956). The Commission instituted an investigation and then ordered that certain commodities were not "agricultural" under the applicable statute. *Id.* The Court held that the order was final agency action because it had "an immediate and

practical impact on carriers who are transporting the commodities, and on shippers as well." *Id.* at 43–44. The Court highlighted that the order "warns every carrier, who does not have authority from the Commission to transport those commodities, that it does so at the risk of incurring criminal penalties" and "touches vital interests of carriers and shippers alike and sets the standard for shaping the manner in which an important segment of the trucking business will be done." *Id.* at 44. The Court explained that the Commission's order was "in substance a 'declaratory' one." *Id.*

As in *Frozen Foods*, the FDIC has declared that charging re-presentment NSF fees without certain disclosures and alerts are UDAP violations. FIL 32 warns every regulated bank that charges re-presentment NSF fees that it does so at the risk of enforcement actions. It also warns every regulated bank that if the bank does not self-identify and fully correct re-presentment NSF fee practices, it runs the risk of incurring "civil money penalties and restitution." (App. 57 R. Doc. 13-2, at 5 Add. 13.) This declaration has an immediate and practical impact on banks who charge re-presentment NSF fees.

In the Amended Complaint, Plaintiffs allege that FIL 32 has had an effect on their day-to-day operations. Minnesota Bankers Association "has expended significant resources to communicate and meet with its member institutions" regarding FIL 32. (App. 13 ¶ 29 R. Doc. 13, at ¶ 29.) These activities have diverted Minnesota Bankers Association's "resources away from its growth-focused

educational and advocacy initiatives." (*Id.* at ¶¶ 28–30.) Lake Central Bank asserts that it has expended resources to notify its customers about the mandates of FIL 32 and that it risks enforcement actions related to re-presentment NSF fees. (App. 13–14, ¶¶ 32–33 R. Doc. 13, ¶¶ 32–33.)

(f) According to the available public evidence, re-presentment NSF fees are among the FDIC's "most frequently cited" UDAP violations.

The District Court reasoned that Plaintiffs had not "demonstrated that the FDIC applies FIL 32 in a way to indicate that it is binding." (App. 205–06 R. Doc. 34, at 7–8 Add. 7–8.) However, the Supreme Court has "long held" that a party challenging whether agency action is final does not need to wait for enforcement to challenge the action. *Hawkes*, 578 U.S. at 600; *see also Sierra Club v. U.S. Army Corps of Eng'rs*, 446 F.3d 808, 813 (8th Cir. 2006) ("[I]f the agency has issued 'a definitive statement of its position, determining the rights and obligations of the parties, that action is final for purposes of judicial review despite the possibility of further proceedings in the agency to resolve subsidiary issues." (internal quotation marks omitted)); *see also Frozen Food Exp.*, 351 U.S. at 44–45; *Abbott Lab'ys*, 387 U.S. at 155.

In *Hawkes*, the Supreme Court held that the agency's action was final even where "no administrative or criminal proceeding can be brought for failure to conform to the approved [Jurisdictional Determination] itself." 578 U.S. at 600. The

Court explained that regulated entities are not expected to assume risks while waiting for the federal agency to "'drop the hammer' in order to have their day in court." *Id.* As in *Hawkes*, Plaintiffs need not wait for the FDIC to cite FIL 32 in a compliance examination or enforcement action to have their day in court.

Moreover, it is not possible for Plaintiffs to identify compliance examinations in which the FDIC is enforcing FIL 32 because "[t]he FDIC's regulations generally prohibit banks from disclosing the results of these examinations or making representations as to the FDIC's findings." *Intervest Mortg. Inv. Co. v. Skidmore*, 632 F. Supp. 2d 1005, 1006 (E.D. Cal. 2009); *see also* 12 C.F.R. Part 309[7]. Indeed, the FDIC's publicly available Consumer Compliance Examination Manual[8] provides a template examination report, which includes the following language on the first page:

> THIS REPORT OF EXMAINATION IS STRICTLY CONFIDENTIAL.
>
> . . . .

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[7] FDIC, Banker Resource Center, https://www.fdic.gov/resources/bankers/exam-processes-and-procedures/ (last visited July 24, 2024) (explaining that 12 C.F.R. Part 309 "outlines the confidentiality of examination findings and establishes that the information may not be disclosed to non-related third parties without prior regulatory approval")

[8] FDIC, *Consumer Compliance Examination Manual* (last updated June 18, 2024), https://www.fdic.gov/resources/supervision-and-examinations/consumer-compliance-examination-manual/documents/compliance-examination-manual.pdf.

> This copy of the report is the property of the Federal Deposit Insurance Corporation and is furnished to the financial institution examined for its confidential use. Under no circumstances shall the financial institution or any of its directors, officers, or employees disclose or make public in any manner the report or any portion thereof.

Consumer Compliance Examination Manual, FDIC (last updated June 18, 2024).

Because compliance examination reports are "strictly confidential," Plaintiffs put forth the best available evidence of the FDIC enforcing FIL 32. First, FIL 32 itself provides:

> Deceptive Practices: In a number of consumer compliance examinations, the FDIC determined that if a financial institution assesses multiple NSF fees arising from the same transaction, but disclosures do not adequately advise customers of this practice, the misrepresentation and omission of this information from the institution's disclosures is material. The FDIC found that if this information is not disclosed clearly and conspicuously to customers, the material omission of this information is considered to be deceptive pursuant to Section 5 of the FTC Act.

(App. 54 R. Doc. 13, at 2 Add. 10.) In addition, exhibits C and D to the Amended Complaint show that the FDIC is citing re-presentment NSF fees as UDAP violations. (App. 58–100 R. Docs. 13-03, 13-04.) Specifically, the FDIC is claiming that re-presentment fees pose "heightened risk of violations of Section 5 of the FTC Act," (App. 68 R. Doc. 13-3, at 11 [Exhibit C].), so much so that re-presentment fees are among the "most frequently cited violation[s]" cited by the FDIC during

examinations, (App. 85 R. Doc. 13-4, at 6 [Exhibit D].). In 2022 alone, the FDIC cited 172 total violations of Section 5 of the FTC Act, (App. 86 R. Doc. 13-4, at 7), the most common of which was the practice of charging re-presentment fees, (App. 85 R. Doc. 13-4, at 6), presumably in violation of FIL 32.

3. Because FIL 32 is Final Agency Action, Plaintiffs Have Suffered Procedural Injury that is Redressable.

In *Iowa League of Cities*, the Court thoroughly explained procedural redressability when a regulated entity is subject to final agency action without procedural protections. The Court's analysis is instructive here:

> [T]he violation of a procedural right can constitute an injury in fact so long as the procedures in question are designed to protect some threatened concrete interest of the petitioner that is the ultimate basis of [its] standing. The League's members have a concrete interest not only in being able to meet their regulatory responsibilities but in avoiding regulatory obligations above and beyond those that can be statutorily imposed upon them. Notice and comment procedures for EPA rulemaking under the CWA were undoubtedly designed to protect the concrete interests of such regulated entities by ensuring that they are treated with fairness and transparency after due consideration and industry participation. Thus, the League has established an injury in fact related to the EPA's purported procedural deficiencies.
>
> Causation and redressability, and therefore standing to assert this procedural challenge, follow from these conclusions. Where a challenger is the subject of agency action, there is ordinarily little question that the action . . . has caused him injury, and that a judgment preventing . . . the action will redress it.

711 F.3d at 870–71 (cleaned up).

Notably, "redressability in this context does not require petitioners to show that the agency would alter its rules upon following the proper procedures." *Id.* at 871. Rather, a party shows redressability for procedural claims where notice and comment procedures would prompt the agency "to reconsider the decision that allegedly harmed" the party. *Id.*; *see also Massachusetts v. EPA*, 549 U.S. 497, 518 (2007) (explaining that if a litigant "is vested with a procedural right, that litigant has standing if there is some possibility that the requested relief will prompt the injury-causing party to reconsider the decision that allegedly harmed the litigant"); *Sierra Club*, 699 F.3d at 533 ("Having shown its members' redressable concrete interest, Sierra Club can assert violation of the APA's notice-and-comment requirements, as those procedures are plainly designed to protect the sort of interest alleged.").

B. Plaintiffs' Alleged Substantive Injuries Are Redressable.

The District Court concluded that Plaintiffs' substantive injuries are not redressable because "Plaintiffs remain obligated not to engage in deceptive and unfair practices and acts." (App. 203–04 R. Doc. 34, at 5–6 Add. 5–6.)

1. Law

At the pleading stage, "[f]or purposes of ruling on a motion to dismiss for want of standing, both the trial and reviewing courts must accept as true all material allegations of the complaint, and must construe the complaint in favor of the

complaining party." *National Wildlife Federation v. Agricultural Stabilization and Conservation Service*, 901 F.2d 673, 677 (8th Cir. 1990) (internal quotation marks and citation omitted); *see also Lujan*, 504 U.S. at 561. On a motion to dismiss, "general factual allegations of injury resulting from the defendant's conduct may suffice" and courts "presum[e] that general allegations embrace those specific facts that are necessary to support the claim." *Lujan*, 504 U.S. at 561. Where a party alleges direct harm from government action and then challenges the legality of that action, "there is ordinarily little question that the action . . . has caused him injury, and that a judgment preventing . . . the action will redress it." *Id.* at 561–62.

Iowa League of Cities is instructive. In that case, this Court held that an association's members had standing to challenge two letters written by the Environmental Protective Bureau to a Senator. *Iowa League of Cities*, 711 F.3d at 870–72. The members had injuries in fact because they were out of compliance with the letters and thus needed to "imminently rectify" their positions, which "w[ould] be costly." *Id.* The members established causation because their injuries arose from the letters, which were binding. *Id.* And plaintiff's injuries were redressable because "[i]f the rules were vacated as substantively unlawful, it is indeed likely that the members' injuries would be redressed." *Id.*

2. Allegations

As in *Iowa League of Cities*, Minnesota Bankers Association asserts that the Association and its members, including Lake Central Bank, have faced increased compliance costs responding to FIL 32. (App. 13 ¶¶ 28–29 R. Doc. 13, at ¶¶ 28–29.) This has frustrated Plaintiff Minnesota Bankers Association's purpose by diverting resources away from its growth-focused educational and advocacy initiatives. (*Id.* ¶ 30.) Similarly, Lake Central Bank asserts that it has expended resources to notify its customers about the mandates of FIL 32. (*Id.* ¶ 32.) Lake Central Bank also asserts that it will have a compliance examination by the FDIC and thus faces the FDIC's enforcement action with respect to standards outlined in FIL 32 regarding re-presentment fees. (App. 14 ¶ 33 R. Doc. 13, at ¶ 33.) Assuming that these alleged injuries are true and that they are caused by FIL 32, these alleged injuries would be redressed if FIL 32 was vacated. *See Ciox Health, LLC v. Azar*, 435 F. Supp. 3d 30, 52 (D.D.C. 2020) (rejecting, when determining redressability, agency's argument that guidance document "works no change in the law" but simply clarifies earlier regulation because that was "a merits argument, and for purposes of standing, the court must assume the merits of [plaintiff]'s claims"). Under *Iowa League of Cities*, Plaintiffs have established redressability for their substantive injuries.

3. Absent FIL 32, There Are No Other Regulations that Address Required Disclosures and Alerts for Re-presentment NSF Fees.

The District Court determined that Plaintiffs' substantive injuries are not redressable because, in the absence of FIL 32, "Plaintiffs remain required to minimize risk and to comply with statutory unfair-and-deceptive-practices prohibitions." (App. 203 R. Doc. 34, at 5 Add. 5.)

First, other than FIL 32, there are no other rules or regulations that establish and require certain material disclosures and alerts regarding re-presentment FSF fees. Congress delegated rulemaking authority to define unfair or deceptive acts or practices to two agencies—the Federal Trade Commission ("FTC") and the Consumer Financial Protection Bureau ("CFPB"). Congress gave the FTC rulemaking authority to define unfair or deceptive acts or practices under 15 U.S.C. § 57a(a)(1). Similarly, Congress delegated "exclusive" rulemaking authority to the CFPB to administer federal consumer financial law, 12 U.S.C. §§ 5512(b)(4), as well as authority to prevent unfair, deceptive, and abusive acts in connection with consumer financial products or services, 12 U.S.C. § 5531(b). Neither agency has issued rules or regulations regarding re-presentment NSF fees.

In contrast, Congress gave the FDIC only *enforcement* authority under 12 U.S.C. §§ 1818(b)(1), (i). Congress has not given the FDIC rulemaking authority to

define unfair or deceptive acts or practices—nor has the FTC delegated its authority to the FDIC under 15 U.S.C. §§ 57a(d)(1), 5512(b)(4), or 5531(b).

Second, Plaintiffs' general duty to avoid deceptive or unfair practices and acts does not support the conclusion that injuries flowing from FIL 32 are not redressable. In *UnitedHealthcare Insurance Company v. Price*, the District of Columbia rejected a very similar argument. 248 F. Supp. 3d 192 (D.D.C. 2017). In *Price*, the court considered whether the plaintiffs had standing to challenge a legislative rule issued by the Centers for Medicare and Medicaid Services ("CMS"). *Id.* at 198. The government argued that plaintiffs' alleged injuries were not redressable because they had "a pre-existing obligation to exercise due diligence." *Id.* at 200–01. But the court noted that there were no other regulations applying the due diligence standard in the way that CMS's legislative rule applied it. *Id.* at 201. Because CMS's legislative rule imposed new obligations, plaintiffs had standing. *Id.*

So too here. The District Court held that Plaintiffs' alleged injuries were not redressable because they have a general pre-existing duty not to engage in UDAP violations. But the District Court did not identify any regulations that address re-presentment NSF fees as UDAP violations. Accordingly, Plaintiffs have standing.

Conclusion

For these reasons, Minnesota Bankers Association and Lake Central Bank respectfully request that the Court reverse the District Court's decision and vacate FIL 32.

Dated: July 26, 2024

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Certificate of Compliance

The undersigned counsel for Minnesota Bankers Association and Lake Central Bank certifies that:

1. This brief complies with the type-volume limitation of Fed. R. App. P. 5(c) because it contains 7,773 words.

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(7)(B)(i) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word in fourteen-point Times New Roman font.

3. This brief and accompanying addendum have been scanned with antivirus software and are virus-free.

Dated: July 26, 2024

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Certificate of Service

I hereby certify that on July 26, 2024, I caused the foregoing to be electronically filed with the Clerk of the Court for the United States Court of Appeals for the Eighth Circuit by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system

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