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MID-SIZE BANK COALITION OF AMERICA

March 5, 2012

Research, Markets & Regulations Division
Bureau of Consumer Financial Protection
1700 G Street, N.W.
Washington, D.C. 20006

Re: **Streamlining Inherited Regulations: Docket No. CFPB-2011-0039**

Dear Bureau of Consumer Financial Protection:

On behalf of the Midsize Bank Coalition of America ("MBCA"), I am writing to provide the MBCA's comments on the above-referenced notice of streamlining project and request for information (the "Request") published by the Bureau of Consumer Financial Protection ("CFPB") on December 5, 2011.[1]

By way of background, the MBCA is a non-partisan financial and economic policy organization comprising the CEOs of mid-size banks doing business in the United States. Founded in 2010, the MBCA, with now 28 members, was formed for the purpose of providing the perspectives of mid-size banks on financial regulatory reform to regulators and legislators.

As a group, the MBCA banks do business through more than 3,800 branches in 41 states, Washington D.C. and three U.S. territories. The MBCA's members' combined assets exceed $450 billion (ranging in size from $7 to $30 billion) and, together, its members employ approximately 77,000 people. Member institutions hold nearly $336 billion in deposits and total loans of more than $260 billion.

The MBCA strongly supports the CFPB's commitment to streamline the consumer financial regulations previously issued by other agencies and republished by the CFPB in December 2011 as interim final rules ("inherited

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1 *Bureau of Consumer Financial Protection: Streamlining Inherited Regulations*, 76 Fed. Reg. 75,826 (Dec. 5, 2011).

regulations”). As noted in the Request, some elements of the inherited regulations are unnecessarily difficult to understand and comply with, or are unnecessarily restrictive or more stringent than justified by the underlying agency objective. Some are disproportionately burdensome for smaller participants, which in certain cases include MBCA members. The MBCA is therefore pleased to provide comments that may assist the CFPB in streamlining the inherited regulations. We focus on issues that are particularly important to MBCA members and our customers, and recognize that large banks and community banks may have different priorities. Below, we offer comments on the specific areas for modification discussed in detail in the Request, as well as suggestions for other priority areas for streamlining and practical measures to facilitate compliance and promote innovation.

I. Specific Revisions to the Inherited Regulations

The MBCA believes that the nine specific revisions to the inherited regulations that the CFPB has identified in the Request as worthy of immediate consideration are indeed important priorities.[2] Among these nine suggested revisions, the MBCA believes the top priority for the CFPB should be creating consistency among definitions across all the inherited regulations. We also support revisions in certain other of the nine specified areas, as discussed further below.[3]

A. Consistent and Sufficient Definitions

The MBCA urges the CFPB to give priority to providing clear and consistent definitions of key terms in the consumer financial regulations.

Precise and consistent definitions are critical to reducing misinterpretation of the regulations and easing the compliance burden. As the CFPB has noted in the Request, the inherited regulations define key terms inconsistently. These key terms include “consumer,” “credit,” “business day,” and “application.” The term “business day” is defined differently even within one single regulation. Specifically, in Regulation Z, it means one thing for purposes of the creditor’s disclosure obligations and another thing for purposes of the consumer’s rescission right. And the definition of “application” should be more specific. Under the current definition, it can be difficult for a bank to determine when it is considered to have taken an “application.” For example, has an “application” been made when a potential customer makes an inquiry, or provides partial information, or only when the potential customer provides all the information required for a product? Resolution of these questions through more specific regulatory definitions is particularly important because bank

[2] 76 Fed. Reg. at 75,828-29.

[3] We do not suggest priority streamlining in all of the nine specific areas identified in the Request.

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responses to “applications” are generally required within a specified period following receipt of the application.

Consumer financial regulations affect virtually every American and every business that provides financial services for American consumers. They should be readily understandable to the majority of consumers and businesses. Using the same term to mean different things within these regulations, or even within one single regulation, is an unusual way of using language. It causes confusion, both to banks working hard to comply with the regulations and to consumers trying to understand their rights. Banks must incur substantial extra costs to clear up such confusion, and they may nevertheless inadvertently misapply the definitions. Consumers may be so frustrated with the mystifying regulations that they give up learning their rights.

Furthermore, defining key terms consistently across all the consumer financial regulations will help to ensure that, when one regulation is amended, other regulations using the same terms are amended consistently. It will also help banks and consumers understand how a change in one regulation may affect another regulation with the same terms.

The CFPB has also noted in the Request that some key terms are not defined in the inherited regulations. The Request cited the example that neither Regulation B nor Regulation C defines the terms “approved,” “denied,” or “withdrawn” with respect to an application. This is an excellent example of the opportunity that the CFPB now has to make the consumer financial regulations understandable. As the CFPB has noted, important obligations of a creditor depend on whether an application is “approved,” “denied,” or “withdrawn.” Creditors need these terms to be clearly defined so they would know when exactly their obligations arise.

B. Annual Privacy Notices

Financial services providers should not be required to give a privacy notice to a customer annually during a customer relationship if the provider’s privacy practices have not changed since the last notice. The MBCA urges the CFPB to eliminate the annual privacy notice requirement in this circumstance.

The annual privacy notice mailing is costly and ultimately paid for by consumers. If there is no change to the privacy notice, consumers are not getting any new information from the annual mailing. It burdens consumers with paper that they do not want and also distracts them from important disclosures such as notice of change in terms.

Financial services providers are required to provide a revised privacy notice regarding new disclosure practices that would negatively affect the consumer. This requirement for a revised notice is sufficient protection for the consumer. Requiring a revised notice but not an annual notice is consistent with

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other consumer financial regulations, such as Regulation Z. Furthermore, to the extent that a financial services provider posts its privacy notice on its website in a way that enables consumers to locate it easily, consumers will get a refresher of the privacy notice whenever they need it. This is by far a more effective, cost-efficient, and environmentally friendly way of keeping consumers informed of the financial services provider's privacy notice.

Although the Gramm-Leach-Bliley Act requires that privacy notices be sent by financial institutions annually, it also provides that the disclosures "shall be made in accordance with the regulations prescribed under section 6804 [of Title 15 of the United States Code]."[4] We believe Congress' directive for regulatory implementation affords the CFPB ample authority to eliminate the requirement for annual notices where such notices are duplicative and therefore create unnecessary burdens and costs for financial institutions with no appreciable benefit, and at some added cost, to the consumer.

C. ATM Fee Disclosure

The CFPB should revise Regulation E to eliminate the requirement that an ATM operator post a sign on the ATM itself that fees will or may be imposed.

An ATM operator that imposes a fee on any consumer for withdrawing funds or inquiring about a balance must disclose the amount of any fee it charges on the ATM screen or in a paper notice before the consumer must pay a fee. Therefore, the consumer will have been informed of any fee that will be charged before he or she decides whether to proceed with the transaction. The fee information provided on the ATM screen or in a paper notice is much more useful than a general statement that a fee will or may be imposed.

Furthermore, ATMs, by design, are not staffed by any human beings. And even though they are monitored by security cameras, what happens to a sign that is posted on the ATM itself often cannot be picked up by the cameras. Because ATMs are meant to be accessible to the public, they are exposed to the risk of small acts of vandalism such as defacement or removal of the sign. Or the sign could simply fall off without being noticed immediately. The signage requirement imposes significant monitoring costs on the operator without any material benefit to the consumer.

The superfluous signage requirement has led to waves of litigation against ATM operators.[5] To avoid such litigation, some banks now photograph

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[4] 15 U.S.C. § 6803.

[5] *See* David Morrison, *ATM Litigation Stoked by Legal Opportunism*, Credit Union Times, August 17, 2011, *available at* http://www.cutimes.com/2011/08/17/atm-litigation-stoked-by-legal-opportunism.

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all of their ATMs to substantiate that they meet the signage requirement; they often hire third party vendors to photograph remote ATMs. The cost of defending or avoiding such litigation increases the cost of delivering consumer financial services without contributing to consumer protection in any way.

D. Coverage/Scope of Regulation C

The MBCA does not have a strong view on an exemption from the Home Mortgage Disclosure Act requirements based on the number of loans made or refinanced. However, the MBCA urges the CFPB to provide a simplified rule for determining what is a reportable transaction.

Currently, whether a loan is reportable depends on the loan purpose (*i.e.*, whether a loan is a home purchase loan, home improvement loan, or refinancing as defined in Regulation C) and product type (*i.e.*, whether a loan is a home equity line of credit). Banks spend a great deal of time trying to determine if a particular loan or application is reportable under Regulation C. In some cases, by the time a loan or application is determined to be reportable, it is too late to collect certain information (such as the ethnicity, race, and gender of the applicant) that the government uses to monitor compliance with fair lending laws, which must be collected at the time of application and at that time only.

A simplified rule, such as one that requires reporting for any loan or line of credit secured by residential real estate above a certain amount, will ease the compliance burden. It will be no less effective in helping determine whether financial institutions are serving the housing needs of their communities and identify possible discriminatory lending patterns.

E. Coverage/Scope of Regulation B

The CFPB should revise the Regulation B requirement for collecting information about race, ethnicity, and certain other applicant characteristics, by creating an exemption based on factors such as the location, size, and loan volume of the lender. As noted in the Request, such an exemption is provided in Regulation C. The collection of information about applicant characteristics under both Regulation B and Regulation C serves the purpose of helping regulators monitor compliance with fair lending laws, and a consistent exemption under both regulations is sensible. Likewise, the information-collection requirements for government monitoring purposes under Regulation B and Regulation C should be made consistent. Furthermore, the MBCA believes that the requirements for sending notice of adverse action under Regulation B should be consistent with those under the Fair Credit Reporting Act ("FCRA").

The MBCA does not believe that there should be an exemption from the requirement for timely notice to applicants for credit of action on their applications based on the number of applications received. A consumer who

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applies for credit expects to be advised of the creditor's decision so that the consumer could make financial plans accordingly, and this expectation does not change according to how many applications the creditor receives, which the consumer likely would not know in any event. Meeting this expectation assists with the consumer's financial planning, and the benefit to the consumer should justify any additional cost to the creditor.

F. Coverage/Scope of Regulation Z

The MBCA supports an exemption from the disclosure requirements of the Real Estate Settlement Procedures Act ("RESPA") for creditors that extend consumer credit no more than a certain number of times in the past calendar year, as is currently available under Regulation Z.

We do not believe that the threshold for exemption under Regulation Z should vary according to the type of consumer credit. The cost of tracking the number of loans of each type could outweigh the benefit of an exemption based on the loan type.

There are several other particular revisions to Regulation Z that we believe are warranted and should be made priorities as part of the CFPB's streamlining effort. We urge revisions that would result in the following:

- A loan will not be treated as a "variable rate" loan for purposes of Regulation Z merely because the creditor provides discounts on the interest rate to reward payments through automatic debits or because the creditor provides employee discounts.
- The 45-day advance notice requirement for changes in terms would apply only where the creditor unilaterally changes the terms, not in cases where the consumer requests a change in terms or negotiates an agreement with the creditor to change the terms.
- The classifications of residential mortgage loans would be simpler: currently, the Truth in Lending Act ("TILA") defines too many types of residential mortgage loans based on the level of perceived risk to the consumer.
- The Regulation Z rules for open-end credit would be set forth in three separate sets of rules governing credit card accounts, home equity lines of credit, and all other open-end accounts, respectively.

We also request that the CFPB provide definitive guidance on the following questions regarding Regulation Z:

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- To what extent is Regulation Z applicable to credit extended to trusts, including *inter vivos* revocable trusts, and limited liability companies formed to hold the primary residences of their members?

- Should negative prepaid interest (which arises when the closing date and the first payment date are less than a full month apart and the borrower pays interest for a full month on the first payment date, having received a credit for any anticipated extra payment on the closing date) be included in the calculation of the APR?

G. Ability to Pay Credit Card Debt

The MBCA supports the CFPB's suggestion of eliminating the requirement that a credit card issuer consider an applicant's independent sources of income and not rely solely on the applicant's household income in making credit decisions. The MBCA also suggests that the CFPB eliminate the "ability to pay" requirement with respect to charge cards.

The independent income requirement often precludes a non-working spouse from obtaining a credit card independently. Under this requirement, even where the working spouse qualifies for an individual credit card account, the non-working spouse may have to apply jointly with the working spouse to obtain a credit card. We believe the requirement inappropriately and unnecessarily reinforces the economic power of the working spouse at the expense of the non-working spouse.

The MBCA also believes that the ability to pay requirement in the context of charge cards is unworkable. Charge cards are repayable in full each month, and thus more likely to be used by consumers in lieu of a debit card or checks for day-to-day expenses as opposed to "big ticket" purchases. Therefore, to make a meaningful ability to pay determination with respect to charge cards, creditors would first need to determine how the consumer planned to use the card (*i.e.*, for day-to-day expenses only, or also for big-ticket items). This is clearly unworkable. Furthermore, treating revolving credit cards and charge cards in the same way under the ability to pay requirement leads to results that cannot possibly have been intended. Assume, for example, that a consumer qualifies for a revolving credit card with a minimum monthly payment of no more than $100 when the line is fully drawn. That same consumer would qualify for a charge card with a spending limit of only $100 under the ability to pay requirement. If this was the intent (and we do not believe it was), then only the wealthy could qualify for charge cards with a meaningful spending limit. Because revolving credit cards and charge cards differ significantly in their design and purpose, we believe the CFPB should seriously consider exempting charge cards from the ability to pay requirement.

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H. Electronic Disclosures

We also support the CFPB's suggestion that the inherited regulations permit all required disclosures to consumers to be delivered in electronic form, provided that the consumer affirmatively consents to electronic delivery. This would be efficient, cost-effective, and environmentally friendly.

As noted in the Request, some parts of the inherited regulations require disclosures to be provided in writing, while others permit certain disclosures to be provided either electronically or in writing. Under the E-Sign Act, disclosures provided electronically are deemed to be "in writing" if the consumer consents to electronic delivery and a number of other requirements are met, including the requirement that the consumer be informed of how he or she may obtain a paper copy of the disclosures upon request. The consent requirement of the E-Sign Act is important because it gives the consumer the right to decide whether he or she wishes to receive electronic disclosures, but at least some of the additional requirements may provide minimal incremental benefit in the consumer financial services context. Presumably, it is for this reason that current regulations already allow certain disclosures to be provided electronically without meeting all the E-Sign Act requirements.

The Request queries whether, for mobile banking applications, financial institutions should be permitted to provide certain disclosures by text messaging. We believe it may be appropriate to allow certain short disclosures, such as notices of particular account activity without disclosure of any nonpublic personal financial information, to be provided by text messaging. We urge the CFPB to continue to consider the technological capabilities and limitations of text messaging, as well as other rapidly developing modes of communication with consumers, as those technologies evolve.

II. Comments in Response to General Requests for Information

In the Request, the CFPB also solicits comment on other priorities for streamlining the inherited regulations and practical measures to facilitate compliance and promote innovation. The MBCA believes the CFPB should take a variety of steps in this regard, as detailed below.

A. Other Areas for Priority Streamlining

<u>Mortgage Reforms – Ability to Pay</u>

In its anticipated regulations requiring a mortgage lender to consider the borrower's ability to pay, the CFPB should establish a "safe harbor" pursuant to which a bank that follows certain procedures should be deemed to have made a reasonable and good faith determination that the borrower has a reasonable

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ability to repay the loan.[6] Without such a safe harbor, banks are likely to tighten up further on credit standards in a way that goes beyond the requirements of prudent underwriting, for fear that the borrower could take advantage of any ambiguity in the regulations and assert in a foreclosure action that the lender failed to consider his or her ability to pay. Such further tightening of credit will delay housing recovery and restrain economic growth.

In addition, the regulations should ensure that the definition of a "qualified mortgage" is precise and simple. This definition is important because a bank that makes a qualified mortgage loan is deemed to have met the requirements regarding the borrower's ability to pay. The definition should allow community and regional banks some flexibility to underwrite loans that are not high-interest loans. Without such flexibility, community and regional banks cannot afford to offer new niche home loan products for their customers. As a result, the largest banks, with uniform products that benefit from economies of scale, will dominate the mortgage market more than ever, at the expense of the consumer.

Plain English Regulations and Disclosures

The CFPB's streamlining effort should result in shorter, simpler, and clearer regulations, and the disclosures to consumers required by the revised regulations should likewise be simpler and clearer. The benefits will inure to consumers in the form of lower costs and increased financial literacy as well as from the unique offerings that community and regional banks can provide.

Additional Specific Disclosures

The MBCA suggests that the CFPB make the following changes to current disclosure requirements under the inherited regulations:

- The Rescission Model Form should be revised as proposed in the Federal Reserve Board's proposed rule, published in the Federal Register on September 24, 2010.[7] The creditor should be required to provide only one copy of the rescission form, and there should be a bright-line rule for proving delivery of notice.

- The disclosure requirements for advertising should be consistent for any product subject to TILA.

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[6] This safe harbor would be in addition to the statutorily mandated safe harbor for "qualified mortgage" loans.

[7] *Board of Governors of the Federal Reserve System: Regulation Z; Truth in Lending,* 75 Fed. Reg. 58539 (Sept. 24, 2010).

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- The “interest rate and payment summary” that Regulation Z currently requires for variable rate mortgage loans should be replaced with an appropriate payment schedule. In the summary, the creditor must provide the interest rate at consummation, the maximum possible rate at any time during the first five years after consummation, and the maximum interest rate that could apply at any time during the life of the loan, as well as the corresponding monthly payment at each of these three rates. This causes confusion because none of the payments disclosed in the summary matches the “Total of Payments” or the “Annual Percentage Rate” shown in the “Fed box” disclosures (*i.e.*, the required Regulation Z disclosures for closed-end loans, which are generally presented in a box). If the purpose of the summary is to warn the consumer of the worst case scenario, it will be better served by requiring the creditor to provide a payment schedule that is based on the maximum rate and to disclose a corresponding “Total of Payments” and “Annual Percentage Rate” in the Fed box.

- There should be a form disclosure document for adjustable-rate mortgage loans, designed as a “term sheet,” that could be provided rather than the currently required copy of the Consumer Handbook on Adjustable-Rate Mortgages (the CHARM booklet).

- The format of the Amount Financed Itemization required under Regulation Z should be made consistent with the format of the Good Faith Estimate required under RESPA.

- The required disclosure relating to escrow accounts should be improved to eliminate the aggregate adjustment. Regulation X, which implements RESPA, currently requires an itemization of individual deposits into the escrow account on the HUD-1 Settlement Statement. It also requires disclosure of the aggregate adjustment, which equals the difference between the deposit required under aggregate accounting and the sum of the itemized deposits. The disclosure requirements should be revised so that it would not be necessary to calculate an aggregate adjustment for the HUD-1 Settlement Statement.

<u>Fair Debt Collection Practices Act</u>

Banks should be exempt from the Fair Debt Collection Practices Act (“FDCPA”) with respect to past due loans purchased from the FDIC as receiver for failed institutions. Without such an exemption, banks are considered debt collectors with respect to such loans under the FDCPA and subject to the requirements of the FDCPA. Among other things, such requirements include

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stating in the initial communication to the consumer that the bank is attempting to collect a debt and that any information obtained will be used for that purpose, and sending debt validation letters within five days after the initial communication with the consumer. We do not believe that Congress intended the FDCPA to apply to debts acquired from the FDIC as receiver.

<u>Unauthorized Transfer Under Regulation E</u>

The definition of "unauthorized electronic fund transfer" at 12 C.F.R. § 1005.2(m) should be revised to provide that a PIN-based transaction is presumed authorized, and that the burden is on the consumer to prove that it is unauthorized. Banks have been defrauded by accountholders who falsely claim that certain PIN-based transactions were not authorized.

B. Measures to Facilitate Compliance and Promote Innovation

There are also a variety of steps that the CFPB could take to facilitate compliance and promote innovation. Among those most important to MBCA members are:

<u>Incorporating Comments from Prudential Regulators</u>

In the early stage of all of its rulemaking proceedings, the CFPB should solicit comments from the prudential regulators and incorporate their suggestions into any proposed rules. The prudential regulators have enforced the consumer financial regulations for many years and they are uniquely positioned to provide informed advice, guidance, and specific suggestions for revisions. As part of the supervisory exchange between the CFPB and each prudential regulator, the CFPB should seek the regulator's comments before proposed rules are published. To encourage maximum candor, the views expressed in this exchange should remain confidential to each individual agency and the CFPB only.

<u>Establishing a Financial Institution Advisory Board and Peer Group Forums</u>

The CFPB should establish a financial institution advisory board composed solely of representatives of financial institutions. The CFPB should meet with the advisory board to learn about new financial products being developed and discuss how existing regulations or interpretive guidance need to be amended in light of the new products. Through these meetings, the CFPB will gain important knowledge of the consumer financial services market, which will help to inform its rulemaking.

The CFPB should also sponsor peer group forums for bankers to exchange ideas and share best practices relating to compliance with consumer financial regulations.

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Clear Guidance

The MBCA urges the CFPB to provide clear guidance to banks. For example, in the area of unfair, deceptive, or abusive acts or practices, the MBCA believes that banks can comply with the CFPB's supervisory expectations better if such expectations are clearly communicated. Although supervision and enforcement can provide concrete examples, it should be possible to articulate the criteria that the CFPB will use in making supervision and enforcement decisions in a way that helps banks comply.

Intent as a Consideration

The MBCA believes that the CFPB should consider a bank's intent in reviewing incidents of violation of consumer financial regulations. If a bank's overall operations and compliance policies, procedures, and practices evidence a good faith effort to comply with the consumer financial regulations, the CFPB should take that into account in its enforcement work. For example, while there are banks that structure overdraft programs to maximize charges to consumers, other banks allow overdrafts to accommodate clients who decide to overdraw their accounts occasionally to avoid more adverse financial consequences, and charge an overdraft fee consistent with industry practices. To the extent that the CFPB sees an issue in the overdraft program of the latter banks, it should take into account the intent of the banks in making enforcement decisions.

Allowing Sufficient Time to Implement New Rules

The CFPB should allow banks sufficient time to implement new rules. There are some rules that have short time frames between issuance as a proposed rule, the end of the comment period, issuance of the final rule, and the effective date. This could require banks to start making changes on the basis of a proposed rule that could change before it is finalized.

It takes time to interpret new regulations, determine and agree on necessary changes to a bank's policies and procedures, and implement those changes. The implementation of many changes requires one or more vendors to modify software, revise disclosure language, or update forms. In addition, the bank needs to provide training to a large number of staff. Therefore, the CFPB should allow sufficient time to implement new rules.

In addition, new rules related to the same subject matter should be issued together, not piecemeal. A constant flux of piecemeal changes increases the implementation cost significantly.

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Providing Staff Commentary and Training

The CFPB should provide staff commentary on all consumer financial regulations. Some of the inherited regulations have such commentary, but those issued to implement the FCRA and the FDCPA do not. The CFPB should publish interim interpretive letters before it issues codified staff commentary. In addition, the CFPB should provide telephone or Web-based seminars to explain new substantive rule changes.

III. Conclusion

The MBCA strongly supports the CFPB's effort to streamline the inherited regulations. To the extent we can further assist the CFPB in this effort, we are available to answer questions, provide additional information, and to meet with CFPB officials to discuss our suggestions above as well as any related issues.

Yours Truly,

Russell Goldsmith
Chairman, Midsize Bank Coalition of America
Chairman and CEO, City National Bank

cc: Mr. Jack Barnes, People's United Bank
Mr. Greg Becker, Silicon Valley Bank
Mr. Daryl Byrd, IBERIABANK
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