August 21, 2018

The Honorable Jelena McWilliams
Chairman
Federal Deposit Insurance Corporation
1776 F Street, NW
Washington, DC 20006

Re: Bank Payday Lending

Dear Chairman McWilliams:

We, the undersigned community, civil rights, faith, and consumer groups, urge you not to open the floodgates to predatory small dollar loan practices by banks and payday lenders. Existing protections—including state usury laws and existing FDIC guidance on small dollar loan products—are critical tools to ensure safe, responsible lending practices are not pushed out of the marketplace by high-cost, unaffordable debt trap products. Specifically, we urge you to (1) retain the FDIC's critical guidance addressing payday loans ("deposit advances") made by banks; (2) ensure that small dollar installment loans are priced at 36% APR or less and based on the consumer's ability to repay considering both income and expenses; and (3) prevent bank partnerships that evade state interest rate limits.

1. **<u>Retain deposit advance guidance addressing high-cost payday loans.</u>**

In 2013, a handful of banks were making high-cost payday "deposit advance" loans, structured just like loans made by non-bank payday lenders. The bank repaid itself the loan in full directly from the borrower's next incoming direct deposit, typically wages or Social Security, along with annual interest averaging 225% to 300%. The data on bank payday loans made indisputably clear that they led to the same cycle of debt as payday loans made by non-bank lenders. The annual median number of advances was 14, and over a third of borrowers had more than 20 advances in a year—all despite so-called protections banks touted, like installment options.

At their peak, bank payday loans—even with only six banks making them—drained roughly half a billion dollars from bank customers annually. This cost does not include the severe broader harm that the payday loan debt trap has been shown to cause, including overdraft and non-sufficient funds fees, increased difficulty paying mortgages, rent, and other bills, loss of checking accounts, and bankruptcy. Payday lending has a particularly adverse impact on African Americans and Latinos. A disproportionate share of payday borrowers come from communities of color, and bank payday loans that jeopardize their bank accounts can leave these communities even more disproportionately underserved by the banking mainstream.

Payday lending by banks was met by fierce opposition from virtually every sphere—the military community, community organizations, civil rights leaders, faith leaders, socially responsible investors, state legislators, and members of Congress. The FDIC and OCC's 2013 guidances requiring an income-and-expense-based ability-to-repay determination, and the Federal Reserve's supervisory statement emphasizing the "significant consumer risks" bank payday lending poses. As a result of these actions, most bank payday lending programs were suspended and bank customers were protected from these devastating debt traps.

We were deeply discouraged by the OCC's rescission of its deposit advance guidance in October 2017. In response, more than 230 groups signed an open letter to banks urging them to stay out of payday lending. The OCC rationalized this rescission in part by noting that the Consumer Financial Protection Bureau's finalization of its payday lending rule earlier that day subjected banks to potentially inconsistent regulation.[1] But the CFPB's rule and the deposit advance guidance are both necessary and are complimentary. Moreover, the CFPB has since publicly announced that it is reconsidering its rule, and rescission of the deposit advance guidance could leave borrowers entirely unprotected from debt-trap lending by our nation's banks.

The OCC also noted that banks should offer more short-term credit because banks are more regulated than non-bank lenders and thus can do so at less risk to the consumer. The Treasury Department expressed the same notion in its fintech paper last month. But again, the data on bank payday loans left no question that bank payday loans were the same as those made by non-bank lenders—high-cost, unaffordable, debt-traps.[2]

2. **<u>Ensure installment loans cost no more than 36% and are based on ability-to-repay considering both income and expenses.</u>**

The Treasury paper also recommended that the FDIC issue installment loan principles similar to the OCC's May installment loans bulletin. We urge the FDIC to be clear that any installment loans should be reasonably priced at 36% APR or less, consistent with the FDIC's 2007 Affordable Small-Dollar Loan Guidelines. We reject the notion that bank loans as high as 99% APR will drive out higher-priced credit by non-banks. To the contrary, high-cost lending by banks will undermine the most effective measure against predatory lending: state interest rate limits. Rate caps in the nearly one-third of states—home to approximately 100 million Americans—have meaningful restrictions on payday loans that prevent the debt trap business model, and most states cap rates on longer-term loans. We further urge that the FDIC insist that installment loans be based on the borrower's ability to repay with consideration of both income and expenses. Income-only underwriting will easily lead to unmanageable debt burdens for borrowers who are already likely financially distressed. New research underscores the dangers of high-cost installment loans, such as in Colorado, where borrowers in many cases reported that unaffordable payments on these loans triggered significant additional financial hardships, either immediately or down the road.[3]

3. **<u>Prevent bank partnerships that evade state laws.</u>**

Finally, we urge the FDIC to stop banks from renting out their charter to facilitate high-cost loans that evade state interest rate limits. The FDIC's 2005 guidelines advise against bank partnerships that keep borrowers in unlimited cycles of debt, yet high-cost payday installment loans often do just that. Elevate makes loans at 100% interest, with very high charge-off rates, using Republic Bank & Trust in Kentucky, ignoring the voter-approved 36% or lower rate caps in Arkansas, Montana, South Dakota and other states. As recently as

[1] The OCC's rescission following finalization of the CFPB rule was immediate, even as the CFPB rule's compliance date is not until August 2019.

[2] Deposit advance borrowers were seven times more likely to have their accounts charged off than their counterparts who did not take deposit advance loans. Further, following discontinuation of deposit advance, former borrowers, compared to non-borrowers, did not incur an increase in overdraft or NSF fees. CFPB, *Supplemental findings on payday, payday installment, and vehicle title loans, and deposit advance products* at 39 (June 2016), https://s3.amazonaws.com/files.consumerfinance.gov/f/documents/Supplemental_Report_060116.pdf.

[3] Center for Responsible Lending, *Sinking Feeling: Colorado Borrowers Describe Their Experiences with Payday Loans* (July 2018), available at http://bit.ly/COSinking.

March of this year, Enova was also using Republic Bank & Trust to make loans at rates that exceed state limits. CashCall made loans up to 99% in Maryland and West Virginia using First Bank of Delaware and First Bank & Trust, though courts later shut them down. On Deck Capital makes small business loans with rates up to 99.7% APR, originating loans through Celtic Bank in states where it cannot make the loans directly. Online lenders are also using banks to charge rates up to 36% that are not permitted in many states for large loans of $30,000 to $40,000; the State of Colorado has sued two lenders, Avant and Marlette, for using rent-a-bank schemes to hide that these state-regulated lenders are the true lender.

Depository involvement in high-cost lending is both a consumer protection and a safety and soundness concern. It violates the basic safety and soundness principle of lending based on the borrower's ability to repay a loan without relying on collateral (in this case, the borrower's incoming deposits); it poses severe reputational risk, as evidenced by sweeping negative reaction; and it risks violation of consumer protection laws, which itself poses safety and soundness risk. Ultimately, high-cost loans erode the assets of bank customers and, rather than promote savings, make checking accounts unsafe for already financially distressed customers. It is therefore incumbent on the FDIC to ensure that banks not make high cost payday loans, whether short-term or installment, whether directly or through partnerships. Please reject calls to authorize such loans and take every necessary step to prevent them.

We appreciate your consideration of our concerns.

Sincerely,

Americans for Financial Reform

Arkansans Against Abusive Payday Lending

CASH Campaign of Maryland

Center for Global Policy Solutions

Center for Responsible Lending

Chapter 7, Reserve Officer's Association (Indianapolis Chapter)

Congregation of Our Lady of the Good Shepherd, US Provinces

Consumer Action

Consumer Federation of America

Consumers Union, advocacy division of Consumer Reports

Delaware Community Reinvestment Action Council, Inc.

Demos

Dominican Sisters of Hope Cincinnati

Empire Justice Center

Florida Alliance for Consumer Protection

Florida Consumer Action Network

Fund 17

Georgia Watch

Heartland Alliance for Human Needs & Human Rights

Illinois People's Action

Indiana Catholic Conference

Indiana Institute for Working Families

Kentucky Equal Justice Center

The Leadership Conference on Civil and Human Rights

Maryland Consumer Rights Coalition

Metropolitan Milwaukee Fair Housing Council

Mississippi Center for Justice

Montana Organizing Project

NAACP

National Advocacy Center of the Sisters of the Good Shepherd

National Consumer Law Center (on behalf of its low income clients)

Neighborhood Housing Services of Baltimore

New Economics for Women

New Economy Project

New Jersey Citizen Action

The One Less Foundation

Oregon Food Bank

PathWays PA

Pennsylvania Council of Churches

Public Citizen

Public Justice Center

Reinvestment Partners

RESULTS Columbus

SC Appleseed Legal Justice Center

Syracuse Habitat For Humanity Inc

UnidosUS

VOICE - OKC

Woodstock Institute