



June 24, 2015

Via Facsimile and E-mail

California Department of Business Oversight
Office of Legislation and Policy
Attn: Karen Fong (PRO 04/08)
1515 K Street, Suite 200
Sacramento, CA 95814-4052

RE: INVITATION FOR COMMENTS (PRO 04/08)

Department of Business Oversight:

The following comments are submitted by the Center for Responsible Lending (CRL) regarding the Department of Business Oversight's Invitation for Comments on Proposed Rulemaking Under the California Deferred Deposit Transaction Law (CDDTL).

CRL is a national organization working to eliminate abusive lending practices. We have undertaken research and policy work on payday lending for more than 10 years, in states across the country. We are also affiliated with Self-Help, one of the nation's largest national Community Development Financial Institution (CDFI), whose collective mission is to create and protect ownership and economic opportunity for all. For over 30 years, the Center for Community Self-Help and its affiliates have provided \$6.6 billion in financing to help over 99,000 low-wealth borrowers buy homes, start and build businesses, and strengthen community resources.

Self-Help Federal Credit Union (Self-Help Federal) was chartered in 2008 to build a statewide network of branches in California that serve working families and underserved communities. With 20 branches in California (in the Central Valley, the greater Bay Area and Los Angeles), three branches in Illinois, approximately \$600 million in assets, and serving more than 80,000 members and clients, Self-Help Federal is one of the fastest-growing low-income designated credit unions in the country. Self-Help Federal is part of the national Self-Help family of non-profit organizations.

In January 2010, Self-Help Federal launched a pilot credit union concept, called Community Trust Prospera (CT Prospera), which is designed specifically around the needs of families that are living paycheck-to-paycheck. A hybrid of a check casher and a credit union branch, CT Prospera meets unbanked customers where they are by providing check cashing, remittance and other services in a convenient and comfortable environment with extended hours. But unlike a check casher, its tellers are trained to deliver "in-line financial education" at the point of service, nudging customers toward mainstream financial products such as savings and checking accounts, and a broad range of responsible loan products, including personal loans, credit cards and mortgage loans.

On August 16, 2013, and again on May 16, 2014, CRL submitted lengthy comments in response to the DBO's prior Invitations for Comments. CRL is extremely pleased that the DBO is now proposing to ban disbursement and payment methods other than a personal paper check, recognizing that existing law, in fact, so limits deferred deposit transactions. We believe that the DBO's updated proposal represents the proper reading of California law and the limits of DBO authority, and commend the DBO for taking the approach, notwithstanding industry opposition and current practice.

Herein, we emphasize our support for the DBO's proposal, but seek not to repeat in length the arguments we made in our prior comments. Instead, we summarize those arguments, where useful, and focus our comments on new issues, as well as the remaining areas where we believe the regulations might be strengthened. We also attach our prior comments hereto for convenience.

As discussed in detail in our prior comments, although payday lenders market their product as a quick fix to meet an occasional, unexpected expense, the data consistently supports the payday borrowers get trapped in long-term cycles of debt. The data released by the DBO last week show that the industry is still growing. The total dollar amount of payday lending activity increased 6.6% from 2013 to 2014, to \$3.38 billion, with a staggering 12,407,422 transactions. Three-quarters of these transactions reflect the unaffordability of the loans; borrowers cannot meet monthly expenses and also pay off their payday loans without taking out a new loan.

This growth in California underscores the urgency and importance of the DBO's proposals, as well as the need for the state legislature and CFPB to continue its efforts to more effectively rein in the predatory payday loan debt trap.

I. Summary of Positions

We applaud the DBO for its bold proposed rules. DBO has done the right thing with its existing proposal, in choosing not to expand payday loans beyond the narrow limits and plain language of the CDDTL. We support the proposal in significant part, but also suggest ways to strengthen the proposal in certain areas.

Herein, we argue as follows:

- **The DBO has correctly proposed to ban payments and disbursements through electronic means or debit cards, as these are not the equivalent of a “personal check” under the CDDTL, and allowing them would exceed DBO authority and violate the Administrative Procedures Act or other California law.**
- **The proposed rules, by limiting the unlawful expansion of a product that leaves many Californians financially worse off, will have significant positive economic impacts on consumers and the California economy.**

- **The DBO has properly defined deferred deposit originator to include lead generators. This definition will help ensure an appropriately broad and inclusive application and enforcement of the law.**
- **The DBO has the authority to establish a common database and require licensees to report to it. The common database will allow the DBO to better enforce the CDDTL, and to gain data that will allow it to assess the fiscal health and compliance practices of California’s deferred deposit originator industry.**
- **The DBO should allow public access to non-private and non-proprietary data maintained in the database.**
- **The DBO should take stronger steps to protect consumers from excessive NSF fees, by limiting the number of check presentments to two.**

COMMENTS

I. The DBO’s Proposed Rules That Would Prohibit Anything Other Than Paper Checks and Cash in Connection with Disbursement and Repayment of Deferred Deposit Transactions Is Appropriate and Required By California Law.

The DBO now proposes that Section 2030.23 of the CDDTL regulations clarify that “a personal check does not include an electronic fund transfer or other electronic debit or credit to the customer’s checking account,” and provides that the licensee “shall not use a customer’s account number to prepare, issue or create a check on behalf of the customer.”

This proposal correctly interprets existing law, and gets the policy right. As detailed in our August 16, 2014 comment (attached hereto), under the existing CDDTL, electronic transfers (through ACH transactions or otherwise), prepaid cards and credit cards are not authorized methods of disbursement or repayment of payday loans under the CDDTL, and therefore should not be permitted through regulation. Moreover, we previously urged that the DBO ban the use of remotely created checks and purchase orders in connection with Deferred Deposit Transactions in California, given the risks of harm and abuse associated with them.¹ We commend the DBO for doing so.

Although industry commenters have argued that the CDDTL was intended to be technology neutral, neither the facts nor the law support this argument. Statutory interpretation and legislative history suggest the narrow interpretation put forward by the DBO is the correct one.

¹ See CRL August 16, 2013 Comments at 19-21.

A. Statutory Interpretation Supports the DBO Proposal.

First, as we explained in our August comment, statutory interpretation requires that words be given their common meaning unless ambiguity exists.² The plain meaning of “personal check” is a paper check from an individual (and not a business) provided by a customer for deposit.³ The position of the CFSP in its May 19, 2014 letter that “electronic fund transfers are the legal equivalent of a check under applicable California law,” is patently wrong.

As we established in our August 2013 and May 2014 comments, federal law treats a personal check differently from an electronic funds transfer such as an ACH transaction.⁴ Regulation E defines electronic funds transfer in part as a transaction that is *not* a check. Moreover, while the California Commercial Code does not include ACH or other electric transfers within the definition of a check, other California law does include an electronic transfer or an ACH transaction as an option where intended.⁵

B. Legislative History Supports the DBO Proposal.

Second, the legislative history of the CDDTL supports a narrow interpretation.⁶ There is no evidence that the removal of “written by the consumer” from the statute was somehow intended to broaden the scope of DDTs to authorize electronic and other transactions. The amendment itself is ambiguous at best, and there is no mention in any of the committee analyses of this amendment at all. The CFSP cites to the trail of communications in Enclosure 3 as apparently evidencing how the concept of having the CDDTL be technology neutral “was developed and accepted in the legislative process ...”⁷ Unfortunately for the CFSP, however, the trail of communications contemporaneous to the amendment-drafting make no mention of the purpose of the amendments. Although they do set forth the agreed upon amendments, nowhere does it indicate that the purpose was to ensure that electronic transactions would be permitted.⁸

The CFSP does offer one letter, sent by licensee Cash onCall to the Governor, dated September 10, 2002 – after legislative passage of the bill – indicating support for the bill based on its “understanding with S.B. 898’s author’ that businesses like ours will not be forced out of business simply because we offer [payday loans] using electronic and telephonic mediums.”⁹

² See *Green v. State of Cal.* (2007) 42 Cal.4th 254, 260, 64 Cal.Rptr.3d 390, 165 P.3d 118 (“The statute’s plain meaning controls the court’s interpretation unless its words are ambiguous. If the plain language of a statute is unambiguous, no court need, or should, go beyond that pure expression of legislative intent.”) However, if the statutory language is ambiguous, additional sources of information are consulted to determine the Legislature’s intent. *Olson v. Auto. Club of So. Cal.* (2008) 42 Cal.4th 1142, 1147, 74 Cal.Rptr.3d 81, 179 P.3d 882.

³ CRL August 16, 2013 Comment at 7.

⁴ A check is a negotiable instrument covered by Articles 3 and 4 of the Uniform Commercial Code (Cal. Comm. Code §§ 3101-4504 (West 2012)), and by Federal Reserve regulation CC and the Check 21 Act, while an ACH transaction is governed by the Electronic Funds Transfer Act and Regulation E. The 2005 Soter Letter relied upon by the CFSP incorrectly claims that an ACH transaction is subject to the UCC. (2005 Soter Letter at 7.)

⁵ CRL August 16, 2013 Comment at 10-11.

⁶ See detailed discussion in CRL August 16, 2013 Comment at 8-10.

⁷ CFSP May 19, 2014 Letter at 4.

⁸ CFSP May 19, 2014 Letter, Encl. 3.

⁹ CFSP May 19, 2014 Letter, Encl. 3 at 1.

The law is clear, however, that such documents cannot be used to support a supposed legislative intent that “is at odds with the plain language of the statute: to require an intent not spelled out in the statute itself.”¹⁰ The Court in *Patterson* specifically rejected the defendant’s attempt in that case to use a letter to the Governor (there by the bill’s author, not a licensee subject to the law) as “a valid index of legislative intent,” where it differs from the plain meaning of the statute.¹¹

C. **The DBO Cannot Base Rulemaking on Updated Technologies, Where It Would Be Contrary to Statutory Language.**

In its May 2014 comment, the CFSP argues that because we are in the 21st Century and California is the home to Silicon Valley, regulations should reflect new technologies.¹² Where statutory language is precise, however, the DBO cannot ignore it in favor of technological advances that are directly contrary to law. As described in prior comments and summarized above, the CDDTL authorized only a very specific and narrow transaction. Under California law, the DBO is not authorized to create regulations that conflict with this clear law. “[N]o regulation adopted is valid or effective unless consistent and not in conflict with the statute and reasonably necessary to effectuate the purpose of the statute.”¹³ “Administrative regulations that alter or amend the statute or enlarge or impair its scope are void[.]”¹⁴

In the same vein, the CFSP argues that it would be “ironic, and contrary to the interests of competitiveness and innovation” to ban electronic and other disbursement and payment methods.”¹⁵ However, “[n]o claim of public policy or public urgency may justify an administrative regulation which conflicts with a statutory regulation.”¹⁶

CFSP further argues that because the DBO has requested that licensees provide electronic records (even where burdensome for licensees), it has recognized technological advances, and should do so with respect to the transaction itself as well. This comparison is inapposite. The DBO’s authority to review the records of licensees is broad, and not limited to paper copies. Specifically, the CDDTL provides as follows:

(a) ... the commissioner may at any time, ... investigate the business of deferred deposits, and examine ***the books, accounts, records, and files*** used in the business of deferred deposit transactions, ... For the purpose of examination, the commissioner and the commissioner’s representatives shall have ***free access to the offices and places of business, books, accounts, papers, records, files, safes, and vaults of all these persons.***

¹⁰ *People v. Patterson*, 72 Cal.App.4th 438, 444, 84 Cal.Rptr. 2d 870, 873 (1999).

¹¹ *Id.* On May 5, 2014, CRL requested that Mr. Soter provide us with a copy of this letter, but as of May 16, we have received no response from Mr. Soter.

¹² CFSP May 19, 2014 Letter at 8-9.

¹³ Cal. Gov. Code § 11342.2.

¹⁴ *Dyna-Med, Inc. v. Fair Employment & Housing Com.* (1987) 43 Cal.3d 1379, 1389; *Helene Curtis, Inc. v. Assessment Appeals Bd.* (1999) 76 Cal.App.4th 124, 129.

¹⁵ CFSP May 19, 2014 Letter at 8.

¹⁶ *In re Merch. Mariners Documents Issued to Dimitratos*, 91 F. Supp. 426, 429 (N.D. Cal. 1949).

Cal. Fin. Code § 23046(a) (emphases added). The Division also provides that “The commissioner may require the production for examination in this state of ***all books, records, and supporting data*** used by the licensee in the preparation of reports to the commissioner. . . .” Cal. Fin. Code § 23048(b) (emphasis added). Finally, the CDDTL grants the DBO the authority to “make . . . specific . . . demands, . . . for the enforcement of [the CDDTL], in addition to, and within the general purposes of, [the CDDTL].” Cal. Fin. Code § 23015.

These sections demonstrate the broad authority given to the DBO to review licensees’ records and files, with no limitation based on technology. CFSP’s attempt to apply the breadth granted to the DBO in examinations to the transaction itself simply fails.

II. The Proposed Rules Would Have Significant Positive Economic Impacts On Consumers And the California Economy.

The DBO asks how the proposed changes to the CDDTL would impact the economy, and what benefits the rules would provide to consumers. As we laid out in detail in our August 2013 comments, payday loans are harmful to California consumers.¹⁷ They trap consumers in debt, subject consumers to hundreds of millions of dollars in fees, and therefore, drain the California economy of spending capacity. A 2013 report by the Insight Center for Community Economic Development concluded that payday lending causes a net drain on the economy, when taking into account both jobs and value added by payday lending and the losses caused by payday lending.¹⁸

By properly limiting payday loans to the statutorily authorized paper checks, the DBO would block the illegal expansion and availability of payday lending thus benefitting both California consumers and the economy.

A. ACH (and Other Electronic) Transactions Adversely Impact Consumers By Adding Risk and Reducing Protections.

Authorizing electronic (ACH) transactions would increase the risks and costs of payday loans for Californians. CRL’s August comment detailed how this would add great risk for payday borrowers. An expansion into ACH or other electronic transfers would exacerbate payday

¹⁷ These negative impacts include the direct impacts of loans made without any underwriting for the ability to repay, *i.e.*, the costs of falling into the debt trap (with the average California borrower taking out 7-10 loans per year, amounting to fees of between \$315 and \$450 for a \$255 loan, as well as indirect harms, such as higher default rates (on other loans), more credit card or other delinquencies, more overdrafts and loss of bank accounts. CRL August 16, 2013 Comment at 5-7.

¹⁸ Tim Lohrentz, “The Net Economic Impact of Payday Lending in the U.S.” (Insight Ctr. for Cmty. Econ. Dev. Mar. 2013), *available at* <http://www.insightcced.org/uploads/assets/Net%20Economic%20Impact%20of%20Payday%20Lending.pdf>. The report found that nationwide, the payday lending industry had a negative economic impact of \$774 million in 2011, and resulted in an estimated loss of 14,000 jobs. *Id.* at 1. Starkly, the report found that “for each dollar of payday lending interest paid, an estimated 24 cents is lost to the U.S. economy.” *Id.* Using 2011 estimates, the report concluded that payday lending caused a net drain of \$135 million to the California economy and a loss of nearly 2,000 jobs. *Id.* at 10, Fig. 7.

lenders' failure to underwrite their loans. By obtaining access to the borrower's account for repayment, lenders effectively obtain a super-lien on the account even more powerful than a post-dated check, which dangerously encourages more reckless lending with no regards to a borrower's ability to repay. Moreover, when payday lenders obtain electronic access to consumers' checking accounts, borrowers lose certain protections, such as has the right to stop payment for a single electronic debit (as on a paper check).¹⁹ Allowing repayments through electronic funds transfer also exposes low-balance borrowers to multiple attempts to collect the debt, each triggering the bank's NSF fees for the borrowers, even if the lender is only allowed to impose its own fee on the borrower one time. Expanding payday lending from paper checks to electronic access to accounts may also expose borrowers to unsafe treatment of personal financial information.

By banning these alternative disbursement and payment methods, therefore, the DBO proposal would reduce risk and increase protections for California consumers.

B. Prepaid Card Transactions Adversely Impact Consumers By Adding Risk, Reducing Protections and Increasing Costs.

The DBO's proposed rulemaking properly limits risks that would be associated with allowing payday loans on prepaid debit cards. The risks of such an expansion of payday lending would be too great and are not counterbalanced by any significant benefits. We commend the DBO for reconsidering its prior position and proposing to ban CDDTL licensees from disbursing funds onto and/or accepting repayment from a prepaid card.

As CRL discussed at length in its prior comments, prepaid cards often have features that expose consumers to unnecessary dangers; these tend to be consumers with limited resources who seek out prepaid cards as a safer way to manage their finances. Prepaid cards also have high, complex and varied usage fees, especially those offered by payday lenders currently.²⁰

As we previously noted, the Check Into Cash US Money payday debit card could increase the APR on a payday loan from an already exorbitant 459% to an astounding 600%.²¹ Other payday

¹⁹ CRL has urged federal regulators to amend Regulation E to give single ACH authorizations all of the same protections as recurring ones. See *Comments of AARP, Center for Responsible Lending, Consumer Federation of America, Leadership Conference on Civil and Human Rights, NAACP, National Consumer Law Center (on behalf of its low income clients), and National Council of La Raza, to the OCC and FDIC on their Proposed Guidance on Deposit Advance Products* at 35 (May 30, 2013), available at http://www.responsiblelending.org/payday-lending/policy-legislation/regulators/bpd-comments-to-occ_fdic_may-30-2013_final-1.pdf.

²⁰ See generally The Pew Charitable Trusts, *Consumers Continue to Load Up On Prepaid Cards* (Feb. 2014), available at http://www.pewstates.org/uploadedFiles/PCS/Content-Level_Pages/Reports/2014/Prepaid-Cards-Still-Loaded-Report.pdf. See also Consumer Reports, *Prepaid Cards: Loaded with Fees, Weak on Protections* (Mar. 2012), available at http://consumersunion.org/pdf/Prepaid_Cards_Report_2012.pdf (listing types of fees connected with prepaid cards, including the following: Initiation or activation fees; Monthly fees; Point of sale transaction fees; Cash withdrawal fees; Balance inquiry fees; Transaction statements, including paper and other; Customer service fees; Bill payment fees; Fees to add or "load" funds; Dormancy fees; Fees to get remaining funds when closing the account; and Overdraft or "shortage" fees.).

²¹ CRL May 16, 2014 Comment at 15 (citing <http://usmoneycard.com/fees.html> (verified June 23, 2015)).

lenders also already offer prepaid cards that charge many fees.²² Just \$5 in prepaid card fees per loan would increase the already exorbitant APR of 459% to 510%, with each additional \$5 increasing the APR by approximately another 50 percentage points.²³ Based on the Pew Report, *Consumers Continue to Load Up on Prepaid Cards*, the “basic” prepaid card user would see an extra \$12.75 in costs over two weeks,²⁴ leading to an APR of 588%.

By banning prepaid cards as alternative disbursement and payment methods for payday loans, therefore, the DBO proposal would reduce risks and costs, and increase protections for California consumers.

III. THE DATABASE WILL HELP DBO ENFORCE THE CDDTL, AS WRITTEN.

A. The DBO Has The Authority To Create and Administer a Database.

We support the DBO’s proposal to implement a common database for the purpose of preventing violations of the CDDTL. The Financial Code provides that “[t]he commissioner may make general rules and regulations and specific rulings, demands, and findings for the enforcement of [the CDDTL], in addition to, and within the general purposes of, [the CDDTL].” Cal. Fin. Code § 23015.

In June 2013, pursuant to its authority under Cal. Fin. Code § 23015, the DBO directed CDDTL licensees to submit responses to the *California Deferred Deposit Transaction Law – Industry*

²² Cash ‘N Go, another large California payday lender with approximately 175 locations statewide, also offers a Netspend card, but does not appear to disclose the fees on its website. <http://www.checkngo.com/pre-paid-debit-card.aspx>. For example, Advance America, the largest payday lender in California with more than 250 stores in the State, offers the “Purpose Card” Visa® prepaid cards through MetaBank and NetSpend. *See* <https://www.advanceamerica.net/services/details/visa-prepaid-cards>. Note that this card is different from the card Advance America was offering when we submitted our August comment. Although the card does not have “Advance America” branding and Advance America is not listed on the website for the card, a search for locations reveals that only Advance America outlets are “authorized Purpose Card retailers.” *See generally* <http://www.gowithpurpose.com/>. Locations can be searched here: <http://www.gowithpurpose.com/add-money#find-a-location>. The Pay-As-You-Go Plan charges \$1 for each signature purchase transaction, \$2 for each PIN transaction, \$2.50 for domestic ATM withdrawals and \$.50 for any ATM balance inquiry. *See* <http://www.gowithpurpose.com/plans-and-fees>. Other plans have monthly or yearly fees in lieu of purchase transaction fees, but other fees such as the ATM cash withdrawal fee or the ATM balance inquiry remain. *Id.* *See also* Ace Elite Visa Prepaid Card Customer Service Agreement, *available at* <https://www.acecashexpress.com/~media/Files/PrepaidDebit/ACEEliteGPRTerms.pdf> (visited July 29, 2013). The ACE card has similar fees to the Advance America card, including (for the Pas-As-You-Go Plan) a purchase fee of \$1 or \$2, domestic ATM cash withdrawal fees of \$2.50 (not including ATM fees) and \$.50 for any ATM balance inquiry. *Id.* Other plans are the Ace Elite FeeAdvantage Plan (Monthly) and the ACE Elite with Direct Deposit FeeAdvantage Plan (Monthly). *See* <https://aceelite.acecashexpress.com/prepaid-debit-card/> (click on “Show all Fee Plan Options” under “\$5 FeeAdvantage Plan”). ACE’s description suggests that average monthly charges range between \$5/month and \$14.95/month, depending upon which plan is chosen.

²³ This is calculated by dividing the fees (\$45 + \$5 = \$50) by the principal of the loan, \$255 and then multiplying it by 26, to reach an annual percentage rate.

²⁴ The Pew Charitable Trust, *Consumers Continue to Load Up on Prepaid Cards* at 39, Ex. 7 (Feb. 2014), *available at* http://www.pewtrusts.org/~media/legacy/uploadedfiles/pes_assets/2014/PrepaidCardsStillLoadedReportpdf.pdf This was calculated by using the median \$27.33/month charge for basic users, and calculating how much of that would be charged in 14 days.

Survey (the “*Survey*”).²⁵ The stated purpose of the *Survey* was “for the DBO to gather up-to-date information on transaction activities of licensees and potential consumer risks in order to assess the fiscal health and compliance practices of California’s deferred deposit originator industry.”²⁶ Specifically, the *Survey* collected information related to the following:

- Transactions per Customer
- Customer’s Income
- Internet Transactions
- Lead Generators
- Military Customers
- Payments to Customers
- Repayment from Customers
- Collections
- Customer Complaints
- Independent Agents²⁷

There was no question or doubt that this action was within the DBO’s authority over the CDDTL.

Similarly, a database is within the scope of the DBO’s authority to make rules and regulations to enforce and otherwise administer the CDDTL. A database would allow the DBO to gather the same type of information collected through the *Survey* on a regular basis and with presumably greater coverage (not all licensees responded to the survey) and accuracy.

Moreover, a database would allow the DBO to prevent and enforce violations of the law. For example, the CDDTL provides that a “licensee shall not enter into an agreement for a deferred deposit transaction with a customer during the period of time that an earlier written agreement for a deferred deposit transaction for the same customer is in effect.” Cal. Fin. Code § 23036(c). The establishment of a common database allows licensees to comply with this provision and for the DBO to enforce it consistent with its authority.²⁸

The database would also allow the DBO to monitor and enforce other CDDTL activity to ensure compliance with the law, and thus is an appropriate exercise of authority “for the enforcement of” and “within the general purposes of” the CDDTL.

²⁵ California Department of Business Oversight, *Summary Report: California Deferred Deposit Transaction Law – Industry Survey* (2013), available at http://www.dbo.ca.gov/Licensees/Payday_Lenders/pdfs/2013_CDDTL_Industry_Survey_Summary_Report_Letter.pdf.

²⁶ *Id.* at 1.

²⁷ *Id.*

²⁸ We do note that the implementation of a database, as well as enforcement of the one-loan-at-a-time rule, does not address the debt trap. In other states with similar rules, repeat borrowing continues, and borrowers remain trapped in unaffordable debt. See, e.g., Uriah King & Leslie Parrish, *Springing the Debt Trap: Rate Caps Are Only Proven Payday Lending Reform* (CRL Dec. 13, 2007) (providing data to establish that in states that have passed these types of “reforms,” the debt trap persists), available at <http://www.responsiblelending.org/payday-lending/research-analysis/springing-the-debt-trap.pdf>.

B. Databases in Other States Have Allowed Regulators to Enforce Loan Limits.

In other states, payday loan databases have been created to help track payday lending activity and enforce the law, and have been shown to be effective in identifying and preventing non-compliant loans, i.e., loans that in number or dollar amount exceed the maximums permitted by law. Database reports from Florida, Oklahoma and Kentucky reveal a significant percentage of non-compliant loans prior to implementation of the databases in those states.

In Florida, the database revealed that 30.6% of historical transactions were made by payday lenders to borrowers with more loans than what the law allowed.²⁹ Historical data from Oklahoma showed that 18.2% of transactions were similarly non-compliant. According to the Kentucky Department of Financial Institutions, after the statewide database went into effect in 2010, the number of payday loan transactions immediately declined by 26.6%, due primarily to the enforcement of the \$500 loan limit.³⁰

The database could be used in California to ensure that payday lenders are not violating the law's requirement that they not make a loan to a borrower who already has one, and to otherwise track payday lending and enforce the CDDTL.

The creation of a database would also help California CDDTL licensees in complying with the eventual rulemaking on payday loans by the CFPB. The CFPB indicated in its recent proposal the expectation that all payday lenders will report data to at least one commercial database.³¹ California's payday marketplace and the DBO will be well-served by getting a jumpstart on the creation and implementation of such a database.

²⁹ *Florida Trends in Deferred Presentment* at 3 (Dec. 2004).

³⁰ Charles A. Vice, *KY Deferred Presentment Transaction System, Database Overview Banking and Insurance Committee -- October 2010* (Kentucky Department of Financial Institutions) (updated with data through Dec. 31, 2010), available at http://media.kentucky.com/smedia/2011/03/04/22/Payday_-_B_I_Committee_Presentation_with_Data_Updated_Thru_Dec_2010_ver2.source.prod.affiliate.79.PDF. Although the raw number of transactions thereafter climbed, the average transactions per borrower (per month) declined from an average of 2.05 in the four months prior to the database, to an average of 1.66 in the eight months following the database. *Id.* at 12-13.

³¹ Specifically, the CFPB proposal states as follows: "The Bureau anticipates that lenders would have to use a commercially available reporting system to obtain such information. ... To facilitate consideration of borrowing history, lenders would be required to report the use of covered loans to commercially available reporting systems meeting the Bureau's eligibility criteria. Under this proposal, lenders would need to report to all applicable commercially available reporting systems, but would have to check only one such reporting system meeting the Bureau's eligibility criteria. ... The Bureau is not considering creating its own reporting system for borrowing on covered loans. The Bureau also is not considering administering or otherwise contracting with a third-party to create or administer a reporting system." *Small Business Advisory Review Panel For Potential Rulemakings For Payday, Vehicle Title, And Similar Loans: Outline Of Proposals Under Consideration And Alternatives Considered* at 12 (CFPB Mar. 26, 2015) (hereinafter "*CFPB Payday SBREFA Proposal*"), available at http://files.consumerfinance.gov/f/201503_cfpb_outline-of-the-proposals-from-small-business-review-panel.pdf.

C. Database Data Should Be Subject to the Public Records Act.

The DBO proposes in Section 2030.97 that the information contained in the database will be confidential and not subject to inspection. We object to this proposal and urge the DBO to make the database subject to Public Records Act requests, while protecting against disclosure of confidential or proprietary information.

In passing the Public Records Act, the Legislature specifically declared that “access to information concerning the conduct of the people’s business is a fundamental and necessary right of every person in this state.”³²

Public records are broadly defined to include “any writing containing information relating to the conduct of the public’s business prepared, owned, used, or retained by any state or local agency regardless of physical form or characteristics.”³³ The data provided to the database certainly relates to the conduct of the public’s business in administering and enforcing the CDDTL, and would be used by the DBO for this purpose. As such, these data would qualify as public records.

Moreover, it has long been held that “[s]tatutory exemptions from compelled disclosure are narrowly construed.”³⁴ By the same vein, that a public record may contain some confidential information does not justify withholding the entire document.³⁵

Given the strong public policy in favor of disclosure, we would urge the DBO not to issue what appears to be a blanket confidentiality order around the database. Other states have shared non-confidential data from their databases,³⁶ and California should allow the same. This would mean allowing the public to seek data from database that would shed light on how payday loans are used in California. Individual identifying information regarding particular borrowers would and should be protected,³⁷ as well as any truly proprietary or confidential data specific to particular licensees. Aggregate data such as that disclosed by the DBO in its *Survey*, however, should be subject to public inquiry and disclosure.

³² Cal. Gov. Code § 6250.

³³ Cal. Gov. Code § 6252(e).

³⁴ *Am. Civil Liberties Union Found. of S. California v. Superior Court*, 236 Cal. App. 4th 673, 680 (2015), as modified (May 11, 2015) (quoting *California State University, Fresno Assn., Inc. v. Superior Court* 90 Cal.App.4th 810, 831 (2001)).

³⁵ Cal. Gov. Code § 6253 (“Any reasonably segregable portion of a record shall be available for inspection by any person requesting the record after deletion of the portions that are exempted by law.”).

³⁶ See, e.g., *Payday Mayday: Visible and Invisible Payday Lending Defaults* (Mar. 2015), available at 4 (noting that data was acquired from North Dakota’s Veritec database), available at http://www.responsiblelending.org/payday-lending/research-analysis/finalpaydaymayday_defaults.pdf.

³⁷ We note that the CFPB has indicated that a Consumer Reporting Agency (CRA) may be eligible to serve as a database vendor for purposes of tracking ability to repay, as outlined in its proposal. *CFPB Payday SBREFA Proposal* at 12. As such, it is all the more important to protect any personal borrower information is protected from disclosure. The DBO should make clear that any such data is not to be used for marketing purposes, including the use of consumer lists derived from the database for a “firm offer of credit.”

IV. The DBO Should Take Stronger Steps To Protect Consumers From Burdensome NSF Fees By Limiting The Number Of Check Presentments Permitted.

In its current proposed Section 2030.43, the DBO would allow a deferred deposit originator to manually redeposit a customer's check two times for full payment after it is dishonored by a financial institution (for a total of three presentments). The originator would be permitted to charge a single one-time fee of up to \$15 for the return of a dishonored check, in addition to whatever fees the customer's bank may charge. This is unchanged from prior proposals. We believe that allowing three presentments does not sufficiently protect consumers from the very real and significant ancillary harm caused by deferred deposit transactions.

A. DBO Should Limit Licensees to Two Presentments.

As we set forth in our prior comments, given the high rate of payday loan defaults,³⁸ this rule could negatively impact a large number of borrowers. New CRL research confirms these high default rates. According to *Payday Mayday: Visible and Invisible Payday Lending Defaults* (March 2015), nearly half of all payday borrowers (visibly) defaulted within two years of their first loan, and half of those did so within the first two loans.³⁹ Additionally, one-third of borrowers experienced at least one "invisible default," meaning the payday loan was repaid, but contributed to an overdraft that the borrower suffered on the same day as repayment.⁴⁰

Allowing potentially hundreds of thousands of struggling California borrowers to be hit with multiple bank NSF fees (which now average more than \$35 each), plus the \$15 fee to the payday lender exacerbates the harm and adds significantly to the already high cost of payday loans.⁴¹

In its 2007 Report, the Department noted that many banks allow a check to be presented only twice, and subsequently recommended that lenders be allowed to present a check only twice.⁴² We urge the Department to modify Section 17 and Section 18 (if necessary) to authorize a

³⁸ Researchers from Vanderbilt and Oxford found that over half (54%) of all payday borrowers will default in the first twelve months based on an analysis with two million observations. Paige M. Skiba, & Jeremy Tobacman, *Payday Loans, Uncertainty, and Discounting: Explaining Patterns of Borrowing, Repayment, and Default* (Aug. 21, 2008), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1319751. CRL later found that 44 percent of borrowers will experience a "return event" or default in which borrowers cannot service their payday loan debt in a timely manner. Uriah King & Leslie Parrish, *Payday Loans, Inc. Short on Credit, Long on Debt* (Mar. 31, 2011), available at <http://www.responsiblelending.org/payday-lending/research-analysis/payday-loan-inc.pdf>.

³⁹ *Payday Mayday: Visible and Invisible Payday Lending Defaults* (March 2015), available at http://www.responsiblelending.org/payday-lending/research-analysis/finalpaydaymayday_defaults.pdf.

⁴⁰ *Id.* at 7-8.

⁴¹ Multiple NSF fees could also cause banks to involuntarily close customers' accounts, increasing the population of unbanked Californians who then need to rely on even more fringe financial services. An increase in payday lending locations in a particular county is associated with an 11 percent increase in involuntary bank account closures (generally due to the account being excessively overdrawn), even after accounting for county per capita income, poverty rate, educational attainment, and a host of other variables. See generally Dennis Campbell, et al., Harvard Business School, *Bouncing Out of the Banking System: An Empirical Analysis of Involuntary Bank Account Closures* (Dec. 3, 2008), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1335873.

⁴² DoC Report at 29. See also State of California Department of Corporations, *Deferred Deposit Originator Bulletin*, Issue No. 4 at 3 (July 2009) (noting that licensees are permitted to make one additional electronic debit after an initial dishonoring, before having to seek further authorization from the customer), available at http://www.dbo.ca.gov/Licensees/Payday_Lenders/pdfs/0709CDDTLBulletin.pdf.

representation only once, thereby limiting the harm to California consumers of multiple NSF fees on top of already expensive payday loans.

In its recent Outline of Proposals, the CFPB indicated that it is considering a proposal to limit lenders to two consecutive presentment attempts through any payment channel.⁴³ After two failed attempts, the lender would be prohibited from any additional payment attempt without obtaining a new authorization from the borrower.⁴⁴ The CFPB expressed concern “that some lenders make repeated unsuccessful attempts to collect from a consumer’s account, thereby potentially causing the consumer to incur substantial costs, including NSF fees, returned payment fees charged by lenders, and, potentially, costs related to account closure.”⁴⁵ We share this concern, and urge DBO to so limit the number of permissible presentments.

V. The DBO Proposal Would Properly Include Lead Generators in its Definition of a Deferred Deposit Originator.

We support the revised proposed definition offered in Section 2023, that would clarify that lead generators come within the statutory definition of deferred deposit originators. Lead generators are companies that advertise payday loans (generally via the Internet), gather information on potential customers, and then sell the “lead” (*i.e.*, the customer’s information) to a lender who makes the loan. We believe that the revised definition suggested in the current proposal more directly and narrowly includes lead generators, and does a better job of ensuring clarity and consistency with existing law.

The DBO asks what benefits the proposed changes would provide to consumers. We believe that including lead generators within the definition of deferred deposit originator would benefit consumers by ensuring that all actors who assist in the origination of a payday loan are included and covered by the law. CRL specifically commends the Department for seeking to regulate lead generators, which have begun to face increased scrutiny from other federal and state regulators, as evidence arises of shoddy practices that harm consumers.⁴⁶

⁴³ CFPB, *Small Business Advisory Review Panel For Potential Rulemaking for Payday, Vehicle Title, and Similar Loans: Outline of Proposals Under Consideration and Alternatives Considered* at 30-31 (Mar. 26, 2015), available at http://files.consumerfinance.gov/f/201503_cfpb_outline-of-the-proposals-from-small-business-review-panel.pdf.

⁴⁴ *Id.*

⁴⁵ *Id.* at 30.

⁴⁶ See, e.g., Andrew R. Johnson, “Middlemen for Payday Lenders Under Fire,” *Wall Street Journal* (Apr. 7, 2014), available at <http://online.wsj.com/news/articles/SB10001424052702304819004579487983000120324>; Press Release, “Cuomo Administration Expands Investigation into Illegal Online Payday Lending and Related Consumer Abuses” (Dec. 13, 2013), available at <http://www.governor.ny.gov/press/12032013Illegal-Online-Payday-Lending>; Carter Dougherty, “Data From Payday Loan Applicants Sold in Online Auctions” *Bloomberg News* (June 08, 2012), available at <http://www.businessweek.com/news/2012-06-08/data-from-payday-loan-applicants-sold-in-online-auctions>; FTC, “Payday Loan Lead Generators Settle FTC Charges” (June 24, 2008) (settling charges that payday loan lead generator advertised payday loans without disclosing the APR in violation of the Truth in Lending Act), available at <http://ftc.gov/opa/2008/06/wegiveloads.shtml>.

VI. CONCLUSION

Payday loans are designed to create a long-term debt trap for borrowers. New DBO data confirm already extensive data showing that this is the reality for most borrowers. It is already true under existing law, that payday lenders have no need or incentive to engage in underwriting to determine affordability, or to review a borrower's expenses in addition to verifying their income because they are all but guaranteed repayment by holding what is essentially a lien on the borrower's future income. Granting direct electronic access to a borrower's bank account, would only worsen this.

CRL applauds the DBO for its revised proposed rulemaking. Whereas the prior proposals looked to the practices of deferred deposit originators rather than the CDDTL itself to determine what was appropriate and authorized conduct, the DBO has reversed course. The proposed rules are consistent with existing law, and would help limit risk and harm to Californians from the unlawful expansion of payday lending.

As such, CRL commends and applauds the DBO's rules. In large part, the DBO gets the proposal right. We support the proposals that would do the following:

- (1) Ban any disbursement and payment methods (including electronic fund transfers and prepaid cards) other than a personal paper check authorized under statute;
- (2) Ban remotely created checks and remotely created payment orders;
- (3) Align the definition of deferred deposit originator with the statutory definition of licensees, and clarify that the definition includes all lead generators; and
- (4) Establish a common database to which all licensees must report, and with which all licensees must verify that an applicant is eligible for a payday loan.

We would urge modifications to the proposal in two places.

- (1) Allow only one representation of a check after an initial deposit is dishonored; and
- (2) Allow public access to non-private data maintained in the database.

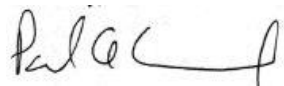
We do recognize the limits of DBO authority to implement true payday lending reform under existing law. As such, we urge policymakers to act to end the debt trap. Ultimately, only legislative reforms that would cap interest rates or the number of loans per borrower, or that would implement true strong and meaningful ability to repay rules can achieve this more important goal.

Should you have any questions, please do not hesitate to contact me.

Sincerely,



Caryn Becker
Senior Policy and Enforcement Strategy Counsel

A handwritten signature in black ink, appearing to read "Paul Leonard". The signature is fluid and cursive, with a prominent loop at the end.

Paul Leonard
Director, California Office

Attachments: (A) CRL August 16, 2013 Comments; (B) CRL May 14, 2014 Comments