May 4, 2018

Ms. Leandra English
Acting Director
Consumer Financial Protection Bureau
1700 G. St. NW
Washington, DC 20552

The Honorable Martin J. Gruenberg
Director
Federal Deposit Insurance Corporation
1776 F Street, NW
Washington, DC 20006

The Honorable J. Mark McWatters
Chairman
National Credit Union Administration
1775 Duke Street
Alexandria, VA 22314-3428

The Honorable Mick Mulvaney
Director
Office of Management and Budget
725 17th St. NW
Washington, DC 20503

The Honorable Joseph M. Otting
Comptroller
Office of the Comptroller of the Currency
250 E Street, SW
Washington, DC 20219

The Honorable Jerome Powell
Chairman
Board of Governors, Federal Reserve System
20th Street and Constitution Avenue, NW
Washington, DC 20551

Re: Usurious Bank Loans

Dear Ms. English, Director Gruenberg, Chairman McWatters, Director Mulvaney, Comptroller Otting, and Chairman Powell:

We, the undersigned national civil rights, faith, and consumer groups, **urge you to prevent high-cost, usurious loans by banks and credit unions—whether short-term, balloon-payment payday loans (which banks sometimes call "deposit advance" loans) or longer-term high-cost installment loans or lines of credit, and regardless of whether the loans are made by banks directly or through partnerships with non-bank lenders**. "Deposit advance" loans are payday loans, pure and simple, and data clearly show they create the same debt trap caused by non-bank payday loans. High-cost longer-term loans facilitated by banks and credit unions would also cause customers substantial harm. **We also urge you to ensure that all financial institutions engaged in small dollar lending (1) limit interest rates to 36% or less, and (2) determine borrowers' ability to repay their loans by assessing both income and expenses rather than engaging in collateral-based income-only underwriting**.

<u>Bank payday loans are high-cost debt traps, just like payday loans from non-banks.</u>

In 2013, a handful of banks[1] 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%.[2]

The data on bank payday loans make clear that bank payday loans led to the same cycle of debt as payday loans made by non-bank lenders. The Consumer Financial Protection Bureau's analysis of thousands of bank payday loans found a median number of advances per borrower of 14, with extremely high numbers of advances for many borrowers: Fourteen percent of borrowers had a median of 38 advances in 12 months.[3] These findings were consistent with the Center for Responsible Lending's prior analysis of bank payday loans, which found that the median bank payday borrower had 13.5 loans in 2011 and was in bank payday loan debt at least part of six months during the year; over a third of borrowers had more than 20 loans during the year.[4] Bank payday loans created this debt trap despite so-called protections the banks touted, like installment repayment options.

At their peak, these loans—even with only six banks making them—drained roughly half a billion dollars from bank customers annually.[5] 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,[6] 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,[7] community organizations,[8] civil rights leaders,[9] faith leaders,[10] socially responsible investors,[11] state legislators,[12] and members of Congress.[13] Bank payday lending also motivated "move-your-money" campaigns.[14] It led groups managing programs aiming to bring people into the banking mainstream to establish policies that excluded banks making high-cost payday loans from the program.[15] And multiple lawsuits involving bank payday loans were filed.[16]

Recognizing the harm to consumers, regulators took action in 2013 to protect bank customers—the OCC and FDIC with their 2013 deposit advance guidance requiring an income-and-expense-based ability-to-repay determination, and the Federal Reserve with its supervisory statement, emphasizing the "significant consumer risks" bank payday lending poses. For the most part, the banks responded by suspending their payday loan products.

We were deeply discouraged by the OCC's rescission of its deposit advance guidance in October 2017. We responded with an open letter, signed by more than 230 groups, urging banks to stay out of payday lending.[17]

We urge the OCC to reinstate its deposit advance guidance; the FDIC to retain its guidance; and the Federal Reserve to issue guidance mirroring the OCC's and FDIC's. We urge the CFPB to retain its payday loan rule's general applicability to short-term bank deposit advance loans.

<u>Prevent high-cost bank installment loans and require ability-to-repay determinations on installment loans based on income and expenses.</u>

We also urge you to prevent banks and credit unions from making high-cost loans directly and to ensure that financial institutions that make small dollar loans determine that borrowers have the ability to repay their loans.

We welcome more small dollar lending by banks and credit unions as long as those loans are reasonably priced and affordable. These institutions are well positioned to make low-cost small dollar loans. Financial institutions possess a lot of information about their customers' income, expenses and financial lives. This information can enable banks and credit unions to assess ability to repay a small dollar loan without complicated loan applications. Further, banks and credit unions can offer these loans as part of a broader relationship with their customers that can enhance the value of a deposit account or open the gateway to other types of loans like auto loans and mortgages down the line.

While financial institutions should be encouraged to make low-cost, affordable small dollar loans, we reject calls for banks to make loans with rates as high as 99%. For small loans, a maximum rate of 36% or less is the widely accepted benchmark for affordable loans, ensuring that the interests of lenders and borrowers are aligned.[18] The FDIC's longstanding 2007 guidelines provide that affordable loans should not exceed 36%. That rate is twice the 18% rate that federal credit unions are allowed to charge. An interest rate cap of 36% or less for small loans has been supported for over a century by reformers and in recent years has been endorsed by Congress, states, regulators and the consumer advocacy community. For larger loans, rates should be even lower, just as many states have tiered interest rate caps. Iowa for example, caps the first $1000 at 36% and ratchets the rate down to 18% for amounts over $10,000.

While your agencies (with the exception of NCUA) do not enforce rate limits, you have the responsibility to ensure that financial institutions under your charge are not engaged in unaffordable lending and do not put their reputations at risk. At high interest rates, both risks are much greater. High interest rates lead to skewed incentives that allow lenders to profit on unaffordable loans.[19] Lenders like CashCall and Elevate make installment loans in the 100% APR range that have very high default rates. Rates above 36% also risk financial institutions' reputations and blur the line between responsible institutions and predatory lenders.

In addition, efforts to encourage financial institutions to offer small dollar loans should not be at the expense of traditional underwriting principles. Financial institution regulators must reject any suggestion that institutions should engage in collateral-based lending that looks only at borrower income and does not consider the borrower's ability to afford existing expenses.

The federal banking regulators have long held that safe and sound lending requires lending based on the borrower's ability to repay and not based on the lender's access to collateral (asset-based lending).[20] Yet making high-cost loans tied to repayment from the borrower's incoming deposit—thus putting the depository first in line for repayment—without an income-and-expense based ability-to-repay determination is asset-based lending. Looking only at income does not ensure that the borrower can continue to meet their remaining obligations and expenses after loan repayment; the borrower must only have enough funds on payday.

Payment-to-income ratios cannot substitute for underwriting or serve as a conclusive determination that a borrower has the ability to afford a payment. Consider a family of four at the federal poverty level of $24,300 annually, $2,025 monthly. A 5% PTI standard would assume that the borrower has $101 in spare cash each month, or $1,215 annually, that they can spare toward service of high-cost debt. Yet, by definition, the poverty level is the level at which a family already has insufficient income. Even at somewhat higher income levels, it is far-fetched to categorically assume that a subprime borrower who has already demonstrated difficulty handling expenses has an extra 5% of her income available to put towards a new debt. Collateral-based income-only lending does not sufficiently account for existing challenges meeting ongoing expenses. Moreover, payday installment loans have very high defaults even when payments are limited to 5% of income or less.[21]

Low default rates, particularly for bank loans repaid from incoming deposits, do not demonstrate that loans are affordable. Certainly, regulators should take action if a loan program has high default rates. As discussed further below, regulators should put a stop to rent-a-bank operations that enable lenders like Elevate to make high-cost loans with high default rates. But when a lender has a strong repayment mechanism, default rates will not tell the whole story, and scrutinizing default rates does not substitute for a front-end determination based on ability to meet expenses. Deposit advance products, for example, likely had extremely low default rates because banks had access to the borrower's deposit accounts and could immediately skim the payment of the top of the next deposit. When loans are tied to automatic repayment from deposit accounts, default rates can understate unaffordability because the lender repays itself on payday, when the borrower's account balance is highest, before all other obligations and expenses. Thus, the loan itself will often be repaid even while the payments on the additional debt load leave the borrower unable to meet other obligations and expenses.

For all of these reasons, regulators' efforts to encourage financial institutions to offer small dollar loans must ensure that rates are reasonable, payments are affordable, and loans are underwritten for ability to repay based on consideration of income and expenses.

<u>Prevent rent-a-bank schemes that enable non-bank lenders to circumvent state interest rate limits.</u>

Interest rate limits are the simplest and most effective way of preventing predatory lending and ensuring that lenders properly consider borrowers' ability to repay their loans. At reasonable interest rates, the interests of the lender and borrower are aligned: They rise and fall together, prospering if a loan is affordable, and suffering if it is not. High interest rates, on the other hand, enable lenders to make profits despite high default rates and even, at times, to profit on loans that default. Interest rate limits are easily understood by lenders and borrowers alike, are easy to comply with, and give lenders flexibility as to how to underwrite to ensure that borrowers can afford their payments.

Decades ago, a few banks – which are not subject to state interest rate limits – began renting out their charters to enable payday lenders to make high-cost loans in states where high rates are prohibited. While those schemes were shut down, they are starting to return.

We call on you to prevent banks from partnering with non-bank lenders to make loans—whether short-term or installment loans—that exceed state interest rate limits. Since the mid-2000s, federal regulators have generally kept rent-a-bank arrangements for short-term payday loans at bay. At that time, OCC Comptroller Hawke called rent-a-bank schemes "an abuse of the national charter"[22] and cautioned that "[t]he benefit that national banks enjoy by reason of [preemption] cannot be treated as a piece of disposable property that a bank may rent out to a third party that is not a national bank."[23]

But these schemes have continued to spring up for high-cost installment loans. Elevate makes loans at 100% interest using Republic Bank & Trust in Kentucky, ignoring the voter-approved 36% or lower rate caps in Arkansas, Montana, South Dakota and other states. Elevate has very high charge-off rates. Enova also uses 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. Marketplace 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 marketplace lenders, Avant and

Marlette, for using rent-a-bank arrangements to hide the fact that these state-regulated lenders are the true lender.

In rent-a-bank operations—both old and new—the non-bank lender is in the driver's seat. The bank is a fig leaf, originating the loan and perhaps having a minor additional role that merely serves as cover for the fact that the main value the bank adds is its interest rate preemption rights. Typically, virtually all aspects of the loan program other than origination are handled by the non-bank lender, which may include setting the loan terms, designing the underwriting criteria, handling the website, marketing the loans, taking and processing applications, servicing the loans, handling customer service, and, for securitized loans, packaging the loans for investors. While the bank may approve aspects of these operations, the vast majority of the work and the vast majority of the profits go to the non-bank lender.[24]

These rent-a-bank arrangements are inconsistent with the banking regulators' stance against third-party arrangements designed to permit circumvention of state law. We urge the regulators to use their supervision and enforcement authority to ensure that banks are not renting their charters.

We note with alarm that the OCC recently lifted a 2002 consent order prohibiting Ace Cash Express from engaging in a rent-a-bank partnership. We hope this is not a sign of a more permissive stance by the OCC or any other federal regulator. We also call on the FDIC, in particular, to stop its supervisee banks that are currently engaged in rent-a-bank schemes from helping non-bank lenders evade state limits on interest rates.

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High-cost loans made or facilitated by banks and credit unions will not drive out even higher-cost lending by non-bank lenders. To the contrary, high-cost lending by banks and credit unions 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 prohibited or imposed meaningful restrictions on payday loans in recent years. And most states cap rates on longer-term loans.[25]

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.[26] 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 prudential regulators, in addition to CFPB, to ensure that banks do not get back into high-cost payday lending, whether short-term or installment, whether directly or through partnerships. Please reject calls to explicitly authorize such loans and take every necessary step to prevent them.

We appreciate your consideration of our concerns. We will follow up to request a meeting with each of you to discuss them further.

Sincerely,

Michael Calhoun, President
Center for Responsible Lending

Lisa Donner, Executive Director
Americans for Financial Reform

Richard DuBois, Executive Director
National Consumer Law Center

Edmund Mierzwinski, Senior Director, Consumer Programs
U.S. PIRG

Reverend Dr. Cassandra Gould, Executive Director
Missouri Faith Voices, a Faith in Action Federation

Christopher Peterson, Director of Financial Services and Senior Fellow
Consumer Federation of America

Samantha Vargas Poppe, Associate Director of Policy & Advocacy
UnidosUS

Hilary O. Shelton, Director
NAACP Washington Bureau & Senior Vice President for Policy and Advocacy

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[1] Wells Fargo, US Bank, Fifth Third, Regions, Bank of Oklahoma and its related banking divisions, and Guaranty Bank.

[2] For further background, *see* Center for Responsible Lending, *Been There, Done That: Banks Should Stay Out of Payday Lending* (July 2017), http://www.responsiblelending.org/research-publication/been-there-done-banks-should-stay-out-payday-lending.

[3] Consumer Financial Protection Bureau, *Payday Loans and Deposit Advance Products: A White Paper of Initial Data Findings* at 33-34*,* April 24, 2013, *available at* http://files.consumerfinance.gov/f/201304_cfpb_payday-dap-whitepaper.pdf.

[4] Rebecca Borné and Peter Smith, *Triple Digit Danger: Bank Payday Lending Persists* (March 21, 2013), Center for Responsible Lending, *available at* http://www.responsiblelending.org/payday-lending/research-analysis/Triple-Digit-Bank-Payday-Loans.pdf.

[5] CFPB reports that the market was roughly $6.5 billion in advances at its peak in 2013. Bureau of Consumer Protection, 12 CFR Part 1041, Payday, Vehicle Title, and Certain High-Cost Installment Loans; Proposed Rule, 81 Fed. Reg. 47864, 47884 (July 22, 2016), *available at* https://www.gpo.gov/fdsys/pkg/FR-2016-07-22/pdf/2016-13490.pdf (CFPB Proposed Rule). Banks charged from $7.50 to $10.00 per $100 borrowed, computing to a range of $487.5 million (if every customer were charged $7.50) to $650 million (if every customer were charged $10.00).

[6] For example, studies in California and Texas have both shown that African American and Latinos are far more likely to have been extended payday loans than the population as a whole. California Department of Corporations, "Payday Loan Study (Updated June 2008); Paige Marta Skiba and Jeremy Tobacman, *Do Payday Loans Cause Bankruptcy?* Vanderbilt University and the University of Pennsylvania (October 10, 2008). This disproportionate share is even more significant because African Americans and Latinos are much less likely to have a checking account—a basic requirement for obtaining a payday loan. *See also* Robin Howarth, Delvin Davis, & Sarah Wolff, *Shark-Free Waters: States Are Better Off without Payday Lending*, Center for Responsible Lending (Aug. 2016), *available at* http://www.responsiblelending.org/sites/default/files/nodes/files/research-publication/crl_shark_free_waters_aug2016.pdf (payday lenders in Florida were more concentrated in majority black and Latino communities, even after controlling for income); Wei Li, Leslie Parrish, Keith Ernst, and Delvin Davis, *Predatory Profiling: The Role of Race and Ethnicity in the Location of Payday Lenders in California,* Center for Responsible Lending (March 26, 2009), *available at*: http://www.responsiblelending.org/payday-lending/research-analysis/predatory-profiling.pdf (Payday lenders in California were found 2.4 times more concentrated in African American and Latino communities, *even after controlling for income and a variety of other factors*).

[7] *See*, *e.g.*, Testimony of Steve Abbot, former President of the Navy-Marine Corps Relief Society, Before the U.S. Committee on Banking, Housing and Urban Affairs (Nov. 3, 2011) (noting bank payday loans among the "most egregious trends"); Comments of Michael Archer, Director of Military Legal Assistance, Marine Corps Installations East, to CFPB (April 4, 2012): "Most ominously, a few large banks have gotten into the business of payday loans through the artifice of calling the loans open ended credit," http://www.regulations.gov/#!documentDetail;D=CFPB-2012-0009-0056.

[8] Hundreds of groups urged the prudential regulators to stop banks from trapping borrowers in payday loans. Letters from approximately 250 groups to FDIC, OCC, FRB and CFPB, March 13, 2013 (http://ourfinancialsecurity.org/blogs/wp-content/ourfinancialsecurity.org/uploads/2013/03/Bank-Payday-Sign-On-Letter-3-13-13-Final.pdf) and February 22, 2012 (http://www.responsiblelending.org/payday-lending/policy-legislation/regulators/Dear-Regulators.pdf). Thousands of individuals and many community groups filed comments with the OCC urging that Wells Fargo's Community Reinvestment Act rating be negatively impacted because it makes payday loans. The comment filed by CRL and NCLC is available here: http://www.responsiblelending.org/payday-lending/policy-legislation/regulators/cra-comment_wells-nov-29-2012_final.pdf.

[9] *See*, *e.g.*, Letter from Benjamin Todd Jealous, President and Chief Executive Officer, NAACP, to FDIC, OCC, FRB, and CFPB opposing bank payday lending (Feb. 21, 2013), *available at* http://www.responsiblelending.org/payday-lending/policy-legislation/regulators/NAACP-redatory-Pay-Day-Loans-to-regulators-BTJ.pdf.

[10] *See*, *e.g.*, Elaina Ramsey, Faith Groups Take On Payday Lenders, Sojourners, *available at* https://sojo.net/magazine/stub/faith-groups-take-payday-lenders (discussing a National Day of Action among faith leaders in early 2013 to address payday lending). In connection with this National Day of Action, Rev. DeForest B. Soaries, jointly with other nationally prominent African American ministers, called for "an end to usury, an end to 300% interest rates, and an end to enslavement to both payday lenders and the banks now offering equally dangerous products" in *An Emancipation Proclamation from Payday Lending.* Center for Responsible Lending, *Bank Payday Lending: Overview of Media Coverage and Public Concerns*, CRL Issue Brief, March 7, 2013, *available at* http://www.responsiblelending.org/payday-lending/tools-resources/BPD-media-coverage-3-7-13.pdf

[11] For proxy year 2013, investors filed shareholder resolutions with the four largest banks making payday loans expressing concern about the product and requesting data, which none of the banks agreed to provide. Wells Fargo (http://www.onlineethicalinvestor.org/eidb/wc.dll?eidbproc~reso~10525); Fifth Third Bank (http://www.trilliuminvest.com/resolutions/payday-lending-fifth-third-bancorp-2013/); Regions Bank;

(https://www.sec.gov/divisions/corpfin/cf-noaction/14a-8/2013/dominisocial012513-14a8.pdf); and U.S. Bank and U.S. Bank (https://www.sec.gov/divisions/corpfin/cf-noaction/14a-8/2013/congregationsisters011413-14a8.pdf).

[12] *See*, *e.g.*, "Legislative Black Caucus slams Regions Bank over payday-style loans," Raleigh News and Observer "Under the Dome," Oct. 11, 2012, *available at* http://www.cashcowadvances.com/paydayblog/legislative-black-caucus-slams-regions-bank-over-payday-style-loans.html (quoting letter from N.C. Senator Floyd McKissick, Jr., chairman of the N.C. Legislative Black Caucus, to Regions Bank, which stated: "We are deeply concerned about recent reports of Regions Bank offering its 'Ready Advance' payday loans in North Carolina . . . . High-cost, short-term balloon loans like these sharply increase the financial distress of families under economic strain"); Letter from Arizona Democratic Caucus to the prudential banking regulators, February 2012 (noting that Arizona "has spent countless state resources to study and understand the effects of [payday lending], and ultimately outlaw payday lending entirely" and calling on federal regulators to "take immediate action so that meaningful reforms taking place in Arizona and throughout the country in the name of consumer protection will not be undermined.").

[13] In January 2013, several Senators wrote the FRB, OCC, and FDIC urging action to address bank payday lending (http://www.blumenthal.senate.gov/newsroom/press/release/blumenthal-calls-on-regulators-to-act-to-stop-abusive-bank-payday-lending). In April 2013, House members did the same. For further documentation of opposition to bank payday lending, *see* Center for Responsible Lending, *Bank Payday Lending: Overview of Media Coverage and Public Concerns* at 10, CRL Issue Brief, March 7, 2013, *available at* http://www.responsiblelending.org/payday-lending/tools-resources/BPD-media-coverage-3-7-13.pdf.

[14] *See*, *e.g.*, Green America's "Break up with your mega bank" campaign focused on bank payday lending: http://breakupwithyourmegabank.org/. In addition, a 2012 North Carolina poll found that 93 percent of respondents were less likely to use a bank that makes payday loans that violate North Carolina law. North Carolina Justice Center, *Regions Bank Halts Illegal Payday Lending in North Carolina* (Jan. 16, 2013), *available at* http://www.ncjustice.org/?q=consumer-and-housing/media-release-regions-bank-halts-illegal-payday-lending-north-carolina (citing Public Policy Polling poll conducted on behalf of CRL, Sept. 2012).

[15] In 2012, "Bank On" Savannah (Ga.) adopted as policy that participating banks may not make deposit advance products in excess of 36% APR. Relatedly, Cities for Financial Empowerment, the organization that supports cities in implementing "Bank On" programs to bring people into the banking mainstream, wrote to the prudential regulators expressing serious concerns about bank deposit advance programs (https://www.fdic.gov/regulations/laws/federal/2013/2013-deposit_advance_products-c_61.pdf).

[16] For example, the following class action lawsuits were filed against Fifth Third Bank: *Klopfenstein v. Fifth Third Bank*, S.D. Ohio (Aug. 3, 2012); *Laskaris v. Fifth Third Bank*, S.D.Ca. (Feb. 12, 2013); *Jesse McQuillen v. Fifth Third Bank*, W.D. Ky. (May 7, 2013). Another was filed against Bank of Oklahoma and its affiliates (*Leland Small v. BOKF, N.A.*, 13-cv-01125), which resulted in a $1.8 million settlement, http://fastloansettlement.com/Home/FAQ.

[17] http://www.responsiblelending.org/research-publication/open-letter-banks-dont-make-debt-trap-payday-loans.

[18] *See* Lauren K. Saunders, National Consumer Law Center, Why 36%? The History, Use, and Purpose of the 36% Interest Rate Cap (April 2013), http://www.nclc.org/images/pdf/pr-reports/why36pct.pdf. Generally, all fees, interest and other charges together should not exceed an annualized rate of 36%, as under the Military Lending Act. Many states enforce usury limits far below 36%, e.g. Arkansas (17%), New York (25%), Maryland (33%). Under a proposal in Congress to institute a 36% rate cap, $30 per year in application or participation fees would not be included. See S. 1659 (Durbin)/H.R. 3760 (Cartwright), Protecting Consumers from Unreasonable Credit Rates Act of 2017.

[19] Lauren Saunders et al., National Consumer Law Center, Misaligned Incentives: Why High-Rate Installment Lenders Want Borrowers Who Will Default (July 2016), https://www.nclc.org/issues/misaligned-incentives.html.

[20] For example, in 2001, the agencies issued joint guidance on subprime consumer lending products, emphasizing that banks need to base lending on determination of the borrower's ability to repay the loan, as opposed to relying on collateral, and that the failure to underwrite the loan was a safety and soundness concern: "Loans to borrowers who do not demonstrate the capacity to repay the loan, as structured, from sources other than the collateral pledged are generally considered unsafe and unsound. Such lending practices should be criticized in the Report of Examination as imprudent. Further, examiners should refer any loans with the aforementioned characteristics to their Agency's respective consumer compliance/fair lending specialists for additional review." FIL 9-2001, Interagency Expanded Guidance for Subprime Lending Programs, January 31, 2001, available at http://www.federalreserve.gov/boarddocs/srletters/2001/sr0104a1.pdf. This guidance was applicable to subprime consumer lending generally, beyond the mortgage context, and the FDIC has cited its specific relevance to payday lending. FDIC Financial Institution Letters, Guidelines for Payday Lending, FIL 14-2005, February 2005, available at http://www.fdic.gov/news/news/financial/2005/fil1405a.html. For further discussion, *see* Center for Responsible Lending, *Prudential Regulators Should Apply Safety and Soundness Standards to Bank Payday Loan Products*, January 24, 2013, *available at* http://www.responsiblelending.org/payday-lending/policy-legislation/regulators/Safety-Soundness-BPD.pdf.

[21] CFPB's research found extraordinarily high default levels on online installment loans even at PTI ratios of 5% or less. For one lender in the Bureau's data whose loans included both storefront and online loans, 28% to 30% of loans with PTI of 5% of less defaulted, excluding loans with first-payment defaults. CFPB, Supplemental Findings on payday, payday installment, and vehicle title loans, and deposit advance products (June 2016), https://s3.amazonaws.com/files.consumerfinance.gov/f/documents/Supplemental_Report_060116.pdf, at 17 (Figure 6), 22 (Figure 9) and n.31 at 24. CFPB's analysis of a large dataset uses a conservative definition of default, counting as defaulted loans only those charged off. *Id*. at 19. In addition, the Bureau excluded from this analysis loans with defaults before the first payment. This results in a conservative defaults figure, particularly considering that some portion of first payment defaults are due to inability to repay. At the same time, we note, as the Bureau does, that a nonprime 101 study found that the statistical correlation between PTI and defaults was substantially mitigated or eliminated when first-payment defaults were eliminated. For all loans for which the origination channel was unknown—about half the dataset, or 1.25 of 2.5 million loans—the Bureau found default rates of 38 to 40% at PTI of 5% or less, including first-payment defaults. CFPB Supplemental Findings at 18, 23, 24.

[22] The Office of the Comptroller of the Currency, Office of Thrift Supervision, Federal Reserve Board, and FDIC all shut down rent-a-bank in the early-to-mid 2000s.

The OCC issued an advisory as well as enforcement actions and then-Comptroller John D. Hawke called the schemes "an abuse of the national charter," noting "It is a matter of great concern to us when a national bank essentially rents out its charter to a third-party vendor who originates loans in the bank's name and then relinquishes responsibility for how these loans are made . . . . [w]e are particularly concerned where an underlying purpose of the relationship is to afford the vendor an escape from state and local laws that would otherwise apply to it." http://www.occ.gov/static/news-issuances/news-releases/2002/nr-occ-2002-10.pdf; http://www.occ.gov/topics/consumer-protection/payday-lending/index-payday-lending.html; http://www.occ.gov/static/news-issuances/news-releases/2003/nr-occ-2003-3.pdf.

The Office of Thrift Supervision also issued an advisory, noting "Associations should not 'lease' their charter out to nonthrift entities through an agreement that allows the nonthrift entity to circumvent state and local law." Thrift Bulletin 82, Aug. 18, 2003, at 8.

The Federal Reserve Board stopped the First Bank of Delaware from renting its charter to storefront payday lenders; the relationship is described here: http://www.consumerfed.org/financial-services/166.

The FDIC also issued an advisory addressing payday lending through non-bank partners (FIL FDIC: FIL-14-2005: Guidelines for Payday Lending) and later shut down a straggling rent-a-bank arrangement with an enforcement action (*In the Matter of First Bank of Delaware, and CompuCredit Corporation, Notice of Charges for an Order to Cease and Desist and for Restitution, Federal Deposit Insurance Corporation,* FDIC-07-256b, June 15, 2008, *available at* http://www.FDIC.gov/news/perss/2008/FDBNoticeofCharges.pdf; *See also In the Matter of First*

Bank of Delaware, Stipulation and Consent to the Issuance of an Order to Cease and Desist, Order for Restitution, and Order to Pay, Oct. 3, 2008, *available at* http://www.FDIC.gov/bank/individual/enforcement/2008-10-20.pdf.

[23] https://www.occ.treas.gov/news-issuances/news-releases/2002/nr-occ-2002-10.html.

[24] These undisputed facts recited by the court are virtually identical to the payday lender rent-a-bank arrangements of 20 years ago:

> For example, Avant, Inc. paid the implementation fee to initiate the lending program, paid all of WebBank's legal fees in the program, bears all of the expenses incurred in marketing the lending program to consumers, determines which loan applicants will receive Avant Loans and bears all costs of making these determinations, ensures the program complies with federal and state law, assumes responsibility for all servicing and administration of the Avant Loans "even during the period before WebBank sells the loans to Avant, Inc. or its affiliates," and assumes responsibility for all communications with loan applicants and consumers who receive Avant Loans. [Id. at 34(a)-(j)] Additionally, Avant, Inc. bears all risk of default, and indemnifies WebBank against all claims arising from WebBank's participation in the lending program. [Id. at 34(l)] Avant, Inc., along with the other non-bank entities, collects 99% of the profits on the loans while "WebBank's share in the profit is only approximately one percent.

Meade v. Avant of Colorado, LLC, 2018 WL 1101672 (D. Colo. Mar. 1, 2018). Avant attempted to distinguish itself from the rent-a-bank arrangements 20 years ago on the grounds that payday lenders claimed to be agents of the bank whereas Avant was an assignee of the loans. That is not only a distinction without a difference, it is not even a distinction. Payday lenders in the past were also assignees of the loans, and Avant also claims to be a bank "service provider" (i.e., an agent).

[25] Lauren Saunders, Margot Saunders, Carolyn Carter and Andrew Pizor, *Installment Loans: Will States Protect Borrowers from a New Wave of Predatory Lending?* (July 2015), *available at* http://www.nclc.org/images/pdf/pr-reports/report-installment-loans.pdf.

[26] For further detail, *see* Center for Responsible Lending, *Prudential Regulators Should Apply Safety and Soundness Standards to Bank Payday Loan Products*, January 24, 2013, *available at* http://www.responsiblelending.org/payday-lending/policy-legislation/regulators/Safety-Soundness-BPD.pdf .