



May 30, 2013

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Re: Docket No. FDIC-2013-0043, Docket ID OCC-2013-005  
Proposed Guidance on Deposit Advance Products

Dear Comptroller Curry and Chairman Gruenberg:

### **Introduction**

Thank you for this opportunity to comment on your Proposed Guidance on Deposit Advance Products. Legal Services NYC (LS-NYC) is the nation's largest provider of free civil legal services to the poor. For nearly 40 years, LS-NYC has provided critical legal help to low-income residents of New York City. The nineteen neighborhood offices of LS-NYC operate in diverse communities throughout the city, representing over 25,000 clients each year across the five boroughs.

LS-NYC writes to emphasize the need to ban Deposit Advance (i.e. payday) loans to account holders who receive direct deposit federal payments. Social Security and

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Supplemental Security Income payments constitute 90 percent of these electronic federal payments and thus are the focus of these comments.<sup>1</sup>

## **Congress Protects Social Security from Creditors to Feed and House the Poor**

Since the Depression, Social Security has protected America's most vulnerable – the elderly, disabled and orphaned - from abject poverty. Key to Social Security's potency is its anti-alienation provision<sup>2</sup> which prevents banks and other creditors from taking Social Security moneys to pay debts.<sup>3</sup> Thus a state that pays welfare to a needy citizen cannot recoup its losses from a retroactive Social Security check.<sup>4</sup> Nor can a state take Social Security to offset the expense of housing and feeding a Social Security recipient it has imprisoned.<sup>5</sup>

## **Recent Treasury Action Protects Social Security Payments from Creditors and Payday Lenders**

The statutory requirement to protect Social Security from creditors is so crucial that the U.S. Treasury issued rules to ensure Americans can safely electronically bank without fear of creditors freezing their accounts.<sup>6</sup> Treasury likewise ruled that Social Security recipients are so vulnerable to Deposit Advance (i.e. payday) loans that it bans such products from any pre-paid debit card that is loaded by electronic federal payments.<sup>7</sup>

## **21 Million Potential Deposit Advance (i.e. Payday) Borrowers**

58 million American receive their monthly Social Security or SSI check electronically at national and local banks.<sup>8</sup> Of this group, twenty-one million rely exclusively upon that monthly deposit for food, rent and other daily needs.<sup>9</sup>

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<sup>1</sup> U.S. Gen. Accounting Office, GAO-02-913, *Electronic Transfer, Use by Federal Payment Recipients Has Increased but Obstacles to Greater Participation Remain* 7 (2002), available at <http://www.gao.gov/new.items/d02913.pdf>.

<sup>2</sup> 42 U.S.C. § 407(a) (2006).

<sup>3</sup> Other federal benefit payments that are similarly protected from creditors include veterans' benefits, Supplemental Security Income ("SSI"), retirement payments to former federal employees, and Seamen and Railroad worker benefits.

<sup>4</sup> *Philpott v Essex County Welfare Board*, 409 U.S. 413 (1973).

<sup>5</sup> *Bennett v Arkansas*, 485 U.S. 395 (1988).

<sup>6</sup> 31 C.F.R. pt. 208; 78 Fed Reg. 32,099 (May 29, 2013).

<sup>7</sup> Department of Treasury, Federal Government Participation in the Automated Clearing House, Interim Rule, 75 Fed. Register 80335, 80338 (December 22, 2010).

<sup>8</sup> *Social Security Basic Facts*, (February 7, 2013); available at <http://www.ssa.gov/pressoffice/basicfact.htm>;

<sup>9</sup> The 21 million figure is derived as follows. 14 million aged Social Security recipients rely on their monthly Social Security check for 90% or more of their income. Office of Retirement and Disability Policy, Social Security Admin., Pub. No. 13-11785, *Fast Facts & Figures About Social*

Not surprisingly, Social Security recipients living on the edge of poverty comprise one-quarter of the payday loan market.<sup>10</sup> That percentage is likely to rise if payday lenders migrate from stripmall store-fronts to Main Street banks where Social Security recipients now send their electronic payments. Indeed, 21 million Social Security recipients are one dead car battery, leaky roof, or sick child away from a Deposit Advance (i.e. payday) loan that will drag them deeper into debt.

Deposit Advance (i.e. payday loans) will quickly deprive them of money Congress earmarked for day-to-day needs. The Wall Street Journal documented just such a practice involving payday lenders who gained access to electronically deposited federal payments.<sup>11</sup> One such 80 year old victim of payday lending saw his monthly Social Security check tumble from \$565 to \$180 a month due to his inability to repay a loan with an APR of 400%.

### **Mandatory Direct Deposit Increases the Likelihood of Deposit Advance (i.e. Payday) Abuse**

The proposed guidance's failure to protect electronic federal payments is remarkable because direct deposit – which is now mandatory<sup>12</sup> – eliminates any risk of borrower default when the borrower receives Social Security. As one payday lender said "Rain or shine [Social Security recipients] will always have money, every 30 days."<sup>13</sup>

While mandatory direct deposit increases the number of customer to whom banks can peddle their payday products, it also eliminates the best escape hatch from the payday loan trap – the paper check. In the past, a victim of payday lending could call Social Security to convert the direct deposit payment to a paper check, thereby preventing the bank from gouging future deposits with fees.

Not anymore. Since March 1, 2013, all Social Security checks are delivered electronically.<sup>14</sup> While a victim of payday lending can still try to walk-away from a

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*Security 7* (2011); available at [http://www.ssa.gov/policy/docs/chartbooks/fast\\_facts/2011/fast\\_facts11.pdf](http://www.ssa.gov/policy/docs/chartbooks/fast_facts/2011/fast_facts11.pdf). In addition, seven million adults receive Supplemental Security Income, a need based disability program for persons living below the poverty line. *Id.* at 22.

<sup>10</sup> Center for Responsible Lending, *Triple-Digit Danger: Bank Payday Lending Persists*, p. 2 (March 21, 2013); available at <http://www.responsiblelending.org/payday-lending/research-analysis/Triple-Digit-Bank-Payday-Loans.pdf>.

<sup>11</sup> Ellen E. Schultz & Theo Francis, *High-Interest Lenders Tap Elderly, Disabled*, Wall Street J., at A1 (Feb. 12, 2008); available at <http://online.wsj.com/article/SB120277630957260703.html>.

<sup>12</sup> Management of Federal Agency Disbursements, 75 Fed. Reg. 34394, 34395 (proposed June 17, 2010) (to be codified at 31 C.F.R. pt. 208).

<sup>13</sup> *Supra* note 11.

<sup>14</sup> *Supra* note 12.

predatory lender by switching banks, doing so is not as easy as picking up the phone. To stop payment, the Social Security Administration needs a new bank account into which to electronically send the monthly benefit.

Further preventing a Social Security recipient from walking away from a bank that has saddled her with a deposit advance debt (payday loan) is ChexSystems. ChexSystems is a credit agency that 80% of banks use to assess the credit worthiness of consumers seeking to open a new account.<sup>15</sup> If a victim of payday lending defaults on repaying a payday loan, the payday lending bank will report him or her to ChexSystems. Thereafter, that unpaid debt will likely prevent him or her from opening a new account at a new bank.

### **Courts are Unlikely to Protect Victims of Deposit Advance (i.e. Payday) Loans**

An outright ban of Deposit Advance (i.e. payday) loans to account holders receiving electronic federal payment is needed because courts are unlikely to protect payday victims. First, Deposit Advance (i.e. payday) contracts contain arbitration clauses that preclude any court relief, as well as any class action relief within an arbitral forum.<sup>16</sup> These arbitration clauses enable banks to insulate themselves from law reform suits brought by private litigants as well as from public scrutiny.

Second, the anti-alienation provision of the Social Security Act is not likely to provide significant protection to a victim of a Deposit Advance (i.e. payday) loan, either in court or before an arbitrator. Prior to 2003, a number of courts forbade banks from taking (or “setting off”) Social Security deposits to collect debts for personal loans (which would include a payday loan) that were unrelated to the day-to-day operation of the account.<sup>17</sup>

In 2003, the anti-alienation clause of the Social Security Act was significantly weakened in the context of bank set-offs by a Supreme Court decision. The Court ruled that Social Security payments are only protected when a creditor takes them pursuant to a legal or quasi-legal proceeding.<sup>18</sup> “Set-off” (the process by which a bank

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<sup>15</sup> James Marvin Perez, *Blacklisted: The Unwarranted Divestment of Access to Bank Accounts*, 80 N.Y.U. L. Rev. 1586, 1587 (2005).

<sup>16</sup> For example, Wells Fargo’s *Direct Deposit Advance Service Agreement and Product Guide* at 25 (April 1, 2013) contains a mandatory arbitration agreement. Available at [https://www.wellsfargo.com/downloads/pdf/checking/dda/termsandconditions\\_english.pdf](https://www.wellsfargo.com/downloads/pdf/checking/dda/termsandconditions_english.pdf).

<sup>17</sup> *Tom v. First American Credit Union*, 151 F.3d 1289 (10th Cir. 1998); *Marengo v. First Massachusetts Bank*, 152 F. Supp. 2d 92, 95 (D. Mass. 2001); *In Re: Brewer*, U.S. Bankruptcy Court, S.D. Ill., 2002 Bankr. LEXIS 992 (August 15, 2002).

<sup>18</sup> *Washington State v. Keffeler*, 537 U.S. 371 (2003).

administratively takes a deposit to recover a debt incurred by the account holder) is not such a legal proceeding that triggers such protections.<sup>19</sup>

### **Regulators Must Ban Banks from Offering Deposit Advance (i.e. Payday) Loans to Account holders Receiving Electronic Federal Payments**

Regulators and attorney generals, not private litigants, are burdened with the primary role of policing Deposit Advance products of banks. Given the unrelenting evidence that payday loans are harmful, you should utilize your regulatory powers under the Electronic Funds Transfer Act<sup>20</sup> and prohibit banks from providing Deposit Advance products to account holders who receive electronic federal benefits. Consumers who want such payday loans will have to go elsewhere. Such payday lenders will have to assess whether the borrower is a credit risk without using the direct deposit account as collateral.

### **Conclusion**

Treasury prohibits Deposit Advance (i.e. payday) loans on pre-paid debit cards loaded by electronic federal payments.<sup>21</sup> You should do the same for all bank accounts in receipt of electronic federal payments. Otherwise, banks that safeguard safety-net payments will plunder them for their own gain.

***For Further Information, Please Contact Johnson M. Tyler at 718-237-5548 or  
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<sup>19</sup> *Wojchowski v. Daines*, 498 F.3d 99 (2d Cir. 2007); *Wilson v. Harris N.A.*, 2007 WL 2608521 (N.D.Ill. 2007); *Fortelney v. Liberty Life Assurance Company of Boston*, 2011 WL 1938174 (W.D.Okla.); *Sanford v. Standard Federal Bank*, 2011 WL 721314 (E.D.Mich.); *In re Ward*, 2011 WL 2680295 (Bkrtcy.N.D.Ga. 2011).

<sup>20</sup> 15 U.S.C. § 1693 et. al.

<sup>21</sup> Department of Treasury, *Federal Government Participation in the Automated Clearing House, Interim Rule*, 75 Fed. Register 80335, 80338 (December 22, 2010).