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The Honorable Richard Cordray
Director
Consumer Financial Protection Bureau
1625 I Street, N.W.
Washington, DC 20006

The Honorable Edith Ramirez
Chairwoman
Federal Trade Commission
600 Pennsylvania Avenue, NW
Washington, DC 20580

The Honorable Greg Abbott
Attorney General
Office of the Attorney General
300 W. 15th Street
Austin, TX 78701

The Honorable Leslie Pettijohn
Commissioner
Office of Consumer Credit Commissioner
2601 North Lamar
Austin, Texas 78705

December 17, 2014

Dear Director Cordray, Chairwoman Ramirez, Attorney General Abbott, and Commissioner Pettijohn,

We are writing to express deep concern about new Texas data that documents an ongoing trend of unlawful use of criminal charges by payday loan businesses to collect debts. The use of bad check or theft by check charges by payday loan businesses, which operate as credit access businesses (CABs) in Texas, constitutes a violation of the letter and spirit of: (1) state laws governing the filing of such criminal charges and the operations of CABs; and (2) state and federal fair debt collection laws.¹ It is also a harmful practice and a wrongful use of taxpayer-funded law enforcement resources.

Our research, which includes public information requests to 21 Texas counties and information from four justice courts in Texas documents over 1,500 criminal complaints of bad check and theft by check complaints filed by payday loan businesses in Texas. **In one justice court, where more detailed data is available, arrest warrants were issued in 42% of the bad check cases brought based on payday loan business complaints, and jail time or jail credit applied in 5.6% of the cases.**² In Collin County, the county with the highest number of documented complaints, over 700, \$131,836 was collected from 204 individuals, representing 28% of the complaints.³ In a case from a justice court

¹Texas has a long history of not criminalizing debts. The Republic of Texas Constitution drafted in 1836 clearly states, “No person shall be imprisoned for debt in consequence of inability to pay” and the current Texas Constitution’s Bill of Rights states, “No person shall ever be imprisoned for debt.” Texas Penal Code Chapters 31 and 32 both establish that a returned check or payment, in the case of a transaction where a post-dated check is accepted, does not meet the legal standard to establish theft or fraud. In addition, the Texas Legislature clarified the matter in 2011 by adding § 393.201(c)(3) to the Texas Finance Code, prohibiting CABs from pursuing criminal charges related to a check or debit authorization. State and federal debt collection laws also include language prohibiting wrongful threats of criminal charges, including Texas Finance Code § 392.301 and the Fair Debt Collections Practices Act, 15 USC § 1692(e). This practice also meets the standards of unfair and abusive practices under 12 USC § 5531 and prohibited acts under 12 USC § 5536.

² See Appendix A and Exhibit E.

³ See Appendix A and Exhibit B-1.

in Travis County, payment of \$918.91 was ordered on a bad check case for a defaulted \$225 payday loan.⁴ This individual was able to obtain legal counsel and the case was eventually dismissed. At the time she obtained counsel, there was a warrant for her arrest in connection with the criminal case.

Appendix A and the exhibits, included in the enclosed CD, provide additional details of the research findings. We believe this data represents only a fraction of the total number of individuals impacted by this wrongful practice.

We urge you, as state and federal regulators of these businesses, to take immediate action to: stop payday loan businesses (operating as CABs in Texas) from filing criminal complaints against borrowers; ensure that all possible action is taken to remove any resulting wrongful criminal convictions from borrowers' criminal records; impose punitive fines for the wrongful filing of criminal complaints; and ensure restitution for individuals with losses due to the threat or filing of a wrongful criminal complaint.

Background

Payday loan businesses (CABs in Texas) generally provide short-term loans to borrowers who present a post-dated personal check or authorize electronic debits from a bank account for the amount borrowed plus the finance charge.⁵ Once the term of the loan expires, typically the borrower's next payday, the loan may be paid by the borrower by: (1) allowing the check to be deposited by the payday loan business; (2) allowing the business to debit a designated account; or (3) paying a new finance charge to roll the loan over for another pay period.⁶

In cases where the borrower does not make a new payment to pay off or refinance the loan and the check or debit authorization is not paid due to insufficient funds, some CABs are threatening borrowers with criminal prosecution for writing bad checks and filing complaints with district attorneys, county attorneys, or justice courts.⁷ This scenario may take place even after the borrower has paid refinance fees in excess of the original loan amount borrowed. The threat of imprisonment is a powerful borrower intimidation and debt collection tactic.⁸ Unknowing prosecutors and judges

⁴ See Appendix A and Exhibit G.

⁵ Leah A. Plunkett, Ana Lucia Hurtado, *Small-Dollar Loans, Big Problems: How States Protect Consumers from Abuses and How the Federal Government Can Help*, 44 Suffolk U. L. Rev. 31, 33-34 (2011).

⁶ *Id.*

⁷ See Texas Penal Code § 31.06(f), § 31.04(g)(1), § 32.41.

⁸ Creola Johnson, *Payday Loans: Shrewd Business or Predatory Lending?*, 87 Minn. L. Rev. 1, 86-87 (2002).

have exacerbated the issue by allowing criminal complaints to be filed,⁹ by mailing demand letters,¹⁰ and by punishing debtors.¹¹

A *Texas Observer* article¹² published in July of 2013 uncovered the severity of the debt collection scheme by documenting at least 1,700 instances in which criminal complaints were filed against customers by payday loan businesses in Amarillo, Houston, and San Antonio.¹³

New Findings

In an attempt to further understand the pervasiveness of this practice, Texas Appleseed, a public interest law center based in Austin, Texas, submitted open records requests to state regulators and twenty-one district attorneys.¹⁴ Data was also collected from four justice courts based on individual complaints to state regulators and to Texas Appleseed.¹⁵ The data requests were limited to complaints and cases filed between January 1, 2012 and dates in the spring of 2014 (the date each records request was filed) due to a Texas law change that went into effect on January 1, 2012, further clarifying that CABs may not pursue criminal charges for nonpayment except in cases of clearly established fraud.¹⁶ The open records requests revealed approximately 1,500 cases by 13 CABs where a borrower was charged or a district attorney's office sent the borrower a notice to pay on behalf of a payday loan business.¹⁷

Of the eight counties reporting at least one instance where a letter was sent to or charges were filed against a borrower, six of them have policies posted on their websites specifically noting that they do not file theft by check charges for post-dated checks.¹⁸ In an attempt to get around these policies, some payday businesses asked borrowers to date their checks for the initial transaction date—a

⁹ Lynn Drysdale ; Kathleen E. Keest, *The Two-Tiered Consumer Financial Services Marketplace: The Fringe Banking System and Its Challenge to Current Thinking About the Role of Usury Laws in Today's Society*, 51 S.C. L. Rev. 589, 610 (2000) (payday lenders filing over 13,000 criminal charges with law enforcement officials against their customers in just one Dallas, Texas precinct in one year.).

¹⁰ Forrest Wilder, *Fast Cash: How Taking Out a Payday Loan Can Land You in Jail*, The Texas Observer (Jul. 16, 2013)

¹¹ *Id.*

¹² *Id.*

¹³ *Id.*

¹⁴ Texas Appleseed produced 21 open records requests to the county and district attorneys in the most populous areas of the state. Five counties refused to provide the data; 10 indicated that they do not pursue theft by check or bad check charges for payday loans, citing the post-dated check exemption; six provided documentation of one or more complaints. Texas Appleseed uncovered evidence in two additional counties where criminal complaints were filed by payday loan businesses in at least one justice court and pursued by county attorneys.

¹⁵ With more than 800 justice courts in Texas, there is no systematic means to obtain information regarding bad check complaints filed by CABs. Texas Appleseed's investigation of four precincts was based on specific case information. It demonstrates that the problem persists and that further investigation by a regulatory agency is necessary.

¹⁶ Texas Finance Code § 393.201(c)(3).

¹⁷ See Appendix A for a list of counties where Texas Appleseed received evidence of district or county attorney action in support of criminal theft by check or bad check complaints filed by CABs.

¹⁸ See Appendix B regarding county website language that specifically addresses hot check prosecutions for postdated checks.

misleading practice, as the premise of the transaction is that the check will not be cashed until a later date.¹⁹

In response to the findings of the 2013 article, The Office of Consumer Credit Commissioner (“OCCC”), the state’s regulators of CABs,²⁰ issued an advisory bulletin by stating that “if a consumer postdates a check to pay for a payday loan, and that check later bounces, this is not sufficient evidence to show that the consumer committed criminal conduct...[w]hen a CAB accepts a postdated check or ACH transfer authorization, the CAB should understand that there might not be available funds at the time of the transaction.”²¹ The Consumer Financial Protection Bureau emphasized the seriousness of abusive debt collection tactics by taking enforcement action against ACE Cash Express, headquartered in Irving, Texas, for using “unfair, deceptive, and abusive practices” to collect consumer debts, including threats to criminally prosecute borrowers.²²

The problem of payday businesses wrongfully using the criminal justice system as a debt collection tool is not new. A 1999 article published by Consumers Union in Texas documented the problem of payday businesses using criminal complaints filed in justice courts as a debt collection tool,²³ and a 2000 article documented 13,000 criminal complaints filed by a payday lender in one Dallas precinct.²⁴ In the early 2000s, when many payday loan businesses were operating through partnerships with out-of-state banks, the Federal Deposit Insurance Corporation added to their examination manual a requirement for examiners to focus on “the practice of threatening, and in some cases pursuing, criminal bad check charges, despite the payment of offsetting fees by the consumer and the lender’s knowledge at the time the check was accepted that there were insufficient funds to pay it.”²⁵ Attempts over the past two decades to stop this practice have not been successful. **Ultimately, the penalties for engaging in this wrongful practice must be greater than the profits reaped.**

¹⁹ *Supra* note 7. Texas Appleseed also documented this practice through an individual borrower contract and the related bad check complaint documents, and through information in complaints submitted to the state regulator.

²⁰ See the Texas Debt Collection Act (Tex. Fin. Code Ann. § 392.301(a)(2), and the Credit Services Organizations Act (See Tex. Fin. Code Ann. § 393.201(c)(3))

²¹ Texas Office of Consumer Credit Commissioner, Credit Access Business Advisory Bulletin: Filing Criminal Charges Against Consumers (Oct. 14, 2013).

²² Consumer Financial Protection Bureau, *CFPB Takes Action Against ACE Cash Express for Pursing Payday Borrowers Into Cycle of Debt* (July 2014). Available at <http://www.consumerfinance.gov/newsroom/cfpb-takes-action-against-ace-cash-express-for-pushing-payday-borrowers-into-cycle-of-debt/>.

²³ Ruth Cardella, Rob Schneider, and Kathy Mitchell, “Wolf in Sheep’s Clothing: Payday Loans Disguise Illegal Lending,” Consumers Union Southwest Regional Office (February 1999). Available at: <http://consumersunion.org/pdf/paydayloans2.pdf>.

²⁴ *Supra* note 9.

²⁵ Federal Deposit Insurance Corporation, Payday Lending Programs Revised Examination Guidance, Financial Instruction Letter 14-2005, Fed. Banking L. Rep (CCH) ¶ 64-103 C (March 1, 2005). Available at: <https://www.fdic.gov/news/news/financial/2005/fil1405a.html>.

Appendix A and the exhibits, included in the enclosed CD, detail the data we have collected as part of this research. In total, we have documented over \$160,000 in fees, fines, and payments collected as a result of criminal complaints filed by payday businesses. Depending on the jurisdictions, between 10% and 45% of the complaints resulted in the payment of some amount by the payday borrower. **We are not able to discern, from this data, how much the businesses were able to obtain outside of the criminal process due to the intimidation that resulted from the criminal complaint.** In one justice court, in 2012 alone, 5.6% of the complaints resulted in jail credit or jail time for the individual charged.

Conclusion

Payday loan businesses (CABs) filing criminal charges erode the quality, consistency, and authority of the criminal justice system by brazenly violating state and federal laws. Unlawful use of state prosecutors and courts as de facto debt collection agencies undermines the integrity of these agencies. These outcomes are inconsistent with intent of consumer protection laws and the intent of Texas criminal laws.

Considering the limited research conducted thus far, the issue appears more pervasive than initially thought, and merits deeper investigation and regulatory scrutiny. We respectfully ask that you use your enforcement authority to:

- Take rulemaking and enforcement action to end the practice of payday loan businesses filing criminal complaints against borrowers as a debt collection tool;
- Conduct a more detailed investigation to identify the true scope of the use of criminal prosecutors as de facto debt collection agencies by payday loan businesses;
- Ensure all possible action is taken to remove from borrower criminal records any wrongful criminal convictions resulting from a bad check or theft by check complaint by a payday loan business and that any necessary credit repair is completed;
- Impose punitive fines for the wrongful filing of criminal bad check or theft by check complaints by payday loan businesses;
- Terminate licenses for payday loan businesses that systematically engage in the wrongful filing of criminal charges against borrowers as a debt collection tool; and
- Ensure restitution for individuals who paid money or served jail time due to the threat or filing of a wrongful criminal complaint by a payday loan business—including funds paid to the district attorney, the court, and funds collected through concurrent, non-criminal debt collection tactics.

We appreciate your consideration of our concerns.

Sincerely,



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Appendix A: Counties or Precincts That Have Acted to Collect Debts on Behalf of Payday Businesses

County	Payday Loan Businesses (CABs) Filing Complaint	Policy re Post-dated Checks and Theft by Check Presumption	Payday Business Bad Check Complaint filing with District Attorney or Justice Court	Dollars Collected	Open Records Request
Bexar	Cash Zone/Cash Biz (189 complaints), Ace Cash Express (1 complaint), Schlebach & Associates LLP (1 complaint)	Yes	191 complaints; 86, or 45% resulted in some payment.	\$22,699	See "Exhibit A"
Collin	Fast Bucks/Fast Bucks Holding(73 complaints), PLS Loan Store (636 complaints), Quick Cash Loans (30 instances), Cash Now (1 instance)	Yes	740 complaints; 204 or 28% resulted in some payment.	\$131,836	See "Exhibit B-1" and "Exhibit B-2"
Dallas	Ace Cash Express (8 complaints), All Star Financial Services (5 complaints), Cash Biz (8 complaints), Cash Now (128 complaints), Check N Title Finance (181 complaints), PLS Loan Store (140 complaints)	Yes	470 complaints; 50, or 10.6% resulted in some payment	\$8,231.49	See "Exhibit C"
El Paso	Aqua Investments (1 complaint)	Yes	1 complaint	\$0	See "Exhibit D"

Appendix A (cont.)

County	Payday Loan Businesses (CABs) Filing Complaint	Policy re Post-dated Checks and Theft by Check Presumption	Payday Business Bad Check Complaint filing with District Attorney or Justice Court	Dollars Collected	Open Records Request
Harris (Justice of the Peace – Precinct 4)	Cash Biz (107 complaints)	Yes	107 complaints; Arrest warrants issued for 42% (45); 5.6% (6) served jail time in lieu of paying business and fines; 11.2% (12) paid some amount to the court Note: In 2011, before TX law change, 296 cases were filed by the same payday business in this court.	\$3,255	See “Exhibit E”
Potter	Fast Cash (14 complaints)	No	At least 14 complaints filed.	Unknown	See “Exhibit F-1” and “Exhibit F-2”
Travis (Justice of the Peace – Precinct 3)	Cash Plus (52 complaints)	Yes	Filing of 52 cases from January 1, 2013 – through July 9, 2013; fines paid in 5 of the cases.	Unknown	See “Exhibit G-1” and “Exhibit G-2”
Williamson (Justice of the Peace Precinct 1)	Approved Money Services (1 complaint)	Yes	1 case filed	\$0	See “Exhibit H”

Appendix B: Policy Regarding Theft by Check Charges for Postdated Checks Cited Online.

County	Policy Language
Bexar	“Please note that the following types of checks do not qualify under this criterion: POST-DATED CHECKS: If you willingly accepted a post-dated check in exchange for merchandise or a service, you extended credit to the check writer.” ²⁶
Collin	The DA’s Office cannot accept the following kinds of checks for prosecution: Post-dated or “hold” checks. ²⁷
Dallas	“The check must have been exchanged for property or service, which was provided at the same time the check, was issued. The check cannot be: Payment on an open or billed account. Payment on an outstanding loan. A replacement, held or post-dated check.” ²⁸
El Paso	“The Following Checks Are Not Handled By This Office: -Checks post-dated from date of issuance” ²⁹
Travis	“The County Attorney’s Office cannot accept the following kinds of checks for prosecution: Post-dated or “hold” checks” ³⁰
Williamson	“The County Attorney’s Office cannot accept the following kinds of checks for prosecution: Post-dated” ³¹

²⁶ <http://home.bexar.org/da/checks.html>

²⁷ <http://collincountyda.com/hot-check/>

²⁸ <https://www.dallasda.com/division/check-division/>

²⁹ <http://www.epcounty.com/CA/criminalhc.htm>

³⁰ http://www.co.travis.tx.us/county_attorney/hot_checks/file_yes.asp

³¹ <http://www.wilco.org/CountyDepartments/CountyAttorney/HotChecksDivision/tabid/224/language/en-US/Default.aspx>