January 3, 2019

The Honorable Kathleen Kraninger
Director
Bureau of Consumer Financial Protection
1700 G Street, NW
Washington, DC 20552

Re: Final Rule and Official Interpretations, Payday, Vehicle Title, and Certain High-Cost Installment Loans, Docket No. CFPB-2016-0025, 82 Fed. Reg. 54,472 (Nov. 17, 2017)

Dear Director Kraninger:

The American Bankers Association[1] and the Consumer Bankers Association[2] appreciated the opportunity to accompany our members who met with Thomas Pahl and others on your staff on November 5, 2018, to discuss the Bureau of Consumer Financial Protection's (Bureau) final rule on Payday, Vehicle Title, and Certain High-Cost Installment Loans (Final Rule).[3] We would like you to be aware of the views that our members expressed at that meeting, which we describe in this letter.

As you know, on October 26, 2018, the Bureau announced that it expects to issue in January 2019 a proposal that will reconsider the "ability to repay" provisions of the Final Rule and will address the date by which regulated entities must comply, which is currently August 19, 2019 (Compliance Date).[4] We believe that the banking industry is and should be a major participant in the market for short-term, small dollar credit and could actually do more were certain regulatory impediments addressed. We look forward to providing additional comments during the rulemaking process.

I. Summary of Letter

We recommend that the Bureau invite and accept comments on all aspects of the Final Rule when the Bureau issues its proposal later this month. We have identified a number of problems with the Final Rule, which we describe in this letter, and we expect that there are other issues

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[1] The American Bankers Association is the voice of the nation's $17 trillion banking industry, which is composed of small, regional, and large banks that together employ more than 2 million people, safeguard $13 trillion in deposits, and extend nearly $10 trillion in loans.
[2] Founded in 1919, the Consumer Bankers Association (CBA) is the trade association for today's leaders in retail banking - banking services geared toward consumers and small businesses. The nation's largest financial institutions, as well as many regional banks, are CBA corporate members, collectively holding well over half of the industry's total assets. CBA's mission is to preserve and promote the retail banking industry as it strives to fulfill the financial needs of the American consumer and small business.
[3] Final Rule and Official Interpretations, Payday, Vehicle Title, and Certain High-Cost Installment Loans, Docket No. CFPB-2016-0025, 82 Fed. Reg. 54,472 (Nov. 17, 2017).
[4] Press Release, Bureau of Consumer Fin. Protection, Public Statement Regarding Payday Rule Reconsideration and Delay of Compliance Date (Oct. 26, 2018), https://www.consumerfinance.gov/about-us/newsroom/public-statement-regarding-payday-rule-reconsideration-and-delay-compliance-date/.

that have not yet been identified. By considering the rule in its entirety, the Bureau would use this rulemaking, hopefully, to avoid the need for serial amendment of the rule.

Because we expect the rulemaking will likely identify other problems with the Final Rule, we also urge the Bureau to grant an immediate extension of the Compliance Date for the *entire* Final Rule. Without an immediate extension, banks will expend resources unnecessarily to achieve compliance with a rule that the Bureau is in fact reconsidering and may materially change.

We also urge the Bureau to issue a proposal that removes obstacles in the Final Rule that impede the ability of banks to meet their customers' short-term, small dollar credit needs and interests. These include the following:

- The Bureau should exempt entirely traditional consumer loan products, which do not raise consumer protection concerns intended to be addressed by this rulemaking. The Bureau expansively defined "covered loans" — i.e., the loans subject to the Final Rule's restrictions — without regard to the loan's amount or duration. Consequently, the Final Rule captures many loans that are not, in fact, short-term, small dollar loans, including some wealth management products.

- The Bureau should clarify that the financing of any product or service in connection with a purchase money loan is included in the Rule's exemption for these loans.

- The Final Rule should avoid restricting access to open-end lines of credit. The structure of these products encourages responsible borrowing by allowing the customer to borrow only the amount needed. The Final Rule adds ambiguous and burdensome requirements to open-end lines of credit, which unless modified or removed may curtail the availability of this valued and convenient credit product and will increase costs to banks to offer these credits.

II. The Bureau Should Invite and Accept Comments on All Aspects of the Final Rule

In its announcement of October 26, the Bureau stated that it is "currently planning to propose revisiting only the ability-to-repay provisions [of the Final Rule] and not the payment provisions."[5] We urge the Bureau to invite and accept comment on *all* aspects of the Final Rule, not only the ability-to-repay provisions. In the following sections of this letter, we describe problems we have identified with the Final Rule, including problems regarding (a) the Rule's definition of "covered loan," (b) the Rule's exemption for loans extended to finance a customer's purchase of a vehicle or other good, and (c) the Rule's treatment of open-end lines of credit. However, there may be other, not yet identified, problems with the Final Rule. The Bureau should use its rulemaking to invite information on, identify, and address those problems.

For example, our members have reported that the payment provisions present compliance challenges, including challenges that we believe the Bureau did not foresee when it issued the Final Rule. The Final Rule seeks to curtail repeated withdrawals from an account — and the assessment of repeated nonsufficient fund fees — by prohibiting the withdrawal of payment

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[5] *Id.*

from an account after two consecutive unsuccessful withdrawal attempts, unless the lender obtains the borrower's authorization for additional withdrawals from the account (the Payment Withdrawal Restriction).[6] Although the Final Rule excludes from this restriction banks that hold the consumer's account from which the transfer is attempted if other conditions are also met,[7] the Rule does not exclude banks that are withdrawing from the customer's account at *another* financial institution. This may occur when the customer presents a paper check to the lending bank that is drawn on the customer's account at another financial institution. One bank reported that its systems cannot be programmed to determine immediately whether a customer's check payable to the bank has been drawn at an account at the bank or at another institution. Consequently, the bank cannot be certain that it qualifies for the Payment Withdrawal Restriction when receiving payment on its loan by paper check. This impairs the bank from providing small dollar credit to customers in a manner that qualifies for this exemption.

In addition, the payment withdrawal restriction is inconsistent with NACHA's rules. Those rules limit unsuccessful withdrawal attempts to three. As stated above, the Final Rule limits unsuccessful withdrawal attempts to two before new authorization is required.

For such reasons as these, the Bureau should seek and accept comment on all aspects of the Final Rule.[8]

III. The Bureau Should Extend Immediately the Compliance Date for All Provisions in the Final Rule

We renew our request that the Bureau immediately extend the Compliance Date for all provisions in the Final Rule.[9] The Bureau's October 26 announcement states that the Bureau expects that it will address the Compliance Date later this month (January 2019). If the Bureau proceeds with this timeline, it would extend the Compliance Date only seven months before compliance is mandatory.

An immediate extension of all requirements in the Final Rule is needed to avoid the unnecessary expenditure of resources to achieve compliance with a rule that the Bureau is reconsidering actively. To implement new regulatory requirements, banks typically spend well over a year reviewing a rule, identifying products that may be covered, conducting a gap analysis, and then as necessary, modifying policies, procedures, and systems, training employees, and testing the new procedures and systems. Unless the Compliance Date is adequately extended, banks will be compelled to begin compliance processes now, even though there may yet be material changes in the Bureau's requirements. The Bureau's immediate announcement of an extension in the

[6] 12 C.F.R. §§ 1041.7 & 1041.8(b).
[7] *Id.* § 1041.8(a)(1)(ii).
[8] In revisiting the Final Rule, the Bureau should build upon the positive elements that are in the Rule. In particular, ABA wishes to underscore the importance of preserving the Rule's exemption for "accommodation loans" — i.e., the exemption for depository institutions that made 2,500 or fewer small dollar loans in each of the current and preceding calendar years if the institution derived no more than 10% of its receipts from those loans. *See* 12 C.F.R. § 1041.3(f).
[9] We have previously urged the Bureau to extend the Compliance Date, including in a letter dated October 24, 2018. *See* Letter from Consumer Bankers Ass'n & Am. Bankers Ass'n to Mick Mulvaney, Acting Dir., Bureau of Consumer Fin. Protection (Oct. 24, 2018).

Compliance Date would result in the avoidance of these costs and would advance the Bureau's statutory objective to "reduce unwarranted regulatory burdens."[10]

We recommend that the Bureau issue an interim final rule to extend the Compliance Date of the Final Rule. The Bureau previously has issued interim final rules to modify existing rules, including to update the Bureau's model forms under Regulation V, to amend the timing for mortgage servicers to provide required early intervention notices to borrowers under Regulation X, and to adjust for inflation the civil monetary penalties that are within the Bureau's jurisdiction. There is no reason the Bureau could not issue immediately an interim final rule to extend the Compliance Date.

An extension in the Compliance Date is also needed, because the Final Rule does not state expressly that it applies only to loans originated on or after that date. Consequently, previously originated loans that are outstanding as of the Compliance Date may be required to meet the Rule's restrictions, including the rule's payment, recordkeeping, and withdrawal requirements.

We recognize that, on November 6, 2018, a federal district court in Texas issued a stay of the Compliance Date.[11] However, the court did not specify an end date of the stay, declaring only that the Compliance Date was stayed "pending further order of the court."[12] The court specifically declined the parties' request to stay the Compliance Date until 455 days from the date of final judgment in the legal proceeding. Consequently, at any time the court could lift the stay and reinstate the Compliance Date. Because of this uncertainty, our members report that the Texas court's stay has not ameliorated their concerns about the looming Compliance Date.

IV. The Bureau Should Ensure that Banks May Continue Offering Traditional Bank Loan Products

The Bureau's expansive definition of a "covered loan" sweeps in a number of wealth management products, which should not be covered by a rule intended to regulate short-term, small dollar loans.[13] These include the following:

- Wealth management loans, which provide customers with short-term liquidity and may have a term of 45 days or less, or have a large, "balloon" payment due at maturity. These loans would constitute a "covered short-term loan" as defined in 12 C.F.R. §§ 1041.2(10) and 1041.3(b)(3) or constitute a "covered longer-term balloon-payment loan" as defined in 12 C.F.R. §§ 1041.2(7) and 1041.3(b)(2).

- "Bridge" loans, including those designed to assist with the purchase of the customer's new home before the customer has sold his or her existing home. These loans are secured by collateral other than real estate or are unsecured. The loans typically have a term of 45 days or less and nearly always have a balloon payment. As such, they would constitute a

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[10] Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 1021(b)(3), 124 Stat. 1376 (2012).
[11] Order, *Community Fin. Svcs. Ass'n of America et al. v. Bureau of Consumer Fin. Protection*, No. A-18-CV-0295-LY (W.D. Tex. Nov. 6, 2018).
[12] *Id.* at 3.
[13] *See* 12 C.F.R. § 1041.3(b) (defining "covered loan").

covered short-term loan under the Final Rule or, if longer than 45 days, a covered longer-term balloon-payment loan.

- Revolving lines of credit and other loans secured typically by securities held in a brokerage account, with low periodic payments (such as payments of interest only during the life of the loan) and a fixed maturity date, with a balloon payment due at maturity. Because of the balloon payment, these loans would constitute a covered short-term loan or covered longer-term balloon-payment loan under the Final Rule.

- Loans secured by a Certificate of Deposit or other security. These loans typically require only payments of interest during the life of the loan, with the balance due at maturity. Because of the balloon payment, these loans would also constitute a covered short-term loan or covered longer-term balloon-payment loan under the Final Rule.

The Bureau should clarify that it did not intend for these loan products to be covered by the Final Rule. The consumer protection concerns regarding "payday, vehicle title and certain high-cost installment loans" cited by the Bureau in the Final Rule clearly do not apply to these loans. To exclude these products from coverage, we recommend that the Bureau consider limitations to the definition of a "covered loan" to exclude loans over a certain dollar amount and beyond a certain term. Notably, the Office of the Comptroller of the Currency's (OCC) recent guidance on short-term, small dollar installment loans included references to both of these parameters.[14]

More broadly, the Bureau should engage in meaningful coordination with the OCC and the Federal Deposit Insurance Corporation on its regulatory approach toward small dollar lending. Through coordination, the Bureau and its sister agencies can avoid subjecting banks to multiple inconsistent regulatory frameworks and remove obstacles that may currently impair banks from preserving or expanding small dollar credit offerings.

V. The Bureau Should Exempt Entirely Purchase Money Loans

The Final Rule exempts entirely loans extended to finance a customer's purchase of a vehicle or other good (Purchase Money Loans).[15] In the Preamble and Official Commentary, the Bureau stated that this exemption includes credit extended to cover taxes and registration fees paid on the good purchased.[16] However, nothing states whether the financing of products or services in connection with the Purchase Money Loan is included in the exemption.

As an initial matter, the Dodd-Frank Act prohibits the Bureau from regulating the "business of insurance,"[17] which the Act defines broadly to include the underwriting of insurance, all acts necessary to that underwriting, and activities related to underwriting conducted by any individual

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[14] *See* Bulletin, Office of the Comptroller of the Currency, OCC Bulletin 2018-14: Core Lending Principles for Short-Term, Small-Dollar Installment Lending (May 23, 2018), https://www.occ.gov/news-issuances/bulletins/2018/bulletin-2018-14.html (stating that short-term, small-dollar installment loans are "typically two to 12 months in duration" and "typically rang[e] from $300 to $5,000").
[15] 12 C.F.R. § 1041.3(d)(1).
[16] 82 Fed. Reg. at 54,544; *id.* at 54,893.
[17] 12 U.S.C. § 5517(m).

associated with an insurer.[18] The writing of credit insurance in connection with a Purchase Money Loan is part of the business of insurance. As such, the Bureau lacks authority to regulate these products.

Any such regulation of credit insurance is not only unlawful but also unnecessary to achieve the Bureau's policy goals. The optional financial protection products and services that may be financed in connection with a Purchase Money Loan include extended care or appliance warranties, credit insurance and/or a guaranteed asset protection (GAP) waiver on a car loan, and delivery fees. For example, many lenders and automobile dealers offer customers the opportunity to purchase a service contract, credit insurance, and/or GAP waiver when financing a motor vehicle purchase. For those who elect to purchase these products, the cost is typically rolled into the principal balance of the vehicle finance agreement.

These optional financial protection products provide value to the borrower who chooses to purchase the product. A service contract on a new or used vehicle protects the borrower from unexpected, and often costly, repairs that are needed to the vehicle after the manufacturer's warranty has expired. Credit insurance pays off the loan in the event of the borrower's death or covers ongoing payments when something unforeseen happens to the borrower. A GAP waiver provides protection when the borrower's vehicle is stolen or destroyed. In these circumstances, the monetary value of the vehicle is typically less than the amount a borrower owes to the lender, because the vehicle has depreciated since it was sold to the borrower. The automobile insurer may pay only an amount equal to the vehicle's value at the time of the vehicle's theft or destruction, not an amount equal to the cost to replace the vehicle. A GAP waiver covers this difference between the amount a borrower owes to the lender and the amount paid by the borrower's automobile insurance.

Without voluntary protection products like service contracts, credit insurance, and a GAP waiver, customers can find themselves paying thousands of dollars to make an unexpected vehicle or appliance repair; struggle to make loan payments due to death, disability, or unemployment; or owe hundreds of dollars a month for a vehicle that they can no longer drive. All of these scenarios result in financial hardship and worry for borrowers and their families. Including the cost of these products into the financing of the good purchased does not fundamentally alter the nature of the purchase money transaction. The record put forth by the Bureau shows no evidence that these practices are akin to the payday, vehicle title, or high cost installment loan market practices that the Final Rule sought to address. In the absence of evidence that the protection product has been deceptively marketed, borrowers should have the choice to purchase this protection.

The Bureau should clarify that the financing of all products or services in connection with the Purchase Money Loan is included in the Final Rule's exemption for these loans. Our members report that continued ambiguity over whether the financing of such products and services is included under the exemption may lead banks to cease offering these items, which would curtail customers' access to valued and wanted products and services. Alternatively, if the ambiguity persists in the Bureau's proposal, banks could require borrowers to pay cash for these items, yet this would create an unnecessary and unwelcome financial hardship for many customers.

[18] 12 U.S.C. § 5481(3).

VI. The Bureau Should Avoid Restricting Access to Open-End Lines of Credit

Open-end lines of credit are a valued source of credit that allow a customer to make multiple draws against the line, up to a pre-established maximum amount. The product's structure encourages responsible borrowing by allowing the customer to borrow only the amount needed; the customer may make subsequent draws on the line if additional funds are later needed. For some open-end lines, payment on the total amount borrowed is due at the next recurring deposit to the customer's account. This feature recognizes that, for a variety of reasons, some customers can manage a loan requiring only a single payment more effectively than an installment loan, which requires multiple payments over a period of time.

The Final Rule presents particular challenges to banks that offer short-term, open-end lines of credit. These challenges, which span multiple requirements imposed by the Final Rule, underscore the importance of inviting and accepting comments on all aspects of the Final Rule.

- For a line of credit with a balloon payment, it is not clear whether each advance against the line represents a separate covered short-term loan, requiring a separate ability-to-repay (ATR) determination to be made pursuant to §§ 1041.4 and 1041.5, or whether only the initial extension of the line of credit is subject to the ATR requirement. Similarly, it is not clear whether the "cooling off" period required after a loan sequence of three covered short-term loans is triggered after three advances against the line.[19]

- For open-end credit where the borrower is not required to repay substantially the entire amount of an advance in a single payment, the lender must calculate the loan's annual percentage rate (APR) at loan consummation and at the end of each billing cycle to determine if the APR exceeds 36%, which would qualify the loan as a "covered longer-term [installment] loan" under §§ 1041.2(a)(8) and 1041.3(b)(3), if certain other conditions are present. It is not clear how the lender would calculate the line's APR at origination, as that calculation is based on the balance on the line, which is $0. In addition, whether a line falls within the Final Rule is dependent on the borrower's utilization of that line. A line that would be outside of the definition of a covered longer-term loan, if utilized fully, could be captured if the borrower's low rate of utilization of the line results in an APR that exceeds 36%. A line's status as a covered longer-term loan should not be dependent on the borrower's utilization of that line.

- The Final Rule requires a lender to provide information about each covered short-term loan and covered longer-term balloon-payment loan to an "information system" registered with the Bureau under a new reporting regime established by the Rule.[20] We expect that existing credit reporting agencies will apply to serve as the information systems to which lenders must report loan information under the Rule. One bank reported that some credit reporting agencies treat the extension of an open-end line of credit and *each* draw against that line as a separate loan that is required to be reported to the agency. The reporting of each draw, after the extension of the line has been reported, provides

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[19] The Final Rule prohibits a borrower from taking out more than three covered short-term loans (as defined in 12 C.F.R. § 1041.2(a)(10)) or covered longer-term balloon payment loans (as defined in § 1041.2(a)(7)) within 30 days of each loan. *Id.* § 1041.5(d)(2).

[20] *Id.* § 1041.10(a).

little, if any, benefit from the perspectives of developing the borrower's credit file and advising other lenders of the borrower's outstanding line of credit.

The open-end credit products provided by banks are not the high-cost loans targeted by the Final Rule, but are competitively priced, particularly in comparison with nonbank short-term loans. However, the application of the ambiguous and burdensome requirements to open-end credit will increase costs to banks and may result in the decision by banks not to offer such products. Banks may also be discouraged from offering this form of credit if the Bureau's regulatory approach constrains the bank from using a fee-based structure to price this credit or constrains the bank from designing efficient, predictive underwriting that is based on information derived from the bank's relationship with the bank, which minimizes underwriting costs. The Bureau should avoid restricting access to this customer valued product on the basis of the findings of the Final Rule.

Our members report that customers typically do not access the full amount available under an open-end line of credit before repayment of the amount borrowed is due. Consequently, the consumer protection concerns underlying the Final Rule's restrictions on loan sequences of more than three covered short-term loans or covered longer-term balloon payment loans are not present. The continued application of the Rule to open-end lines of credit would encourage borrowers to utilize the *full* amount available under the line during the borrower's initial draw, when the borrower's immediate needs may require only partial utilization of the available line. This result increases credit risk, to the detriment of the borrower and the bank alike, without any corresponding benefit.

Banks that offer (or previously offered) an open-end line of credit product report high success rates with the product: one bank reported that 96% of its customers did not access the maximum amount of the line in each of six consecutive months of usage. A second bank reported a successful repayment rate of 99%. These findings demonstrate that consumers are not harmed by use of this product.

Conclusion

We appreciate that our members had the opportunity to meet with Bureau staff on November 5. We urge the Bureau to ensure that bank customers may continue to access valued forms of small-dollar, short-term credit by seeking and accepting comment on all aspects of the Final Rule and by extending immediately the Compliance Date of the Rule. Further, as part of the Bureau's revisiting of the Final Rule, we ask that traditional bank loan products be clearly exempted from coverage under the Rule. In particular, the Bureau should remove ambiguous and burdensome requirements on open-end lines of credit and purchase money loans.

We look forward to working with the Bureau during the rulemaking process in its efforts to design a regulatory framework that encourages the supply of and access to small dollar credit by minimizing regulatory burdens and promoting efficiency.

Sincerely,

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