American Bankers Association
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Comment Intake
Bureau of Consumer Financial Protection
1700 G Street, NW
Washington, DC 20552

Re: Notice of Proposed Rulemaking, Payday, Vehicle Title, and Certain High-Cost Installment Loans, Docket No. CFPB-2019-0007, RIN 3170-AA95, 84 Fed. Reg. 4,298 (Feb. 14, 2019)

Dear Sir or Madam:

The American Bankers Association[1] (ABA) appreciates the opportunity to comment on the Bureau of Consumer Financial Protection's (Bureau) proposal[2] to extend by 15 months the compliance date for the mandatory underwriting provisions of the 2017 final rule governing Payday, Vehicle Title, and Certain High-Cost Installment Loans (Final Rule).[3]

I. Summary of Comment

ABA supports the Bureau's decision to reconsider the Final Rule and its proposal to extend the compliance date for the mandatory underwriting provisions in that Rule. (By separate proposal, the Bureau has proposed to rescind those provisions.) We agree that neither consumers, financial institutions, nor the public benefit when financial institutions must expend resources to comply with regulatory provisions that the Bureau has proposed to rescind or materially amend.

However, we urge the Bureau to extend immediately the compliance date for *all* provisions in the Final Rule, including the provisions that impose restrictions and notice requirements in relation to the withdrawal of payment from the borrower's account for loans regulated by the Rule (Payment Provisions).[4] The Final Rule is intended to target short-term, small dollar, high-

[1] The American Bankers Association is the voice of the nation's $18 trillion banking industry, which is composed of small, regional, and large banks that together employ more than 2 million people, safeguard nearly $14 trillion in deposits, and extend more than $10 trillion in loans.
[2] Payday, Vehicle Title, & Certain High-Cost Installment Loans, Docket No. CFPB-2019-0007, 84 Fed. Reg. 4,298 (proposed Feb. 14, 2019).
[3] Payday, Vehicle Title, & Certain High-Cost Installment Loans, Docket No. CFPB-2016-0025, 82 Fed. Reg. 54,472 (Nov. 17, 2017) (codified at 12 C.F.R. pt. 1041).
[4] We have previously urged the Bureau to extend the Compliance Date, including in letters sent on October 24, 2018, and January 3, 2019, and during an in-person meeting with Bureau staff in November 2018. *See* Letter from Consumer Bankers Ass'n & Am. Bankers Ass'n to Mick Mulvaney, Acting Dir., Bureau of Consumer Fin. Prot. (Oct. 24, 2018), https://www.aba.com/Advocacy/LetterstoCongress/Documents/Ltr-PaydayLoans-2018October.pdf; Letter from Virginia O'Neill, Am. Bankers Ass'n, & David Pommerehn, Consumer Bankers Ass'n, to J. Michael Mulvaney, Acting Dir., Bureau of Consumer Fin. Prot. (Jan. 3, 2019), https://www.aba.com/Advocacy/LetterstoCongress/Documents/aba-cba-cbfp-small-dollar-lending-010319.pdf.

cost loans, but the language of the Final Rule in fact would regulate a much broader category of loans (Covered Loans). Installment loans, single payment loans, and lines of credit of *any* dollar amount offered by banks (collectively, Traditional Consumer Loans) may be unintentionally regulated by the Final Rule because it contains no maximum dollar amount or maximum duration for a loan to be designated a Covered Loan. Moreover, the Final Rule may apply not solely to loans and lines of credit originated after the compliance date but also to existing ones.

Specifically, with limited exceptions,[5] the Final Rule defines a "Covered Loan" to include all closed-end loans and open-end lines of credit with a "balloon"-type payment due at maturity, among other loans covered by the Rule. As a result of this overly broad definition of Covered Loan, the following illustrative examples of bank loans — each paid off with a balloon payment — could be subject to the *same* requirements as a two-week loan for $500 offered by a payday lender:

- A $25 million loan secured by a collection of fine art;
- An unsecured "bridge" loan for $100,000 that allows the borrower to purchase a new home before the borrower has sold his or her existing home; and
- An unsecured personal line of credit for $50,000 that allows the borrower to remodel his or her home.

Presumably, the overbroad definition of a Covered Loan was unintended, since it is inconsistent with the Bureau's statutory objective to "reduce unwarranted regulatory burdens,"[6] and it may reduce the loans available to consumers without advancing any consumer protection purpose.

Moreover, this rulemaking represents the agency's inaugural exercise of its authority under section 1031 of the Dodd-Frank Act to designate a practice as unfair, deceptive, or abusive (UDAAP).[7] The rulemaking may set fundamental precedent for the agency's future exercise of its authority under that section. Consequently, it is critical that, in any final rule, the Bureau identify as unfair or abusive acts only those acts for which it has clear and convincing evidence of the unfairness or abusiveness of the conduct to be regulated. Judged by this standard, the Bureau cannot let stand the application of the Payment Provisions to Traditional Consumer Loans. An immediate extension of the compliance date for all provisions in the Final Rule is needed to provide the Bureau with sufficient time to address this critical failure of the Rule.

An extension in the compliance date is also necessary, because a cloud of uncertainty has hung over the Final Rule since it was published in the *Federal Register* in November 2017. Two months after publication, in January 2018, then-Acting Director Mulvaney announced that the

[5] The Final Rule exempts entirely the following loans and services: car loans, real estate loans (including home mortgages), credit cards, student loans, non-recourse pawn loans, overdraft services and lines of credit, wage advance programs, and purchase money security interest loans. 12 C.F.R. § 1041.3(d) (2018).
[6] Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 1021(b)(3), 124 Stat. 1376 (2012) [hereinafter Dodd-Frank Act].
[7] *Id.* § 1031.

Bureau "may reconsider" the Final Rule.[8] In April 2018, two industry trade associations representing payday lenders filed a lawsuit in federal district court in Texas, seeking to overturn the Final Rule.[9] On November 6, 2018, a federal district court in Texas issued a stay of the compliance date for all provisions in the Final Rule but, significantly, did not specify an end date of the stay.[10] That stay remains in force, but it could be lifted at any time.[11] Moreover, the Bureau has indicated that it may materially change the Payments Provision. The Bureau stated that it "intends to examine" a petition for rulemaking it has received to exempt debit card payments and informal requests it received to "exempt certain types of lenders or loan products from the Rule's coverage . . . ."[12]

An immediate extension of the compliance date for *all* provisions is needed so that banks do not expend considerable time and resources to develop compliance systems for products that do not present consumer protection concerns and/or which may materially change under the Bureau's current ongoing review. An immediate extension also would provide the Bureau with sufficient time to address other deficiencies in the Final Rule that may be identified, avoiding the need for serial amendment of the Rule.

II. Background

In October 2017, the Bureau issued the Final Rule, which imposed restrictions on three categories of loans:

- Closed-end loans and open-end lines of credit when the borrower is required to repay substantially the entire amount of the loan or advance within 45 days (Short-Term Loans);[13]
- Closed-end loans and open-end lines of credit when the borrower is required to repay substantially the entire amount of the loan or advance in more than 45 days through a single (balloon) payment or where any required payment on the loan is more than twice as large as another payment (Longer-Term Balloon-Payment Loans);[14] and

[8] Press Statement, Bureau of Consumer Fin. Protection, CFPB Statement on Payday Rule (Jan. 16, 2018), https://www.consumerfinance.gov/about-us/newsroom/cfpb-statement-payday-rule/.
[9] Complaint, *Community Fin. Svcs. Ass'n of America et al. v. Bureau of Consumer Fin. Prot.*, No. A-18-CV-00295 (W.D. Tex. Apr. 9, 2018).
[10] Order, *Community Fin. Svcs. Ass'n of America*, No. A-18-CV-00295 (W.D. Tex. Nov. 6, 2018).
[11] In its Order, the court stated that the Compliance Date was stayed "pending further order of the court." *Id.* at 3. 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. *Id.* In the parties' latest status report, filed on March 8, 2019, the parties could not reach agreement on how long the stay of the compliance date for the Payment Provisions should remain in place, and the Bureau did not concur with the plaintiffs' position that the stay should remain in place until the Bureau completes its current rulemaking processes. Joint Status Report, *Community Fin. Svcs. Ass'n of America*, No. A-18-CV-00295 (W.D. Tex. Mar. 8, 2018). Because of this uncertainty, our members report that the Texas court's stay has not ameliorated their concerns about the looming compliance date.
[12] Payday, Vehicle Title, & Certain High-Cost Installment Loans, 84 Fed. Reg. at 4,301.
[13] 12 C.F.R. § 1041.3(b)(1).
[14] *Id.* § 1041.3(b)(2).

- Loans that have an annualized percentage rate (APR) that exceeds 36%, and for which the bank has obtained a "leveraged payment mechanism"[15] over the account (Longer-Term Loans) (collectively, Covered Loans).[16]

The Final Rule concluded that it is an unfair and abusive practice to make a Short-Term Loan or Longer-Term Balloon-Payment Loan without conducting a prescriptive "ability-to-repay" evaluation prior to making the loan (Underwriting Requirements). The Final Rule also concluded that it is an unfair and abusive practice for a lender to initiate a withdrawal of payment on a Covered Loan from the borrower's account after two consecutive unsuccessful withdrawal attempts, through the same or different payment channels, unless the lender obtains the borrower's authorization for additional withdrawals from the account (Payment Provisions).[17] These Provisions also require a lender to—

- Provide a "Payment Notice" prior to initiating the first payment withdrawal from the customer's account;[18]
- Provide an "Unusual Withdrawal Notice" prior to initiating a payment withdrawal whose amount, timing, or payment channel differs from that of the regularly scheduled payment;[19] and
- Provide a "Consumer Rights Notice" after initiating two consecutive failed payment withdrawals from the customer's account (which states that the lender is no longer permitted to withdraw loan payments).[20]

On February 6, 2019, the Bureau proposed to rescind the Underwriting Requirements.[21] The Bureau did not address the Payment Provisions.

In addition, the Final Rule requires a bank or other lender to develop and follow written policies and procedures that are "reasonably designed to ensure compliance" with the Final Rule's provisions.[22] This provision would survive rescission of the Underwriting Requirements.

Also on February 6, 2019, the Bureau proposed to extend by 15 months (to November 19, 2020) the compliance date for the Underwriting Requirements of the Final Rule.[23] The Bureau did not propose to extend the compliance date for the other provisions of the Final Rule.

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[15] Under the Final Rule, a lender obtains a "leveraged payment mechanism" over the borrower's account if the lender has the right to initiate a transfer of money from the account to satisfy an obligation on the loan, unless the payment is a single immediate payment transfer at the borrower's request. *Id.* § 1041.2(a)(14).
[16] *Id.* § 1041.2(b)(3)).
[17] *Id.* § 1041.8.
[18] *Id.* § 1041.9(b).
[19] *Id.* § 1041.9(b)(3)(ii)(C).
[20] *Id.* § 1041.9(c). The Final Rule exempts from the Payment Provisions banks and other lenders that hold the borrower's account from which the payment withdrawal is attempted, if certain conditions are met, as described below in Part III.a.iii of this letter.
[21] Payday, Vehicle Title, & Certain High-Cost Installment Loans, Docket No. CFPB-2019-0006, 84 Fed. Reg. 4,252 (proposed Feb. 14, 2019).
[22] 12 C.F.R. § 1041.12(a).
[23] Payday, Vehicle Title, & Certain High-Cost Installment Loans, 84 Fed. Reg. at 4,300-02.

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

ABA supports the Bureau's proposed extension of the compliance date for the Final Rule's Underwriting Requirements. However, we urge the Bureau to apply that extension to the entire Final Rule, including the Payment Provisions.

a. An Extension of the Compliance Date for All Provisions in the Final Rule Will Allow the Bureau to Reconsider the Overbroad Definition of a Covered Loan

An extension of all provisions of the Final Rule is necessary to give the Bureau time to revise the definition of a Covered Loan to exclude those loans that are not loans for which the Final Rule was intended to apply, i.e. short-term, small dollar, high-cost loans. There is no evidence associated with this rulemaking that Traditional Consumer Loans raise consumer protection concerns or that they are made to vulnerable borrowers. These include, for example, the following:

- "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 may constitute a Short-Term Loan or, if longer than 45 days, a Longer-Term Balloon-Payment Loan.

- Demand lines of credit and other revolving lines, which are typically secured by securities held in a brokerage account or unsecured, with low periodic payments (such as payments of interest only during the life of the loan). When these lines have a balloon payment due at a fixed maturity date, they may constitute a Short-Term Loan or Longer-Term Balloon-Payment Loan within the language of the Final Rule. Even if a balloon payment is not required, the line may nonetheless constitute a Short-Term Loan or Longer-Term Balloon-Payment Loan, depending on the borrower's draw activity. For example, a borrower with a line of credit of $3,000 may make an initial draw of $300, resulting in a payment of interest only in the amount of $1.15. In the second month, the borrower could draw down the remaining $2,700, resulting in an interest payment of $15.53. Due to the higher balance, the required payment for the second month is more than twice the amount due in the first month. As a result, the line would be a Covered Loan under the language of the Final Rule, regardless of whether the loan is paid off with a balloon payment or on an installment basis, and regardless of the line's APR.

- Loans secured by a Certificate of Deposit or other security. These loans typically require interest-only payments during the life of the loan, with the balance due at maturity. Because of the balloon payment, these loans would also constitute a Short-Term Loan or Longer-Term Balloon-Payment Loan under the Final Rule. One ABA member reports it has approximately 32,000 lines of credit (secured by liquid assets or unsecured) and term loans (requiring the payment of interest only during the life of the loan), which would be unnecessarily subject to the Payment Provisions.

- Lines of credit. These lines could constitute a Longer-Term Loan if the bank assesses a finance charge in a billing cycle in which the principal balance is $0. Under the Final Rule, the line would become a Covered Loan for the duration of the extension of credit availability (if other conditions are also met).[24]

To avoid imposing unwarranted regulation—which will reduce the credit products available to bank customers without advancing any consumer protection purpose—ABA urges the Bureau to extend the compliance date for the entire Final Rule and to request comment on the definition of a Covered Loan. ABA recommends that the Bureau consider limitations to the overbroad 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) guidance on short-term, small dollar installment loans included references to both of these parameters.[25]

i. The Payment Provisions will apply to Traditional Consumer Loans despite the Bureau's intention to exempt depository institutions.

In section 1041.8(a)(1)(ii) of the Final Rule, the Bureau sought to exempt lenders that are the borrower's account-holding institution from the Payment Provisions. The "conditional exclusion" applies if the institution, pursuant to its agreement with the borrower, (a) does not charge the borrower a nonsufficient funds (NSF) or overdraft fee for the attempted withdrawal, and (b) does not close the borrower's account in response to a negative balance that results from a transfer of funds initiated in connection with the loan.[26]

ABA members report, however, that in practice the conditional exclusion will not allow the bank to avoid compliance with the Payment Provisions. For example, although most borrowers are also depositors, many have accounts at other banks and may choose to make payment from those accounts. If a check drawn on an account from another institution is returned twice for insufficient funds, the bank would need to comply with the Payment Provisions. Thus, for each Covered Loan, the lending bank must be prepared for the possibility that payment could be made from an account at another institution and that the lending bank is not exempt from the Payment Provisions. Consequently, the conditional exclusion will not, in practice, allow the bank to avoid implementing a system to comply with the Payment Provisions for Traditional Consumer Loans.

Second, if the bank receives payment on the loan by a paper check, and processing that payment results in a negative balance to the borrower's account, the bank may not be able to determine immediately that the action that led to the negative balance was payment on a Covered Loan, as opposed to an unrelated transaction. If the bank does not determine that the negative balance was caused by payment on a Covered Loan and the bank charges an NSF or overdraft fee, then the exemption will not apply, and the bank will be subject to the Payment Provisions.

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[24] *See* 12 C.F.R. § 1041.3(b)(3)(i)(B).
[25] *See* Office of the Comptroller of the Currency, OCC Bulletin 2018-14, Core Lending Principles for Short-Term, Small-Dollar Installment Lending (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").
[26] 12 C.F.R. § 1041.8(a)(1)(ii).

Our members report that these scenarios will require them to design compliance programs that comply with the Payment Provisions for *all* Traditional Consumer Loans. It simply would not be feasible operationally to establish monitoring systems (across multiple lines of business) to identify payments from other accounts or to determine what transaction resulted in a negative balance.

In addition, as stated above, the exemption protects withdrawals only if, *pursuant to the financial institution's loan or account agreement with the borrower*, (a) the institution does not charge the borrower a nonsufficient funds (NSF) or overdraft fee for the attempted withdrawal, and (b) the institution does not close the borrower's account in response to a negative balance that results from a transfer of funds initiated in connection with the loan.[27] Few, if any, existing loan or deposit agreements state that the bank will not charge an NSF or overdraft fee for an unsuccessful withdrawal attempt, regardless of whether the bank charges such a fee in these circumstances. Consequently, currently existing bank loans may not be exempt from the Payment Provisions.

The additional costs that banks will have to incur to comply with the Payment Provisions—across multiple lines of business and loan operating systems—may lead banks to exit the market for one or more Traditional Consumer Loan products. To avoid this result, which would be harmful to consumers, we urge the Bureau to clarify that the Payment Provisions do not apply to these loans.

ii. There is no evidence offered in connection with the Final Rule that bank payment withdrawal practices for Traditional Consumer Loans cause any harm to borrowers.

To find that an act or practice is unfair, deceptive, or abusive under § 1031 of the Dodd-Frank Act, the Bureau must have evidence establishing the unfairness or abusiveness of the act. But the record in this proceeding is devoid of evidence that borrowers are harmed by bank attempts to withdraw payment for Traditional Consumer Loans. The evidence that the Bureau relied on to support its UDAAP findings underpinning the Payment Provisions relates to repeated payment withdrawals made by *non-banks* to vulnerable borrowers who are already facing financial distress. Based on its own research and enforcement experience, as well as publicly available data, the Bureau concluded that payments practices "among *payday and payday installment lenders* . . . substantially increase [consumers'] financial distress."[28] The Bureau provided no evidence in this rulemaking that that Traditional Consumer Loans are made to vulnerable borrowers. Further distinguishing non-banks' payment practices from banks' practices, the Bureau concluded that the non-bank "industry is an extreme outlier with regard to the rate of returned items."[29]

[27] *Id.*
[28] Payday, Vehicle Title, & Certain High-Cost Installment Loans, 82 Fed. Reg. at 54,724 (under "Cumulative Impacts") (emphasis added).
[29] *Id.*

In sum, there is a lack of evidence in the record of the Final Rule that payment withdrawal practices of banks cause harm to borrowers.[30] It is impermissible for the Bureau to rely on evidence relating to *non-banks* as a justification for regulating bank products.[31]

iii. The Bureau's approach to assessing unfairness and abusiveness should be consistent throughout its reconsideration of the Final Rule.

Because the Bureau has put forth no evidence that payment withdrawal practices for Traditional Consumer Loans cause harm to borrowers, the Bureau is obligated to revise the definition of "Covered Loan" to exclude these loans from the Final Rule's coverage. Such an exclusion would preserve the ability of banks to continue to serve their customers' credit needs with Traditional Consumer Loans. However, an exclusion would not strengthen the weak foundation upon which the Bureau's Payment Provisions rests. In its proposal to rescind the Underwriting Requirements of the Final Rule, the Bureau has reassessed its approach to interpreting its authority to declare certain acts or practices as "unfair" or "abusive."[32] Without explanation, however, the Bureau applied this new approach *only* to the Underwriting Requirements and *not* to the Payment Provisions. This is not good public policy. The inconsistent application of UDAAP standards—in particular, the failure to articulate clearly and apply consistently the elements of unfairness and abusiveness—will generate confusion, which undermines competition and innovation. We urge the Bureau to apply its new approach to the Final Rule in its entirety, including to the Payment Provisions.

Under the Dodd-Frank Act, to declare an act or practice "unfair," the Bureau must have a "reasonable basis" to conclude, among other requirements, that "the act or practice causes or is likely to cause substantial injury to consumers which is not *reasonably avoidable* by consumers."[33] In the Final Rule, the Bureau concluded that a consumer can "reasonably avoid[]" harm associated with the making of a covered Short-Term Loan or Longer-Term Balloon-Payment Loan only if the consumer has a *specific* understanding of the individualized risk of entering into extended loan sequences or defaulting on the loan.[34] However, in the proposal to reconsider the Underwriting Requirements, the Bureau concludes that "consumers *need not have*

[30] The lack of evidence that payment practices of banks cause harm to borrowers is consistent with the paucity of consumer complaints regarding bank loans. In its semiannual report to Congress released in late February 2019, the Bureau reported that only 1% of the complaints it had received from consumers between October 2017 and September 2018 relate to "Personal loan[s]." Bureau of Consumer Fin. Prot., Semi-Annual Report of the Bureau of Consumer Financial Protection, Fall 2018, at 19 (Feb. 27, 2019), https://s3.amazonaws.com/files.consumerfinance.gov/f/documents/cfpb_semi-annual-report-to-congress_fall-2018.pdf.

[31] *See Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (agency action arbitrary and capricious if agency fails to "examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made," or if agency "offer[s] an explanation for its decision that runs counter to the evidence before the agency" (alteration added, quotation marks omitted)).

[32] 12 U.S.C. § 5531 (2012) (Dodd-Frank Act § 1031).

[33] 12 C.F.R. § 1031(c)(1)(A) (emphasis added).

[34] Payday, Vehicle Title, & Certain High-Cost Installment Loans, 82 Fed. Reg. at 54,597-98 (concluding that whether consumers can "reasonably avoid" the injuries that flow from the making of the covered Short-Term Loan or Longer-Term Balloon-Payment Loan will depend on whether consumers "understand the likelihood and the severity of these [individualized] risks," so that they are able to make a reasoned judgment about whether to incur or to forgo such risks").

a specific understanding of their individualized likelihood and magnitude of harm such that they could accurately predict how long they would be in debt after taking out a covered short-term or longer-term balloon-payment loan for the injury to be reasonably avoidable."[35] Rather, the Bureau concludes that consumers need have only a generalized understanding of their risk.

The Bureau appropriately applied similar analysis in its reassessment of whether certain underwriting practices are "abusive." Under the Dodd-Frank Act, it is an abusive practice to take "unreasonable advantage of . . . a lack of understanding on the part of the consumer of the material risks, costs, or conditions of the product or service . . . ."[36] In the proposal to reconsider the Underwriting Requirements, the Bureau concludes that a consumer does not lack understanding of how a loan operates when the consumer lacks a "specific understanding of their personal risks" of entering into extended loan sequences or defaulting on the loan.[37] Rather, consumers have a "sufficient understanding" of the loan product "if they appreciate the *general* risks of harm associated with the products sufficient for them to consider taking reasonable steps to avoid that harm."[38]

The Payment Provisions also rely on an interpretation of "understanding" that requires the consumer to have a *specific* understanding of the lender's payment practices in order to be deemed to understand the costs and risks of the loan.[39] Inexplicably, the Bureau has not reviewed and similarly rejected that conclusion. It is not good public policy for the Bureau to rely on the same analysis that it has rejected in the context of the Underwriting Requirements to support a determination of "unfair" or "abusive" with regard to lender payment practices. To promote the development of clearly articulated UDAAP standards, we urge the Bureau to reexamine the Payment Provisions using the same interpretation of "understanding" that the Bureau has applied to the Underwriting Requirements.

iv. The application of the Payment Provisions to Traditional Consumer Loans results in unnecessary and unwarranted regulatory burdens.

Traditional Consumer Loans frequently span multiple lines of business, product lines, and loan operating systems. If the compliance date for the Payment Provisions is not extended, banks and other lenders will be forced—within six months—to prepare new disclosures, place those disclosures into multiple existing loan operating systems, and train bank staff on new procedures. The Bureau would impose these requirements despite the absence of evidence that Traditional

[35] Payday, Vehicle Title, & Certain High-Cost Installment Loans, 84 Fed. Reg. at 4,269 (emphasis added).
[36] 12 U.S.C. § 5531(d) (2012).
[37] Payday, Vehicle Title, & Certain High-Cost Installment Loans, 84 Fed. Reg. at 4,275.
[38] *Id.* (emphasis added).
[39] In the rulemaking culminating in the Final Rule, the Bureau concluded that a "generalized understanding" that the consumer may incur an NSF or overdraft fee as a result of the lender's payment practices "does not suffice to establish that consumers understand the material costs and risks of a product or service." Payday, Vehicle Title, & Certain High-Cost Installment Loans, 82 Fed. Reg. at 54,740. Instead, a consumer must "understand the *specific* risks at issue." *Id.* at 54,741 (emphasis added).

Consumer Loans cause consumers harm and despite the Dodd-Frank Act's mandate that the Bureau "reduce unwarranted regulatory burdens."[40]

The imperative to develop compliance systems in little time would have a significant impact on bank operations. For example, one regional bank reported that the Payment Provisions would apply to 650,000 of the bank's customers with consumer loans outstanding. In addition, the Provision would apply to nearly all loans to customers with the bank's wealth management division, because that division's products are lines of credit or term loans with a balloon payment. These loan products represent $250 million in outstanding term loans and $364 million in outstanding lines of credit at that bank.

The additional costs that lenders would incur to comply with the Payment Provisions may lead banks to exit the market for one or more Covered Loan products, thus reducing consumer choice and credit availability, without any countervailing benefit to consumer protection.

b. An Extension of the Compliance Date for All Provisions in the Final Rule Will Allow the Bureau to Address Other Deficiencies in the Payments Provision

ABA has identified a number of problems with the Final Rule, including provisions in the Payment Provisions that, if followed, may create conflicts with other requirements. By extending the compliance date for all provisions in the Final Rule, the Bureau would have the opportunity to address these problems at one time.

For example, the Payment Provisions require a lender (who is not subject to the conditional exclusion) to provide a notice to the borrower prior to the lender's initiation of the first payment withdrawal from the borrower's account. The notice must be provided either three business days (if by electronic delivery) or six business days (if by mail) prior to initiation of the withdrawal. These requirements may be impractical to follow in cases where the borrower provides a paper check to the lending bank more than one business day prior to the date when the borrower seeks to make payment[41] but fewer than three or six business days before that date. Under those circumstances, the bank would be required to provide the notice, and then wait up to three or six days (depending on the method of delivery of that notice) prior to initiating the transfer. This may result in late payment on the loan.

The Bureau acknowledged that other stakeholders have brought additional issues to the Bureau's attention.[42] We also expect that there are other issues that have not yet been identified. The Bureau has stated that it will "commence a separate rulemaking initiative" if it concludes that

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[40] 12 U.S.C. § 5511(b)(3) (2012) (Dodd-Frank Act § 1021(b)(3)).

[41] The Final Rule exempts from the notice requirement a payment transfer initiated when the lender processes the borrower's check (or electronic fund transfer at the borrower's authorization) within one business day after the borrower provides the check or authorization to the lender. 12 C.F.R. § 1041.8(a)(2). Thus, a lender may be exempt from the notice requirement if it processes the borrower's check within one day of receiving it.

[42] *See*, Payday, Vehicle Title, & Certain High-Cost Installment Loans, 84 Fed. Reg. at 4,301 (stating that the "Bureau has received a rulemaking petition to exempt debit card payments from the Rule's Payment Provisions" and "requests to exempt certain types of lenders or loan products from the Rule's coverage . . .").

there is merit to any of the issues that have been brought to the agency's attention.[43] We urge the Bureau to extend the compliance date to provide itself with an opportunity to consider these and other issues.

c. The Bureau Should Revise the Overbroad Definition of a Covered Loan Through Notice-and-Comment Rulemaking

The Bureau has suggested informally that, if it decides to address the overbroad definition of a Covered Loan, it may do so through issuance of a guidance bulletin that states that the Bureau will not bring adverse action against banks whose Traditional Consumer Loans are not in compliance with the Final Rule. Although we would appreciate the intent of such action, the issuance of guidance is insufficient, because the overbroad definition of a Covered Loan would remain in the Rule. It is untenable for a bank to rely on guidance that conflicts with the text of a regulation that has not been modified or rescinded. We urge the Bureau to revise the definition of a Covered Loan through notice-and-comment rulemaking to provide banks with certainty that the Final Rule does not apply to Traditional Consumer Loans.

d. Banks Need Sufficient Time to Design Systems to Comply with the Provisions that Remain in Force After the Bureau's Rulemaking Concludes

The Bureau should extend the compliance date for all provisions in the Final Rule and, in the intervening time period, modify the definition of a Covered Loan to exclude Traditional Consumer Loans offered by banks. In the event that the Bureau excludes Traditional Consumer Loans from the Final Rule's coverage, as we urge, banks will need sufficient time to develop systems to achieve compliance with the Rule for those bank loan products that remain subject to the Rule. 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. Even if the Bureau narrowed the types of loans restricted by the Rule immediately after May 15, 2019 (the deadline for submission of comments in response to the Bureau's proposal to rescind the Underwriting Requirements), banks and other lenders would have only three months to comply with the Payment Provisions. Plainly, that is insufficient time.

Conclusion

We appreciate and support the Bureau's proposal to extend the compliance date of the Underwriting Requirements in the Final Rule. We urge the Bureau to extend the compliance date for all provisions in the Final Rule. An extension is needed to allow the Bureau to modify the Final Rule to avoid regulation of Traditional Consumer Loans offered by banks. The Bureau did not intend to restrict these products, which do not serve vulnerable consumers nor present consumer protection concerns. The Bureau has put forth no evidence in connection with the

[43] *Id.*

Final Rule that Traditional Consumer Loans are unfair or abusive. The Bureau should not let stand UDAAP findings that are unsupported by evidence.

Sincerely,

Jonathan Thessin
Senior Counsel, Center for Regulatory Compliance