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-2019-0006, RIN 3170-AA80, 84 Fed. Reg. 4,252 (Feb. 14, 2019)

Ladies and Gentlemen:

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

I. Summary of Comment

ABA supports the Bureau's decision to reconsider the Payday Rule and its proposal to rescind the mandatory underwriting provisions in that Rule (Underwriting Requirements). A fundamental flaw of the Rule is its breath of coverage. Rather than prohibiting practices that the Bureau found cause harm in the specific products the Bureau studied, the Bureau chose to prescribe a set of required practices applicable to a wide range of loan products, including loan products for which there is no evidence of harm to consumers. For example, the rulemaking record is devoid of evidence that the underwriting or payment practices of securities-backed lines of credit offered by banks pose risks to consumers, yet the full scope of this rulemaking would apply to these loans, including the mandatory underwriting, payment withdrawals, consumer disclosure, compliance, and recordkeeping provisions. If not rescinded, the Underwriting Requirements will curtail customer access to the variety of loan products offered by banks, and it will discourage bank efforts to develop responsible new small dollar loan products to better serve the needs of their communities.

We repeat our call for the Bureau to reconsider *all* aspects of the Payday Rule, including the Rule's definition of a "covered loan"—i.e., those loans that would be regulated by the Rule

[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, and Certain High-Cost Installment Loans, 84 Fed. Reg. 4,252 (proposed Feb. 14, 2019) [hereinafter, Rescission Proposal].
[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) [hereinafter, Payday Rule].

(Covered Loan).[4] The Bureau sought to regulate short-term, small dollar, high-cost loans made to "vulnerable" consumers, but the overbroad Payday Rule will regulate a much broader category of 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 Payday Rule, because it contains no maximum dollar amount or maximum duration for a loan to be designated a Covered Loan. Moreover, the Payday Rule may apply not only to loans and lines of credit originated after the Rule's compliance date but also to existing ones that are outstanding as of that date.

The Payday Rule restricts Traditional Consumer Loans by defining a "Covered Loan" to include, with limited exceptions,[5] 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. In sum, *any* loan or line of credit where the bank has the legal right to require payment of the entire balance in a single payment could be a "Covered Loan." As a result of this overly broad definition, the following illustrative examples of bank loans — each paid off with a balloon payment — could be subject to the *same* payment withdrawal and recordkeeping requirements as a two-week loan for $500 offered by a payday lender:

- A loan for $25 million that is used to purchase a boat and that is 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.

The overbroad definition of a Covered Loan is inconsistent with the Bureau's statutory objective to "reduce unwarranted regulatory burdens."[6] Neither consumers nor the public benefit when lenders are compelled to expend considerable time and resources to develop compliance systems for products that are not marketed to vulnerable consumers and that do not present consumer protection concerns. The additional costs that banks will have to incur to comply with the payment provisions and other requirements—across multiple lines of business and loan operating

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[4] We previously have urged the Bureau to reconsider all provisions in the Payday Rule, including in a comment letter submitted on March 18, 2019. *See* Letter from Jonathan Thessin, Am. Bankers Ass'n, to Comment Intake, Bureau of Consumer Fin. Protection (Mar. 18, 2019), https://www.aba.com/Advocacy/commentletters/Documents/cl-SmallDollar20190318.pdf [hereinafter, ABA March 2019 Letter].

[5] The Payday 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) (2019). At ABA's request, the Rule also exempts entirely any depository institution that made 2,500 or fewer small dollar loans regulated by the Rule in each of the current and preceding calendar years if the institution derives no more than 10% of its receipts from those loans. *Id*. § 1041.3(f).

[6] Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 1021(b)(3), 124 Stat. 1376 (2012).

systems—may lead banks to reduce their presence in the market for one or more Traditional Consumer Loan products, causing harm to consumers.

The overbroad definition of a Covered Loan is particularly problematic, because this rulemaking represents the Bureau's inaugural exercise of its authority under section 1031 of the Dodd-Frank Act to identify acts or practices that are "unfair" or "abusive."[7] The rulemaking may set fundamental precedent for the agency's future exercise of its authority under that section. It is critical that, in any final rule, the Bureau identify as unfair or abusive 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 any aspect of the Payday Rule to Traditional Consumer Loans.

To provide the Bureau with sufficient time to address this critical failure of the Rule (and other deficiencies with the Rule that ABA and others have identified), we renew our request that the Bureau extend the compliance date of August 19, 2019, for all provisions in the Payday Rule.[8] In addition, we urge the Bureau to issue a separate proposal to revise the definition of a Covered Loan to exclude Traditional Consumer Loans.

II. **Background**

In October 2017, the Bureau issued the Payday Rule, which prescribed underwriting, payment, and recordkeeping requirements for three categories of loans (collectively, Covered 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);[9]
- 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 any other payment (Longer-Term Balloon-Payment Loans);[10] and
- Loans that have an annualized percentage rate (APR) that exceeds 36%, and for which the bank has obtained a "leveraged payment mechanism"[11] over the account (Longer-Term Loans).[12]

The Payday 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). Specifically, the lender must

[7] *Id.* § 1031(a).
[8] *See* ABA March 2019 Letter, *supra* note 4, at 5-11.
[9] 12 C.F.R. § 1041.3(b)(1).
[10] *Id.* § 1041.3(b)(2).
[11] Under the Payday 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).
[12] *Id.* § 1041.2(b)(3).

(a) obtain the borrower's written statement and verification evidence of the borrower's net income; (b) obtain the amount of the borrower's payments for major financial obligations; (c) assess the borrower's rental housing expense; and (d) use the information referenced above to make a reasonable projection of the borrower's net income and payments for major financial obligations for the month during which the largest loan payment is due.[13]

The Payday 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).[14]

These Provisions also require a lender to—

- Provide a "Payment Notice" prior to initiating the first payment withdrawal from the customer's account;[15]

- 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;[16] and

- Provide a "Consumer Rights Notice" after initiating two consecutive failed attempts to withdraw payment from the customer's account (which notice states that the lender is no longer permitted to withdraw loan payments).[17]

On February 6, 2019, the Bureau proposed to rescind the Underwriting Requirements.[18] The Bureau did not propose to address the Payment Provisions.

In addition, the Payday Rule requires a bank or other lender to retain records relating to the lender's withdrawal of payment on a Covered Loan for 36 months after the loan ceases to be outstanding.[19] The Rule also requires a lender to develop and follow written policies and procedures that are "reasonably designed to ensure compliance" with the Final Rule's provisions.[20] These provisions would survive rescission of the Underwriting Requirements.

[13] *Id.* § 1041.5.
[14] *Id.* § 1041.8.
[15] *Id.* § 1041.9(b).
[16] *Id.* § 1041.9(b)(3)(ii)(C).
[17] *Id.* § 1041.9(c). The Payday 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.c of this letter. *Id.* § 1041.8(a)(1)(ii).
[18] Rescission Proposal, 84 Fed. Reg. at 4,252.
[19] 12 C.F.R. § 1041.12(b).
[20] *Id.* § 1041.12(a).

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 Payday Rule.[21] The Bureau did not propose to extend the compliance date for the other provisions of the Payday Rule.

III. The Bureau Should Issue a Separate Proposal to Revise the Overbroad Definition of a "Covered Loan"

To find that an act or practice is unfair or abusive under § 1031 of the Dodd-Frank Act, the Bureau must have evidence establishing its unfairness or abusiveness. To declare an act or practice "unfair," the Bureau must have a "reasonable basis" to conclude that "(A) the act or practice causes or is likely to cause substantial injury to consumers which is not reasonably avoidable by consumers; and (B) such substantial injury is not outweighed by countervailing benefits to consumers or to competition."[22] In addition, the Bureau may not allow "public policy considerations [to] serve as a primary basis for [its] determination" that the making of certain small dollar loans is an unfair practice.[23] As described below, the rulemaking record is devoid of evidence that the underwriting or payment practices relating to Traditional Consumer Loans offered by banks cause injury—thus, clearly failing to establish the substantial injury predicate for extending the Payday Rule to these bank products.

Similarly, there is no evidence that the longstanding safe and sound underwriting and payment practices relating to Traditional Consumer Loans are "abusive" acts or practices under § 1031. To declare an act or practice "abusive" under that section, the Bureau must find that the act or practice—

> (1) materially interferes with the ability of a consumer to understand a term or condition of a consumer financial product or service; or
>
> (2) takes unreasonable advantage of
>
>> (A) a lack of understanding on the part of the consumer of the material risks, costs, or conditions of the product or service;
>>
>> (B) the inability of the consumer to protect the interests of the consumer in selecting or using a consumer financial product or service; or
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>> (C) the reasonable reliance by the consumer on a covered person to act in the interests of the consumer.[24]

As described below, the Bureau has not asserted evidence to satisfy any of these statutory requirements with respect to Traditional Consumer Loans offered by banks.

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[21] Payday, Vehicle Title, & Certain High-Cost Installment Loans, 84 Fed. Reg. 4,298, 4,300-02 (proposed Feb. 14, 2019).
[22] Dodd-Frank Act, § 1031(c)(1) (codified at 12 U.S.C. § 5531(c)(1) (2012)).
[23] *Id.* § 1031(c)(2) (codified at 12 U.S.C. § 5531(c)(2)).
[24] 12 U.S.C. § 5531(d).

To remedy these deficiencies in the Payday Rule, the Bureau should issue immediately a separate proposal that revises the overbroad definition of a Covered Loan.

The exclusion of Traditional Consumer Loans from the definition of "Covered Loan" would preserve the ability of banks to continue to serve their customers' credit needs with these loan products. 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, the Bureau has reassessed its approach to interpreting its authority to declare certain acts or practices as "unfair" or "abusive" (a UDAAP). 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 renew our request made in ABA's March 18, 2019, letter that the Bureau reexamine the Payment Provisions using the same interpretation of "unfair" and "abusive" that the Bureau has applied to the Underwriting Requirements.[25]

a. The Bureau Has Asserted Evidence Only that Storefront Payday Loans, Online Payday Loans, Payday Installment Loans, and Vehicle Title Loans Cause Harm to Consumers

In this rulemaking proceeding, the Bureau has asserted evidence of unfair or abusive underwriting or payment practices only with respect to storefront payday loans, online payday loans, payday installment loans, and vehicle title loans. As such, the Bureau must limit any finding of unfairness or abusiveness to those loan products.

In support of the Underwriting Requirements, the Bureau cited data from past studies showing that borrowers of payday loans (including, specifically, storefront payday loans) and vehicle title loans roll over the loans when due instead of repaying the loan in full, that borrowers do not expect lengthy loan sequences, and that borrowers experience "very high" default rates on these loans.[26] From these data, the Bureau concludes that borrowers are harmed by these loans.

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[25] *See* ABA March 2019 Letter, *supra* note 4, at 8-9.

[26] The Bureau asserted the following evidence in support of its conclusion that storefront payday loans, online payday loans, payday installment loans, and single-payment vehicle title loans cause specific harms to borrowers (emphasis added in each description):

- "The Bureau found that 56 percent of *payday loans* are borrowed on the same day [that a preceding loan comes due] and 85 percent of these loans are re-borrowed within a month." Payday Rule, 82 Fed. Reg. at 54,554.
- "Fifty percent of all new *storefront payday loans* are followed by at least three more loans and 33 percent are followed by six more loans." *Id.* at 54,554-55.
- "The Bureau found that 83 percent of *single-payment vehicle title loans* are re-borrowed on the same day [as a preceding loan comes due] and 85 percent of them are re-borrowed within a month." *Id.* at 54,555.
- "Over half (56 percent) of all new *single-payment vehicle title loans* are followed by at least three more loans, and more than a third (36 percent) are followed by six or more loans." *Id.*
- "Of the *payday loans* made to borrowers paid weekly, bi-weekly, or semi-monthly, over 20 percent are in loan sequences of 20 loans or more and over 40 percent of loans made to borrowers paid monthly are in loan sequences of comparable durations (i.e., 10 or more monthly loans)." *Id.*

There is no evidence in the record of harm to borrowers arising from the underwriting of other loans. Indeed, the Bureau only expresses its *belief* that the underwriting performed on payday installment loans and other balloon-payment loans of more than 45 days *may* lead to consumer harm (Longer-Term Balloon-Payment Loans). The Bureau does not offer *evidence* that Longer-Term Balloon-Payment Loans cause harm to consumers, because "relatively few covered longer-term balloon-payment loans appear in the market today,"[27] and the Bureau "is not able to directly observe the harms borrowers suffer from making unaffordable payments" on these loans.[28] Moreover, the Bureau has not advanced evidence that the underwriting of Covered Loans made by *banks* causes harm to consumers.[29]

As the Bureau expressly recognizes, the data on which the Bureau relies in support of the Payment Provisions are similarly limited to evidence concerning online payday and payday installment lenders.[30] The single study of payment practices that the Bureau conducted concluded that online payday and payday installment lenders "re-presented after one failed attempt 75 percent of the time, re-presented after the second failed attempt 66 percent of the time, represented after the third failed attempt 50 percent of the time, and re-presented after the fourth failed attempt 29 percent of the time."[31]

Based on this single study of payment practices, the Bureau's enforcement experience, and publicly available data, the Bureau concluded that payment practices "among *payday* and *payday installment lenders* . . . substantially increase [consumers'] financial distress."[32] The Bureau made no similar finding that payment practices by *banks* cause consumers financial distress or other harm. Indeed, the Bureau's decision to include the conditional exclusion from the Payment Provisions for banks and other depository institutions that hold the borrower's deposit account

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- "Many consumers who take out a *payday loan* do not expect to re-borrow to the extent that they do. . . . A study on this topic found that as many as 43 percent of [payday loan] borrowers may have underestimated the length of time to repayment by two weeks or more." *Id.*
- "[A]pproximately 20 percent of *payday loan* sequences and 33 percent of *single-payment vehicle title loan* sequences end up with the consumer defaulting." *Id.*
- "[A]bout 60 percent of balloon-payment [vehicle title] installment loans resulted in refinancing, re-borrowing, or default." *Id.* at 54,582.

[27] *Id.* at 54,580. As described below in Part III.b below, many Longer-Term Balloon-Payment Loans are made by banks, but these loans are not made to vulnerable borrowers.
[28] *Id.* at 54,582.
[29] The Bureau asserts that it is "appropriate to apply" the requirements of the Payday Rule to deposit advance products offered by banks. *Id.* at 54,586. However, the Bureau asserted *no* evidence that deposit advance products cause harm to borrowers. Instead, the Bureau's sole study of deposit advance products, published six years ago, found that the median deposit account borrower had an advance outstanding during only 31% of the days in the study period, the median number of months per year in which the borrower had outstanding advance balances was seven, and the median number of days between borrowers' advance balance episodes was 13. *See* Consumer Fin. Prot. Bureau, Payday Loans and Deposit Advance Products: A White Paper of Initial Data Findings 37-39 (Apr. 24, 2013), https://files.consumerfinance.gov/f/201304_cfpb_payday-dap-whitepaper.pdf. These findings demonstrate that borrowers used the product for a limited period of time and then exited the product. The findings do not demonstrate that the product causes harm to borrowers.
[30] The Bureau acknowledged that its research on lenders' payment practices "focused on online payday and payday installment loans." Payday Rule, 82 Fed. Reg. at 54,720.
[31] *Id.* at 54,721.
[32] *Id.* at 54,724 (emphasis added).

from which payment on the loan is withdrawn suggests that the Bureau was not concerned with bank payment practices.[33]

b. The Bureau Must Limit the Scope of its Regulation to the Loans for which the Bureau Has Asserted Evidence of Harm

As described above, the Bureau has asserted evidence only that storefront payday loans, online payday loans, payday installment loans, and vehicle title loans cause harm to consumers. The Bureau must limit the scope of its regulation to specific practices that it found to be unfair and/or abusive in the context of the specific types of loans it studied.

According to the Bureau's findings, the median amount of a storefront payday loan is $350, the median term is 14 days, and the average term is 18.3 days.[34] The median amount of an online payday loan is $400, according to a study of 2.5 million online payday borrowers cited by the Bureau.[35] The "typical" duration of a single-payment vehicle title loan is 30 days, with a median loan amount of $694 and average loan amount of $959.[36] Payday installment loans have terms of less than six months and loan amounts of less than $1,000, according to state laws cited by the Bureau.[37]

In sum, the nonbank loans for which the Bureau has asserted evidence of consumer harm are made in amounts that average less than $1,000 and have terms of no more than six months (with some nonbank loan amounts and durations significantly lower). The Bureau should limit the definition of a Covered Loan to exclude loans over a certain dollar amount and beyond a certain term, consistent with the Bureau's evidence as described above.

The Traditional Consumer Loans offered by banks differ in significant respects from payday and vehicle title loans. These products are designed for and marketed to creditworthy borrowers, not the vulnerable borrowers with limited credit opportunities that the Rule sought to protect, and there is no evidence presented by the Bureau of unfairness or abusiveness in the bank underwriting or payment practices associated with these loans.[38] As described in ABA's letter of March 18, 2019,[39] these Traditional Consumer Loans 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

[33] *See* 12 C.F.R. § 1041.8(a)(i)(ii) (providing conditional exclusion).
[34] Payday Rule, 82 Fed. Reg. at 54,477-78.
[35] *Id.* at 54,487 n.151. No median or average term of an online payday loan is provided.
[36] *Id.* at 54,490.
[37] The terms of payday installment loans vary by state. In two examples cited by the Bureau, the State of Colorado requires that a loan have a minimum term of six months to avoid an interest rate cap on payday installment loans. *Id.* at 54,496. The State of Illinois requires that a loan be fully amortizing for terms of 112 to 180 days and the loan amount be limited to the lesser of $1,000 or 22.5 percent of gross monthly income, for the loan to be a permissible payday installment loan. *Id.* at 54,496-97.
[38] *See Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (agency action is arbitrary and capricious if the 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)).
[39] ABA March 2019 Letter, *supra* note 4, at 5-6.

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, under the current rule 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 are unsecured, and have 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 thereby constitute a Short-Term Loan or Longer-Term Balloon-Payment Loan within the language of the Payday Rule.

  In addition, *any* loan or line of credit where the lender may demand immediate payment may be a Covered Loan. Under the Payday Rule, a loan is a Covered Loan when the borrower is "required to repay substantially the entire amount" of the loan or advance within 45 days or is "required to repay substantially the entire balance of the loan in a single payment more than 45 days after consummation."[40]

  The borrower's draw activity also may cause the loan to be subject to the Payday Rule. 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 loan balance, the second month's payment would be 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 Payday Rule, regardless of whether the bank demands repayment of the entire line 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 Payday 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).[41]

[40] *See* 12 C.F.R. § 1041.3(b)(1).
[41] *See id.* § 1041.3(b)(3)(i)(B).

c. The Payday Rule's "Conditional Exclusion" Does Not Exempt Traditional Consumer Loans from the Payment Provisions

As noted above, the Bureau has presented no evidence that longstanding bank payment practices with regard to Traditional Consumer Loans are unfair or abusive. Accordingly, the Payday Rule includes a so-called "Conditional Exclusion," which exempts from the Payment Provisions lenders that are the borrower's account-holding institution and that, pursuant to the lender's agreement with the borrower, (a) do not charge the borrower a nonsufficient funds (NSF) or overdraft fee for the attempted withdrawal, and (b) do 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.[42]

In practice, however, the Conditional Exclusion will not achieve its intended result. As we explained in our March 18, 2019, letter, although many borrowers are also bank depositors, many also have accounts at other banks and may choose to make payment from those accounts.[43] 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 that possibility and will need to implement a system to comply with the Payment Provisions for Traditional Consumer Loans.

In addition, if a bank receives payment on a Covered 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 negative balance was in fact caused by a payment on a Covered Loan and the bank charges an NSF or overdraft fee, then the exemption will not apply, and the bank would be subject to the Payment Provisions.

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 which transaction resulted in a negative balance.

This result should be avoided. As noted above, the Bureau has presented no evidence that Traditional Consumer Loans cause harm to consumers; therefore, application of the Payment Provisions to these loans is arbitrary, capricious, and an abuse of discretion.

Further, ABA members advise that application of the Payday Rule to Traditional Consumer Loans may lead banks to limit ways in which borrowers may repay the loan. For example, banks may require that borrowers make payment on Covered Loans from the borrower's account with that bank, and not from an account with another institution, in order to ensure that the loan is excluded from the Rule's restrictions under the Conditional Exclusion.

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[42] *Id.* § 1041.8(a)(1)(ii).
[43] *See* ABA March 2019 Letter, *supra* note 4, at 6-7 (expressing ABA's view that the Conditional Exclusion will not allow banks to avoid compliance with the Payment Provisions).

In addition, banks may be motivated by the Rule to insist that borrowers provide an authorization for an immediate withdrawal—i.e., a withdrawal within one business day—to avoid triggering the notice requirement which may lead to a late payment if triggered. As described above, 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 (Payment Notice), *except* if the payment withdrawal is a single immediate payment transfer initiated at the borrower's request.[44] If the Payment Notice requirement applies, 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.[45] Thus, the Payment Notice requirement may result in late fees if 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, i.e. fewer than three or six business days before that date. This result may encourage banks to require that the borrower make payment on the loan via a single immediate payment transfer.

In sum, the Conditional Exclusion does not exempt Traditional Consumer Loans offered by banks from the Payment Provisions. Borrowers of Traditional Consumer Loans are not the vulnerable consumers identified by the Bureau and should not be inconvenienced by a regulation that seeks to protect an entirely different group of consumers.

d. Application of the Payday Rule to Traditional Consumer Loans May Result in Unnecessary and Unwarranted Regulatory Burden to Lenders and Impair Communications from Lenders to Borrowers

A statutory objective of the Bureau is to "reduce unwarranted regulatory burdens."[46] Application of the Payday Rule's requirements to Traditional Consumer Loans would contravene this objective by imposing unnecessary and unwarranted regulatory burdens on lenders.

Traditional Consumer Loans frequently span multiple lines of business, product lines, and loan operating systems. If the Bureau does not exclude Traditional Consumer Loans from the definition of a Covered Loan, banks and other lenders will be forced to prepare new disclosures, place those disclosures into multiple existing loan operating systems, and train bank staff on new procedures—all within three months' time.[47] For example, banks must prepare a Consumer

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[44] *See* 12 C.F.R. § 1041.9(b)(1).
[45] *Id.* § 1041.9(b)(2).
[46] Dodd-Frank Act § 1021(b)(3).
[47] 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. The additional costs that lenders would incur to comply with the Payday Rule 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.

Rights Notice and be prepared to send that Notice in connection with a Traditional Consumer Loan after two failed payment transfers.[48]

Banks also will be required to modify payment systems to distinguish between Covered Loans and non-Covered Loans to ensure that attempted payment withdrawals on Covered Loans comply with the Payment Provisions. These operational challenges are compounded by the fact that the Rule's prohibition on initiating payment withdrawals after two unsuccessful withdrawal attempts is triggered by two unsuccessful attempts made in connection with two *different* Covered Loans, according to the Official Interpretations to the Rule.[49] Consequently, banks will be required to track unsuccessful withdrawal attempts across all Covered Loans held by a borrower.

e. The Bureau Should Rescind the Payday Rule's Underwriting Requirements to Avoid Stifling Innovation in the Market for Small Dollar Loans

ABA agrees that the Bureau should rescind the Underwriting Requirements. As a threshold matter, the Bureau lacks statutory authority to impose the Underwriting Requirements or other ability-to-repay requirement on the making of *short-term loans*. As discussed in our comment to the proposed rule, by imposing such a requirement, the Bureau has upended the regulatory framework grounded in the Truth in Lending Act and has acted notwithstanding Congress' purposeful decision not to grant the Bureau the authority to impose an ability-to-repay requirement.[50] For these reasons, the Bureau has exceeded its statutory authority in promulgating the Underwriting Requirements.

As also discussed in our previous comment,[51] compelling policy reasons support rescission of the Underwriting Requirements. These Requirements are exceedingly burdensome and prescriptive, mandating a narrow one-size-fits-all underwriting formula.[52] If not rescinded, they will

[48] 12 C.F.R. § 1041.9(c). Banks must also prepare a Payment Notice and be prepared to send that Notice prior to initiating a payment transfer on the loan, except where the payment transfer is made through a single immediate payment transfer initiated at the borrower's request. *Id.* § 1041.9(b).

[49] *See* Payday Rule, 82 Fed. Reg. at 54,912 (Official Interpretation to § 1041.8(b)(2)(ii)); *see also* Consumer Fin. Prot. Bureau, Payday, Vehicle Title, and High-Cost Installment Lending Rule: Payment-Related Requirements, Small Entity Compliance Guide § 4.3.4 (Feb. 2019), https://files.consumerfinance.gov/f/documents/cfpb_payday_small-entity-compliance-guide.pdf ("If the consumer has more than one covered loan with the lender, the two consecutive failed payment transfers do not need to be initiated in connection with the same covered loan for the prohibition to be triggered, but rather can be initiated in connection with two different covered loans.").

[50] *See* Letter from Virginia O'Neill, Am. Bankers Ass'n, to Monica Jackson, Bureau of Consumer Fin. Prot. 18-20 (Oct. 7, 2016), https://www.aba.com/Advocacy/commentletters/Documents/cl-SmallDollar-2016.pdf [hereinafter, ABA 2016 Letter]; Letter from Am. Bankers Ass'n et al. to Monica Jackson, Bureau of Consumer Fin. Prot. 2 (Oct. 6, 2016), https://www.aba.com/Advocacy/commentletters/Documents/JointLtr-SmallDollar2016.PDF [hereinafter, Joint Trade Associations 2016 Letter].

[51] *See* ABA 2016 Letter, *supra* note 50, at 22.

[52] They require that a lender document, verify, and project the borrower's income, major financial obligations, housing costs, and basic living expenses; impose arbitrary "cooling off" periods; and require that lenders furnish loan information to a "registered information system." *See* 12 C.F.R. §§ 1041.5 (underwriting mandates); 1041.5(d)(2) (cooling-off requirements); § 1041.10 (requirement that lenders furnish loan information to a "registered information system").

discourage innovation in credit risk evaluation, including the development of streamlined and predictive underwriting tools and algorithms that many banks and even nonbank companies are developing.

These mandates would be imposed at a time when banks are innovating to compete against payday lenders and other nonbank providers of small dollar credit. Banks can use information derived from the customer's relationship with the bank, particularly the customer's history of incoming credits, to design predictive underwriting approaches that permit the bank to offer small dollar credit products at competitive rates.[53] These bank efforts would be curtailed by enforcement of the Underwriting Requirements.

For those banks that are not currently exploring new underwriting tools, the Underwriting Requirements will discourage the refinement of existing approaches. Underwriting methods are developed and continually refined by lenders based upon their experience with their own portfolios and customer populations. Constraining underwriting to a prescriptive formula will prevent utilization of this important information and discourage acceptable risk taking. Competition, consumer choice, and consumer access to small dollar credit will all suffer.

Without rescission, the Underwriting Requirements would curtail customer access to the variety of small dollar loans offered by depository institutions, despite the lack of evidence that these loans pose risks to customers.[54]

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

ABA renews our call that the Bureau revise the overbroad definition of a Covered Loan through notice-and-comment rulemaking, and not through guidance or other such agency action.[55] 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 action, while appreciated as a policy direction, would be 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. We urge the Bureau to revise the definition of a Covered

[53] The Office of the Comptroller of the Currency (OCC) also has addressed appropriate underwriting standards for small dollar loans, from the perspective of promoting the safety and soundness of this lending by banks. *See* Office of the Comptroller of the Currency, OCC Bulletin 2018-14, Core Lending Principles for Short-Term, Small-Dollar Installment Lending (2018). As the OCC stated, a responsible small dollar credit program can be guided by "reasonable policies and practices," including the use of "deposit activity to assess a consumer's creditworthiness." In permitting banks to innovate in designing appropriate underwriting standards, the OCC concluded that a bank may determine that a customer has "an ability to repay a loan despite a credit profile that is outside of the bank's typical underwriting standards for credit scores and repayment ratios." The OCC did not suggest that prescriptive underwriting expectations were necessary or even helpful in predicting a borrower's creditworthiness for small dollar borrowing.

[54] The Underwriting Requirements also should be rescinded for the separate reasons that the requirements represent an unlawful cap on interest rates and an impermissible regulation of insurance in violation of the Dodd-Frank Act. *See* ABA 2016 Letter, *supra* note 50, at 17-21; Joint Trade Associations 2016 Letter, *supra* note 50, at 1-4.

[55] *See* ABA March 2019 Letter, *supra* note 4, at 11 (urging the Bureau to revise through notice-and-comment rulemaking the overbroad definition of a Covered Loan).

Loan through notice-and-comment rulemaking to provide banks with certainty that the Payday Rule does not apply to Traditional Consumer Loans.

IV. The Bureau Should Clarify that the Payday Rule Applies Prospectively

The Bureau should clarify that the Payday Rule applies only to loans originated on or after the compliance date. As stated above, the Conditional Exclusion exempts from the Payment Provisions only lenders that, *pursuant to the lender's agreement with the borrower*, (a) do not charge the borrower a nonsufficient funds (NSF) or overdraft fee for the attempted withdrawal, and (b) do 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.[56] 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.

In addition, ABA members report that existing bank systems are not designed to identify all existing loans that fall within the overbroad definition of a Covered Loan. For example, one ABA member reported that its core system cannot identify loans that require principal and interest payments over a term that is less than the amortization period, resulting in a "balloon"-type payment at the end of the loan term. The task of identifying existing Covered Loans is made more difficult by the fact that the classification of a loan as a Covered Loan may depend on the borrower's draw activity, as described above in Part III.b of this letter (under "Demand lines of credit and other revolving lines").

V. The Bureau Should Extend the Compliance Date for All Provisions in the Payday Rule

We cannot emphasize strongly enough the importance of extending immediately the compliance date for all provisions in the Payday Rule. Since the Payday Rule was published in the *Federal Register* in November 2017, a cloud of uncertainty has hung over the Rule. Two months after publication, in January 2018, then-Acting Director Mulvaney announced that the Bureau "may reconsider" the Payday Rule.[57] After litigation was initiated against the Bureau,[58] a federal district court in Texas issued a stay of the compliance date for all provisions in the Rule but, significantly, did not specify an end date of the stay.[59] That stay remains in force, but it could be lifted at any time.[60]

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[56] 12 C.F.R. § 1041.8(a)(1)(ii).

[57] 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/.

[58] *See* Complaint, *Cmty. Fin. Svcs. Ass'n of Am. v. Consumer Fin. Prot. Bureau*, No. A-18-CV-00295 (W.D. Tex. Apr. 9, 2018) [hereinafter, *CFSA v. CFPB*].

[59] *CFSA v. CFPB*, 2018 WL 6252409 (W.D. Tex. Nov. 6, 2018).

[60] In its Order, the court stated that the Compliance Date was stayed "pending further order of the court." *Id.* 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,

ABA members report that vendors have not taken adequate steps to assist banks with modifying their loan origination, documentation, payment, and core processing systems to bring those systems into compliance with the requirements of the Payment Provisions.[61] Vendors' inaction may be due to the stay of the compliance date but, as described above, that stay does not specify an end date of the stay, and the stay could be lifted at any time.

In ABA's letter of March 18, 2019, we urged the Bureau to extend the compliance date for all provisions in the Payday Rule. That comment period closed nearly two months ago, yet the Bureau still has taken no action with respect to the compliance date. It is imperative that the Bureau act immediately.

In addition, once the Bureau concludes its rulemaking, banks will need sufficient time to develop systems to achieve compliance with the Payday 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. An extension in the compliance date for all provisions in the Payday Rule is necessary to provide adequate time for banks to implement the final rule.

Conclusion

We appreciate and support the Bureau's proposal to rescind the Underwriting Requirements in the Payday Rule. However, we continue to urge the Bureau to reconsider *all* provisions in the Rule. As part of that reconsideration, the Bureau should issue a separate proposal that revises the definition of a Covered Loan to include only those loans for which the Bureau has evidence of harm to consumers. The Bureau has asserted no evidence that Traditional Consumer Loans offered by banks cause consumer harm. Consequently, the Bureau should exclude these loans from the definition of a Covered Loan.

The Bureau also should clarify that the Payday Rule applies prospectively only and should extend the compliance date for all provisions in the Rule.

Sincerely,

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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, *CFSA v. CFPB*, 2018 WL 3491029 (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.

[61] At least one ABA member recently received a notice from one of the three major core service providers that stated that the core provider does not have plans to add any new type of functionality to its existing products to permit the bank's lending systems to comply with the Payday Rule.