



CENTER FOR CAPITAL MARKETS
COMPETITIVENESS.

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May 15, 2019

Mr. David Silberman
Associate Director
Research, Markets, and Regulations
Consumer Financial Protection Bureau
1700 G Street NW
Washington, D.C.

Re: Response to Notice of Proposed Rulemaking for Payday, Vehicle Title, and Certain High-Cost Installment Loans; RIN 3170-AA80 [Docket No. CFPB-2019-0006]

Dear Mr. Silberman:

The U.S. Chamber of Commerce's Center for Capital Markets Competitiveness (CCMC) believes that strong and appropriate consumer protections and access to credit are important and necessary components of efficient capital markets. CCMC appreciates the opportunity to respond to the Consumer Financial Protection Bureau's (CFPB or Bureau) notice of proposed rulemaking (Proposed Rule)¹ for the payday, vehicle title, and certain high-cost installment loans rulemaking (the Rule).² As we stated in our response to the request for comment³ on the delay of the Rule, we support a delay of the compliance date and urge the CFPB to:

¹ CFPB Response to Notice of Proposed Rulemaking for Payday, Vehicle Title, and Certain High-Cost Installment Loans; RIN 3170-AA80 [Docket No. CFPB-2019-0006].

² *Payday, Vehicle Title, and Certain High-Cost Installment Loans*, 82 Fed. Reg. 54472 (2017).

³ <http://www.centerforcapitalmarkets.com/wp-content/uploads/2019/03/3.18.19-CFPB-PaydayRuleDelay.pdf?#>

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1. Ensure consumers maintain access to much-needed small dollar credit;
2. Coordinate with the prudential banking regulators as they investigate the most effective and efficient means for regulating the small dollar credit market; and
3. Delay and reopen the entire rulemaking to allow appropriate time to fix issues that have arisen.

Consumers Need Access to Responsible Small Dollar Loans.

Each year, consumers borrow nearly \$90 billion in loans and millions of Americans try to make ends meet with short term, small dollar loans mostly ranging in amount from \$300 to \$5,000 each.⁴ According to the Federal Reserve Board (Fed), significant percentages of Americans lack the ability to adequately address immediate financial needs, such as unexpected expenses, current month's bills, and medical costs. This financial stress was compounded for thousands of Americans with an event completely outside their control – the 35 day U.S. government shutdown. During the shutdown, five financial regulators issued a joint statement asking financial institutions to work with borrowers who were facing hardship at no fault of their own. .⁵

To better understand the financial strain of Americans, the Fed regularly conducts a Survey of Household Economics and Decision making, which in 2017 found:

- 40% of adults would either not be able to cover an unexpected expense of \$400 or would cover it by selling something or borrowing money. This percentage is an improvement from 48 percent in 2013 when the survey began.
- Over one-fifth of adults are not able to fully pay off all of their current month's bills.

⁴ OCC, "Comptroller Urges Banks to Meet Consumers' Short-Term, Small-Dollar Credit Needs" (May 23, 2018) <https://www.occ.gov/news-issuances/news-releases/2018/nr-occ-2018-51.html>

⁵ OCC joint statement, "Regulators Encourage Institutions to Work with Borrowers Affected by Government Shutdown" <https://www.occ.treas.gov/news-issuances/news-releases/2019/nr-ia-2019-4.html>

- Over one-fourth of adults skipped necessary medical care in 2017 because they could not afford the cost.⁶

Similarly, the Center for Financial Services Innovation (CFSI) found that many Americans cannot effectively manage their debt and do not plan ahead financially. CFSI's U.S. Financial Health Pulse (Pulse),⁷ based on CFSI's Financial Health Score that is comprised of methodology, consumer surveys, and transactional records, reveals that:

- 47% of Americans are spending more than or equal to their income;
- 36% of Americans are not able to pay their bills on time;
- 30% of Americans say they have more debt than they can manage; and
- 40% of Americans do not plan ahead financially.

Access to small dollar credit critically supports Americans facing these immediate and pressing financial challenges. As the CFPB imposes requirements on small dollar loans, it is imperative that these Americans retain access to small dollar loan products from responsible sources, which can only occur if the CFPB encourages lenders to provide this type of credit. Absent the supply of small dollar credit from responsible lenders, consumers will inevitably meet their immediate and pressing financial needs with loans from less responsible lenders and on less favorable terms.

The CFPB Should Coordinate with the Prudential Banking Regulators to Achieve One Workable Standard.

It is critical that the CFPB coordinate with the prudential banking regulators to establish consistent standards for the small dollar marketplace. Since the CFPB finalized the Rule in 2017, the prudential regulators have been actively engaged in shaping the regulatory framework for the small dollar credit market. In May 2018, we were pleased that the Office of the Comptroller of the Currency (OCC) released a statement,⁸ "Core Lending Principles for Short-Term, Small-Dollar Installment

⁶ Fed "Survey of Household Economics and Decision making of 2017" (May 2018) <https://www.federalreserve.gov/publications/2018-economic-well-being-of-us-households-in-2017-executive-summary.htm>

⁷ Center for Financial Services Innovation, U.S. Financial Health Pulse <https://cfsinnovation.org/u-s-financial-health-pulse/>

⁸ OCC, "Comptroller Urges Banks to Meet Consumers' Short-Term, Small-Dollar Credit Needs" (May 23, 2018) <https://www.occ.gov/news-issuances/news-releases/2018/nr-occ-2018-51.html>

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Lending”⁹ encouraging banks to offer these types of loans. In his statement, Comptroller Otting illustrated the demand for short term, small dollar loans and urged banks to offer affordable credit, especially to consumers who have weaker credit history and ability to repay. He stated, “[b]anks may not be able to serve all of this large market, but they can reach a significant portion of it and bring additional options and more competition to the marketplace while delivering safe, fair, and affordable products that promote the long-term financial goals of their customers.”¹⁰

Similarly, the Federal Deposit Insurance Corporation (FDIC) published a request for information (RFI) on November 20, 2018 and asked how the FDIC can better enable banks to provide such products to meet consumer demand.¹¹ In the RFI, the FDIC “recognizes the important role small-dollar credit products can play...[by] addressing cash-flow imbalances, unexpected expenses, or income volatility.”¹² We responded to the FDIC RFI and asked the FDIC to: 1. Pursue an interagency short term, small dollar rule to establish a workable, consistent standard; 2. Coordinate with the Consumer Financial Protection Bureau as it reassesses its Payday Loan Rule; and 3. Rescind the harmful Deposit Advance Product Guidance.

As indicated above, a healthy small dollar loan market is critical for the financial health of American consumers. To create a robust market that adequately serves consumers’ needs, financial institutions need clear guidelines on how to do so. With multiple regulators having jurisdiction over this market, it is imperative that the regulators are coordinating to produce a unified standard.

**The CFPB Should Delay and Reopen the Entire Rule to Allow
Appropriate Time to Fix Issues that have Arisen.**

We applaud the CFPB for reopening the Rule¹³ and agree that if the compliance date is not delayed “industry participants would expend significant

⁹ OCC BULLETIN 2018-14, “Description: 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>

¹⁰ OCC, “Comptroller Urges Banks to Meet Consumers’ Short-Term, Small-Dollar Credit Needs” (May 23, 2018) <https://www.occ.gov/news-issuances/news-releases/2018/nr-occ-2018-51.html>

¹¹ Request for Information on Small-Dollar Lending, FDIC, 83 Fed. Reg. 58566, (Nov. 20, 2018) available at <https://www.govinfo.gov/content/pkg/FR-2018-11-20/pdf/2018-25257.pdf>.

¹² FDIC RFI at 58567.

¹³ *Payday, Vehicle Title, and Certain High-Cost Installment Loans*, 82 Fed. Reg. 54472 (2017).

resources and incur significant costs in order to comply with the 2017 Final Rule, and industry participants could experience substantial revenue disruptions that could impact their ability to stay in business once the compliance date has passed.”¹⁴ This sweeping Rule has broad ramifications that would impact consumers’ ability to obtain much-needed small dollar credit, as noted above. Further, the Rule inadvertently sweeps in wealth management and other traditional banking products that were not intended to be covered. To mitigate disruptions to the lending market, it is critical that these issues are resolved before the Rule becomes effective.

I. Implementation has Exposed Payment Provision Challenges.

a. Documenting Consecutive Failed Payment Transfers is Unworkable.

We urge the Bureau to delay the Rule entirely and reconsider the payment provisions. We have learned the payment provisions, as currently written, would be incredibly difficult to comply with due to the current provisions mandating the documentation for consecutive failed payment transfers. As an illustration, let’s imagine there is an account that has a \$0 balance and is used by the customer to make payments on two covered loans and a non-covered loan, such as a mortgage or car loan. If the payment is triggered on three consecutive days, the first two days are for the two covered loans and the third day is for the non-covered loan. Section 4.3.4 of the recent CFPB small entity compliance guide states that the two consecutive failed payment transfers do not need to be initiated with the same covered loan for the prohibition to be triggered. Under this scenario, once the first two failed payments are made, financial institutions will not be able to charge non-sufficient funds (NSF) fees for the failed payment of the non-covered mortgage or car loan as the institutions would not currently have any way to track whether these payments are for covered or non-covered loans. This is just one example of the confusion and unworkability presented by the current payment provisions.

b. Check Payment Documentation is Impractical.

We have heard a similar issue with payments that are made by checks. If a customer pays a loan with a check, it’s covered under the payment provisions as a “lender initiated payment transfer,” however financial institutions have no way of identifying whether the payment is for a covered loan. Thus, financial institutions are

¹⁴ NPRM pg 4.

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unable to track the payment for purposes of complying with the payment provisions. Here is an example from one of our members that describes the problem:

[W]here other forms of payment on a covered loan are involved, such as a check or remotely-created payment order, it becomes far more difficult for a depository institution lender to take the steps required to meet the conditional exclusion; particularly, preventing the imposition of any fee in connection with a failed payment. To illustrate this point, we offer the following example:

A borrower obtains a covered loan and authorizes [the Bank] to automatically withdraw her monthly loan payments from her [bank] account when due. Despite having established automatic payments, the borrower (for whatever reason) also decides to make a payment by mailing a paper check drawn on her [bank] account.

When the paper check is processed, the Bank's deposits platform will determine whether to pay the check based on rules set within the deposits platform and with sole reference to the status of the checking account. The system is not set up to recognize or react to details on the check such as payee or an indication on a memo line specifying the loan account involved, so it will not recognize when such a check was intended for payment of a covered loan. If the checking account has insufficient funds to cover the amount of the check at the time of processing, one of the following must occur:

- The check is paid and an overdraft fee assessed.
- The check is returned unpaid, resulting in a [NSF] fee.
- The check is paid and triggers an automated transfer from another account linked for the purpose of protecting against overdrafts, resulting in a transfer fee.

Any one of these outcomes would create a situation where the borrower is assessed a fee, thereby disqualifying the Bank from the conditional exemption outlined in the Rule. As a result, the transfer would constitute a failed "payment transfer," thereby triggering additional obligations – most notably, the need for the Bank to develop systemic counting mechanisms to track subsequent covered loan payments to ensure compliance with the Rule's prohibition on more than two consecutive failed payment transfers from a consumer's account.

These examples are not exhaustive, but provide an illustration of some of the problems that have arisen. We hope these real-life consequences of the payment provisions clearly exhibit the unworkability that has resulted from these provisions and the need to reassess them. We respectfully ask the Bureau to delay the entire rulemaking and work with stakeholders to ensure these problems, among others, are resolved.

II. Wealth Management Products are not the Unfair, Deceptive, and Abusive Acts and Practices (UDAAP) the Rule is Intended to Address.

Although the CFPB indicated it will be revisiting the “ability to repay” requirements of the Rule as part of the reassessment, we hope it will consider all aspects of the Rule, including its definitions of covered products. One unintended consequence of the Rule is that traditional bank loans and lines of credit that are neither short-term nor small-dollar nor high cost could be captured, many of which are provided to wealth management customers. This would restrict the ability of depository institutions to serve their customers. Some institutions have expressed concern that the Rule would inappropriately capture consumer loans that are not “small dollar” or “payday” loans and subject such loans to the rule’s payment withdrawal restrictions and notice provisions.

Importantly, the Rule does not have a loan amount threshold, so a loan for \$300 and a loan for \$300,000 could both be considered “covered loans” if they meet one of the Rule’s three primary definitions. For example, each of the following consumer loan products could be considered a “covered product” under the rule *regardless of the amount of the loan*:

- A line-of-credit with an interest-only feature;
- A 30-day bridge loan;
- A margin loan; and
- A line-of-credit with a low drawn amount, a finance charge during a billing cycle, and auto-pay.

Under the Rule, it would be an unfair and abusive practice for a lender to make further attempts to withdraw a payment from a consumer’s account in connection with a covered loan after two failed attempts due to a lack of sufficient funds, unless the lender obtains the consumer’s new and specific authorization to make further

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withdrawals from the account.¹⁵ Additionally, the Rule would require lenders to maintain a compliance program reasonably designed to ensure compliance with the Rule, retain records of compliance, images of loan agreements, and payment authorizations, and furnish new payment and consumer rights notices according to the timelines and formats called for by the Rule. This is especially the case since the Bureau is reassessing multiple parts of the Rule so it is unreasonable to expect financial institutions to establish a compliance regime just to have it changed shortly thereafter.

It would be hard to imagine that these types of traditional bank products, designed for credit-worthy borrowers, would generate the type of UDAAP concerns that the short-term, high-cost, small-dollar loans identified by the Rule intends to address. To mitigate unintended consequences to the traditional bank products and wealth management lending market, we ask that the CFPB delay the entire Rule and reconsider the covered loan portion of the Rule.

Conclusion

Consumers need responsibly-provided short term, small dollar credit, especially when unexpected expenses arise. We thank the CFPB for reopening this section of the Rule, but urge it to go further by delaying and reopening the entire rulemaking. Before such a sweeping rule goes into effect, it is imperative that vast unintended consequences are cured to mitigate disruptions to the small dollar, retail bank, and wealth management credit markets.

We look forward to working with the CFPB as it reassesses the Rule and welcome the opportunity to be a resource.

Sincerely,



Kate Prochaska

Vice President and Regulatory Counsel

¹⁵ Note that the rule exempts from this provision attempted withdrawals by banks and other lenders that hold the consumer's account from which the transfer is attempted, if, pursuant to its agreement with the consumer, the bank does not charge a non-sufficient funds or overdraft fee for the attempted withdrawal.