May 15, 2019

The Honorable Kathleen Kraninger
Director
Consumer Financial Protection Bureau
1700 G Street, NW
Washington, D.C., 20552

RE: Proposed Rule - Payday, Vehicle Title, and Certain High-Cost Installment Loans Rule - Docket No. CFPB-2019-0006

Dear Director Kraninger:

The Consumer Bankers Association ("CBA")[1] appreciates the opportunity to provide our comments in response to the Consumer Financial Protection Bureau's ("Bureau" or "CFPB") notice of proposed rulemaking for payday, vehicle title, and certain high-cost installment loans ("Proposal"). CBA strongly supports effective consumer protections and, specifically, the principles of choice, transparency and fairness in customer relationships.

CBA commends the Bureau for reexamining the small-dollar credit marketplace and how lenders in this market meet consumers' need for credit. We believe it is important that consumers receive the products they want and need at fair prices and on transparent terms. We believe it is equally important to rid the market of bad actors that engage in fraudulent transactions or violate federal laws and fashion rules that deter such conduct. As a policy matter, we support the Bureau's goal of ending abusive payday lending practices by nonbank lenders. Unlike some nonbanks, depository institutions have long had their consumer lending products and practices examined against consumer protection and safety and soundness standards by various state and federal supervisory agencies, including the CFPB.

[1] The Consumer Bankers Association is the only national financial trade group focused exclusively on retail banking and personal financial services—banking services geared toward consumers and small businesses. As the recognized voice on retail banking issues, CBA provides leadership, education, research, and federal representation for its members. CBA members include the nation's largest bank holding companies as well as regional and super-community banks that collectively hold two-thirds of the total assets of depository institutions.

It is important to state plainly that even though the CFPB has had exam authority over the nation's larger depository institutions for over seven years, the Bureau has never found that any depository institution's short-term, small-dollar lending products were either "unfair" or "abusive" as is asserted by the Bureau's 2017 Final Rule ("Final Rule" or "Rule"). Unless the CFPB delays all the provisions of the Rule, depository lenders will be discouraged from providing responsible forms of short-term, small-dollar credit to the consumers who need it most, and will have the effect of reducing the availability of other responsible credit products to consumers due to the overly broad scope of the Rule (e.g. wealth products).

Accordingly, CBA fully supports the CFPB's proposal to rescind the provisions in the 2017 Rule related to the required ability to pay assessment for covered short-term and longer-term balloon payment loans, and associated reporting and recordkeeping requirements ("Ability to Repay Provisions" or "ATR").

Specifically, the Proposal would rescind the following:

- **Identification of Unfair and Abusive Practice:** The provision under which it is an unfair and abusive practice for a lender to make a covered short-term loan or longer balloon-payment loan without making a reasonable determination that consumers will have the ability to repay the loans according to their terms.
- **Ability to Repay Determination Requirement:** The provisions that prescribe the mandatory underwriting requirements for making ability to repay determinations to prevent unfair and abusive practices. The provisions require lenders to do the following when a consumer applies for a loan: obtain a written statement from a consumer with respect to his or her income and financial obligations, obtain verification of the income and financial obligations, obtain a report on the consumer from a national consumer reporting agency and a report from a registered information system, and review its own records and records of their affiliates to determine whether the consumer has any required payments under debt obligations. A lender must then make a reasonable determination of the consumer's net income and major financial obligations, calculate the consumer's debt-to-income ratio or residual income, estimate the consumer's living expenses, and determine, based on this information, whether a consumer would be able to make payments under the covered loan and his or her payment obligations and meet his or her basic living expenses.

As a result of the proposed rescission of these two sections, the CFPB also proposes to rescind the below provisions as they would no longer serve the purposes for which they were included in the 2017 Rule:

- **Conditional Exemption:** The provision that exempts certain covered short-term loans from the mandatory underwriting requirements.
- **Reporting and Furnishing Provisions:** The provisions that require lenders making covered short-term loans or longer-term balloon-payment loans to furnish certain information

regarding the loans to registered information systems and establish a process for registering such systems.
- **Recordkeeping:** The portions of the recordkeeping provisions that are related to the mandatory underwriting requirements.

For reasons discussed in detail below, CBA supports the proposed changes and believes the rescissions would substantially increase the ability of banks to lend to un- and under-banked consumers by decreasing the significant burdens on lenders.

The 2017 Rule would require lenders to obtain extensive information about a consumer's finances and use the information to project whether the consumer will be able to make payments for his or her existing payment obligations and the payments under the covered loan and still meet basic living expenses. This level of underwriting, while suitable for many other types of loans, is not cost-efficient or effective for small-dollar, short-term lending. As such, we believe the Proposal will encourage lenders previously discouraged by the compliance costs associated with the 2017 Rule to serve this much needed market.

That said, we nevertheless again encourage the Bureau to reexamine and delay *all* provisions of the 2017 Rule. The Bureau has indicated that it will separately examine certain issues, such as whether to exempt debit card payments from the payment provisions and other issues related to the rule that have been brought to its attention by industry participants and may initiate a separate rulemaking upon review. Because we expect the Bureau's reconsideration of the Rule's ATR requirements will likely identify other problems with the Rule, and due to existing deficiencies with the scope of what the Rule currently considers to be a "covered loan" and the Rule's payment provisions, we again urge the Bureau to grant an immediate extension of the compliance date for the *entire* Final Rule.[2] Without an immediate extension, banks will face tremendous uncertainty as to the Rule's expectations and will expend resources unnecessarily, and ultimately inefficiently, to achieve compliance with a rule that the Bureau may materially change.

Therefore, the Bureau should issue an interim final rule to extend the compliance date of the entire Final Rule as the agency has previously done in other circumstances.[3] Additionally, the Bureau should engage and coordinate with the Office of the Comptroller of the Currency, the Federal Reserve Board and the Federal Deposit Insurance Corporation on its regulatory approach toward small dollar lending. Through coordination, the Bureau and the prudential regulators can create a consistent regulatory framework that would reduce cost and thus

[2] We have previously urged the Bureau to extend the Compliance Date, including in letters dated October 24, 2018, January 3, 2019, and March 18, 2019. CBA has also conducted numerous in-person meetings with the Bureau to address this issue.

[3] The Bureau has previously issued interim final rules to modify existing rules, including to update the Bureau's model forms under Regulation V, to amend the timing for mortgage servicers to provide required early intervention notices to borrowers under Regulation X, and to adjust for inflation the civil monetary penalties that are within the Bureau's jurisdiction.

promote banks' ability to preserve or expand small-dollar credit offerings and to allow them to preserve currently offered traditional bank products that are unintentionally covered by the broad scope of the Rule.

Discussion

I. CBA Supports the Bureau's Reassessment of the Rule's Ability to Repay Provisions

In 2017, The Bureau finalized a strict and prescriptive rule that has stifled progress in the small-dollar market. The Rule's conditions created conditions requiring compliance costs so great that they negate depository lenders' ability to make small-dollar loans at reasonable cost to consumers. The hurdles would have reduce efficiencies, restrict flexibility and reduce consumer options for small-dollar liquidity. Only simple, flexible rules/guidance will foster the innovation needed to meet consumer demand for value, speed of funds availability, and ease of application.

The current Rule requires lenders, among other things, to determine, pursuant to an overly burdensome standard, whether consumers have the *ability to repay* their loans, prior to issuing certain short-term small dollar, payday, and auto title loans.[4] The Rule requires an excess of added manual processes including complicated income verifications and "reasonable" projections of future expenses. Other unsecured consumer loans do not require lenders to verify income; the consumer merely needs to state their income. Verifying paystubs, tax forms, and other documentation introduces a manual process that the consumer may find excessively burdensome, delaying their access to much-needed funds and potentially driving them to an unregulated, unsafe provider to obtain them.

By way of comparison, below is a comparison between ability to pay analyses for a covered loan and a $500 thousand mortgage:

By way of comparison, an ability to pay analysis for a covered loan would require:[5]	An ability to repay analysis for a half-million dollar mortgage would require:[6]
• A "reasonable" determination of the borrower's ability to repay the loan according to its terms; • The borrower's current verified income • A determination that the borrower's residual income is sufficient to make all payments under the loan and to meet basic living expenses during the shorter of the term of the loan or the period	• The borrower's current or reasonably expected income or assets (excluding the property that secures the loan) that the borrower will rely on to repay the loan • The borrower's current verified employment status and income • Any payments on simultaneous loans that are secured by the same property (for example, second mortgages)

[4] 12 C.F.R. §1041.
[5] 81 Fed. Reg. at 47865.
[6] 12 C.F.R. §1026.

ending 45 days after loan consummation; • "Reasonable" projections of amount and timing of the borrower's net income, debt payments, housing expenses, child support; • A determination if a borrower had a short-term covered loan or balloon payment loan paid off within prior 30 days; • A determination if the borrower has expressed an inability to make a payment on an existing loan; • A demonstration that the borrower's circumstances have recently improved if there is a presumption of unaffordability; and • The use of a CFPB-registered information system to report and obtain credit information about covered loans. This requirement includes the duty to report basic loan information and updates to that information.	• Ongoing expenses related to the mortgage loan or the property (such as property taxes, insurance, HOA dues, and ground rent) • Other debt obligations (such as alimony and child support payments) • The borrower's monthly debt-to-income ratio or residual income, and • The borrower's verified credit history.

The required underwriting for these two vastly different types of lending represents a fundamental disconnect on behalf of the Bureau. While CBA supports establishing clear criteria regarding the qualification and eligibility of borrowers of small-dollar credit products, the proposed level of underwriting complexity ignores the cost of providing this type of loan and does not take into account that customers often need short-term, small-dollar loans for emergencies and cannot wait for the conclusion of a lengthy underwriting process. Requiring mortgage-like underwriting will only result in pricing out would-be borrowers.

The Rule also calls for reports, restrictions and refunds of fees under certain conditions. In total, these provisions require countless hours of new compliance and oversight at a very high cost. As a result, the lenders the CFPB would like to see offer more affordable options as an alternative to payday providers simply will not be willing to participate in this space. These new restrictions and requirements unduly hinder the expansion of small-dollar lending products offered by banks and will lead to further retractions in the marketplace. CBA maintains that standards with less of an implementation burden will allow banks to make loans efficiently and at reasonable prices and facilitate lenders' ability to meet consumer needs while maintaining robust compliance frameworks for these products.

II. UDAAP Analysis for Ability to Repay Provisions

CBA agrees with the Bureau's recent assessment of its improper use of its authority to regulate unfair, deceptive, or abusive acts and practices ("UDAAP") as prescribed by the Dodd-Frank Act with respect to the Rule's ATR provisions.[7] CBA submits that the Bureau's us of this authority was also improper with respect to the Rule's payment provisions. Dodd-Frank authorizes the Bureau to prescribe rules identifying UDAAP, as well as to enforce the Act's UDAAP prohibition. In the Rule, the Bureau has identified two practices as both unfair and abusive: to make a covered loan without reasonably determining that the consumer will have the ability to repay the loan, with some exception, and to attempt to withdraw payment from a consumer's account in connection with a covered loan after the lender's second consecutive attempt has failed due to a lack of sufficient funds, unless the lender obtains the consumer's new authorization. The Rule marks the Bureau's first rule issued under its UDAAP authority.

In exercising this authority, the Bureau promulgated a very prescriptive rule that would effectively create a narrowly tailored product designed to operate in a very constrictive regulatory scheme. In general, we believe this approach is an inappropriate exercise of the Bureau's UDAAP rulemaking authority.

Regulations concerning alleged unfair or abusive acts or practices should be tailored to prohibit the specific practices observed, not create prescriptive arbitrary requirements, such as requiring the use of an exclusive underwriting methodology for entire credit markets, much less dictate that lenders conduct various ancillary practices (*e.g.,* credit reporting, etc.) that have little if anything to do with the alleged harmful practices. Unlike prior UDAP rulemakings, the Bureau's Proposal does not merely ban an identified practice; it imposes specific detailed underwriting methodologies and standards on the market, banning all other alternative underwriting methodologies and standards of these products as unfair and abusive. However, to this point, the Bureau has shown no evidence to support the sweeping legal conclusion that all alternative underwriting approaches would be unable to pass the unfair or abusive standard. In creating such a detailed and proscriptive rule -- one that prohibits all other ability to repay alternatives as per se abusive and unfair -- the Bureau has exceeded its limited UDAAP authority, which should require a prior finding that the acts and practices in question are unlawful before being banned. UDAAP rulemakings should only be used to ban specifically identified acts and practices. The Bureau's study did not investigate the relative merits of these now banned alternative approaches, it only relied on a broad review of the current marketplace.

We concede that the Bureau has amassed considerable data on the non-depository payday industry; however, it has failed to provide a comprehensive study of bank-offered products and their proclaimed harm to consumers. There has been no showing that loans issued by depositories produce consumer harm. In fact, we believe bank-issued loans offer great benefit

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

to, and do not harm, consumers. They can help borrowers obtain needed liquidity for emergencies and avoid non-sufficient fund and overdraft fees, late payment charges and utility disruption. To this point, we do not believe the Bureau has established that any consumer injury resulting from bank-offered covered loans exceeds the benefits they provide to consumers.

Although the Dodd-Frank Act grants the Bureau authority to prevent "unfair, deceptive, or abusive act[s] or practices," depositories issuing loan products do not engage in any of these forbidden practices.[8] Far from being unfair, deceptive, or abusive, short-term, small-dollar products offered by depository institutions are reasonably underwritten, fully amortized, transparent, beneficial to consumers, and issued with the expectation that they will be repaid in full according to their terms. The Bureau has no findings of which we are aware, and certainly no substantial basis in data, to conclude that depository institution products are unfair, deceptive, or abusive. While we understand the Bureau's desire to ensure that payday and title lenders do not sidestep the Bureau's Rule, the fear of side-stepping cannot and does not justify the substantial and unwarranted burden on such a large segment of the consumer lending industry. Moreover, the Bureau may not rely on findings regarding other types of small-dollar loans, such as payday loans, to justify UDAAP-based regulation of those products offered by well-supervised and regulated depository institutions under the Bureau's UDAAP authority.

i. The Record Evidence Does Not Justify Regulation of Bank-Offered Products

The Rule largely treats depository loan products as collateral damage. Although the Rule goes on at length regarding unfair, deceptive, and abusive practices associated with other forms of loans (such as payday and title-lending products), nowhere does the Bureau make a similar showing with respect to those short-term, small-dollar products offered by banks. It is axiomatic that the Bureau cannot extend the Rule to cover depository loan products unless the record evidence demonstrates that these products are unfair, deceptive, or abusive. The Bureau has not even attempted to make this showing regarding many of the products captured by the Rule's various definitions of covered loans. The Bureau's unfounded conclusions concerning bank-offered products cannot substitute for data. In the absence of such data, it is improper for the Bureau to erroneously conclude that traditional bank installment loans and lines of credit are subject to the UDAAP criteria set forth in 12 U.S.C. § 5531.[9]

ii. The Bureau Has Not Established That Traditional Loan Products Are "Unfair"

[8] 12 U.S.C. § 5531(a).

[9] See 5 U.S.C. § 706(2); see also Motor Veh. 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 the agency "offer[s] an explanation for its decision that runs counter to the evidence before the agency" (alteration added, quotation marks omitted)); Ass'n of Data Processing Serv. Organizations, Inc. v. Bd. of Governors of Fed. Reserve Sys., 745 F.2d 677, 683–84 (D.C. Cir. 1984) (ADPSO) (courts will "strike down, as arbitrary, agency action that is devoid of needed factual support").

The Bureau's authority over "unfair" practices is limited to practices that (i) cause "substantial injury to consumers" (ii) that "is not reasonably avoidable by consumers," and (iii) where the "substantial injury is not outweighed by countervailing benefits to consumers or competition."[10] The Rule is ultra vires because the Bureau has not established that any of those criteria are met with respect to bank-offered products. To begin with, the Bureau has not demonstrated that bank-offered products (or acts and practices taken in conjunction with the offering and issuance of such loans) cause substantial injury to consumers. Indeed, the Bureau has offered little to no evidence to suggest that bank-offered (or the steps lenders taken in issuing them) cause harm to consumers, much less "substantial injury." On the contrary, bank-offered products have long provided consumers with important benefits. Given the lack of data showing substantial injury to consumers, the Rule is arbitrary and capricious to the extent it relies on the Bureau's authority to regulate "unfair" practices.[11]

Moreover, the Rule does not provide any evidence suggesting that consumers do not understand the terms of bank-offered products. Furthermore, any injury resulting from bank-offered products would be substantially outweighed by the significant benefits such loans provide to consumers. Bank-offered products have long helped borrowers with few other options meet their financial obligations such as making a rent or mortgage payment, paying utility bills, and so on.

iii. The Bureau Has Not Established That Traditional Loan Products Are "Abusive"

The Bureau's authority over "abusive" practices does not provide a basis for regulating Traditional Loan Products. This authority is limited to practices that: (i) materially interfere with the ability of a consumer to understand a term or condition of a consumer financial product or service, or (ii) take 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 his or her interests in selecting or using a consumer financial product or service, or (c) the reasonable reliance by the consumer on the financial service provider to act in the interests of the consumer.[12]

Bank-offered products (and lenders' practices in issuing such loans) cannot be regulated as "abusive" because they do not meet any of those statutory requirements. As an initial matter, the Bureau has not identified any practice that materially interferes with the ability of consumers to understand terms or conditions of bank-offered products. The Bureau may not regulate bank-offered products without making such a finding. Because the Bureau has failed to do so, it exceeds its statutory authority. Further, the Bureau has not demonstrated that consumers do not understand the terms and conditions, or material risks or costs of Bank-

[10] 12 U.S.C. § 5531(c)(1).
[11] *See* 5 U.S.C. § 706(2); State Farm, 463 U.S. at 43.
[12] 12 U.S.C. § 5531(d).

offered products.[13] Bank products are loans with transparent, easy-to-understand terms, due dates, and payment amounts.

Even if the Bureau could demonstrate a "lack of understanding," the Bureau's former Director, Richard Cordray, raised doubts about whether such "lack of understanding" could even be the basis for a broad rulemaking such as that envisioned by the Proposed Rule. He stated that a lack of understanding sufficient to support an abusive claim is "unavoidably situational" and that the Bureau would need to investigate the facts "consumer by consumer."[14] He also stated that "what is abusive and takes unreasonable advantage can differ from circumstance to circumstance."[15] Accordingly, to justify regulation of bank-offered products under section 5531(d)(2), the Bureau would need to show that such loans are not understood by all or nearly all consumers. Once again, the Bureau has not done so. Any lack of understanding would, in the first instance, compel the Bureau to explore enhanced disclosures as a remedy, which the Bureau has not done.

iv. The Proposed Rule is Arbitrary, Capricious, and Contrary to Law

In addition to respecting the limitations on their statutory authority, agencies must also engage in reasoned decision-making.[16] The Dodd-Frank Act permits the Bureau to issue regulations "as may be necessary or appropriate to enable the Bureau to administer and carry out the purposes and objectives of the Federal consumer financial protection laws, and to prevent evasions thereof."[17] As the Supreme Court held in *Michigan v. EPA*,[18] statutes that use the term "appropriate" impose an implicit requirement to assess a rule's costs and benefits. The Dodd-Frank Act provides specific guidance regarding the kind of cost-benefit analysis that the Bureau must undertake. In particular, the Bureau "shall consider (i) the potential benefits and costs to consumers and covered persons, including the potential reduction of access by consumers to consumer financial products or services resulting from such rule; and (ii) the impact of proposed rules on covered persons . . . and the impact on consumers in rural areas."[19]

The Rule is arbitrary and capricious because it fails to conduct such an analysis with respect to bank-offered products. Missing entirely from the Rule is evidence to suggest that bank-offered products harm consumers. Even if there were evidence of harm, the Bureau never explains how the Rule would address the purported harm, or whether the Rule's perceived benefits outweigh its substantial (and presently unacknowledged) costs in terms of consumer access to

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[13] *See* 12 U.S.C. § 5531(d)(2)(A).
[14] Transcript, House Committee on Financial Services, ''The Semi-Annual Report of the Consumer Financial Protection Bureau,'' 112th Cong. (March 29, 2012), at 18.
[15] *Id.*
[16] *See*, e.g., Encino Motorcars, LLC v. Navarro, 136 S. Ct. 2117, 2125 (2016) ("One of the basic procedural requirements of administrative rulemaking is that an agency must give adequate reasons for its decisions."); State Farm, 463 U.S. at 43, 52. The Proposed Rule fails this fundamental requirement in multiple respects.
[17] 12 U.S.C. § 5512(b)(1).
[18] 135 S.Ct. 2699, 2706–07 (2015).
[19] 12 U.S.C. § 5512(b)(2)(A).

safe, legal means of small-dollar credit. Nor is the Rule based on any findings that other traditional bank-offered products (such as larger and longer-term bridge or wealth loans) or payment transfers used by consumers to make payment on such loans in connection with such loan products are harmful or confusing to consumers. Specifically, the Court held in *Michigan* that "'appropriate' is the classic broad and all-encompassing term that naturally and traditionally includes consideration of all the relevant factors"—including whether a rule's costs are justified by its benefits.[20] "Agencies have long treated cost as a centrally relevant factor when deciding whether to regulate," because "[c]onsideration of cost reflects the understanding that reasonable regulation ordinarily requires paying attention to the advantages and the disadvantages of agency decisions."[21] The Bureau's failure to conduct these statutorily mandated aspects of the cost benefit analysis renders the Rule arbitrary and capricious.[22]

III. Ensure that Banks May Continue Offering Traditional Bank Products

At the time the Rule was proposed, the Bureau failed to realize that the expansive definition of a "covered loan" would sweep in a number of traditional retail bank and wealth management products, which should not be covered by a rule intended to protect the un- and under-banked by regulation short-term, small-dollar, higher-cost loans.[23] These include, but are not limited to, 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 would constitute a covered short-term loan under the Final Rule or, if longer than 45 days, a covered 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 covered loan within the language of the Final Rule. Even if a balloon payment is not required, the line may nonetheless constitute a covered 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

[20] 135 S. Ct. at 2707.
[21] *Id*.
[22] *See*, e.g., Bus. Roundtable v. SEC, 647 F.3d 1144, 1148–49 (D.C. Cir. 2011).
[23] 12 C.F.R. § 1041.3(b) (defining "covered loan").

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.

- Wealth management loans, which provide customers with short-term liquidity and may have a term of 45 days or less, or have a large, "balloon" payment due at maturity. These loans would constitute a "covered short-term loan" as defined in 12 C.F.R. §§ 1041.2(10) and 1041.3(b) (3) or constitute a "covered longer-term balloon-payment loan" as defined in 12 C.F.R. §§ 1041.2(7) and 1041.3(b) (2).
- Loans secured by a certificate of deposit or other security. These loans typically require only payments of interest during the life of the loan, with the balance due at maturity. Because of the balloon payment, these loans would also constitute a covered short-term loan or covered longer-term balloon-payment loan under the Final Rule.
- Margin loans backed by securities. These loans, if originated by a bank, typically require only payments of interest during the life of the loans, with no specific principal payments. Because lenders reserve the right to demand full payment of the loans at any time, these loans could also constitute a covered short-term loan under the Final Rule.
- Unsecured personal lines of credit where the balance is minimal or zero. For example:
  - Lines where the customer draws and pays back the line of credit to zero toward the end of the billing cycle, and a cash advance fee is accessed after the end of the billing cycle.
  - A line of credit at 21.9% and an average daily balance of $820.00. The customer advance one time during the billing cycle for $100 and the advanced fee charged was $10.00. These finance charges would place the line at 36.95%, making it a covered loan.

The Bureau will need to immediately clarify that it does not intend for these loan products to be covered by the Final Rule and that, specifically, the consumer protection concerns regarding "payday, vehicle title and certain high-cost installment loans" cited by the Bureau in the Rule clearly do not apply to these loans. The Bureau's neglect to do this immediately will force banks into a burdensome compliance regime for numerous products that were not intended to be within scope of the Rule. To exclude these products from coverage, we recommend the Bureau immediately delay all provisions of the Rule in order to consider limitations to the definition of a "covered loan" to exclude loans over a certain dollar amount and beyond a certain term. We believe the CFPB has the authority to issue such a delay either without a notice and comment process or by issuing an interim final rule. Notably, the Office of the Comptroller of the Currency's recent guidance on short-term, small dollar installment loans included references to both of these parameters. That guidance suggests limits to small-dollar, short-term lending - typically two to 12 months in duration and that typically range from $300 to $5,000.[24]

[24] Bulletin, Office of the Comptroller of the Currency, OCC Bulletin 2018-14: Core Lending Principles for Short-Term, Small-Dollar Installment Lending (May 23, 2018), available at https://www.occ.gov/news-issuances/bulletins/2018/bulletin-2018-14.html.

IV. Ensure Certainty and Conservation of Valuable Resources

While the CFPB has proposed a rescission of the Rule's ability to repay provisions, it has not proposed changes to any of the payment provisions of the Rule. However, the Bureau has indicated that it will separately examine certain issues, such as whether to exempt debit card payments from the payment provisions and other issues related to the Rule that have been brought to its attention by industry participants and may initiate a separate rulemaking upon review. This uncertainty in the approach to the payments provisions of the Rule lends itself to the need for an immediate extension of the compliance date for *all provisions* in the Final Rule. A full extension is needed to avoid the unnecessary expenditure of resources to achieve compliance with a rule that the Bureau is actively reconsidering and, therefore, surrounded by a great deal of uncertainty.

For nearly its entire existence, the 2017 Final Rule has been clouded by uncertainty, preventing banks from being able to adequately design compliance programs. This ambiguity was the result of previous statements from the Bureau and the slow realization by both the industry and the CFPB that the Rule covered products that were unintended. Prior to release of the Proposal, the Bureau's own actions created significant uncertainty as to whether it would revise or withdraw the 2017 Final Rule in full or in part. Immediately following the 2017 publication of the Rule in the Federal Register, the Bureau issued a press release stating that it "intends to engage in a rulemaking process so that the CFPB may reconsider the Payday Rule," drawing no distinctions between its plans for the ATR provisions and the payment provisions.[25] The Bureau did not clarify which provisions it was going to address until it released a statement in October of 2018.[26] Prior to that time there were no other indications that the Bureau was planning to only address the ATR provisions of the Rule.

Additionally, in a May 31, 2018 court filing in its litigation with the Consumer Financial Services Association regarding the legality of the Rule under the Administrative Procedures Act, the CFPB moved for a stay of the Rule in its *entirety* in the United States District Court for the Western District of Texas.[27] On November 6, 2018, the Court issued a stay of the compliance date.[28] However, in a status report to the Court filed on March 8, 2019, the Bureau stated that "the possibility that the Bureau may revise the payments provisions does not justify continuing to stay the compliance date of those provisions." It further stated, "the Bureau has not made

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[25] Consumer Financial Protection Bureau, CFPB Statement on Payday Rule (Jan. 16, 2018), *available at* https://www.consumerfinance.gov/about-us/newsroom/cfpb-statement-payday-rule/.

[26] Consumer Financial Protection Bureau, Public Statement Regarding Payday Rule Reconsideration and Delay of Compliance Date (Oct. 26, 2018), *available at* https://www.consumerfinance.gov/about-us/newsroom/public-statement-regarding-payday-rule-reconsideration-and-delay-compliance-date/.

[27] Motion, *Community Fin. Svcs. Ass'n of America et al. v. Consumer Fin. Protection Bureau*, Joint Motion for Stay of Litigation and Stay of Agency Action Pending Review, Civil Action No. 1:18-cv-295 (W. D. Tex. May 31, 2018).

[28] Order, *Community Fin. Svcs. Ass'n of America et al. v. Consumer Fin. Protection Bureau*, Order No. A-18-CV-0295-LY (W.D. Tex. Nov. 6, 2018).

any decision to propose revising those provisions."[29] As such, any future outcomes of this litigation could significantly change the force and effect of the entire Rule and it would be efficient at this time to extend the compliance date for the entire Rule until the Bureau has finalized reconsiderations of the ATR provisions. Otherwise, the Bureau may later decide to rescind or revise the payment provisions and clarify the scope of "covered loans," resulting in very expensive and wasteful compliance efforts and possible harm to lenders, and ultimately consumers, by rendering all compliance efforts moot and limiting valuable products and services.

In addition to the great uncertainty, as described above, it would be extremely difficult and expensive to comply with the payment provisions. As summarized above, the Rule's payment provisions would currently apply to a wide range of traditional bank products that are not in any way small dollar, payday or vehicle title-type loans. While the Bureau included a conditional exclusion in the Rule, which would exempt some lender-initiated payment transfers from coverage, many traditional consumer loans and wealth products will remain covered by the Rule and be subject to extremely burdensome limitations on payment transfers and processing of payments, even where those transfers are initiated by borrowers. The conditional exclusion states, "When the lender is also the account-holder, an account-holding institution's transfer of funds from a consumer's account held at the same institution is not a payment transfer if … the lender … does not charge the consumer any fee, other than a late fee … [and] does not close the consumer's account in response to a negative balance that results from a transfer of funds initiated in connection with the covered loan."[30] While some of a bank's customers with wealth products and other consumer loans are paying them with automatic withdrawals from the bank account of the institution providing the loan, nothing prevents the customer from paying the loan from an account at another financial institution. In order to ensure full compliance, a lender would have to monitor every loan that meets the other criteria and ensure it was only paid from the account-holder's account, and if it was not, then the compliance program and retention requirements of the Payday Rule would be triggered. Hence, this exclusion will not exempt many bank products from coverage even though the lender is the accountholder.

Also, take, for example, 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. Say a 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, banks in essence will not be able to charge NSF fees for the failed payment of the non-covered mortgage or car loan as we do not currently have any way to track whether these payments are for covered or non-covered

[29] Joint Status Report, *Community Fin. Svcs. Ass'n of America et al. v. Consumer Fin. Protection Bureau*, Joint Status Report No. 1:18-cv-295Order No. A-18-CV-0295-LY (W.D. Tex. March 8, 2019).
[30] 12 C.F.R. § 1041.8 (a)(ii).

loans. Assuming It is even possible, to make the necessary changes to systems to comply with these payment provisions would be very expensive and time consuming and banks are hesitant to make this large investment in light of the current state of play with the Rule in which the CFPB has opened to door to possible later changes to these payment provisions, in which case banks' investment of time and money would have been a complete waste.

There are similar issues with checks. If a customer pays a loan with a check, it is covered under the payment provisions as a "lender-initiated payment transfer," but a bank has no way of identifying whether the payment is for a covered loan so they cannot track for purposes of complying with the payment provisions.

Where 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 their bank to automatically withdraw her loan payments from her account with that bank 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 account at that bank.

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 non-sufficient funds 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.

The Bureau's immediate announcement of an extension in the *entire* compliance date would result in the avoidance of these potentially unnecessary costs and would advance the Bureau's statutory objective to "reduce unwarranted regulatory burdens." The Bureau is authorized to exercise its authorities under federal consumer financial law for the purposes of ensuring "unnecessary, or unduly burdensome regulations are regularly identified and addressed in order to reduce unwarranted regulatory burdens," and that "markets for consumer financial products and services operate transparently and efficiently to facilitate access and innovation.[31]

V. Uncertainty in Retroactivity of the Rule

An extension in the compliance date and subsequent review of the entire Rule is also needed because the Rule does not state expressly that it applies only to loans originated on or after that date. Consequently, previously originated loans that are outstanding as of the compliance date may be required to meet the Rule's restrictions, most notably the rule's payment and withdrawal requirements. As outlined above, the loans outstanding as of the compliance date will generally be those loans that the CFPB did not intend to be covered under the Rule. If the Rule remains in effect in some form, the CFPB should clarify that it, including the Rule's payment and withdrawal requirements, applies only to "covered loans" originated on and after the compliance date

VI. Regulatory Coordination

Despite the many consumer protections and benefits built into bank-offered deposit advance products, the OCC and FDIC effectively forced the shutdown of the product that was designed to benefit consumers in need, forcing them into more costly alternatives. CBA believes it is patently contrary to the intent of any regulatory action to force further monetary constraints on the consumers it intends to help. Regulators should be working closely with industry on practical solutions in order to build a foundation to fully support small-dollar lending needs. We believe this to be especially true for designing products and services that will allow the under-banked and unbanked greater access to mainstream banking opportunities.

Title X of the Dodd–Frank Act created the Bureau to specifically address issues of consumer protection surrounding financial products. To ensure equal protections across all financial products and services, the Bureau's authority to promulgate consumer protection rules extends to all providers of financial services and products including depository and non-depository institutions – authority that the prudential banking regulators do not have. Accordingly, *only the Bureau can ensure that consistent rules are applied across the entire financial services industry*. Unilateral actions by other Federal regulators are contrary to Congressional intent in creating the CFPB and directing that agency to regulate consumer financial services whether offered by banks or nonbanks. Absent across-the-board standards, consumers will be pushed into services that offer fewer protections and come at significantly greater costs. Indeed, even

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

within the realm of Federal prudential banking supervision, banks of different charters will apply inconsistent standards with regards to deposit advance products.

For many of CBA members, the existing FDIC supervisory guidance will present a roadblock for bank-offered products, regardless of a workable final rule for the Bureau. We urge the Bureau to work closely with the Federal prudential banking regulators to ensure consistency across all institutions.

VII. A Practical Approach

CBA believes a product modeled after bank-offered Deposit Advance Products, coupled with a reasonable payment-to-income ("PTI") ratio, would allow for low-cost, affordable products that provide consumers with enhanced protections and banks with viable product offerings.

This model could be offered at much lower rates than non-bank alternatives. By incorporating realistic underwriting standards to determine eligibility and loan/line amounts, banks could create products with low underwriting costs. For example, deposit account attributes such as deposit amounts, cash flows, and tenure provide a very solid proxy for the ability to repay at a fraction of the cost of the Rule's standard and allows banks to serve more consumers in need. This approach could also incorporate reasonable cooling off periods that are tied to sustained use (*e.g.* more than three months), not the number of times a product is used. Once a customer hits a certain amount of months used, banks could convert them to a term loan which serves as both a relief to the debt trap issue and a cooling period simultaneously.

Discussed in detail below, the attributes of bank Deposit Advance Products enhanced by an appropriate PTI will provide a solid foundation for depositories to enter the small-dollar market, enhance market competition, and, most importantly, provide robust consumer protections that will allow for ease of use and prevent sustained consumer reliance.

i. Bank Small-Dollar Lending

Traditional lenders are in a unique position to help those in need of short-term liquidity. However, flexibility from regulators is key to encouraging development of small-dollar loan products by depositories. While we applaud the Bureau's intention to curb the abuses of bad lenders, unfortunately, we firmly believe the Proposal will also have the unintended effect of driving away consumer-friendly financial institutions that provide better alternatives. Limiting the overly burdensome provisions of the Proposal will be an essential factor in determining whether banks and credit unions innovate and offer alternatives to payday loans.

Historically, the federal banking regulators have encouraged depository institutions to meet this particular consumer credit need. In response to this growing need for short-term credit and receiving encouragement from our prudential regulators to offer a small-dollar loan product, some banks developed Deposit Advance Products for consumers who could not qualify for traditional forms of credit. For many years, these products successfully yielded positive reactions from regulators and demonstrated that close working relationships between banks and their regulators can result in services that meet consumers' needs.

However, in late 2013, the OCC[32] and FDIC[33] separately finalized restrictive supervisory guidance on deposit advance products that left only one bank offering DAP services remaining in the market.[34] While several reasons contributed to their exit from the market, the primary force was the supervisory guidance that was inconsistent with the structure and use of deposit advance products, which provide consumers immediate access to the exact amount of money needed.

For the many reasons discussed below, we urge the Bureau to reexamine the utility of bank-offered deposit advance products and work closely with the other Federal regulators to develop consistent regulation and guidance that will allow banks to operate within clear standards in order to avoid regulatory conflict.

ii. The Benefit of Deposit Advance Products

The media coverage of "payday lending products" incorrectly associates bank-offered deposit advance products with traditional payday lending, with little or no distinction in how bank-offered product features allow for greater consumer protection and better customer pricing. There appears to be widespread misunderstanding about how the products work and how consumers use them responsibly to manage their financial needs. Additionally, many consumer groups have unjustifiably raised concerns over bank-offered deposit advance products. Like press accounts, these groups have likened the deposit advance products to non-depository payday lending and have all but ignored the significant positive features in product design and utility.

However, there is little evidence of consumer dissatisfaction with bank-offered deposit advance products. To the contrary, consumer satisfaction with these products is often very high with below average complaint rates. For example, in one bank's survey of deposit advance customers, 90 percent of respondents rated their overall experience with the product as "good" or "excellent." In another survey by a different bank, the customer satisfaction rating ranked higher for the bank's deposit advance product than any other product offered by that

[32] OCC - *Guidance on Supervisory Concerns and Expectations Regarding Deposit Advance Products* (November 2013): http://www.occ.treas.gov/news-issuances/federal-register/78fr70624.pdf . Rescinded 2018 - Under acting Comptroller Keith Noreika the OCC rescinded the small dollar lending guidance that had made it extremely difficult for national banks to offer small dollar lending products to their customers. In May 2018, the OCC issued Bulletin 2018-14, which stated the OCC would be working with the CFPB to help ensure a product banks can issue to meet customer needs.
[33] FDIC - *Guidance on Supervisory Concerns and Expectations Regarding Deposit Advance Products* (November 2013): https://www.fdic.gov/news/news/press/2013/pr13105a.pdf .
[34] The remaining depository offering a deposit advance product is supervised by the Federal Reserve and not subject to guidance issued by the OCC or FDIC.

bank. Similarly, in yet another bank's survey, more than 95 percent of customers said they were "satisfied" or "highly satisfied" with the product.

Complaint levels for deposit advance products are extremely low across the board. One bank that offered the product registered just 41 complaints over the course of a year, representing a mere .018 percent of all active users of that bank's deposit advance product. This percentage equates to roughly one in every 5,500 users. Whether taken together or considered separately, the high customer satisfaction ratings and low levels of customer complaints for deposit advance products refute claims that these products pose significant reputational risk.

There are significant differences between bank-offered deposit advance products and the services offered by non-depository lenders. Bank-offered products have built-in controls designed to limit the usage of the product. These controls include limits on loan amounts, automatic repayment through a linked depository account and "cooling" periods, all designed to keep customers from relying too heavily on the product and to ensure the customer's ability to repay the loan.

Consumers who use bank-offered deposit advance products already have a relationship with the bank. Deposit advance is an integrated feature added to the customer's existing checking account and is not a stand-alone product, allowing banks to better understand a customer's financial situation and ability to repay. These services are only available to established customers who have maintained checking accounts in good standing with regularly scheduled direct deposits for a minimally prescribed period. The maintenance of this relationship is of the utmost importance to a bank. Without a positive banking experience, customers would look elsewhere to meet financial needs and banks would not only lose the opportunity to service the customer's short-term liquidity needs, but also the chance to establish or maintain a long-term banking relationship.

Bank-offered deposit advance products offer customers greater account security. With these products, customers do not have to provide sensitive bank information to third-party financial service providers, opening the door to the possible compromise of sensitive financial information. Accordingly, all personal account information is kept in house, providing a significant security advantage to non-depository services.

The banking industry supports clear and conspicuous disclosures for all financial products and services that assist consumers in making informed decisions about managing their finances. Banks that provide or have provided deposit advance products adhere to strict disclosure standards and all product terms are made clearly and fully transparent to customers prior to product use. At a minimum, all deposit advance providers are bound by applicable federal laws and the customer is typically required to sign a separate, detailed terms and conditions document to activate a deposit advance line of credit.

All depository institutions that offered, or still offer, deposit advance products have limits on the amount a consumer may borrow. Although it varies from bank to bank, advances are generally limited to the lesser of a specific amount or a percentage of the total amount of a customer's monthly direct deposits. These limits ensure that there is money available to the customer for other monthly expenses after the advance is paid.

Additionally, all bank-offered deposit advance products (past or present) impose a mandatory cooling-off period to ensure customers do not depend on the product to meet their monthly financial needs. These periods are imposed to ensure deposit advance products are used for the intended purpose, namely, short-term liquidity. To manage the risk that the consumer will become reliant, a customer typically will be able to access a deposit advance product for a limited period at the end of which they would be required to repay the outstanding balance or completely stop using the product.

Deposit advance products have been criticized for their seemingly high costs when considering the relatively small size of the credit extended. However, for any product to be sustainable, not to mention safe and sound, it must be delivered in a cost-effective manner for both the provider and the customer. Previous small-dollar lending programs, such as one suggested by the FDIC, have not been widely adopted by the industry because the costs to administer the programs outweigh the revenues and, hence, are not sustainable.

Furthermore, the expense of providing an open-end line of credit is nearly the same irrespective of the amount outstanding. Most deposit advance products are priced based on a percentage of the amount advanced and do not include additional costs to the consumer such as application fees, annual fees, over-limit fees, rollover or re-write fees and late payment fees.

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Due to the significant level of uncertainty and lack of clarity, we urge the Bureau to reexamine and extend the compliance date for the entire Final Rule. There are too many questionable variables left open to allow banks to develop sufficient and directed compliance systems. An extension of the compliance date for all provisions of the current Rule would provide ample opportunity to accommodate a full APA rulemaking process and would allow banks to continue to offer products that were not intended to be within scope of the Rule, would avoid the unnecessary use of valuable resources, and would allow for an additional implementation period upon completion of the new rulemaking.

We look forward to working with the Bureau on this important issue and we continue to urge the agency to issue a rule that:

- is based on sound evidentiary conclusions, especially regarding bank-offered products;
- provides for reasonable and complete consumer protections;
- provides for scalability and ease of administrative burdens to allow greater reach to the unbanked and underbanked;
- provides an option for banks to offer small-dollar loans as a line of credit;

- provides banks with a clear and easily applied standard that consumers will understand; and
- allows for flexibility to meet consumer needs through innovative and competitive credit options.

CBA thanks you for your consideration and we appreciate the opportunity to share our comments.

Sincerely,

David Pommerehn
SVP, Associate General Counsel
Consumer Bankers Association