Ballard Spahr
LLP

1735 Market Street, 51st Floor
Philadelphia, PA 19103-7599
TEL 215.665.8500
FAX 215.864.8999
www.ballardspahr.com

Jeremy T. Rosenblum
Tel: 215.864.8505
Fax: 215.864.8999
rosenblum@ballardspahr.com

October 5, 2016

Via E-mail (FederalRegisterComments@cfpb.gov) and Federal Express

Office of the Executive Secretary
Consumer Financial Protection Bureau
1275 First Street, NE
Washington, DC 20002
Attn: Ms. Monica Jackson

Re: Comments on CFPB Proposal on Payday, Vehicle Title, and Certain High-Cost Installment Loans (RIN 3170–AA40; Docket No. CFPB-2016-0025)

Ms. Jackson, Ladies and Gentlemen:

On behalf of Harpeth Financial, doing business as Advance Financial ("Advance Financial"), we appreciate the opportunity to comment on the proposed rule on Payday, Vehicle Title, and Certain High-Cost Installment Loans, to be codified at 12 C.F.R. pt. 1041 (the "Proposed Rule"). The Proposed Rule was published by the Consumer Financial Protection Bureau ("CFPB" or "Bureau") in 81 Fed. Reg. 47,864 (July 22, 2016) (the "Release").

We submit this letter principally to explain that Section 1041.3(b)(2)(i) of the Proposed Rule (the "Rate Trigger") violates Section 1027(o) ("Section 1027(o)") of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (the "Dodd-Frank Act"), 12 U.S.C. § 5517(o), which denies the CFPB authority to establish a usury limit.

Founded in 1996, Advance Financial is a family-owned and operated financial center. It employs over 600 local representatives at over 70 locations in Tennessee. Advance Financial offers FLEX Loans, as well as a number of other services, including check cashing, FREE bill payment,

unlimited FREE money orders and more. Through partnerships with national vendors, the company also offers Western Union electronic wire transfer services and NetSpend prepaid cards. By focusing on a wide variety of financial services, convenient 24/7 operating hours, efficient service and professional staff, Advance Financial is committed to building a long-lasting, strong relationship with every customer. Advance Financial is licensed, regulated and supervised under state law by the Tennessee Department of Financial Institutions.

Advance Financial's FLEX Loan is an open-end credit product provided under the Tennessee Flexible Credit Act, Tenn. Code Ann. § 45-12-101 *et seq.* The Annual Percentage Rate ("APR") on these FLEX Loans significantly exceeds 36%, all borrowers authorize the initiation of a one-time automatic debit entry to his or her bank account to recover the principal balance of the account in the event of default and some borrowers authorize recurring debit entries to cover regular payments, and the minimum payment due on monthly payment accounts generally equals accrued interest and charges plus 3% of the principal balance (but not less than the lesser of $10 or the account balance). Accordingly, the FLEX Loans are "covered longer-term loans" as defined in Section 1041.3(b)(2) of the Proposed Rule and subject to the provisions of the Proposed Rule applicable to such loans.[1]

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[1] As used in this letter, the following terms have the following meanings:

(1) "Triggered Longer-Term Loan" means any loan meeting *all* of the definitional elements of a "covered longer-term loan" set forth in Section 1041.3(b)(2) of the Proposed Rule: (a) the term exceeds 45 days; (b) the lender obtains either a "leveraged payment mechanism" providing access to the consumer's bank account or wages or a non-purchase money security interest in the consumer's motor vehicle; and (c) the "all-in" APR exceeds the Proposed Rule's 36% Rate Trigger.

(2) "Untriggered Longer-Term Loan" means any loan meeting all of the definitional elements of a "covered longer-term loan" set forth in Section 1041.3(b)(2) of the Proposed Rule *except* that the "all-in" APR does *not* exceed the 36% Rate Trigger.

The Rate Trigger violates Section 1027(o) for at least two reasons: *First,* it functions as a usury limit for Non-Compliant Longer-Term Loans. *Second,* it materially impairs the ability of payday and title lenders to charge more than a 36% all-in APR on Longer-Term Loans generally.

THE PROPOSED RULE

The Proposed Rule addresses both Longer-Term Loans and consumer loans that are payable within 45 days ("Short-Term Loans"). Short-Term Loans must comply with a rigorous ability-to-repay ("ATR") regimen, Proposed 12 C.F.R. § 1041.5, or an "alternative" approach that itself is subject to stringent requirements, *id.* § 1041.7, including limits on dollar amounts (subsection (b)), multiple or successive loans (subsection (c)) and loan frequency and duration (subsection (d)), as well as disclosure requirements (subsection (e)). For a borrower to satisfy the ATR test, the lender must reasonably conclude, based on information from the borrower and verification data from specialty and nationwide credit bureaus, bank statements, pay stubs, rent statements and/or other third party materials, that the borrower will be able to repay the loan, outstanding obligations and housing costs, and still have sufficient residual income to cover his or her living expenses over the life of the loan and for 30 days beyond the time of loan funding.

For Longer-Term Loans, the Proposed Rule affords lenders three choices: (1) limit the all-in APR to 36%; (2) comply with the proposed ATR test applicable to Longer-Term Loans; or (3) fall

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(3) "Longer-Term Loan" means any Triggered Longer-Term Loan and/or any Untriggered Covered Long-Term Loan—any loan meeting all of the definitional elements of a "covered longer-term loan" *regardless* of whether or not the "all-in" APR exceeds the 36% Rate Trigger.

(4) "Non-Compliant Longer-Term Loan" means any Longer-Term Loan (whether triggered or untriggered) that is not made or cannot be made in compliance with the ability-to-repay ("ATR") requirements of the Proposed Rule.

within certain safe harbor provisions (the "Safe Harbors"). The ATR test is similar to the approach for Short-Term Loans but the Safe Harbors are useless for payday and title lenders since, among other reasons, one of them limits the interest rate to 28% per annum, with an application fee of not more than $20, *id.* § 1041.11, while the other limits the interest rate to 36% per annum, with an origination fee of up to $50, *id.* § 1041.12. *See also* Release, 81 Fed. Reg. at 48,133 (stating that most Longer-Term Loans will be made using the ATR approach). Not only are the Safe Harbors useless to almost all high-rate lenders, they represent naked usury limits in violation of Section 1027(o).

With considerable understatement, the CFPB acknowledges that the Proposed Rule will have a "substantial impact" on the markets for Short-Term Loans, *id.* at 48,125, and it projects that the industry will need *three to five years* after finalization of the Proposed Rule to make necessary adjustments, *id.* at 48,115 (emphasis added). It concludes—and we agree—that very few Short-Term Loans will be made in compliance with the proposed ATR standards. In any event, the Proposed Rule prohibits Short-Term Loans structured as open-end credit. Proposed 12 C.F.R. § 1041.7(b)(3). Advance Financial has concluded that it cannot profitably make (closed-end) Short-Term Loans under the Proposed Rule. Accordingly, Advance Financial's only recourse is to make Longer-Term Loans and either limit the all-in APR to 36%,[2] in accordance with the Rate Trigger, or comply with the proposed ATR requirements.

[2] The APR construct under the Proposed Rule includes, in addition to traditional interest charges, most additional loan fees and charges as well as charges for ancillary products such as credit insurance, club memberships and other products sold in connection with the loan. Since the proposed APR definition would include fees and charges that are not treated as a cost of credit under state usury laws or the federal Truth in Lending Act, some longer-term loans made at rates of interest less than 36% per annum would be Covered Longer-Term Loans subject to the Proposed Rule.

Lenders attempting to comply with the proposed ATR requirements will incur substantial one-time and ongoing costs, detailed by the CFPB.[3] *See* Release, 81 Fed. Reg. at 48,133–36. These costs alone will preclude many lenders from remaining in business.

However, the larger impact of the Proposed Rule on Longer-Term Loans will result from many borrowers not being able to comply with the proposed ATR standards. The CFPB states that a "majority" of borrowers would be able to comply. *Id.* at 48,138. While this may be literally true, as we read Table 6 and the accompanying CFPB analysis, the CFPB data shows that fully 38% of borrowers would not be able to demonstrate an ability to repay a "typical" Longer-Term Loan, even disregarding the complication that consumers seeking Longer-Term Loans are likely to have greater expenses relative to income than most households. *Id.* at 48,125.

THE 36% RATE TRIGGER IS AN IMPERMISSIBLE USURY LIMIT FOR NON-COMPLIANT LONGER-TERM LOANS

We respectfully submit that the Proposed Rule exceeds the regulatory authority of the Bureau because it would establish a usury restriction in contravention of the explicit limitation on the Bureau's authority under Section 1027(o) of the Dodd-Frank Act, which provides as follows:

> (o) NO AUTHORITY TO IMPOSE USURY LIMIT.—No provision of this title shall be construed as conferring authority on the Bureau to establish a usury limit applicable to an extension of credit offered or made by a covered person to a consumer, unless explicitly authorized by law.

12 U.S.C. § 5517(o).

[3] Advance Financial believes that the CFPB has seriously understated these compliance costs.

1. The 36% Rate Trigger functions as a usury limit for Non-Compliant Longer-Term Loans.

The Rate Trigger is contained in the proposed definition of "covered longer-term loan," Proposed 12 C.F.R. §§ 1041.2(8), 1041.3(b)(2), and is not styled as a "substantive" usury limit. However, any supposed distinction between "definitional" and "substantive" loan features is entirely artificial and semantic and merely serves to obscure the fact that a usury limit is embedded within the Proposed Rule. Whatever loan feature is viewed last effectively serves as a substantive limitation for loans meeting the initial definitional criteria of "covered longer-term loan."

As drafted, the Proposed Rule only applies to loans with the following "definitional" characteristics: (1) a term exceeding 45 days; (2) either (a) authorization for the lender to access to the borrower's bank account or wages through a "leveraged payment mechanism" or (b) the lender's retention of a non-purchase money security interest in the consumer's vehicle; and (3) an all-in APR exceeding 36%. For these Triggered Longer-Term Loans, the borrower must satisfy the ATR test (or come within irrelevant Safe Harbors).

Precisely the same legal result could be achieved by switching "definitional" and "substantive" provisions of the Proposed Rule, thereby illuminating that the Proposed Rule establishes a basic usury limit for Non-Compliant Longer-Term Loans. Under this modified way of expressing the same regulatory limit, the Proposed Rule would establish a usury limit applicable to Non-Compliant Longer-Term Loans with the following characteristics: (1) a term exceeding 45 days; (2) either (a) authorization for the lender to access to the borrower's bank account or wages through a leveraged payment mechanism or (b) the lender's retention of a non-purchase money security interest in the consumer's car; and (3) a failure to satisfy the ATR test. Specifically, Non-Compliant Longer-Term Loans meeting these "definitional" elements would then be subject to a single substantive

limitation—they may not have an all-in APR exceeding 36%. Manifestly, this limitation is a usury limit, and the way the Bureau chooses to articulate its legal rule does not alter its essential nature as such.

In the context of concern, so long as the all-in APR is 36% or less, the loan can include the borrower's authorization for the lender to initiate a card charge or an ACH from the borrower's bank account whenever an installment is due (or can create a non-purchase money security interest in the borrower's motor vehicle) but nevertheless can be made without regard to the borrower's: (1) ability to repay the loan; (2) income, obligations or repayment history on prior borrowings; (3) borrowing history; or (4) number or recency of like loans. Simply put, the loan cannot violate the Proposed Rule if the all-in APR is limited to 36%.

Conversely, a Non-Compliant Longer-Term Loan that meets the other definitional elements of the Proposed Rule but fails to comply with its "substantive" requirements is flatly prohibited if made at an all-in APR exceeding 36%. Thus, if a lender makes a longer-term loan with a non-purchase money security interest in the borrower's motor vehicle or a means of access to the borrower's bank account or wages and if the loan is made without a satisfactory ATR analysis, the all-in APR on the loan is capped by the Proposed Rule at 36% and charging more than this rate violates the Proposed Rule. This is a usury limit, plain and simple. *See Western Reserve Bank v. Potter*, Cl. Ch. 432, 442, 7 N.Y. Ch. Ann 163 (N.Y. Ch. 1841) ("To constitute usury in a transaction, there must be ... [a] taking or reservation of more than legal interest"); *Usury*, BLACK'S LAW DICTIONARY (10th ed. 2014) (defining "usury" as "the charging of an illegal rate of interest as a condition to lending money"; stating that the word "usury" "merely signifies the taking under

contract of more than lawful interest for the loan or forbearance of money") (quoting James Every Webb, *A Treatise on the Law of Usury* 1–2 (1899)).

2. *The ATR exception from the usury limit imposed by the Rate Trigger does not change the function of the Rate Trigger.*

The Bureau has made little attempt to explain why the proposed Rate Trigger is not proscribed by Section 1027(o). Its sole defense of the rate limit consists of the following statement:

> The Bureau is not proposing to prohibit lenders from charging interest rates, APRs, or all-in costs above the demarcation. Rather, the Bureau is proposing to require that lenders make a reasonable assessment of consumers' ability to repay certain loans above the 36 percent demarcation, in light of evidence of consumer harms in the market for loans with this characteristic.
>
> The Bureau believes ... that it is appropriate to focus regulatory attention on the segment of longer-term lending that poses the greatest risk of causing the types of harms to consumers that this proposal is meant to address, and that price is an element in defining that segment. The Bureau also believes that setting the line of demarcation at 36 percent would facilitate compliance given its use in other contexts, such as the Military Lending Act. Such differential regulation does not implicate section 1027(o) of the Dodd- Frank Act. *The Bureau believes that the prohibition* on the Bureau ''establish[ing] a usury limit'' *is reasonably interpreted not to prohibit such differential regulation given that the Bureau is not proposing to prohibit lenders from charging interest rates above a specified limit.*

Release, 81 Fed. Reg. at 47912-13 (emphasis added). Advance Financial respectfully submits that the conclusory assertion that Section 1027(o) is only implicated by an absolute prohibition against extending credit at a rate greater than that specified by the Bureau is rhetoric masquerading as argument. The assertion is: (1) inconsistent with the statutory text; and (2) a transparent attempt to avoid acknowledging that differential regulation by rate is merely another way of saying "differential ***rate*** regulation." A rose by any other name, however, still has the same thorns. What the Bureau characterizes as "differential regulation" of loans based upon the APR at which they are made is well within the ambit of the prohibition established by Section 1027(o), which merely speaks in terms of "a usury limit applicable to an extension of credit offered by a covered person."

For Longer-Term Loans to borrowers who can satisfy the ATR test, it is true that the Rate Trigger creates a regulatory compliance burden rather than a prohibition against making the loan at all-in APR greater than 36%. However, for borrowers who cannot satisfy the ATR test, the Rate Trigger *does* create a prohibition on making Longer-Term Loans at all-in APRs exceeding 36%. Moreover, the plain language of Section 1027(o) denies the Bureau authority to establish a usury "limit" and not merely the authority to create an impregnable barrier or absolute prohibition against making a loan at a rate greater than a rate specified by the Bureau. *See Limit*, BLACK'S LAW DICTIONARY (10th ed. 2014) (defining the word "limit" as merely a "restriction or restraint" or a "boundary or defining line").

The Proposed Rule is conceptually indistinguishable from many state usury laws, which similarly create basic usury limits and various exceptions thereto.[4] Like the Proposed Rule for Longer-Term Loans, a state usury exception is often coupled with specific regulatory requirements that must be satisfied to qualify for the exception. And the existence of a usury exception does not, of course, alter the essential nature of the basic usury restriction, which nevertheless remains "a usury limit."

The Pennsylvania usury law provides a good illustrative example of a basic usury limit combined with numerous exceptions. In Pennsylvania, the general usury limit is 6% per annum, 41 P.S. § 201(a), and there are usury exceptions for: (1) certain residential mortgage loans, 41 P.S. § 301 (separate rate limit); (2) loans made in compliance with the small-loan regulatory statute, the

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4 *See generally* B. Curran, TRENDS IN CONSUMER CREDIT LEGISLATION 15 (1965) (interest and usury statutes prescribing legal and contract rates of interest "are general in their application, and only those arrangements or those parties specifically excepted are exempted from compliance with such statutes").

Consumer Discount Company Act, 7 P.S. §§ 6203, 6217.1 (separate rate limit); (3) obligations to pay a sum of money in an original principal amount of more than $50,000, 41 P.S. § 201(b)(i) (no civil rate limit); (4) unsecured, noncollateralized loans in excess of $35,000, 41 P.S. § 201(b)(ii) (no civil rate limit); and (5) "business loans" of any principal amount, 41 P.S. § 201(b)(iii) (no civil rate limit).[5]

New York likewise has a general usury limit with numerous exceptions. Thus, the general usury law in New York prohibits a person from making a loan or forbearance of money at rate of interest greater than 16% per annum "*except . . . as otherwise provided by law.*" N.Y. Gen. Oblig. Law § 5-501(1) (emphasis added); N.Y. Banking Law § 14-a(1). *See also* N.Y. Gen. Oblig. Law §§ 5-501(6)(a) (establishing a civil usury exception for large loans in an amount of $250,000 or more); 5-521 (generally prohibiting corporations from interposing the defense of civil usury), 5-523 (usury exception for certain advances made on collateral security), 5-526 (establishing a limited usury exception for interest on certain secured loans or forbearances in the amount of $100,000 or more made for business or commercial purposes).

The New York Licensed Lender Law provides another exception from the general usury limit of 16% per annum. *See* N.Y. Banking Law § 340 (license requirement triggered by charging a higher rate than otherwise permitted by law). Like the Proposed Rule, lending at a rate greater than

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5 10 Pa. Code § 7.2 defines a "business loan" for purposes of this exception, requiring that the borrower exercise actual control over the managerial decisions of the enterprise and that the borrower execute a satisfactory affidavit concerning the intended use of proceeds. The "business loan" definitional provision thus illustrates that an exception to a usury limit can impose substantive requirements on the borrower—and can do so in the guise of a definitional provision, thereby further illustrating the blurred distinction between definitional and substantive provisions.

the statutory rate trigger comes at a regulatory price, since a licensed lender seeking to take advantage of this usury exception must comply with various regulatory requirements deemed necessary for high-cost small loans. *See id.* §§ 351 (specifying various restrictions on loans subject to the Licensed Lender Law); 352 (specifying certain prohibited and required acts and practices). In exchange for subjecting themselves to these small loan regulatory requirements, licensed lenders are authorized to exceed the basic usury limit and charge interest on consumer loans of $25,000 or less "at the rate or rates agreed to by the licensee and the borrower."[6]

Of course, this type of state small loan regulatory structure is not limited to Pennsylvania and New York. For example, with respect to a consumer loan other than a supervised loan, the Uniform Consumer Credit Code ("U3C") authorizes a lender to contract for a finance charge at a rate not to exceed 18 per cent per year. U3C, § 2-401(1) (1974). In order to charge a greater rate of finance charge in connection with a consumer loan, the lender must be a supervised lender authorized to make supervised loans.[7] *See* U3C, § 2-401(2)(a) (1974) (authorizing a supervised lender to impose a finance charge at the greater of: (i) 18% per year on the unpaid balances of the amount financed; or (ii) at split rates of 36% on that part of the unpaid balances of the amount financed which is $300 or less; and 21% on that part of the unpaid balances of the amount financed which is more than $300 but does not exceed $1,000). Additionally, as with state small loan regulatory laws, the U3C subjects

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6 N.Y. Banking Law § 351(1). *See Beneficial N.Y., Inc. v. Stewart*, 25 Misc. 2d 797, 799, 844 N.Y.S.2d 6423 (Sup. Ct. Kings County 2009) ("By virtue of . . . the Licensed Lender Law, the Defendant is not subject to the statutory limits on the rates of interest that may be charged pursuant to Section 5-501 of the New York General Obligations Law. . . . However, the Licensed Lender Law does subject licensed lenders to stringent restrictions . . . .") (quoting *In re Watkins*, 240 B.R. 668, 672 (Bankr. E.D.N.Y. 1999)).

7 A "supervised lender" is "a person authorized to make or take assignments of supervised loans, under a license issued by the Administrator (Section 2.301) or as a supervised financial organization (subsection (41))." U3C, §1-301 (42) (1974).

supervised lenders to additional restrictions and consumer protections not applicable to consumer loans other than supervised loans. *See generally* U3C, Article 2, Part 3 (1974) (Consumer Loans: Supervised Lenders).[8]

And, of course, many states have general rate limits for most consumer loans and more permissive rules for payday and/or title loans. *See, e.g.*, Cal. Fin. Code § 23036(a) (authorizing a fee for a deferred deposit transaction not to exceed 15% of the face amount of the check); Tenn. Code Ann. § 45-17-112(b) (Deferred Presentment Services Act provision authorizing a fee not to exceed 15% of the face amount of the check).

In all these cases, the structure of the state usury laws parallels the provisions of the Proposed Rule applicable to Longer-Term Loans. The lender may limit its rates to a specified level or it may charge greater rates and subject itself to additional regulatory restrictions. This structural similarity can be demonstrated by recasting the language (but not the substance) of the Proposed Rule. The identical result could be reached by summarizing the provisions of the Proposed Rule as follows:

- Usury Limit: A lender taking a non-purchase money security interest in a motor vehicle or obtaining access to the borrower's bank account or wages on a longer-term loan may not charge more than a 36% all-in APR except as otherwise permitted by law.

[8] Other states have a general usury limit for loans below a specified dollar threshold and no limit for larger loans. *See, e.g.*, Cal. Fin. Code §§ 22303, 22304 (exempting from the maximum interest charge and the alternative interest rate charge provisions of the California Finance Lenders Law loans in a principal amount of $2,500 or more).

- Exception for Certain Longer-Term Loans: A lender taking a non-purchase money security interest in a motor vehicle or obtaining access to the borrower's bank account or wages on a longer-term loan may charge the interest at a rate permitted by state law if the lender satisfies the ATR requirements of the Proposed Rule.

In sum, the Proposed Rule simultaneously establishes a basic usury limit of 36% and a limited exception for Longer-Term Loans meeting the ATR requirements of the Proposed Rule.

3. The Proposed Rule conflicts with the Dodd-Frank Act prohibition against the establishment of a usury limit by materially impairing the ability of payday and title lenders to charge more than a 36% all-in APR on Longer-Term Loans.

By declaring the subject of usury limits beyond the scope of the regulatory authority of the Bureau, Congress has created a federal statutory right for all consumer lenders to charge interest at the rate permitted by state usury laws, free of limits the CFPB might otherwise choose to establish. The Supreme Court has addressed when purported limits on Congressionally-created powers are invalid. The leading case is *Barnett Bank, N.A. v. Nelson*, 517 U.S. 25 (1996), which established a conflict preemption rule expressly approved and codified by Congress in Section 1044(a) of the Dodd-Frank Act, 12 U.S.C. § 25b(b)(1)(B).

Under *Barnett Bank*, a burden on the exercise of a power created by a federal statute is invalid if it forbids or "impair[s] significantly" the exercise of the power.[9]

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9 *Barnett Bank* involved a *state statute* that interfered with a Congressionally created right whereas the Proposed Rule involves *federal regulations* that interfere with a Congressionally created right. However, this difference is not legally relevant since neither a state nor a federal regulatory agency has the power to nullify a federal statutory right.

Barnett Bank instructs as follows:

> ***[W]here Congress has not expressly conditioned the grant of "power" upon a grant of state permission, the Court has ordinarily found that no such condition applies.*** In *[Franklin Nat. Bank of Franklin Square v. New York,* 347 U.S. 373 (1954)] the Court made this point explicit. It held that Congress did not intend to subject national banks' power to local restrictions, because the federal power-granting statute there in question contained "no indication that Congress [so] intended . . . as it has done by *express language* in several other instances." 347 U.S. at 378, and n. 7.

517 U.S. at 34 (bold italics added; non-bold italics in original).[10] Here, of course, Congress did not include in the Dodd-Frank Act any language expressly authorizing the Bureau to restrict the power of payday and title lenders to charge high rates of interest. To the contrary, it included language expressly *denying* the CFPB "authority ... to establish a usury limit applicable to an extension of credit offered by a covered person to a consumer, *unless explicitly authorized by law*." Dodd-Frank Sec. 1027(o), 12 U.S.C. Sec. 5517(o) (emphasis added).

Thus, just as it is not necessary for a state law to prohibit entirely the exercise of a federal power in order for the state law to be preempted, it is not necessary for a CFPB rule to bar entirely the exercise of a lender's right to charge the interest rate permitted by applicable usury laws for the rule to be held invalid. Rather, to paraphrase *Barnett Bank,* "*Congress would not want the [Bureau] to forbid, or to impair significantly, the exercise of a power that Congress explicitly granted*"—that is, the power to charge the interest rate otherwise allowed by applicable usury laws. *Barnett Bank,* 517 U.S. at 33 (emphasis added). This means that, "[i]f a state law places limits on an unrestricted grant of authority under Federal law, the state law will be preempted." Notice of Preemption Opinion

[10] In *Franklin*, the Supreme Court held that a New York prohibition against using the word "savings" in advertising was preempted by a federal authorization to receive savings deposits.

of Julie L. Williams, OCC First Senior Deputy Comptroller and Chief Counsel (May 3, 2001), 66 Fed. Reg. 23,977, 23,979 (May 10, 2001).

Here, the Bureau threatens severe interference with the protected right under the Dodd-Frank Act of covered lenders to charge the interest rates permitted by applicable usury laws. The Bureau's own data shows that lenders will lose 38% or more of their revenues on Longer-Term Loans that cannot satisfy its proposed ATR test.

Even for Longer-Term Loans that could or would satisfy the ATR test, many consumers will choose not to apply due to the inconvenience and delays associated with proving an ability to repay. And lenders will incur significant costs in obtaining and processing the applicant information required to establish the applicant's qualification for a loan. These costs will be incurred for qualifying and non-qualifying borrowers alike. As the CFPB has acknowledged, many lenders will go out of business if the Proposed Rule is adopted. It is hard to imagine a more significant interference with the power of payday and title lenders to charge the interest rates otherwise allowed by applicable law.

In short, under the conflict standard enunciated by the United States Supreme Court in *Barnett Bank* and codified in Section 1044(a) of the Dodd-Frank Act, the Proposed Rule conflicts impermissibly with the interest rate authority conferred upon payday and title lenders for their longer-term installment loans, and the Congressional determination that the Bureau may not override state interest rate authority by establishing a federal usury limit.

THE PROPOSED RULE IS UNSUPPORTED BY ADEQUATE RESEARCH OR ANALYTICS

Although the Section 1027(o) proscription against the establishment of a usury limit is the focal point of this letter, Advance Financial submits that also endorses and supports the view expressed in other comment letters that: (1) the CFPB has not established a reasonable basis for its determination that the acts and practices sought to be addressed by the Proposed Rule are "unfair" or "abusive" within the meaning of Section 1031 of the Dodd-Frank Act. 12 U.S.C. § 5531; and (2) the CFPB has failed to perform a cost-benefit analysis of the Proposed Rule meeting the requirements of Section 1022(b)(2)(A) of the Act, 12 U.S.C. § 5512(b)(2)(A).

This is especially the case for open-end loans such as Advance Financial's FLEX Loans. As far as Advance Financial is aware, neither the CFPB nor anyone else has studied the consumer welfare impacts of open-end loans such as these. Instead, the CFPB simply *assumes* that open-end credit subject to the Proposed Rule is inherently harmful. Yet Advance Financial knows from its direct experience, and the gratitude its customers regularly express for the loans they have received, that FLEX Loans are a *positive* factor in their lives. Depriving consumers of lifeline credit may be politically correct but it would be a substantial disservice to those most in need.

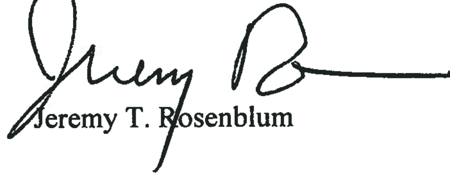
CONCLUSION

Advance Financial respectfully requests that the Bureau withdraw the Proposed Rule in its entirety due to the Bureau's failure to demonstrate a reasonable basis for its determination that the acts and practices sought to be addressed by the Proposed Rule are "unfair" or "abusive" within the meaning of Section 1031 of the Dodd-Frank Act. Alternatively, if the Bureau is unwilling to honor this request, it should eliminate the Longer-Term Loan provisions in their entirety or, failing that,

replace the 36% all-in APR trigger with a legally permissible differentiator between Longer-Term Loans the Bureau wishes to cover and those it does not.

On behalf of Advance Financial, we thank the Bureau for the opportunity to comment on the Proposed Rule. Please feel free to contact me with any questions at 215-864-8505 or rosenblumjt@ballardpahr.com.

Very truly yours,



Jeremy T. Rosenblum

JTR/eer