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Via E-mail and Federal Express

Consumer Financial Protection Bureau
1700 G Street, NW
Washington, DC 20552
Attn.: Kathleen L. Kraninger, Director
Brian Johnson, Acting Deputy Director
Andrew Duke, Policy Associate Director for External Affairs

Re: Payment Provisions of CFPB Rule on Payday, Vehicle Title, and Certain High-Cost Installment Loans (RIN 3170–AA80; Docket No. CFPB-2019-0006)

Ladies and Gentlemen:

We are writing this letter to address the decision of the Consumer Financial Protection Bureau (the "Bureau") to refrain from addressing the payment provisions (the "Payment Provisions") of the Bureau's rule on Payday, Vehicle Title, and Certain High-Cost Installment Loans, codified at 12 C.F.R. pt. 1041 (the "Rule") as part of its proposal to amend the Rule, 84 FR 4252 (Feb. 14, 2019) (the "Proposal").

Previously, the Bureau stated that it would likely propose modifications to the mandatory underwriting or ability-to-repay provisions of the Rule, 12 C.F.R. §§ 1041.4-6, but warned that is would probably not modify the Payment Provisions, 12 C.F.R. §§ 1041.7-9, 12, "in significant part because the ability-to-repay provisions have much greater consequences for both consumers and industry than the payment provisions." As the Bureau has recognized, the mandatory underwriting provisions, if implemented, would largely kill a multi-billion dollar industry and eliminate or severely circumscribe the availability of covered loans to credit-starved consumers. In light of the

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devastating consequences of the mandatory underwriting provisions, both as initially proposed and as adopted, the Payment Provisions have never received the attention they deserve.

Although the mandatory underwriting provisions have received much of the attention of the business community, the media and the Bureau, the Payment Provisions merit further consideration by the Bureau. They impose substantial and unwarranted burdens on the industry and reduce options and flexibility for consumers. They are replete with ambiguities and provisions likely to trap the unwary (and even the most diligent). They were adopted without investigation or serious consideration of the business practices of storefront payday lenders, the largest part of the industry. Accordingly, the August 19, 2019 implementation date for the Payment Provisions should be delayed and the Payment Provisions should be subjected to further comment, review and rulemaking (including rulemaking leading to complete rescission of the Payment Provisions). We are confident that such reconsideration will result in substantial needed revisions to the Payment Provisions.

EXECUTIVE SUMMARY

The Payment Provisions are deeply flawed. In large part, they are not justified by the UDAAP concerns the Bureau has identified as their source. They impose substantial unwarranted burdens on the industry and straightjacket covered lenders from taking actions beneficial to their customers. And, despite their complexity and detail, they fail to provide clear guidance on fundamental issues.

Problems with the Payment Provisions identified to date, and proposed actions by the Bureau to address such problems, include the following:

- **Lack of Justification and Authority.** *Problem/Issue:* There is no apparent link between the UDAAP problem identified in Section 1041.7 of the Rule[1]—consumers incurring bank NSF fees for dishonored checks and ACH transactions after two consecutive failed payment transfers—and the burdensome notice requirements in Section 1041.9 of the Rule. Accordingly, the Bureau had no authority to adopt Section 1041.9.

  Proposal: The Bureau should re-visit the need and justification for Section 1041.9 and then rescind it in its entirety.

- **Treatment of Payments by Card.** *Problem/Issue:* The Rule subjects payments by debit and prepaid cards ("Cards") to the same restrictions as payments by ACH and check, even though Card payments do not produce bank NSF fees.

  Proposal: The Rule should be amended to provide that declined Card authorizations are *not* failed payment attempts.

- **Payment Notices; Model Forms.** *Problem/Issue:* The Model Forms do not properly address many real world issues that regularly surface, including: (1) payment transfers that are contingent upon the borrower's failure to make an in-store payment in cash or that are otherwise contingent in nature, (2) the description of the payment transfer date, and (3) changes in recurring payments.

  Proposal: The Bureau should clarify that modifications may be made to the Model Forms to clarify the withdrawal process or reduce consumer confusion, including to: (1) indicate the contingent nature of the initiation of a payment by the lender; (2) advise consumers that funds may be withdrawn from the consumer's account on a later day than the day of the withdrawal attempt; and (3) indicate that payments will be initiated on a recurring basis at specified intervals or on specified dates.

- **Overbroad Definition of "Unusual Withdrawal."** *Problem/Issue:* If the Rule's definition of what constitutes an "unusual withdrawal" is read literally, unusual withdrawal notices will need to be delivered in cases where the consumer is unlikely to be surprised and has no need for protection, including voluntary regular payments within a business day of the scheduled payment date and possibly even modified payments resulting from an amendment to the loan agreement. In these cases, the notice requirement functions only to impose undue operational burdens, costs and exposure on the industry.

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1 All Rule citations are to the corresponding section of Title 12 of the Code of Federal Regulation.

Proposal: The Bureau should clarify that payments are not "unusual" in these circumstances.

- **"Business Day" Timing Requirements.** *Problem/Issue:* Different Payment Provisions express timing requirements in terms of "business days," but the term is never defined, creating potential pitfalls for a lender because the Bureau's intent is unknown.

  Proposal: The term "business day" should be defined to provide a measure of flexibility to covered lenders. Additionally, the timing requirements under the Rule should be interpreted without regard to the time of day when relevant actions take place.

- **Blackout Periods.** *Problem/Issue:* The required three business day required notice period for an "unusual withdrawal" (six business days if the notice is provided by mail) effectively creates a "blackout period" for deferred or otherwise unusual payments requested by the consumer that lenders might otherwise permit. Thus, for example, if a borrower is unable to visit a storefront on a Friday when a scheduled payment is due and asks the lender to initiate the payment on the following Tuesday, the lender would be unable to honor the borrower's request during this blackout period created by the Payment Provisions.

  Proposal: The Rule should be amended to provide that, when a borrower requests or authorizes an unusual withdrawal, the lender may provide the unusual withdrawal notice at any time within one business day after the date of such request or authorization.

- **Phase-In of Payment Provisions.** *Problem/Issue:* The Bureau has not provided guidance concerning whether and how the Payment Provisions will apply to loans made prior to the implementation date of the Rule.

  Proposal: The Bureau should clarify that loans made prior to the implementation date are not "covered loans" subject to the Payment Provisions.

- **Treatment of Checks.** *Problem/Issue:* It is unclear whether ordinary payment checks are treated as "payment transfers" under the Rule. Such treatment would produce potential adverse consequences to lenders and consumers alike.

  Proposal: The Bureau should clarify that a payment check that is not a leveraged payment mechanism and is sent by a consumer prior to notice from the lender of an uncured payment delinquency is not a "payment instrument" under the Rule. Conversely, a payment check that is either a leveraged payment mechanism or is sent by the consumer after such consumer receives notice from the lender of an uncured payment delinquency is a "payment instrument."

- **Additional Matters Meriting Clarification.** Further matters that should be clarified include: (1) the application of the Rule to multiple borrowers using the same account, to assignees and to third party payers; (2) the permissibility of electronic delivery of notices on-screen; and (3) the impact of a successful single immediate payment transfer.

A delay of the implementation date for the Payment Provisions and new rule-making is warranted to eliminate the provisions in Section 1041.9 that are unjustified by the Bureau's UDAAP finding in Section 1041.7 and to reverse the position that declined Card transactions should be treated as failed payment attempts under Section 1041.8. An implementation delay and new rule-making is also warranted to address the technical problems with the Payment Provisions summarized in this letter and to identify and address further problems that undoubtedly exist.

GLOBAL COMMENTS

Lack of Justification and Authority

Problem/Issue: The Bureau's research suggests that return rates for covered loans "vastly exceed those in other markets, substantially increasing consumers' costs of borrowing, their overall financial difficulties, and the risk that they will lose their accounts." 82 FR. 54720-21. Accordingly, the Bureau has concluded that it "is an unfair and abusive practice for a lender to make attempts to withdraw payment from consumers' accounts in connection with a covered loan after the lender's second consecutive attempts to withdraw payments from the accounts from which the prior attempts were made have failed due to a lack of sufficient funds, unless the lender obtains the consumers' new and specific authorization to make further withdrawals from the accounts." 12 C.F.R. § 1041.7.

Most of the Bureau's research focused on automated Clearinghouse (or ACH) returns on payday and high-rate installment loans in online markets. *See* 82 FR 54720 ("*The Bureau's research* *with respect to payment practices focused on* <u>*online*</u> *payday and payday installment loans*, where payment attempts generally occur through the ACH network and thus can be readily tracked at the account and lender level.") (emphasis added). Accordingly, the Bureau's support for applying Payment Provisions to covered loans originated in-store, where post-dated checks are frequently utilized in lieu of ACH authorizations, appears to be limited at best. Likewise, research on debit and prepaid Card transactions, for both online and in-store payments, is also lacking.

Despite the Bureau's focus on online lending and ACH payments, we are willing to assume for the sake of argument that the Bureau has the necessary evidentiary basis for the ACH and check payment limitations set forth in Section 1041.8 of the Rule, both for online customers and also for storefront customers. For those payments, at least, there is a direct tie-in between the UDAAP identified in Section 1041.7 and the requirements of Section 1041.8 of the Rule. However, with the possible exception of the requirements for delivery of a consumer rights notice under Section 1041.9(c) of the Rule, there is no logical relationship between the harm the Bureau has identified in Section 1041.7, resulting from certain additional withdrawal requests after two consecutive failed requests, and the elaborate notice requirements in Section 1041.9.

Section 1031(b) of the Dodd-Frank Act, 12 U.S.C. § 5531(b), authorizes the Bureau to identify UDAAP violations, subject to limits on the practices it may declare to be unfair or abusive. It further authorizes the Bureau to include requirements in its rules for the purpose of preventing such violations. It does *not* authorize the Bureau to adopt free-floating rules merely because it believes such rules will benefit consumers. Having failed to identify any UDAAP that Section 1041.9 would serve to prevent, the Bureau was without authority to adopt Section 1041.9. Thus, the adoption of Section 1041.9 was improper. "[T]he agency must examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made." *Motor Vehicle Manufacturer's Ass'n v. State Farm Mutual Ins. Co.*, 463 U.S. 29, 43 (1983)) (internal quotation marks and citation omitted). An agency's conclusory or unsupported suppositions are entitled to no deference. *McDonnell Douglas Corp. v. U.S. Dep't of the Air Force*, 375 F.3d 1182, 1187 (D.C. Cir. 2004).

Proposal: Given the fact that the requirements of Section 1041.9 do not address the UDAAP concerns identified in Section 1041.7, and given the burdens to the industry and absence of discernable consumer benefit associated with Section 1041.9, the Bureau should re-visit the need and justification for Section 1041.9 and ultimately rescind Section 1041.9.

Treatment of Payments by Card

Problem/Issue: As the Bureau explained in the Fact Sheet it prepared when it adopted the Rule, available at https://files.consumerfinance.gov/f/.../201710_cfpb_fact-sheet_payday-loans.pdf, the purpose of the Payment Provisions is to protect against penalty fees and bank account closures:

> Repeated unsuccessful withdrawal attempts by lenders to collect payment from consumers' accounts can pile on insufficient funds fees for consumers from their financial institution and prompt returned payment fees from the lender. These attempts can also lead to bank account closures. To protect consumers, the rule includes penalty-fee prevention measures that apply to short-term loans, balloon-payment loans, and any loan with an annual percentage rate over 36 percent that includes authorization for the lender to access the borrower's checking or prepaid account.

When a lender deposits a check or initiates an ACH payment against insufficient funds in the consumer's bank account, the bank's dishonor of the payment almost always gives rise to a nonsufficient funds (NSF) charge, which averages about $35.[2] Repeated NSF charges can cost hundreds of dollars and also lead to bank account closure.

Conversely, when a lender seeks authorization for a Card payment against insufficient funds in the consumer's bank or prepaid account, and the bank elects not to authorize an overdraft, the bank merely declines the authorization request without any other adverse consequence. *The bank does not charge the consumer and does not terminate account privileges.* Thus, the rationale for the Payment Provisions is inapplicable to Card authorization requests.

In adopting the Rule, the Bureau devoted a single paragraph to an explanation of its decision to treat failed Card authorizations the same as bounced checks and ACH withdrawals. It said:

> Lastly, the Bureau has decided not to exempt payments made using debit cards from the rule. First, while failed debit card transactions may not trigger NSF fees, some of them do trigger overdraft fees, even after two failed attempts, as our study showed. Second, lenders may still charge return fees for each presentment. And third, the Bureau does not believe an exclusion based on payment type would work to alleviate much compliance burden associated with § 1041.8 because the lender would need to develop processes and procedures for those payment types that are covered regardless. In fact, juggling multiple, disparate processes and procedures depending on payment type would involve its own compliance burdens.

82 FR 54747.

Based on our broad experience counseling clients in the industry, the Bureau's explanation is patently unsustainable. With respect to the first justification the Bureau has proffered, it is unclear whether the Bureau is referring to overdraft fees on *successful* payment attempts or, instead, to NSF fees on unsuccessful Card payments. Either way, the rationalization fails.

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2 *See* 84 FR 4292 ("If a lender deposits a check or submits a payment request and it is returned for insufficient funds, the borrower's bank or credit union will likely charge the borrower an NSF fee of approximately $35, and the lender may charge a returned-item fee.").

If the Bureau was referencing overdraft fees on *successful* Card transactions, these are not the transactions the Rule is designed to limit or address. Moreover, charges for these transactions can only be assessed if the consumer has explicitly and voluntarily requested his or her bank to authorize Card payments into overdraft, after being informed of the fees the issuer will charge. *See* 12 C.F.R. § 1005.17.[3] Thus, conduct giving rise to the fees can hardly be considered unfair or abusive. *See, e.g.*, 12 U.S.C. § 5331(c)(1)(A) (conduct not unfair if injury is reasonably avoidable by the consumer).

If the Bureau is suggesting instead that some issuers may charge for declining a Card transaction, we are not aware that this is *ever* the case, much less frequently the case. Accordingly, the possibility of issuer charges on Card transactions cannot be used to justify the inclusion of declined Card authorization requests under the Rule's payment provisions.

The Bureau's second explanation for subjecting rejected Card authorization requests to the Rule—that lenders may charge their own return fees for failed Card transactions—is likewise unavailing. Theoretically this possibility exists, at least where state lending laws permit such charges. But we are not aware that this is a common practice and the Bureau has provided no evidence that lenders regularly, if ever, charge return fees for failed Card transactions. Moreover, the Bureau has no need to subject all Card authorization requests to the Rule. Rather, it could treat a declined Card authorization request as a failed payment transfer *if and only if* the lender charges a fee on the

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3 Only about 5% of successful Card payments on covered loans are approved overdrafts, according to the Bureau's own study. *See* CFPB, ONLINE PAYDAY LOAN PAYMENTS" (Apr. 2016) ("[O]f the successful online payday debit network transactions we do observe, 5% succeed only through overdraft, slightly lower than the share of successful payment requests that succeed through overdraft in the ACH network (7%)."). Furthermore, in the context of payday loans that originate in stores, lenders will typically initiate a payment transfer attempt only after a borrower has failed to repay the loan, or installment of a loan, in cash in the lender's store.

declined request. This modified rule would address the Bureau's concern while simultaneously allowing lenders who do not impose such charges to utilize Card payments as a consumer-friendly payment mechanism.

The Bureau's third attempted justification—the claim that subjecting Card payments to the Rule would not pose "much compliance burden" and might even increase compliance burdens in "juggling multiple, disparate processes and procedures depending on payment type"—is unsupported by evidence or analysis. It is flatly contradicted by the views of our clients who are forced to find ways to comply with the Payment Provisions.

In reality, the compliance burden resulting from subjecting unsuccessful Card authorization requests to the Rule is substantial. Among other consequences, this aspect of the Rule interferes with measures many lenders would take to facilitate compliance with the Payment Provisions if unsuccessful Card authorization attempts were treated differently. For example, some lenders might choose to initiate most or all payments by Card and largely eschew use of checks and ACH transfers altogether.[4] Other lenders might comply with the Rule by exclusively using Card payments once a single check or ACH has been returned NSF without a successful subsequent payment transfer, which would simultaneously limit the amount of returned check and NSF fees that a consumer would incur and reduce the burdens associated with the Rule. Others might use Card-initiated transactions after two consecutive failed payment transfers as an alternative or supplement to seeking new payment authorization. The flexibility to make this use of Card payments, in contrast to the CFPB's assertion, would provide a huge reduction in regulatory burden from the Payment Provisions. If

4 Lenders going this route would need to accept the higher charges Card networks impose compared to NACHA and banks processing check payments.

given the chance, much of the industry would build their compliance programs around the ability to initiate Card transactions as a way to comply with the Rule.

While we do not believe that unsuccessful Card authorization attempts should count as failed payment transfers under the Rule, we submit that successful Card authorization attempts should be treated the same as successful payments that are made by post-dated checks or ACHs. This is because, in the case of a successful payment, there is no functional difference in terms of the consumer's exposure to NSF fees between payments by Card and payments by check or ACH. It is only where a payment *fails* that the consequences of Card payment attempts differ from those resulting from other payment methods.

Proposal: Based on the foregoing, we propose amending the Rule to add the following sentence at the end of Section 1041.8(a)(1): "*Failed payment transfer*" means (x) any unsuccessful payment transfer, other than an attempted payment transfer initiated through a debit, prepaid or other payment card network, or (y) any attempted payment transfer initiated through a debit, prepaid or other payment card network if (and only if) the lender charges a fee for such unsuccessful payment transfer."

Need for New Rule-Making

A delay of the implementation date for the Payment Provisions and new rule-making is warranted to eliminate the provisions in Section 1041.9 that are unjustified by the Bureau's UDAAP finding in Section 1041.7 and to reverse the position that declined Card transactions should be treated as failed payment attempts under Section 1041.8. An implementation delay and new rule-making is warranted for the following further reasons:

- As reflected in the technical comments below, the Payment Provisions are not yet drafted with the necessary precision.
- Correction of the Rule's treatment of Card payments and addressing the "blackout period" concern discussed below will require regulatory modifications and not just clarifications outside the Rule. Even for issues that could be clarified supplementally, incorporating the clarifications into the Rule or Commentary would be a greatly preferred resolution.
- Undoubtedly due to the overriding importance to the industry of the mandatory underwriting provisions, the Payment Provisions have to date received insufficient industry attention. While we have identified a number of problems and concerns, we have no confidence that we have addressed all of the matters meriting attention.

ADDITIONAL COMMENTS

Payment Notices; Model Forms

Problem/Issue: The Rule requires payment notices to be "substantially similar" to the model forms. *See, e.g.,* 12 C.F.R. § 1041.9(b)(2)(ii) (requiring the first payment withdrawal notice to use language "substantially similar to the language set forth in Model Form A-3"); 12 C.F.R. § 1041.9(b)(3)(ii) (requiring the unusual withdrawal notice to use language "substantially similar to the language set forth in Model Form A-4"). While Comment 9(a)(7)-1 goes on to say that use of the model forms is not required and instead will be deemed to be in compliance with the applicable disclosure requirements, the language must still be "substantially similar," and Comment 9(a)(5)-1 prohibits the inclusion of additional content "above, below, or around the required content."

Unfortunately, the model forms are flawed in a number of respects. *First,* they speak in absolute terms concerning future events that may or may not occur, especially in a storefront environment where authorized payments are contingent upon the consumer's failure to make payment in cash directly, without the necessity of the lender's initiation of a payment transfer. Undoubtedly, this is because "[t]he Bureau's research with respect to payment practices focused on *online* payday and payday installment loans, where payment attempts generally occur through the ACH network and thus can be readily tracked at the account and lender level." 82 Fed. Reg. 54720 (emphasis added).[5] *Second,* they are uninformative and/or confusing about the date the withdrawal will actually be effected. *Third,* Model Form A-4 does not address recurring payments that may be initiated with the borrower's consent outside the parameters of the original loan agreement.

Contingent Payments. In storefronts, lenders usually take post-dated checks or electronic payment authorizations as *back-ups* to the desired method of payment—in-person cash repayment at the store. Thus, initiation of payment through this back-up payment mechanism is contingent. In the overwhelming majority of cases, payments are made in cash, in person, rather than through the lender's initiation of payment through its leveraged payment mechanism. That is not how the model notices read, however. For example, Model Form A-3 includes the following statement (bold in original; underscoring added): "**On November 12, 2016, Willow Lending will attempt to withdraw a payment of $80 from your account ending in 0022.** The payment will be withdrawn by check, using check #999." Accordingly, the language of the notice flatly states, twice, that the payment attempt or payment "will" be effected on the specified date.

In most storefront cases, the unqualified statements that a payment attempt "will" be made on the specified date and a payment "will" be withdrawn by check are simply untrue. These statements will lead to massive customer confusion and, likely, to undesired changes in customer

5 Of course, the Bureau was aware of this industry-wide store-front practice. *See* CFPB, ONLINE PAYDAY LOAN PAYMENTS (Apr. 2016) (noting that "when a storefront lender deposits a borrower's check or submits an ACH payment request it is often because the borrower has previously failed to come to the storefront location and make a payment in cash"). However, it failed to take the practice into account in finalizing the Rule.

behavior as customers come to believe that in-store payments are not desired or, worse, may lead to duplicative payments.

Description of Transfer Date. The dates lenders are required to use in the notices create an additional concern. Under Section 1041.9(b)(2)(ii)(B)(*1*) of the Rule, lenders must specify in the first payment withdrawal notice the "[d]ate that the lender will initiate the transfer." Comment 9(b)(2)(ii)(B)(*1*)-1 adds: "The initiation date is the date that the payment transfer is sent outside of the lender's control. Accordingly, the initiation date of the transfer is the date that the lender or its agent sends the payment to be processed by a third party." Presumably, this initiation date is also the date that must be inserted in unusual withdrawal notices as well.

Additionally, the relevant Model Notices all specify that, on the specified date, the lender "will attempt to withdraw a payment." This is the date when the lender loses control over the payment. Frequently (if not usually), the funds are not withdrawn from the consumer's account until the succeeding business day or later. For example, a lender may send out an ACH file late on one business day but the receiving bank will not act on the file until the ensuing business day. However, even though the Model Notices speak in terms of the date the lender initiates payment, we think many consumers will expect the funds to be withdrawn on the specified date and will be confused about their actual account balances, perhaps making purchase they would otherwise eschew, when such balances do not reflect the anticipated withdrawal. We submit that lenders should be allowed to clarify the timing of actual withdrawal in the notices they send.

Changes in Recurring Payments. Sometimes, lenders afford borrowers payment plans or agree to other modifications to the payment schedule on an installment loan. We argue below that, when the modification is pursuant to a formal amendment to the loan agreement, no unusual withdrawal notice at all should be required because the payments are "regularly scheduled" under the amended agreement. However, some modified arrangements for recurring payments may lack the formality of an amendment to the loan agreement. In this case, as Section 1041.9(b)(3)(ii)(C) of the Rule and Model Form A-4 are currently drafted, the lender would arguably need to provide an unusual withdrawal notice for each and every payment in the new payment stream. We submit that the increased burdens and costs of such a requirement serve no consumer protection purpose and that a single, appropriately worded unusual withdrawal notice should suffice.

Proposal: The Bureau should make the following clarifications (or clarifications to the same effect), preferably in the Rule or Commentary but initially through less formal guidance, if necessary:

> It is not a violation of the Rule for a lender to make one or more of the following modifications to Model Forms A-3, A-4, A-6 and/or A-7:
>
> > The lender may indicate the contingent nature of the initiation of a payment by the lender. For example, where a storefront lender will not initiate a payment if the consumer pays in cash, the lender may change the word "will" in these notices to read "may." Alternatively, the lender may specify that the payment "will" be withdrawn if the consumer fails to make payment or payment arrangements by a specified time. For example, a lender may modify the first sentence in Model Form A-3 to read as follows (with bracketed language of the lender's choice and additional or modified language underscored): "**<u>If you do not make payment or other arrangements for payment by 5:00 on November 12, 2016, on [November 13, 2016] [the next business day]</u> Willow Lending will attempt to withdraw a payment of $80 from your account ending in 0022.**"
> >
> > The lender may add language to clarify that the withdrawal will be initiated (and not necessarily completed) on the specified date. For example, the lender may change the first sentence of Model Form A-3 or Model Form A-4 to read as follows (underscored language added): "**On November 12, 2016, Willow Lending will <u>initiate an</u> attempt to withdraw a payment of $80 from your account ending in 0022.**" Additionally, the lender may add a sentence at the end of the first paragraph of Model Form A-3 or Model Form A-4, reading as follows (with bracketed language of the lender's choice): "The

> actual withdrawal may take place on [a later date] [November ___, 2016] [the next business day]." Any added sentence may be in normal or bold font, at the lender's choice
>
> Where the lender and consumer agree to a series of substantially equal payments to recur at regular intervals, the lender may modify the first sentence of Model Form A-4 to read as follows (underscored language added): "**On November 12, 2016, <u>and every two weeks thereafter,</u> Willow Lending will <u>initiate an</u> attempt to withdraw a payment of $80 from your account ending in 0022 <u>if you do not make payment or other arrangements for payment by 5:00 pm on the date in question</u>.**"

Overbroad Definition of "Unusual Withdrawal"

The Rule requires delivery of an unusual withdrawal notice three to seven business days in advance of an unusual withdrawal (six to ten business days if the notice is mailed). 12 C.F.R. § 1041.9(b)(3). This requirement is designed to protect borrowers from unexpected withdrawal attempts. Unfortunately, if the Rule's definition of what constitutes an "unusual withdrawal" is read literally, the requirement will apply to scenarios where the consumer is unlikely to be surprised and has no need for protection. In these cases, the notice requirement functions only to impose undue operational burdens, costs and exposure on the industry, as well as unwanted and potentially confusing "junk" messages to consumers.

The Rule provides that a transfer is "unusual" if, among other features, it varies in amount from the regularly scheduled payment amount. 12 C.F.R. § 1041.9(b)(3)(ii)(C)(*1*)(*i*). The term "regularly scheduled payment amount" is nowhere defined. For an installment loan, is the final payment equal to the "regularly scheduled payment amount" if it is computed in accordance with the loan agreement? Or must it be in the exact amount of prior installments or the exact amount estimated in the lender's disclosures under the Truth in Lending Act? Lenders are left to guess.

Additionally, no explicit exception is provided to the notice requirement if the notice requirement is promised on the lender's TILA disclosures and payment is less than or a few pennies greater than the estimated amount. This contrasts to Regulation E, which allows the lender and borrower to agree upon a range of payments that will not require advance notice. *See* 12 C.F.R.§ 1005.10(d). Almost always, the final payment on a simple-interest installment loan will be "unusual" under an expansive reading of the Rule, since the final payment may be estimated and, even if it is not, TILA allows disclosures to be based on simplifying assumptions that generally result in minor variances between final payment disclosures and actual amounts due on the final payment. *See* 12 C.F.R. § 1026.17(c). Thus, the Rule seemingly requires delivery of unusual withdrawal notices in circumstances where the notice provides non consumer benefit or protection whatsoever.

We note that, depending on how the Bureau interprets its Rule, in addition to the final payment problem, partial prepayments may also pose problems. Almost always, prepayments will result in a smaller final payment. Also, if the loan agreement provides for reamortization of the balance in the event of a partial prepayment, the next payment and possibly all ensuing payments might also be "unusual" in the sense that they differ from the originally scheduled payments. Of course, they are not "unusual" and thus can be deemed to be "regularly scheduled payment amount[s]" in the sense that they are determined in accordance with the terms of the loan agreement. Accordingly, clarification is needed that the lower reamortized payments do not give rise to an unusual withdrawal notice requirement. Even if the first lowered payment is deemed to merit a notice, clarification is required that subsequent payments in a reduced amount are not "unusual."

Not only is the Rule overly expansive as to payment *amounts* it deems "unusual," it is overly broad as to the payment *dates* it considers "unusual." Under Section 1041.9(b)(3)(ii)(C)(*2*) of the

Rule, a payment is unusual if the "payment transfer date" is not the date a regularly scheduled payment is due. Under the Rule, lenders would be required to deliver "unusual" withdrawal notices for perfectly standard payments, leading to significant compliance burdens and customer confusion.

For online loans, borrowers expect payments to be *consummated* on the scheduled payment date. Accordingly, online lenders typically initiate ACH payments *prior* to the scheduled payment date.[6] In such a case, if the "payment transfer date" under Section 1041.9(b)(3)(ii)(C)(*2*) is treated as the date of initiation and not the date of consummation of a payment transfer,[7] "unusual" withdrawal notices would need to be delivered for each and every payment on such an installment loan even if payment is effected on the scheduled payment date, just as the parties expect and intend. Respectfully, this makes no sense.

Without clarifying guidance, Sections 1041.9(b)(3)(i) and 1041.9(b)(3)(ii)(C)(2) of the Rule could create an even worse problem for storefront lenders. In the storefront world, the norm—and the preference for lenders and borrowers alike—is for borrowers to visit the storefront to make their

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6 Some storefront lenders may attempt to submit ACH files ahead of time in order to effect the actual payment on the payment due date but we do not believe such a practice is common because storefront payday lenders have generally found the cash repayment model to work best for them and they do not wish to inconvenience consumers who visit the store on the payment due date.

7 As used in 1041.9(b)(3)(ii)(C)(*2*) , the meaning of "payment transfer date" is not wholly clear. However, in context it would appear to be the date of initiation of a payment as opposed to the date the payment is withdrawn from the consumer's account. Not only is this consistent with Comment 9(b)(2)(ii)(B)(*1*)-1 (providing that the "initiation date is the date that the payment transfer is sent outside of the lender's control"), the language of the unusual withdrawal notice set forth in Model Form A-4 (requiring a statement of when the transfer is "initiated") is likewise based on the date of initiation. Additionally, the date of actual withdrawal of funds from the consumer's account cannot be known with precision in advance for payments initiated by check, and can only be estimated. Nevertheless, confirmation that the "payment transfer date" is the date of initiation would be helpful.

payments. While lenders could theoretically contract to treat payments made after a mid-day cutoff time as if they were made on the succeeding day, and thus preserve sufficient time to deposit a check or initiate an ACH for a customer who does not pay by the cut-off time, it is in the borrower's interest to receive credit for payments made up to the close of business on the scheduled payment date. However, if borrowers are given until the end of the day to make payments in person, the lender might find it difficult or impossible to batch and process an ACH payment file, or to assemble and deposit checks, for those borrowers who have failed to pay in person. If the payment cannot be initiated on a same-day basis and must be delayed until the succeeding business day, rigid application of the Rule would arguably require delivery of an "unusual" withdrawal notice to a consumer who fully expects (and desires) the lender to initiate the payment promptly *after* the scheduled payment date. Worse, the notice must be given at least three business days in advance (six business days, if mailed), meaning that the lender would not be allowed to deposit the check or initiate the ACH immediately after the scheduled payment date. Of course, a delay of three (or six) business days would require a major change in existing practices and would likely produce a substantial deterioration in the efficiency of collections, as well as unanticipated delays in collection from the borrower's standpoint.

So, how can this conundrum be resolved? The answer, we believe, would be for the Bureau to recognize explicitly that the date of initiation is the relevant date under Section 1041.9(b)(3)(ii)(C)(*2*) but, more importantly, to articulate that a payment is not "unusual" if, in accordance with the lender's normal practice, the payment is initiated *on or about* the scheduled payment date, that is within one business day before or after the scheduled payment date. This will accommodate both online lenders who initiate payment one business day in advance, in order to complete the payment on the scheduled payment date, and also storefront lenders who initiate payment shortly after the consumer fails to make the scheduled payment in-person or through some other means on or before the scheduled payment date. In neither case will the consumer be the least bit surprised or in need of an unusual withdrawal notice. Certainly, the requirement to deliver an unusual withdrawal notice in these circumstances cannot be justified by any UDAAP concerns, including the concerns articulated by the Bureau in Section 1041.7 of the Rule.

One further clarification is warranted regarding unusual withdrawal notices: Payment dates and amounts are frequently adjusted to accommodate borrowers who cannot come into stores to repay their loans on the due date, change paydays (perhaps due to a change in employment), expect to be short of funds on the scheduled payment date, or wish to enter into a payment plan. We submit that, when the loan agreement is amended to reflect the new payment arrangement, whether in writing or verbally (if verbal amendments are permitted under state law and the loan agreement),[8] the "regularly scheduled" date and amount of the payment should be the date and amount under the agreement, *as amended*. Accordingly, the modified payment date and amount should not be regarded as "unusual" within the meaning of Section 1041.9(b)(3)(ii)(C) of the Rule and should not give rise to an obligation to provide an unusual withdrawal notice under Section 1041.9(b)(3) of the Rule. This will not disadvantage the consumer and indeed will frequently occur at the consumer's request. Where the loan agreement has been amended, a consumer does not lack notification of, and will not be caught off-guard by, a payment falling due on the contractually modified date.

8 Most loan agreements do not permit oral amendments. However, under the laws of many if not most states, the loan agreement could provide the flexibility to effect an oral amendment.

Proposal: The Bureau should make the following clarifications (or clarifications to the same effect), preferably in the Rule or Commentary but initially through less formal guidance, if necessary:

> As used in Section 1041.9(b)(3)(ii)(C) of the Rule, the phrase "regularly scheduled payment amount" means an amount no greater than the scheduled or estimated payment amount under the loan agreement, as it may be amended from time to time in accordance with the loan agreement and applicable state law, or no more than a specified dollar amount or percentage greater than such scheduled payment amount, as agreed between the lender and borrower.
>
> For purposes of the timing requirements of Section 1041.9(b)(3)(ii)(C)(*2*) of the Rule, a payment will be deemed to be made on the payment transfer date so long as the lender initiates the payment, in accordance with its normal practice, within one business day before or after the scheduled date of payment.
>
> As used in 1041.9(b)(3)(ii)(C) of the Rule, the phrase "regularly scheduled payment" includes a payment scheduled under the loan agreement, as it may be amended from time to time in accordance with the loan agreement and applicable state law.

"Business Day" Timing Requirements

Problem/Issue: Different Payment Provisions express timing requirements in terms of "business days." *See, e.g.*, 12 C.F.R. § 1041.9(b)(2)(i) (requiring electronic or in-person delivery of initial withdrawal notices at least three business days in advance and requiring mail delivery of initial withdrawal notices at least six business days in advance); 12 C.F.R. § 1041.9(b)(3)(i) (requiring electronic or in-person delivery of unusual withdrawal notices at least three business days and no more than seven business days in advance and requiring mail delivery of unusual withdrawal notices at least six business days and no more than ten business days in advance); 12 C.F.R. § 1041.8(a)(2)(i) (requiring payments to be initiated or processed within one business day of authorization in order to qualify as "single immediate payment transfers"). However, the Rule does not define the term "business day" and does not directly address within-day timing requirements, leading to unnecessary ambiguity and compliance risk.

In the absence of a "business day" definition in the Rule or associated Commentary, lenders must guess which days are "business days." Conceivably, even Sundays and/or federal holidays could be treated as "business days" if some storefronts or back offices of a lender are operational on such days. For purposes of Sections 1041.9(b)(2)(i) and 1041.9(b)(3)(i) of the Rule, an overly narrow definition of "business day" (*i.e.*, if "business day" were treated as Monday through Friday, excluding federal holidays, for this purpose) would create further, and unnecessary, delays in initiating payments that are not "single immediate payment transfers." Conversely, for purposes of Section 1041.8(a)(2)(i) of the Rule, an overly expansive "business day" definition could produce significant hardship and compliance burden on lenders. Even a lender that has open storefronts or processes applications on Saturdays may not have the staff and infrastructure necessary to initiate payments and/or process payment instructions on Saturdays. Thus, a definition of "business day" under this provision that includes Saturdays and state holidays could make it impossible for many lenders to initiate "single immediate payment transfers" on Saturdays or to take authorizations for such payments on Fridays or Saturdays.

Fortunately, there is no compelling reason why lenders should need to use the same definitions of "business day" for these differing provisions,[9] and modest variations in the definition of "business day" therefor can and should be employed, as suggested below.

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[9] We note that different federal consumer financial services laws define the term "business day" differently. *See, e.g.*, 12 C.F.R. § 1026.58(b)(3) (Regulation Z provision addressing posting requirements for credit card agreements and defining "business day" as "a day on which the creditor's offices are open to the public for carrying on substantially all of its

Not only does the Rule fail to define "business day," it does not articulate clearly whether any significance should attach to the time of day that certain actions transpire. As the Rule is currently drafted, it is conceivable that a lender could be deemed to violate the advance notice requirements of Section 1041.9(b)(2)(i) or Section 1041.9(b)(3)(i) if it sends the requisite notice three business days in advance but not three *full* business days in advance—for example, if it emailed a first payment withdrawal notice at 10:00 p.m. on a Monday and then initiated the first payment on the following Thursday at 9:00 p.m., assuming no days during the week are holidays. Conversely, it could be argued that a transfer is not a "single immediate payment transfers" if the transfer authorization is made at 2:00 p.m. one business day and the payment is initiated or processed at 10:00 p.m. on the next business day. We think the Bureau should clarify that it does not intend the timing of actions in a particular day to create this kind of trap for the unwary.

Proposal: The Bureau should make the following clarifications (or clarifications to the same effect), preferably in the Rule or Commentary but initially through less formal guidance, if necessary:

> For purposes of the timing requirements of Sections 1041.9(b)(2)(i) and 1041.9(b)(3)(i) of the Rule, regarding delivery of written notices, the term "business day" means Monday through Saturday, excluding federal holidays.
>
> For purposes of the timing requirements of Section 1041.8(a)(2)(i), defining "single immediate payment transfer," "business day" means Monday through Friday, excluding federal holidays and state holidays in states where the lender maintains any office.

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business functions"); 12 C.F.R. § 1026.10(d)(1) (Regulation Z provision addressing the date of crediting of payments and defining "next business day" as the "next day on which the creditor accepts or receives payments by mail"); Official Interpretations to Regulation Z, § 1026.31(c)(2)-1 (provision of Regulation Z Commentary addressing the timing of the delivery of high-cost mortgage disclosures and defining "business day" as "all calendar days except Sundays and the Federal legal holidays listed in 5 U.S.C. 6103(a)").

> The timing requirements under the Rule are interpreted without regard to the time of day when relevant actions take place. For example, assuming the other definitional requirements are met, a payment transfer is a "single immediate payment transfer" even if the transfer authorization is made at 2:00 p.m. one business day and the payment is initiated or processed at 10:00 p.m. on the next business day. Additionally, an initial payment withdrawal notice or unusual withdrawal notice is timely if it is sent by email at 10:00 p.m. on a Monday and the payment is initiated on the following Thursday at 9:00 p.m., assuming no days during the week are holidays.
>
> If a lender has facilities in different time zones, it may treat a payment initiated at a time that is on one day in one time zone and another day in another time zone as being made on either day. For example, a lender with stores in Virginia and Texas could treat a payment initiated at 11:30 Central Time on a Thursday as being initiated either on that Thursday or the following Friday.

Blackout Periods

Problem/Issue: Not uncommonly, consumers request or agree to initiate or make payments on dates or in amounts that would be "unusual" under the Rule. For example, a consumer may contact a lender on the scheduled payment date in order to request a reduction in the payment amount or a short delay in the date the payment will be initiated. Conversely, a consumer may agree in a collections call to pay a delinquent balance in one or more payments, starting a few days in the future.

Sometimes, even if a lender were to provide an unusual withdrawal notice on a same- or next-business day basis, the advance notice requirements of Section 1041.9(b)(3)(i) of the Rule would operate to prevent the lender from initiating payment on the desired day. In effect, the Rule creates a "blackout period," where new or modified payments cannot be scheduled. A single immediate payment transfer could be initiated the same day or the next business day after the contact between the lender and borrower but, after then, a payment could not be initiated under Section

1041.9(b)(3)(i) until, at the earliest, three business days have lapsed, in the case of electronic or personal notices, or six business days have lapsed, in the case of a mailed notice.[10]

This *de facto* prohibition against payment modifications during the blackout period, which are expressly agreed-upon by the consumer, disadvantages lenders and consumers alike. For example, if a consumer wishes to schedule an early payment or partial prepayment on a simple-interest installment loan, to be initiated during a blackout period, the Rule would currently preclude the consumer from reducing the loan principal and interest during the blackout period.

Proposal: The Bureau should add a new Section 1041.9(b)(2)(ii)(E) to the Rule, along the following lines:

> (E) *Exception for Certain Agreed Payment Modifications:* If the consumer has requested or agreed to a modification of payment terms for a covered loan (whether in writing, electronically, verbally or otherwise), the lender may provide the unusual withdrawal notice at any time within one business day after the date of such request or authorization by the consumer.

Phase-In of Payment Provisions

Problem/Issue: Currently, the Payment Provisions are scheduled to go into effect on August 19, 2019, at least if the stay in the Texas industry lawsuit against the Bureau is lifted. However, we have not seen any guidance concerning whether and how the Payment Provisions will apply to loans made prior to the compliance deadline. Any attempt to apply the Payment Provisions to loans originated prior to the mandatory implementation date would create severe problems and confusion, and result in a *de facto* implementation date earlier than the date published in the Federal Register.

10 While the lender could advise the borrower to re-authorize the payment later as a single immediate payment transfer, this will merely inconvenience the borrower and risk a miscommunication or failed payment transfer.

For example, take a lender that plans to deliver first payment notices at the time its installment loans are originated, immediately after obtaining leveraged payment mechanisms for the loans, and assume an August 19 compliance deadline. The first payment on some loans (Class A Loans) could be scheduled prior to August 19, the first payment on other loans (Class B Loans) could be scheduled on August 20 or 21, and the first payment on other loans (Class C Loans) on August 25 or later. We submit that it makes no sense to require delivery of a first payment notice on Class A Loans, after the Rule goes into effect and after the first payment on the loan. On Class B Loans, the lender could potentially deliver a first payment notice after the Rule goes into effect but before the date of the first payment, but such notice would be untimely under the Rule. Even for Class C Loans, where a lender could potentially provide a timely first payment notice, requiring a notice would force the lender to adopt special procedures, to deliver the notice at a time that is not contemplated for loans originated after the compliance deadline, simply to address this transitional period.

Not only would compliance with the notice requirements of Section 1041.9 be problematic, compliance with the payment restrictions of Section 1041.8 would be confusing and burdensome. To date, there has been no guidance whether failed payments made prior to the implementation date are counted for purposes of Section 1041.8. Once again, subjecting pre-Rule loans to post-Rule requirements would require the implementation of special procedures.

Proposal: The Bureau should make the following clarification (or a clarification to the same effect), preferably in the Rule or Commentary but initially through less formal guidance, if necessary:

> Loans made prior to the mandatory compliance date of the Rule are not covered loans within the meaning of Section 1041.3 of the Rule.

Treatment of Checks

Problem/Issues: The Rule is clear that a payment by cash is not a "payment transfer" and, accordingly, does not operate to re-set the count of failed payment transfers back to zero. *See* 12 C.F.R. § 1041.8(a)(2) (definition of "payment transfer"); Comment 8(b)(2)(i)-1ii.

While the treatment of cash payments is clear, the treatment of check payments is not. Certainly, some check payments are "payment transfers" subject to the Rule. Thus, Comment 8(a)(1)(i)(B)-1 reads as follows:

> 1. Signature check. A transfer of funds by signature check meeting the general definition in s. 1041.8(a)(1) is a payment transfer regardless of whether the transaction is processed through the check network or through another network, such as the ACH network. The following example illustrates this concept: A lender processes a consumer's signature check through the check system to collect a scheduled payment due under a loan agreement for a covered loan. The check is returned for nonsufficient funds. The lender then converts and processes the check through the ACH system, resulting in a successful payment. Both transfers are payment transfers, because both were initiated by the lender for purposes of collecting an amount due in connection with a covered loan.

We believe that the proper interpretation of Comment 8(a)(1)(i)(B)-1, and the coverage of the Rule as to check payments, turns on the meaning of "signature check." Unfortunately, this term is not defined in the Rule or the Commentary. The preamble to the Rule, however, does shed light on the intended meaning of "signature check" and Comment 8(a)(1)(i)(B)-1. The preamble described "signature checks" as one of a variety of "payment methods that enable lenders to use a *previously-obtained authorization* to initiate a withdrawal without further action from the consumer…." 81 FR at 54499 (emphasis added). This suggests that the Comment's reference to a "signature check" was to leveraged payment mechanisms provided by the consumer and not to checks sent by the consumer to effect ordinary payments on a covered loan.[11]

Treating regular check payments as "payment transfers" subject to the Rule would disfavor payment by checks vis-à-vis payments by other methods. Indeed, with respect to check payments initiated by the borrower, it is far from clear how a lender could give a first payment withdrawal notice describing the date of the payment transfer under 12 C.F.R. § 1041.9(b)(2), or obtain a reauthorization giving the specific date of subsequent transfers for further payment transfers under 12 C.F.R. § 1041.8(c), since the precise timing for the receipt and deposit of such check is in the borrower's and not the lender's control.

Accordingly, for loans payable by checks written on a contemporaneous basis by the consumer, the lender would be confined to reliance on the exemption for payments by "single immediate payment transfers." This means that the lender would be in immediate violation of the Rule if at any time it were to deposit a new check more than one business day after receipt, even if the lender were to give the consumer credit for the check as of the date of receipt and even though the consumer would not have any firm expectation as to the date of deposit of a check mailed to the lender.

Additionally, if a borrower were to have two consecutive payments dishonored for insufficient funds and the lender were to receive a payment check prior to the time it provides the consumer rights notice to the consumer, the lender might be foreclosed from *ever* depositing the

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11 While the preamble does not address a check the borrower provides on a delinquent loan in response to lender collection efforts, we recognize that it might make sense to treat such checks as "payment transfers."

check, to the detriment of both the lender and consumer. This could be a particular problem with covered loans payable on a weekly basis where the lender customarily provides consumer rights notices by mail (or is forced to mail notices to a consumer who has declined to accept electronic delivery of consumer rights notices or whose authorization for electronic notices has terminated). For example, take a borrower who has a check dishonored on one installment and then pays the next installment three days after the due date, where the lender deposits the check the next business day and receives notice of dishonor two days later. Even if the lender timely delivers a consumer rights notice three business days thereafter, the notice will not be effective until another three business days have elapsed. *See* 12 C.F.R. § 1041.8(c)(3)(iii). In the meantime, the consumer might have made another payment. The lender cannot process the new check as a single immediate payment transfer, *see* 12 C.F.R. § 1041.8(d), meaning it can *never* deposit the check. Needless-to-say, this bizarre result will be impossible to explain to a consumer trying to effect a payment by check on his or her loan.

For the most part, lenders will be able to handle payment checks as single immediate payment transfers. However, in the absence of clarifying guidance, and if checks are treated as payment transfers, many lenders are likely to inadvertently violate the Rule. This could occur when two consecutive checks are returned for insufficient funds and the lender, unaware of Comment 8(a)(1)(i)(B)-1 or its potential implications, fails to send a consumer rights notice. Also, it could occur when the lender seeks to resubmit a check after two consecutive checks have failed to clear. However the Bureau ultimately decides to resolve this issue, further clarification is in order.

Proposal: The Bureau should make the following clarification (or a clarification to the same effect), preferably in the Rule or Commentary but initially through less formal guidance, if necessary:

> A payment check that is not a leveraged payment mechanism and is sent by a consumer prior to notice from the lender of an uncured payment delinquency is not a "signature check" or a "payment transfer" under the Rule. Conversely, a payment check that is either a leveraged payment mechanism or is sent by the consumer after such consumer receives notice from the lender of an uncured payment delinquency is a "signature check" and "payment transfer."

Impact of Successful Single Immediate Payment Transfer

Problem/Issue: As presently drafted, the Commentary to the Rule (but not the Rule itself) provides that, if a lender has initiated two consecutive failed payment transfers, an ensuing successful single immediate payment transfer does not reset the failed payment transfer count to zero. *See* Comment 8(b)(2)((ii)-3. There is no corresponding Rule provision or Comment addressing a successful single immediate payment transfer effected after the first failed payment transfer. We believe that Comment 8(b)(2)((ii)-3 is punitive and unwarranted, and that it creates an unnecessary barrier to lenders resuming the initiation of payment transfers after two consecutive failed attempts. Like many other provisions of the Rule, denying the lender the advantage of a count reset in this circumstance appears to reflect nothing more than the prior Bureau leadership's unwarranted hostility to the industry.

Proposal: The Bureau should modify the Commentary to eliminate Comment 8(b)(2)((ii)-3. Further, prior to elimination of Comment 8(b)(2)((ii)-3, the Bureau should confirm, preferably in the Rule or Commentary but initially through less formal guidance, if necessary, that a successful single immediate payment transfer, initiated after a single failed payment transfer, resets the failed payment transfer count to zero.

Application of Rule to Multiple Borrowers Using Same Account

Problem/Issue: The payment restrictions of Section 1041.8 of the Rule are applied on an account basis, at least when a single borrower takes out multiple loans. However, the Rule does not contemplate the possibility that multiple borrowers (perhaps spouses or other family members) may use the same account for making payments on separate loans. Without undue programming and operational difficulties, lenders will not be able to track payments on loans to different borrowers. They will not even know that the same account is being accessed when one borrower provides ACH information for the account and another borrower provides Card information. Moreover, applying the Rule on a combined basis to separate loans made to separate borrowers would apparently require delivery of a consumer rights notice to all such borrowers when two consecutive payments fail. This, too, would require special procedures and burdensome requirements. It would also implicate privacy concerns when one borrower receives notice of failed withdrawals on another customer's loans.

In short, applying the Rule on a combined basis to multiple borrowers would create undue complications. Clarification that this is not the Bureau's intent would be welcome.

Proposal: The Bureau should make the following clarification (or a clarification to the same effect), preferably in the Rule or Commentary but initially through less formal guidance, if necessary:

> If multiple borrowers (for example, two family members) take out separate covered loans and provide leveraged payment mechanisms accessing the same account, the provisions of the Rule apply to the separate borrowers individually without regard to the circumstance that they share a single account.

Application of Rule to Assignees

Problem/Issue: The Rule does not explicitly address the rights and obligations of assignees of covered loans. Indeed, read literally, the Payment Provisions of the Rule might not apply to certain assignees, since they address the actions of "lenders," defined as "person[s] who regularly extend[] credit to a consumer primarily for personal, family or household purposes." *See* Section 1041.2(a)(14) of the Rule. We do not believe that it makes sense to read the Payment Provisions of the Rule as being inapplicable to loan assignees, even if they do not regularly extend consumer credit. However, it *does* make sense to clarify that loan assignees step into the shoes of their assignors for purposes of post-assignment obligations. Thus, assignees should not need to re-deliver notices previously provided by their assignors or obtain re-approvals previously obtained by their assignors.

Proposal: The Bureau should make the following clarification (or a clarification to the same effect), preferably in the Rule or Commentary but initially through less formal guidance, if necessary:

> If a covered loan is assigned to a third party, the assignee shall be subject to the Rule to the same extent as the assignor. All failed payment transfers initiated by the assignor prior to the time of the assignment shall be treated the same as if they had been initiated by the assignee and all notices given by the assignor prior to the time of the assignment shall be treated the same as if they had been given by the assignee.

Application of Rule to Third Party Payers

Problem/Issue: As an accommodation to borrowers, friends and family members frequently make payments on covered loans. In such cases, we read the Payment Provisions to protect these third party payers. Where payments will be initiated by a third party, however, we do not believe that the borrower should be entitled to any notices with respect to payments from the third party. Since this issue is not explicitly addressed in Section 1041.8 or Section 1041.9 of the Rule, clarification would be warranted.

Proposal: The Bureau should make the following clarification (or a clarification to the same effect), preferably in the Rule or Commentary but initially through less formal guidance, if necessary:

> If a third party (for example, a family member or friend of the borrower) authorizes the lender to initiate payments on covered loans, the third party is entitled to all protections provided by this Rule. However, no notices need be sent to the borrower with respect to payments by the third party (or failed attempts to initiate payments from the third party's account), and two consecutive failed attempts from the third party's account do not preclude the lender from initiating an authorized payment from the borrower's account..

Conditioning Loans or Loan Benefits on Consumer's Agreement to Electronic Delivery of Notices

Problem/Issue: In light of the burdens imposed by the Payment Provisions, it is crucial for lenders to be able to deliver notices required under Section 1041.9 electronically. Section 1041.9(a)(4) of the Rule authorizes such electronic delivery if specified consent requirements are satisfied, the consent is not revoked and the lender does not receive notification that the consumer is unable to receive disclosures through the delivery method used by the lender at the address or number used.

The Rule does not impose any additional limitations. Specifically, we read the Rule to allow lenders to require their customers to authorize electronic notices and also to treat a revocation of an electronic notice authorization as a default.[12] In this regard, the Rule differs from Regulation E,

12 *A fortiori,* we also read the Rule to allow lenders to condition specified benefits—for example, an agreement to defer a scheduled payment date—on the consumer's authorization of electronic notices.

which explicitly prohibits creditors from conditioning extensions of credit on the consumer's payment by preauthorized electronic fund transfers. *See* 12 C.F.R. § 1005.10(e).

Proposal: The Bureau should confirm, preferably in the Rule or Commentary but initially through less formal guidance, if necessary, that lenders on covered loans may require borrowers to authorize electronic notices under Section 1041.9 of the Rule as a condition of obtaining a loan or receiving any other economic loan-related benefit.

Electronic Delivery of Notices On-Screen

Problem/Issue: Currently, the only forms of electronic delivery explicitly mentioned in the Rule are emails, mobile applications and text messages. To avoid any potential negative implication concerning online presentation of required disclosures—for example, first payment withdrawal notices delivered at loan origination—confirmation that notices may be delivered online would be warranted.

Proposal: The Bureau should confirm, preferably in the Rule or Commentary but initially through less formal guidance, if necessary, that online notices are permitted under the Rule, subject to the Rule's express requirements.

CONCLUSION

As the foregoing discussion shows, there are serious problems and interpretive difficulties with the Payment Provisions of the Rule. Accordingly, we respectfully request that the Bureau postpone the August 19, 2019 implementation date for the Payment Provisions and simultaneously open up the Payment Provisions for further comment. Changes and clarifications consistent with the discussion above should be implemented during this process.

We think it might be worthwhile to explore these issues further with the Bureau in person, perhaps with one or more of our clients who are, even now, expending tremendous resources in their preparation to comply with the Bureau's deeply flawed Payment Provisions. If a meeting would be possible, we would very much appreciate hearing from you. And, of course, we would be happy to address over the phone or by email any questions you may have.

Very truly yours,

Jeremy T. Rosenblum

Cc: Mark J. Furletti
Jason M. Cover