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Via E-mail and Federal Express

Bureau of Consumer Financial Protection
1700 G Street, NW
Washington, DC 20552
Attn.: Kathleen L. Kraninger, Director

Re: Treatment of Debit and Prepaid Card Transactions under the CFPB Rule on Payday, Vehicle Title, and Certain High-Cost Installment Loans

Director Kraninger and Staff:

We have previously written at length to detail our concerns about the payment provisions of the CFPB's Rule on Payday, Vehicle Title, and Certain Short-Term Loans (the "Payment Provisions"). However, this letter targets a fundamental, but easily correctible problem with the Rule—its treatment of debit and prepaid card payments the same as ACH and check payments. Dishonored checks and ACH payments trigger the non-sufficient fund fees the payment provisions of the Rule were designed to reduce. However, as the CFPB well knows, declined card transactions do *not* give rise to NSF fees. Treating these starkly different transactions the same will enormously increase the compliance burden on companies subject to the Rule and will produce *worse* consumer outcomes.

In Section 7 of the Rule, the CFPB identifies as a UDAAP violation a lender's continued initiation of payments on covered loans after the two immediately preceding payments have failed due to insufficient funds in the borrower's account. The CFPB's concern, and the basis for its UDAAP finding, is that further payments are more likely to produce inordinate NSF charges by the consumer's bank than substantial collections by the lender.

We take no position on whether the Rule's limits on further lender-initiated payments are the best approach to the identified problem and/or whether the Rule sets the appropriate threshold when it picks two consecutive failed payments as the trigger for its limits. We are sure, however, that the CFPB's treatment of card payments is way off base.

When it adopted the Rule, the CFPB grudgingly recognized that "debit card transactions present *somewhat* less risk of harm to consumers" than checks and NSF payments, 82 FR 54472, 54750 (Nov. 17, 2017) (emphasis added), and that "the harm justifying the identified unfair and abusive act or practice is *diminished* for debit card payments." *Id* at 54746. In our experience, debit card transactions present *no* risk of harm. This is not a difference of degree but rather a difference of kind.

We are not aware of a single bank that imposes NSF charges on declined card authorizations. By the same token, although we represent many lenders who will be subject to the Rule, we are not aware of a single one that imposes NSF fees on failed card authorizations. Such fees would be prohibited by the laws of most states and would give rise to a firestorm of consumer complaint. And, if it chose, the CFPB could simply apply its payment limits to any card transactions giving rise to lender fees of this nature.[1]

Lenders *do* charge late charges when the consumer fails to make payment on time or within a short period following the due date for a payment. These late charges can be *reduced* if a lender is able to efficiently collect the required payment on its loans. The Rule's interference with a lender's use of a card collection option that is completely cost-free to the consumer will thus have the unintended and perverse consequence of increasing fees charged to consumers. For this reason alone, the Rule's treatment of card transactions is arbitrary and capricious (to use the language of the Administrative Procedure Act for improper agency rule-making). *See* 5 U.S.C. § 706(2)(A).

In its prior rule-making, the CFPB stated that it "does not believe an exclusion based on payment type would work to alleviate much compliance burden." *Id.* at 54747. Our clients tell us this is simply not correct.

The compliance burdens of the Rule are severe. Lenders subject to the Rule will need to produce an elaborate array of notices and establish operating procedures and computer programs to deliver the notices at the appropriate time. In addition to first payment withdrawal notices, consumer rights notices and associated short notices, where one size will largely fit all, lenders will need to produce unusual withdrawal notices and short notices addressing seven separate variants for delivery of unusual withdrawal notices.[2] Worse, lenders will need to stop using long-standing methods to collect their loans once a consumer fails on two consecutive payment attempts. They will need to develop costly new communications strategies for dealing with delinquent borrowers—strategies that are sure to be significantly less effective than existing methods.

All of this could be avoided if the CFPB were to exclude card payments from the coverage of the Rule. At present, many lenders use ACH and check payments more than card payments due to cost considerations. It might cost approximately $0.15 for a lender to process a $300 ACH payment and nothing to deposit a $300 check. By contrast, a $300 debit card transaction processed through the VISA network would likely cost $0.37 where the card issuer is a large bank with effective fraud prevention controls in place, more than double the cost of an ACH.[3]

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[1] Just as the Rule currently provides a conditional exclusion from the definition of "payment transfer" for certain transfers by account-holding institutions, 12 C.F.R. § 1041.8(a)(1)(ii), it could add a conditional exclusion along the following lines for debit and prepaid card transactions: "Unless the lender charges a fee for declined authorizations of debit and prepaid card payments, debit and prepaid card authorization are not failed payment transfers."

[2] The following scenarios all need to be addressed: (1) an unusual payment amount; (2) an unusual payment date; (3) an unusual payment mode; (4) an unusual payment amount and date; (5) an unusual payment amount and mode; (6) an unusual payment date and mode; and (7) an unusual payment amount, date and mode.

[3] Under Regulation II,, the maximum debit card interchange fee for a large issuer with acceptable fraud prevention controls in place is 22 cents plus 0.5% of the transaction amount. *See* 12 U.S.C. § 235.3(b), 235.4(a).

Nevertheless, the compliance costs of the Rule are far greater than the aggregate cost differentials between debit card payments and ACH payments. Accordingly, if debit card payments were exempted from the Rule, we predict that many if not most issuers would immediately move to the use of debit cards as their primary if not sole leveraged payment mechanism. Thus, for all customers with debit or prepaid cards, covered lenders could process all payments as card transactions and avoid the Rule entirely. This is a result the CFPB should encourage and facilitate.

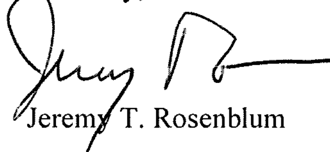
The benefits of a card-centric payment universe would include the following:

- Borrowers would incur *no* NSF fees on failed card payments.[4]
- Borrowers would experience lower default rates and late charges.
- Borrowers would have greater certainty as to the timing of payments.[5]
- Lenders would experience a huge reduction in compliance burdens and costs associated with the Rule.
- Lenders would continue to have available their most efficient collection mechanism,[6] without being subject to the restrictions of the Rule.

For all of the foregoing reasons, the CFPB should promptly initiate rule-making to exclude card transactions from the coverage of the Rule.

Thank you for your consideration of our views.

Sincerely,



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[4] Of course, in its current incarnation, the Rule will not eliminate NSF fees on ACH and check payments but will merely reduce their incidence.

[5] We note that the first payment and unusual withdrawal notices under the Rule require disclosure of when a payment is *initiated*, not the later date when the funds are actually withdrawn from the consumer's account. *See* 12 U.S.C. § 1041.9(b)(2)(ii)(B)(*1*). Because there days are not the same with ACH and check payments, at least some customer confusion is likely. With a card transaction, the issuing bank will reduce the available fund balance immediately upon authorization of the transaction.

[6] When a card payment is authorized, the lender has immediate assurance of fund collection. By contrast, when an ACH or check is processed, the lender has no idea whether the consumer has sufficient funds to cover the item until it is honored or returned as an NSF several days later.