No. 21-50826

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

COMMUNITY FINANCIAL SERVICES ASSOCIATION OF AMERICA, LIMITED;
CONSUMER SERVICE ALLIANCE OF TEXAS,

Plaintiffs-Appellants,

v.

CONSUMER FINANCIAL PROTECTION BUREAU; DAVID UEJIO, IN HIS OFFICIAL CAPACITY AS ACTING DIRECTOR, CONSUMER FINANCIAL PROTECTION BUREAU,

Defendants-Appellees.

On Appeal from the United States District Court
for the Western District of Texas
No. 1:18-cv-00295 (Yeakel, J.)

APPELLANTS' OPPOSED MOTION FOR A STAY PENDING APPEAL

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CERTIFICATE OF INTERESTED PERSONS

No. 21-50826, Community Financial Services Association of America, Ltd. et al. v. Consumer Financial Protection Bureau et al.

The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Fifth Circuit Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal:

1. Plaintiff-Appellant **Community Financial Services Association of America, Ltd.** (CFSA), which has no parent corporation and no publicly held corporation owns 10% or more of its stock.

2. Plaintiff-Appellant **Consumer Service Alliance of Texas** (CSAT), which has no parent corporation and no publicly held corporation owns 10% or more of its stock.

3. Defendants-Appellees **Consumer Financial Protection Bureau** (CFPB or Bureau); **David Uejio, in his official capacity as Acting Director, Consumer Financial Protection Bureau**.

4. Former Defendants-Appellees **John Michael Mulvaney, in his official capacity as Acting Director, Consumer Financial Protection Bureau**; **Kathleen Kraninger, in her official capacity as Director, Consumer Financial Protection Bureau**.

5. *Amici Curiae* **Public Citizen, Inc.**; **Americans for Financial Reform Education Fund**; **Center for Responsible Lending**; **National Consumer Law Center**.

6. Movant to Intervene as Defendant **Cooperative Baptist Fellowship**.

7. The following law firms and counsel have participated in the case:

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

CASES

TABLE OF AUTHORITIES
(continued)

Page(s)

TABLE OF AUTHORITIES
(continued)

Page(s)

REQUEST FOR EXPEDITED CONSIDERATION

Plaintiffs-Appellants respectfully request that this Court extend the district court's stay of the compliance date until 286 days after resolution of this appeal, rather than requiring compliance with the challenged agency action 286 days after the district court's orders entered on August 31, 2021, A01–A25. *See* 5 U.S.C. § 705; Fed. R. App. P. 8. Because Plaintiffs will need to begin preparing for compliance much earlier than **June 13, 2022**, Plaintiffs seek a stay by **October 25, 2021**.[1]

JURISDICTIONAL STATEMENT

The district court had subject matter jurisdiction over these federal claims pursuant to 28 U.S.C. § 1331 and 5 U.S.C. § 702. This Court has jurisdiction under 28 U.S.C. § 1291 because the district court's orders represent its final judgment.

INTRODUCTION

Plaintiffs-Appellants are associations of companies that offer small-dollar consumer-credit products including payday and installment loans. They challenged a final rule promulgated by the Consumer Financial Protection Bureau entitled "Payday, Vehicle Title, and Certain High-Cost Installment Loans" rule ("2017 Rule" or "Rule"), 82 Fed. Reg. 54,472 (Nov. 17, 2017), codified at 12 C.F.R. pt. 1041 (A158–88 (Excerpts)). Plaintiffs sought to set aside the Rule on the grounds that, *inter alia*, the director who promulgated it had been unconstitutionally insulated

[1] Plaintiffs' counsel gave notice to Defendants' counsel on September 30. Defendants' counsel indicated that they oppose relief.

from presidential removal and control. *Seila Law LLC v. CFPB* subsequently vindicated this view. 140 S. Ct. 2183, 2207 (2020). The district court, however, held that it could offer no remedy for this constitutional violation. This Court, en banc, is poised to address similar questions of remedy and ratification in *CFPB v. All American Check Cashing*, No. 18-60302 and *Collins v. Yellen*, No. 17-20364.

The 2017 Rule provided a twenty-one-month implementation period for "lenders [to] be able to reasonably adjust their practices to come into compliance with the rule." 82 Fed. Reg. at 54,814 (A184). In response to this litigation, the district court stayed the compliance date with 286 days left for implementation. Recognizing that Plaintiffs "should receive the full benefit of [its] temporary stay," the district court's summary judgment order restored the pre-stay status quo by staying compliance until 286 days from the date of final judgment (*i.e.*, until June 13, 2022). A24.

The Rule's substantive provisions have never gone into effect. The district court's prior stay orders correctly recognized that the equities support maintenance of the status quo until 286 days after final judgment, so that lenders can fully resolve their claims before undertaking the irreparable, costly, and time-consuming steps needed for compliance. Now that Plaintiffs have appealed, that logic supports extending the stay to 286 days after resolution of this appeal in order to maintain the status quo. Indeed, the district court's order summarily denying that extension offers no rationale for treating the situations differently.

To facilitate orderly proceedings in this Court, Plaintiffs respectfully request a decision on this motion by October 25, 2021.

STATEMENT OF THE CASE

A. The Consumer Financial Protection Act

The 2010 Consumer Financial Protection Act ("CFPA") established the Bureau as an "independent" regulatory agency. 12 U.S.C. § 5491. A single director heads the Bureau for a five-year term. *Id.* § 5491(b)–(c). The Act originally provided that the president could remove the Bureau's director only "for cause," *id.* § 5491(c), but *Seila Law* invalidated this provision.

Under the Director's supervision, the Bureau may "prescribe rules … identifying as unlawful unfair, deceptive, or abusive acts or practices in connection with" certain consumer transactions. *Id.* § 5531(b) ("UDAAP authority"). Congress, however, limited the Bureau's power so that consumers could "make" their own "responsible decisions about financial transactions." *Id.* § 5511(a)–(b); *see also id.* § 5512(b)(2)(A). These limits include narrowly defining practices that could be regulated as "unfair," *id.* § 5531(c)(1), or "abusive," *id.* § 5531(d).

B. Payday and Installment Loans

The loans at issue here are short- and medium-term, small-dollar, consumer-finance products provided by non-bank lenders to consumers lacking access to more traditional forms of credit. *See* A298. Preauthorized repayment, through regularly scheduled bank withdrawals, is a common feature of many of these loans. As in other contexts (*e.g.*, automatic bill payment), the use of preauthorized payments provides numerous benefits to consumers, including greater access to credit, convenience, fewer missed payments, and lower costs. *See, e.g.*, A293.

C. 2017 Rule and Ensuing Litigation

In 2016, the Bureau invoked its UDAAP authority to propose a rule that would fundamentally alter the industry. The rulemaking straddled the administrations of Presidents Obama and Trump. President Obama's appointee, Director Richard Cordray, completed the rulemaking process during the first year of President Trump's administration. As demonstrated below without dispute from the Bureau, but for the later-invalidated removal restriction, President Trump would have fired Director Cordray before he finalized the Rule. A146–49; A155. Director Cordray himself explained that "the threat that I would be fired as soon as President Trump took office loomed over everything." Richard Cordray, *Watchdog: How Protecting Consumers Can Save Our Families, Our Economy, and Our Democracy* 185 (2020); *see also* Kate Berry, *In tell-all, ex-CFPB chief Cordray claims Trump nearly fired him*, American Banker (Feb. 27, 2020), https://www.americanbanker.com/news/in-tell-all-ex-cfpb-chief-cordray-claims-trump-nearly-fired-him. This threat loomed largest over what Cordray described as his—"last big fight," "the payday lending rule." Cordray, *Watchdog*, *supra* at 198.

But "President Trump was advised to hold off on firing Cordray because the Supreme Court had not yet weighed in on [the] 'for cause' provision," Berry, *In tell-all*, *supra*, while the D.C. Circuit, less than one month into the new president's term, had vacated and agreed to reconsider en banc a decision invalidating the removal protection. Feb. 16, 2017 Order (per curiam), *PHH Corp. v. CFPB*, 881 F.3d 75 (D.C. Cir. 2018) (No. 15-1177). Before the courts could rule, however, Director Cordray promulgated the Rule and subsequently resigned.

The Rule originally imposed two major limits. *First*, its "underwriting provisions" prohibited covered lenders from making payday loans unless the borrower could satisfy a government-mandated "ability to repay" test. 12 C.F.R. § 1041.4. *Second*, the Rule's "payment provisions" forbade a covered lender to make or attempt an authorized withdrawal from a bank account after the lender's second consecutive attempt failed due to a lack of sufficient funds, unless the lender obtains the consumer's new and specific authorization for further withdrawals. *Id.* § 1041.7. The Bureau designated departures from either rule as "unfair" and "abusive" practices.

The Rule was published on November 17, 2017, but became effective on January 16, 2018, with an original compliance date of August 19, 2019 for the Rule's substantive requirements. 82 Fed. Reg. at 54,472 (A158). This twenty-one month implementation period—six months more than originally proposed—reflected the Bureau's judgment that twenty-one months were necessary for "an orderly implementation period" and for "lenders [to] be able to reasonably adjust their practices to come into compliance." *Id.* at 54,814 (A184).

Plaintiffs sued to enjoin the Rule on April 9, 2018, arguing that an unconstitutionally structured Bureau promulgated the Rule, that it exceeded the Bureau's statutory authority, and that it was arbitrary and capricious under the APA. But long before the original compliance date, and less than one year after the Rule's issuance, the Bureau announced that it would reconsider the Rule.

The district court stayed the litigation. A127–28. The parties jointly moved to stay the compliance date, agreeing that any stay should "preserve the amount of time for bringing … operations into compliance that Plaintiffs' members currently have from the date of this motion to the Payday Rule's current compliance date." A124. The court stayed compliance with 286 days left on the implementation clock. *See* A129–32.

In early 2019, the Bureau initiated rulemaking proceedings to revoke the Rule's underwriting provisions (but not its payment provisions). *See* 84 Fed. Reg. 4,252 (Feb. 14, 2019). It acknowledged certain key flaws in the Rule, including that the evidence supporting it was insufficiently robust and reliable, and that the prior Director had misinterpreted the scope of the Bureau's UDAAP authority. *Id.*

On June 29, 2020—while the revocation rulemaking was pending—the Supreme Court held that the Bureau was unconstitutionally structured and invalidated the CFPA's removal restriction. *Seila Law*, 140 S. Ct. at 2207, 2209–11.

Eight days later, the Bureau announced a final rule revoking the underwriting provisions. *See* 85 Fed. Reg. 44,382 (July 22, 2020) ("2020 Rule") (A191–204 (Excerpts)). The Bureau simultaneously released a notice purporting to "affirm[] and ratif[y] the payment[s] provisions of the 2017 Final Rule." 85 Fed. Reg. 41,905-02 (July 13, 2020) (A189–90). This purported ratification occurred outside notice-and-comment rulemaking and failed to address how the Bureau could ratify components of a rule that had relied on (in the Bureau's own assessment) an incorrect interpretation of UDAAP authority.

The district court lifted the litigation stay, A133–34, and Plaintiffs amended their complaint to add, *inter alia*, claims challenging the Bureau's ratification, A78–119. The parties cross-moved for summary judgment. On August 31, 2021, the district court granted judgment for Defendants, but restored the parties to the original compliance period remaining when the court granted its stay (286 days). It reasoned that Plaintiffs "should receive the full benefit of the temporary stay," which would also allow "time for appeal." A24.

On the remedial merits, the court concluded that the Bureau's unconstitutional structure did not render the Rule void *ab initio*. Its entire analysis rested on one block-quoted passage from *Collins v. Yellen*, 141 S. Ct. 1761 (2021), which explained only that agency actions taken by unconstitutionally insulated Directors are not always automatically void. *See* A06. It then concluded that Plaintiffs received a "meaningful remedy" when the subsequent Director ratified a portion of the 2017 Rule without actually undertaking a valid notice-and-comment rulemaking. A07. The court also rejected Plaintiffs' APA arguments, primarily reasoning that the Bureau's initial rulemaking combined with the unilateral ratification satisfied the agency's APA duties. *See* A07–15.

On September 9, 2021, Plaintiffs filed their notice of appeal and a motion for stay pending appeal. On September 30, 2021, the district court summarily denied Plaintiffs' motion. A26–28.

STANDARD OF REVIEW

A stay pending appeal "maintain[s] the status quo pending a final determination on the merits." *Ruiz v. Estelle*, 650 F.2d 555, 565 (5th Cir. Unit A 1981). A party seeking a stay "need only present a substantial case on the merits when a serious legal question is involved and show that the balance of equities weighs heavily in favor of granting a stay." *Campaign for S. Equality v. Bryant*, 773 F.3d 55, 57 (5th Cir. 2014). This Court has consistently counseled against "apply[ing] these factors in a rigid, mechanical fashion." *United States v. Baylor Univ. Med. Ctr.*, 711 F.2d 38, 39 (5th Cir. 1983). A stay is proper "where relative harm and the uncertainty of final disposition justify it." *Ruiz*, 650 F.2d at 565.

ARGUMENT

This case presents "a serious legal question" not only affecting the public's access to credit in a global pandemic, but also engendering overarching implications for litigants' remedial relief from rulemakings conducted by unlawfully structured agencies. *See Wildmon v. Berwick Universal Pictures*, 983 F.2d 21, 23–24 (5th Cir. 1992) (per curiam) (serious legal question if case involves "far-reaching effects or public concerns"). Plaintiffs' members will suffer irreparable harm absent an extension of the district court's stay, *see infra* Part I.A, and the balance of equities heavily favors a stay given the district court's own (correct) determination that Plaintiffs are entitled to a compliance period consistent with the pre-stay status quo, *see infra* Part I.B. Plaintiffs have also presented a substantial case on the merits because the en banc Court is poised to address, in *Collins* and *All American*, related questions of remedy and ratification following invalidation of agency structures (including the Bureau's) on constitutional grounds. *See infra* Part III.A. In any event, Plaintiffs are likely to succeed on the merits of their claims. *See infra* Part III.B.

I. PLAINTIFFS' MEMBERS WILL SUFFER IRREPARABLE HARM ABSENT A STAY.

"Federal courts," including this one, "have long recognized that, when the threatened harm is more than de minimis, it is not so much the magnitude but the *irreparability* that counts for purposes of" temporary relief. *Dennis Melancon, Inc. v. City of New Orleans*, 703 F.3d 262, 279 (5th Cir. 2012) (cleaned up) (emphasis in original). As the Supreme Court recently reaffirmed, monetary injury is irreparable when there is "no guarantee of eventual recovery." *Ala. Ass'n of Realtors v. HHS*, No. 21A23, 2021 WL 3783142, at *4 (U.S. Aug. 26, 2021) (per curiam). And here, absent an extension of the district court's stay, Plaintiffs' members have guaranteed irreparable injuries. Given the government's immunity from suit, none will be compensable by money damages should the Rule be invalidated or repealed. *See Texas v. EPA*, 829 F.3d 405, 433–34 (5th Cir. 2016) ("complying with a regulation later held invalid almost always produces the irreparable harm of nonrecoverable compliance costs").

As this Court has previously explained, expenditures needed for compliance constitute irreparable harm even where they occur in advance of a rule's compliance date. In *Texas v. EPA*, for example, the court found irreparable injury, and granted a stay pending review, where power companies were spending money in 2016 to comply with EPA installation deadlines of 2019 and 2021. *See* 829 F.3d at 416. The Court recognized that, despite the deadlines being many years away, the required emissions controls "take several years to install" and "the regulated companies will have to begin installation almost immediately." *Id*. at 433.

The district court here correctly recognized the irreparable harm caused by potentially unnecessary compliance costs, both when it entered the initial stay and in its decision to grant Plaintiffs the full benefit of the pre-stay, 286-day compliance period.

Preparation for compliance is a costly, months-long process. It involves a complete overhaul of Plaintiffs' members' internal compliance systems and external client communications. *See, e.g.*, A136, ¶¶ 6–7. These changes will necessitate extensive testing, new recordkeeping, re-training of employees, restructuring of outside vendor relationships, and similar burdens. A136–37, ¶¶ 5–8. Implementing these changes requires substantial resources and time: six to twelve months, "[a]ssuming the business impacts from COVID-19 normalize in 2021." A137, ¶ 9.[2]

Though the Rule's compliance deadline is still approximately eight months away, this evidence demonstrates that Plaintiffs will need to undertake expensive and disruptive business changes while this appeal is pending. Indeed, because the median decision time is approximately 320 days, *see* Fifth Circuit Practitioner's

[2] Unfortunately, business impacts have not normalized. And the cost and time required to implement necessary changes grew exponentially due to the pandemic. A137–38, ¶¶ 8–11. This only further counsels in favor of relief given that the pandemic was completely unanticipated at the Rule's promulgation and when the original stay took effect.

Guide 4 (Sept. 2021), absent a stay Plaintiffs' members will likely need to begin *complying* with the payment provisions (not just preparing to comply with them) before the appeal is resolved.

II. The Balance of Equities Heavily Favors a Stay.

Balancing the irreparable harm facing Plaintiffs' members against the public interest and the lack of harm to the government weighs heavily in favor of a stay. *See Nken v. Holder*, 556 U.S. 418, 435 (2009) (noting that harm to the opposing party and the public interest "merge when the Government is the opposing party"). This Court routinely recognizes that the equities favor temporary relief where judicial review can resolve serious questions before implementation of a government program irreversibly alters the status quo. *Texas v. United States*, 809 F.3d 134, 187 (5th Cir. 2015); *see also Ruiz*, 650 F.2d at 569.

Preserving the status quo costs the Bureau nothing. The Rule has never gone into effect, and the Bureau previously joined in delaying compliance. Leaving the stay in place pending appeal briefly maintains the status quo that has been in place for decades.

In contrast, requiring implementation of the payment provisions will impose unprecedented changes to the lending industry and fundamentally alter the public's access to affordable credit during a public-health crisis. *See infra* Part III.B.3; *see also Daniels Health Scis., L.L.C. v. Vascular Health Scis., L.L.C.*, 710 F.3d 579, 585

(5th Cir. 2013). Plaintiffs' members will have to budget for increased compliance costs. Accordingly, their services will be more costly, they will offer fewer services to fewer people, and they will have less ability to renegotiate payment terms for borrowers behind on payments. Focusing resources on compliance costs also takes limited resources away from more "immediate and urgent priorities associated with COVID-19, such as addressing consumer needs for convenient remote servicing options and increasing payment accommodation capabilities during these unprecedented times." A137, ¶ 8. At a minimum, the public would not be served by subjecting borrowers to contradictory ping-ponging loan terms if, for example, the payment provisions take effect before the appeal concludes, but this Court ultimately invalidates those provisions. In short, Plaintiffs' members' "normal procedures … should not be interrupted so significantly until an appeal has been decided." *Baylor Univ. Med. Ctr.*, 711 F.2d at 40.

III. THE MERITS JUSTIFY A STAY PENDING APPEAL.

A. Plaintiffs Have a Substantial Case on the Merits.

It is unnecessary for this Court to "express any opinion on the resolution" of the legal issues in order to conclude that a substantial case on the merits exists. *Baylor Univ. Med. Ctr.*, 711 F.2d at 40. Rather, "[t]he Fifth Circuit recognizes that a party presents a substantial case on the merits when there is a lack of precedent to clarify the issues at bar." *Cruson v. Jackson Nat'l Life Ins. Co.*, No. 16-cv-00912, 2018 WL 2937471, at *4 (E.D. Tex. June 12, 2018).

That is certainly the case here, where the en banc Court, in *All American* and *Collins*, is poised to address the questions of remedy and ratification following the invalidation of agency structures, including the Bureau's, on constitutional grounds. That review alone demonstrates that Plaintiffs have a "substantial case on the merits," at least on the remedial questions related to the Bureau's unlawful structure. *See* Fed. R. App. P. 35(a) (explaining that "en banc hearing or rehearing is not favored and ordinarily will not be ordered unless," *inter alia*, "the proceedings involves a question of exceptional importance"); 5th Cir. R. 35.1 (cautioning counsel that en banc review "is a serious call on limited judicial resources").

Regardless, because Plaintiffs are likely to succeed on the merits, *see infra* Part III.B, they certainly meet the "substantial case" standard.

B. In Any Event, Plaintiffs Are Likely to Succeed on the Merits.

Although Plaintiffs only need to demonstrate "a substantial case on the merits," *Bryant*, 773 F.3d at 57, they are *likely* to succeed on the merits for several reasons.

First, the payment provisions must be invalidated because an unconstitutionally structured Bureau issued them after President Trump was prevented from removing Director Cordray. Ratification cannot cure this constitutional defect because a valid legislative rule requires a valid rulemaking.

Second, even if ratification could sometimes cure rulemaking defects, the ratification here violates the CFPA and APA.

Third, ratification aside, the payment provisions themselves are arbitrary and capricious and inconsistent with several statutory limits on the Bureau's authority.

1. The payment provisions are constitutionally defective.

The Bureau lacked authority to promulgate the Rule because its director at the time was unconstitutionally insulated from removal, *see Seila Law*, 140 S. Ct. 2183, thus entitling Plaintiffs to prospective relief. To the extent *Collins* governs the remedial analysis, it confirms Plaintiffs' entitlement to a remedy because the removal restriction in fact prevented President Trump from removing the unconstitutionally insulated director. The Bureau's attempted "ratification" changes neither conclusion.

a. An agency whose very "composition violates the Constitution's separation of powers" simply "lacks authority to" act. *FEC v. NRA Pol. Victory Fund*, 6 F.3d 821, 822 (D.C. Cir. 1993). Where a party timely challenges agency action by an unconstitutionally structured agency, the default remedy to "cure the constitutional error" is to require the agency to conduct the tainted agency proceeding anew. *Lucia v. SEC*, 138 S. Ct. 2044, 2055 (2018).

At the time it promulgated the 2017 Rule, the Bureau was led by an unconstitutionally insulated director. Because the unlawfully composed Bureau lacked valid rulemaking power, the Rule must be set aside.

b. Below, the Bureau argued, and the district court thought, that *Collins* limited this rationale to Appointments Clause violations. That is incorrect. *Collins* concerned a request for far-reaching "retrospective relief," and noted only (under those circumstances) that an unconstitutional removal provision does not automatically require that *all* agency actions "be undone." 141 S. Ct. at 1787–88 & n.24. *Collins* did not dictate limits on *prospective relief* (like the injunction sought here) that would follow from an unlawful removal provision.

This prospective/retrospective distinction is no mere formalism. The *Collins* plaintiffs wielded the constitutional structural flaw as a sword to unwind financial transactions involving hundreds of millions from the Treasury; Plaintiffs here invoke the Constitution as a shield against the Bureau's unlawful exercise of authority. *See NRA Pol. Victory Fund*, 6 F.3d at 828 (granting relief from agency action to parties that "raise [a] constitutional challenge as a defense"). The factbound need to avoid far-reaching financial disruption in *Collins* is inapplicable to the prospective relief sought here. *See* 141 S. Ct. at 1789 (focusing on "compensable" harm); *id.* at 1793 n.5 (Thomas, J., concurring) (relying on *Seila Law* to explain that the "combination" of an unlawful removal provision and statutory enforcement provisions "can produce a separation-of-powers violation that renders Government action unlawful"); *id.* at 1799 (Gorsuch, J., concurring in part) ("nothing [in *Collins*] undoes [the Court's] prior guidance authorizing more meaningful relief in other situations" outside of *Collins*' "unique context").

In any event, the *Collins* framework also would require setting aside the Rule. *Collins* held that plaintiffs are "entitle[d]" even to retrospective relief if a removal provision "inflict[ed] compensable harm" by, for example, actually "prevent[ing]" the President from removing a director he wished to replace. *Id.* at 1788–89 (majority op.). The district court skipped over this step of the required analysis.

No one seriously contends that, absent the removal restriction, Director Cordray would have been the lone Obama holdover to continue to serve. To the contrary, as detailed above, *see supra* pp. 4–6, the evidence shows that before Director Cordray promulgated the Rule, "President [Trump] … would [have] remove[d] [him] if the [unconstitutional] statute did not stand in the way." 141 S. Ct. at 1789. The Bureau did not contest this point below, thereby implicitly conceding it. Plaintiffs therefore satisfy any *Collins* standard for "entitlement to … relief."

Below, the Bureau cited the "ratification" of the payment provisions in 2020 as evidence that a Trump-appointed director would have promulgated the payment provisions. That is as irrelevant as it is unknowable. *Collins* affords relief once a plaintiff establishes (as here) that the unconstitutional removal provision stood in the way of presidential removal. Neither *Collins* nor any other precedent calls for further analysis of a "counterfactual world" to determine whether a different director would have promulgated a different rule containing the challenged provisions. *Seila Law*, 140 S. Ct. at 2196; *see also NRA Pol. Victory Fund*, 6 F.3d at 824–25 (challengers "need not show that the [agency] would have acted differently if it were constitutionally composed"). The Court need only ask whether the President would have removed the Director before promulgation. If so, the removal provision resulted in harm: an illegal rule promulgated by an unconstitutional exercise of executive power. Thus, the only remedy here is a completely new rulemaking.

2. The Bureau's attempted "ratification" cannot save the Rule.

A notice of "ratification" cannot supplant valid notice-and-comment rulemaking. Moreover, even if ratifications of invalid rules were theoretically possible, *this* ratification was arbitrary and capricious.

a. The Bureau cannot "ratify" provisions it lacked authority to initially adopt. "[I]t is essential that the party ratifying should be able … to do the act ratified at the time the act was done," and not only "at the time the ratification was made." *NRA Pol. Victory Fund*, 513 U.S. 88, 98 (1994).

A legislative rule like the 2017 Rule must undergo valid notice-and-comment procedures supervised by a lawfully constituted agency. *See* 5 U.S.C. § 553.

Because the unlawfully constituted Bureau lacked the power to conduct the 2017 rulemaking, it cannot later "ratify" that process or its result. *See* Restatement (Third) of Agency § 4.04 cmt. c (2006) ("[A] person not in existence at the time of an act or transaction may not subsequently ratify it."). Congress did not create the elaborate notice-and-comment procedure as an empty song and dance, and a legislative rule requires more than the Director's signature. It requires a panoply of procedures, including a regulatory flexibility analysis that gives voice to small businesses, *see* 5 U.S.C. §§ 603–04, 609, and extensive engagement with comments (here over a million comments). A valid rulemaking ensures "fairness and mature consideration of rules having a substantial impact on those regulated." *United States v. Johnson*, 632 F.3d 912, 931 (5th Cir. 2011). Thus, a new process, led by a lawfully reconstituted Bureau, is indispensable.

That follows directly from the Supreme Court's decision in *Lucia v. SEC*, which vacated an adjudication conducted by an improperly appointed officer. Once the *Lucia* Court found that the enforcement proceeding suffered from constitutional structural defects, it did not even entertain the possibility that a duly appointed officer could simply ratify the prior decision. Instead, the Court held that "the 'appropriate' remedy for" an unconstitutionally structured agency proceeding is "a *new 'hearing* before a properly appointed' official," 138 S. Ct. at 2055 (emphasis added). And *Lucia* did not break new remedial ground; it followed the foundational principle that "[w]here no office legally exists, the pretended officer is merely a usurper, to whose acts no validity can be attached." *Norton v. Shelby Cnty.*, 118 U.S. 425, 449 (1886); *Ringling v. City of Hempstead*, 193 F. 596, 601 (5th Cir. 1911) ("An unconstitutional law is null and void, and proceedings had under it afford no basis for subsequent ratification or retroactive validation.").

b. Even if ratifications of rules were theoretically possible, the ratification here violates the CFPA and is arbitrary and capricious. The payment provisions rested on at least two premises the Bureau rejected in the course of revoking the underwriting provisions.

First, as part of its statutorily required cost-benefits analysis, 12 U.S.C. § 5512(b)(2), the Bureau in the 2017 Rule expressly concluded that the operation of the underwriting provisions would "lessen the impacts of" the payment provisions. *See* 82 Fed. Reg. at 54,846 (A187). But when it ratified the payment provisions while revoking the underwriting provisions, the Bureau failed to undertake a new cost-benefit analysis assessing the payment provisions' costs without the underwriting provisions' ameliorative effect. This violates the CFPA and renders the ratification arbitrary and capricious. *See Nat'l Ass'n of Home Builders v. EPA*, 682 F.3d 1032, 1040 (D.C. Cir. 2012) (defects or "serious flaw[s]" in an agency's cost-benefit analysis "can render the [resulting] rule unreasonable"); *Bus. Roundtable v. SEC*, 647 F.3d 1144, 1153–54 (D.C. Cir. 2011) (similar).

Second, ratification of the payment provisions rested on interpretations of UDAAP authority that the Bureau rejected in revoking the underwriting provisions. The 2017 Rule found the practices at issue "abusive" partly on the ground that the practices took "unreasonable advantage" of consumers' "lack of understanding" of associated "risks." 82 Fed. Reg. at 54,744 (A172); 12 U.S.C. § 5531(d)(2). And it found the practices "unfair" on the ground that they were likely to cause injuries "not reasonably avoidable by" consumers (which in turn also depended on whether consumers "lack[ed]" "understanding"). 82 Fed. Reg. at 54,740–41 (A168–69); 12 U.S.C. § 5531(c)(1)(A)–(B). The problem is that on both of these related concepts—lack of understanding and reasonable avoidability—the Bureau relied on one set of interpretations in its 2017 Rule, and a diametrically opposed set in revoking the underwriting provisions. *See, e.g.*, 85 Fed. Reg. at 44390–91, 44394–95, 44,397, 44,422 (A193–94, A197–98, A200, A203) (2020 revocation rejecting 2017 interpretation of necessary understanding and reasonable avoidability). This likewise dooms the Bureau's attempted ratification.

3. The payment provisions are themselves unlawful and arbitrary and capricious.

Plaintiffs demonstrated below that, when originally enacted, the payment provisions also themselves violated the CFPA and the APA. *See* 5 U.S.C. § 706(2)(C). Like the ratification, the 2017 Rule rested on an erroneous interpretation of the Bureau's UDAAP authority and was arbitrary and capricious (*e.g.*, by treating lenders as the "cause" of fees charged exclusively by banks). But at the very least, the Rule's failure to differentiate between financial products requires a tailored injunction.

In restricting payment-transfer attempts, for example, the Bureau ignored crucial differences among the varieties of covered loans. According to the Bureau's own 2017 rationale, "the harms underpinning the unfair and abusive practice" "would not occur," absent fees or closing of accounts, "and thus the Bureau conclude[d] that the rule does not need to cover those instances." 82 Fed. Reg. at 54,746 (A174). But the payment provisions treat debit/prepaid-card payments the same as check/ACH payments when debit/prepaid-card payments *almost never* result in nonsufficient-funds fees or overdraft fees. *See id.* at 54,747 (A175). As the Bureau itself admitted, debit-card transactions will not cause such fees unless consumers have "opted in" to these fees with the banks; ACH transactions, in contrast, are not subject to an opt-in requirement. *Id.* at 54,723 n.942, 54,735 (A160, A163). An "injury" that consumers must opt into is surely "reasonably avoidable," so it falls outside the scope of UDAAP and beyond any possible justification for the payment provisions. The Bureau acted arbitrarily by riding roughshod over this difference. *See id.* at 54,741 (A169).

Likewise, the Rule limited payment-transfer attempts across multiple installments of a multi-payment loan, even though those installments are typically spaced two weeks or a month apart. Here, the Bureau failed to account for an "important aspect of the problem"—longer periods between installments leave consumers more opportunity to avoid nonsufficient-funds fees by replenishing funds or renegotiating the loans' terms. *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). The Bureau's two-attempt limit should at least differentiate between each installment. And below, the Bureau only expressed the unsubstantiated belief "that obtaining a new authorization would be appropriate" even after two weeks or a month had passed despite the fact that the Bureau's own cited study "did not distinguish between re-presentments of the same payment and new presentments for new installments." 82 Fed. Reg. at 54,753 (A181). Rank speculation—unsupported by any evidence and contradicted by the record—is quintessential capriciousness.

These arbitrary and capricious inclusions at least require vacating the Rule's application to debit/prepaid-card payments and multi-payment installment loans (and extending the compliance stay as to these applications).

CONCLUSION

Plaintiffs respectfully ask this Court to stay the implementation period and compliance date of the payment provisions until 286 days after their appeal is fully and finally resolved. Plaintiffs further respectfully request determination on this Motion on or before October 25, 2021.

October 1, 2021

Respectfully submitted,

/s/ Christian G. Vergonis

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CERTIFICATE OF SERVICE

I certify that on October 1, 2021, I served a copy of the foregoing on all counsel of record by CM/ECF.

Dated: October 1, 2021

/s/ Christian G. Vergonis
Christian G. Vergonis
Counsel for Plaintiffs-Appellants

CERTIFICATE OF COMPLIANCE

This motion complies with the type-volume, typeface, and type-style requirements of Federal Rule of Appellate Procedure 27(d)(2)(A). Excluding the parts of the document exempted by Federal Rule of Appellate Procedure 32(f), the motion contains 5,165 words and was prepared using Microsoft Word and produced in Times New Roman 14-point font.

Dated: October 1, 2021

/s/ Christian G. Vergonis
Christian G. Vergonis
Counsel for Plaintiffs-Appellants

No. 21-50826

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

COMMUNITY FINANCIAL SERVICES ASSOCIATION OF AMERICA, LIMITED;
CONSUMER SERVICE ALLIANCE OF TEXAS,

Plaintiffs-Appellants,

v.

CONSUMER FINANCIAL PROTECTION BUREAU; DAVID UEJIO, IN HIS OFFICIAL CAPACITY AS ACTING DIRECTOR, CONSUMER FINANCIAL PROTECTION BUREAU,

Defendants-Appellees.

On Appeal from the United States District Court
for the Western District of Texas
No. 1:18-cv-00295 (Yeakel, J.)

APPENDIX TO APPELLANTS' OPPOSED MOTION FOR A STAY PENDING APPEAL

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TABLE OF CONTENTS

TABLE OF CONTENTS
(continued)

TAB 1

Order on Cross-Motions for Summary Judgment
ECF No. 103 (Aug. 31, 2021)

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

COMMUNITY FINANCIAL SERVICES ASSOCIATION OF AMERICA, LTD., CONSUMER SERVICE ALLIANCE OF TEXAS,
PLAINTIFFS,

V.

CONSUMER FINANCIAL PROTECTION BUREAU, KATHLEEN KRANINGER, IN HER OFFICIAL CAPACITY AS DIRECTOR, CONSUMER FINANCIAL BUREAU;
DEFENDANTS.

§ § § § § § § § § § § § § § §

CAUSE NO. 1:18-CV-00295-LY

<u>ORDER ON CROSS-MOTIONS FOR SUMMARY JUDGMENT</u>

Before the court is the above-styled and numbered cause that arises in response to the "Payday, Vehicle Title, and Certain High-Cost Installment Loans" Rule ("the 2017 Rule"), issued by the Consumer Financial Protection Bureau ("the Bureau") on November 17, 2017. Payday, Vehicle Title, and Certain High-Cost Installment Loans, 82 Fed. Reg. 54,472-01 (Nov. 17, 2017). The 2017 Rule limited certain practices by covered lenders deemed "unfair, deceptive, or abusive." *Id.* However, in 2020, the Supreme Court held that at the time of passing the 2017 Rule, the Bureau was unconstitutionally structured. *Seila Law LLC v. Consumer Fin. Prot. Bureau*, 140 S.Ct. 2183, 2192 (2020). The Court did so because Congress improperly shielded the Director of the Bureau from at-will removal by the president, rendering the agency "accountable to no one," and violating the Separation of Powers Doctrine. *Id.* at 2203. Two weeks later, the Bureau—then led by a Director removable by the president—ratified a portion of the 2017 Rule known as the "Payment Provisions." Payday, Vehicle Title, and Certain High-Cost Installment Loans; Ratification of Payment Provisions, 85 Fed. Reg. 41,905-02 (July 13, 2020) (the "Ratification").

Plaintiffs, two trade associations ("the Associations"), bring this action on behalf of certain payday lenders and credit-access businesses affected by the 2017 Rule and the Ratification. The Associations challenge the validity of the Ratification and ask the court to set aside the Payment Provisions Section of the 2017 Rule.[1] Before the court now are the parties' cross-motions for summary judgment, responses, replies, exhibits, and supplemental authorities.[2] Having considered all of the parties' filings and the applicable law, the court renders the following order.

I. LEGAL STANDARD

"Summary judgment is required when 'the movant shows that there is no dispute as to any material fact and the movant is entitled to judgment as a matter of law.'" *Trent v. Wade*, 776 F.3d 368, 376 (5th Cir. 2015) (quoting Fed. R. Civ. P. 56(a)). "A genuine dispute of material fact exists when the 'evidence is such that a reasonable jury could return a verdict for the nonmoving party.'" *Nola Spice Designs, LLC v. Haydel Enters., Inc.*, 783 F.3d 527, 536 (5th Cir. 2015) (quoting

[1] The Associations' Original Complaint was filed April 9, 2018 (Dkt. No. 1). On June 12, 2018, the Court entered an order staying litigation in this case (Dkt. No. 29). On November 6, 2018, the Court entered an order staying the 2017 Rule's August 2019 compliance date (Dkt. No. 53). On August 20, 2020, the Court lifted the stay on litigation but did not lift the stay on the compliance date (Dkt. No. 74). The Associations filed an amended complaint on August 28, 2020 (Dkt No. 76). The Bureau filed an Answer to the Amended Complaint on September 18, 2020 (Dkt. No. 79).

[2] The Associations' Motion for Summary Judgment was filed September 25, 2020 (Dkt. No. 80); The Bureau's Response and Cross-Motion for Summary Judgment was filed October 23, 2020 (Dkt. No. 82); The Associations' Response to Defendants' Cross-Motion for Summary Judgment was filed November 20, 2020 (Dkt. No. 84); The Bureau's Reply was filed December 18, 2020 (Dkt. No. 85); The Bureau's First Notice of Supplemental Authority was filed December 30, 2020 (Dkt. No. 86); The Associations' Response to the First Notice of Supplemental Authority was filed December 31, 2020 (Dkt. No. 87); The Bureau's Second Notice of Supplemental Authority was filed May 20, 2021 (Dkt. No. 88); The Associations' Response to the Second Notice of Supplemental Authority was filed May 21, 2021 (Dkt. No. 89); The Bureau's Third Notice of Supplemental Authority was filed June 28, 2021 (Dkt. No. 90); The Associations' Response to the Third Notice of Supplemental Authority was filed June 30, 2021 (Dkt. No. 91).

Anderson v. Liberty Lobby, 477 U.S. 242, 248 (1986)). "The moving party 'bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of [the record] which it believes demonstrate the absence of a genuine issue of material fact.'" *Id.* (quoting *EEOC v. LHC Grp., Inc.*, 773 F.3d 688, 694 (5th Cir. 2014)). A fact is material if "its resolution could affect the outcome of the action." *Aly v. City of Lake Jackson*, 605 Fed. App'x 260, 262 (5th Cir. 2015). "If the moving party fails to meet [its] burden, the motion [for summary judgment] must be denied, regardless of the nonmovant's response." *Pioneer Expl., LLC v. Steadfast Ins. Co.*, 767 F.3d 503 (5th Cir. 2014).

"When the moving party has met its Rule 56(c) burden, the nonmoving party cannot survive a summary judgment motion by resting on the mere allegations of its pleadings." *Duffie v. United States*, 600 F.3d 362, 371 (5th Cir. 2010). The nonmovant must identify specific evidence in the record and articulate how that evidence supports that party's claim. *Willis v. Cleco Corp.*, 749 F.3d 314, 317 (5th Cir. 2014). "This burden will not be satisfied by 'some metaphysical doubt as to the material facts, by conclusory allegations, by unsubstantiated assertions, or by only a scintilla of evidence.'" *Boudreaux v. Swift Transp. Co., Inc.*, 402 F.3d 536, 540 (5th Cir. 2005). In deciding a summary-judgment motion, the court draws all reasonable inferences in the light most favorable to the nonmoving party. *Darden v. City of Fort Worth*, 866 F.3d 698, 702 (5th Cir. 2017).

On cross motions for summary judgment, the court reviews each party's motion independently, viewing the evidence and inferences in the light most favorable to the nonmoving party, determining for each side whether judgment may be rendered in accordance with the Rule 56 standard. *Amerisure Ins. Co. v. Navigators Ins. Co.*, 611 F.3d 299, 304 (5th Cir. 2010) (internal citation and quotation omitted); *Shaw Constr. v. ICF Kaiser Eng'rs., Inc.*, 395 F.3d 533 n.8, 9 (5th Cir. 2004).

In the context of a challenge to an agency action under the Administrative Procedure Act ("APA"), "[s]ummary judgment is the proper mechanism for deciding, as a matter of law, whether an agency's action is supported by the administrative record and consistent with the APA standard of review." *American Stewards of Liberty v. United States Dept. of Interior*, 370 F. Supp. 3d 711, 723 (W.D. Tex. 2019) (quoting *Blue Ocean Inst. v. Gutierrez*, 585 F. Supp. 2d 36, 41 (D.D.C. 2008)). When a party seeks review of an agency action under the APA, the district judge sits as an appellate tribunal. *See e.g., Redeemed Christian Church of God v. United States Citizenship & Immigr. Servs.*, 331 Fed. Supp. 3d 684, 694 (S.D. Tex. 2018). The entire case on review is a question of law. *Id.* Under the APA, it is the role of the agency to resolve factual issues to arrive at a decision that is supported by the administrative record, whereas the function of the district court is to determine whether as a matter of law the evidence in the administrative record permitted the agency to make the decision it did. *Id.* Summary judgment serves as the mechanism for deciding, as a matter of law, whether the agency action is supported by the administrative record and otherwise consistent with the APA standard of review. *Id.*

II. BACKGROUND

The Bureau is charged with regulating individuals and entities that offer financial products or services. 12 U.S.C. § 5491. Congress authorized the Bureau to "prescribe rules . . . identifying as unlawful, unfair, deceptive, or abusive acts or practices in connection with any transaction with a consumer for a consumer financial product or service, or the offering of a consumer financial product or service." *Id.* at § 5531(b).

Pursuant to its rulemaking authority, the Bureau passed the 2017 Rule, which consisted of two parts: the "Underwriting Provisions" and the "Payment Provisions." *See* 12 C.F.R. § 1041.4.

The Underwriting Provisions, *inter alia*, restricted lenders from making covered loans "without reasonably determining that the consumers will have the ability to repay the loans." 2017 Rule Official Interpretations, 82 Fed. Reg. at 54,826. Those provisions have since been revoked.

At issue here are the Payment Provisions. These provisions restrict lenders of certain loans from attempting to withdraw payments from a consumer's account after a second consecutive failed attempt to do so, without obtaining a new authorization for further withdrawals. 12 C.F.R. §§ 1041.7–.8. The Payment Provisions also set limitations on such a new authorization, including requiring a new consumer-rights notice, and restricting when the lender may obtain the new authorization electronically or by telephone. *Id.* at §§ 1041.8(c)(3), 1041.9(c).

In 2020, the Supreme Court held in *Seila Law* that the Bureau's "leadership by a single [Director] removable only for inefficiency, neglect, or malfeasance violates the separation of powers." 140 S.Ct. 2183, 2197. The Court was then left with the question of whether "the Director's removal protection was severable from the other provisions of the . . . Act that establish[es] the [Bureau]." *Id.* at 2207. "If so," the Court reasoned, "then the [Bureau] may continue to exist and operate notwithstanding Congress's unconstitutional attempt to insulate the agency's Director from removal." *Id.* at 2207–08. The Court found the provision was severable and remanded the case to the Ninth Circuit Court of Appeals for consideration of whether the Bureau's actions in that case were validly ratified. *Id.* at 2211.

Shortly after *Seila Law*, the Bureau's Director, now removable at will by the President, ratified the Payment Provisions of the 2017 Rule. Ratification, 85 Fed. Reg. at 41905-02.

III. ANALYSIS

a. The Associations' motion for summary judgment

The Associations offer six arguments as to why the Payment Provisions should be set aside as a matter of law.

1. Payment provisions void *ab initio* due to Bureau's unconstitutional structure

The Associations contend that the 2017 Rule is void *ab initio* because the Bureau that promulgated it was unconstitutionally structured. The Associations further contend that the "appropriate remedy for this constitutional defect in the 2017 Rule is to set aside that rule and require the Bureau . . . to conduct a new notice-and-comment rulemaking."

Since the Associations' briefing was submitted, the Supreme Court clarified that the contention is an incorrect application of precedent:

> What we said about standing in *Seila Law* should not be misunderstood as a holding on a party's entitlement to relief based on an unconstitutional removal restriction. We held that a plaintiff that challenges a statutory restriction on the President's power to remove an executive officer can establish standing by showing that it was harmed by an action that was taken by such an officer and that the plaintiff alleges was void. But that holding on standing does not mean that actions taken by such an officer are void *ab initio* and must be undone.

Collins v. Yellen, 141 S.Ct. 1761, 1787 n.24 (2021) (internal citations omitted).

The court concludes the 2017 Rule is not void *ab initio*.

2. Bureau's ratification of Payment Provisions was ineffective, unconstitutional, procedurally improper, and arbitrary and capricious

The Associations also contend that the Bureau's ratification of the Payment Provisions is ineffective and improper because: ratification cannot cure the type of constitutional problem present here; a new notice-and-comment process must be undertaken; ratification requires that the agency had the power to do the act ratified at the time it was done; and the ratification was arbitrary and capricious. The argument that ratification cannot cure the type of constitutional problem present here is not persuasive, because the Supreme Court in *Seila Law* remanded to the lower court for consideration of whether ratification was appropriate—a futile step if ratification, like the Associations contend, is never appropriate for this sort of constitutional harm.

Next, the Associations point to the APA's requirement that legislative rules like the Payment Provisions follow notice-and-comment procedures. *See* 5 U.S.C. § 553(b). When those procedures were undertaken for the 2017 Rule, the agency was unconstitutionally structured. The Associations rely on the Supreme Court's holding in *Lucia v. Securities and Exchange Commission* for the premise that allowing the Bureau to lean on ratification would deny the Associations a meaningful remedy to the constitutional wrong and would fail to "create incentives" for plaintiffs to challenge actions taken by unconstitutionally structured agencies. *See* 138 S.Ct. 2044, 2055 (2018). But the Associations already received a meaningful remedy for the harm they suffered: a validly appointed Director reviewed the record pertaining to the 2017 Rule and chose to ratify a portion thereof. *See Intercollegiate Broad. Sys., Inc. v. Copyright Royalty Bd.*, 796 F.3d 111, 120 (D.C. Cir. 2015) ("new hearing" does not need to be "completely new proceeding" but could instead entail "de novo review"). That the remedy the Associations received stops short of their desire is immaterial—the solution is tailored to the harm.

The Associations' next argument is that this specific ratification is improper because ratification requires that the agency had the authority to do the act ratified at the time it was done. The Associations contend: "[R]atification requires two entities—a principal who had authority to act at the time in question, and an agent who did not." Here, though, the Associations contend the Bureau is the only entity involved and it lacked authority from the start. The Bureau responds that "The Bureau is the principal, and the Director is the agent who acts on the Bureau's behalf."

Other courts have considered and rejected this argument. *See Consumer Fin. Prot. Bureau v. Gordon*, 819 F.3d 1179, 1191 (9th Cir. 2016); *Federal Election Comm'n v. Legi-Tech, Inc.*, 75 F.3d 704, 707–09 (D.C. Cir. 1996). The *Gordon* Court explained:

> Both [Defendant and amicus] recognize that for a ratification to be effective, it is essential that the party ratifying should be able not merely to do the act ratified at the time the act was done, but also at the time the ratification was made. This rule of law is derived from the Second Restatement of Agency. Under the Second Restatement, if the principal (here, [the Bureau]) had authority to bring the action in question, then the subsequent August 2013 ratification of the decision to bring the case against [Defendant] is sufficient. The Third Restatement, which is less "stringent" than the Second, advises that a ratification is valid even if the principal did not have capacity to act at the time, so long as the person ratifying has the capacity to act at the time of ratification. . . . Because the [Bureau] had the authority to bring the action at the time [Defendant] was charged, [the Bureau Director's] August 2013 ratification, done after he was properly appointed as Director, resolves any Appointments Clause deficiencies.

813 F.3d at 1191–92 (internal citations and quotations omitted); *see also Intercollegiate Broad. Sys.*, 796 F.3d at 121 ("[O]nce a new Board has been properly appointed (or reconstituted), the Appointments Clause does not bar it from reaching the same conclusion as its predecessor."); *Legi-Tech*, 75 F.3d at 707, 709 (newly constituted Federal Election Commission need not "start at the beginning" and "redo the statutorily required procedures in their entirety").

Based on this analysis, it appears that the Ninth Circuit would uphold the ratification in this case under either the Second or Third Restatement of Agency. *Gordon* identifies the Bureau as the principal—and presumably the Director as its agent. *Gordon*, 813 F.3d at 1191. But *Gordon* also recognized that ratification is valid so long as the person ratifying has capacity to act at the time of ratification. *Id.* at 1192. The court finds this reasoning persuasive.

Finally, the Associations challenge the Ratification as arbitrary and capricious. "The scope of review under the 'arbitrary and capricious' standard is narrow and a court is not to substitute its own judgment for that of the agency." *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins.*

Co., 463 U.S. 29, 43 (1983). Nevertheless, the 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." *Id.* (citing *Burlington Truck Lines v. United States*, 371 U.S. 156, 168 (1962)). In reviewing that explanation, the court should "consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment." *Id.* (citing *Bowman Transp. Inc. v. Arkansas-Best Freight Sys.*, 419 U.S. 281, 285 (1974)).

The Associations posit that the Bureau engaged in an "unexplained about-face" on the issue of the time needed to implement the Payment Provisions. In 2017, the Bureau gave companies like those the Associations represent 21 months to come into compliance with the provisions of the 2017 Rule. The Bureau reasoned that "the interest of enacting protections for consumers as soon as possible" had to be balanced against "giving [lenders] enough time for an orderly implementation period" and concluded 21 months was the time required for lenders to adjust practices to come into compliance. 2017 Rule Official Interpretations, 82 Fed. Reg. at 54, 814. The Associations now urge that if 21 months was the time *required* for lenders to come into compliance, the Bureau's offer of a 30-day compliance period is, on its face, arbitrary and capricious. *See National Res. Def. Council, Inc. v. EPA*, 683 F.2d 752, 762 (3rd Cir. 1982) (effective date is "an essential part of any rule: without an effective date, the agency statement could have no future effect and could not serve to implement, interpret, or prescribe law or policy").

In promulgating the 2017 Rule, the Bureau reasoned that 21 months was the necessary time for lenders to adjust their practices according to the Rule. Lenders have had considerably *more* than 21 months. The Bureau's offer of a short additional compliance period after the lapse of the original 21-month compliance period cannot accurately be described as an "unexplained about-face."

In arguing that the Ratification is arbitrary and capricious, the Associations next point to the requirement that the Bureau consider "the potential benefits and costs to consumers and [lenders]," which the Associations contend the ratification fails to do properly. *See* Consumer Fin. Prot. Act ("CFPA") §§ 1022(b)(2), 12 U.S.C. § 5512(b)(2). The cost-benefit analysis conducted by the Bureau considered the Underwriting Provisions of the 2017 Rule in conjunction with the Payment Provisions—in other words, the analysis considered aspects of the 2017 Rule that have since been revoked *alongside* aspects that were ratified. The Associations contend that the Bureau's failure to conduct a new cost-benefit analysis inherently renders the ratification arbitrary and capricious. But the Bureau responds that the consideration of the crossover impact of the Underwriting Provisions on the Payment Provisions was limited to a couple of sentences on which the 2017 Rule's cost-and-benefit analysis did not rely.[3] The court agrees with the Bureau that this discussion is far from the "essential premise" of the cost-benefit analysis the Associations contend it constitutes.

3. Payment Provisions exceed Bureau's statutory authority and are arbitrary and capricious

The Associations' third argument is that the Payment Provisions violated the CFPA and the APA when enacted by declaring a practice unfair and abusive in a manner that exceeded the Bureau's authority and was arbitrary and capricious.

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3 The language in question is: "[T]he Bureau expects that unsuccessful payment withdrawal attempts will be less frequent under the rule. This is because . . . the [Underwriting] provisions . . . will reduce the frequency with which borrowers receive loans that they do not have the ability to repay. This should in turn lessen the impacts of instances where a lender is required to notify consumers that the lender is no longer permitted to attempt to withdraw payments from a borrower's account." 2017 Rule Official Interpretations, 82 Fed. Reg. at 54,846.

"Unfair." First, the Associations challenge the Bureau's finding that a third withdrawal attempt after two failed withdrawals is unfair. To declare a practice "unfair," the Bureau must find that the practice "has a reasonable basis to conclude that [1] the act or practice causes or is likely to cause substantial injury to consumers [2] which is not reasonably avoidable by consumers; and [3] such substantial injury is not outweighed by countervailing benefits to consumers or to competition." 12 U.S.C. § 5531(c). The Bureau found that all three of these elements were met by new withdrawal attempts from consumer's bank accounts after two attempts have failed unless the consumer gives renewed approval. 2017 Rule Official Interpretations, 82 Fed. Reg. at 54720.

The Associations first challenge is that, in determining the withdrawal attempts were unfair, the Bureau did not carefully weigh the costs and benefits to consumers and to competition. The Associations then suggest that the benefits of payday and other covered loans to consumers are substantial and are discounted only because of the Bureau's paternalism. But this argument fails for two reasons: first, the court is not seeking in this review to determine if the court *agrees* with the Bureau or would have made the same decision, so reweighing the costs and benefits is inappropriate. Second, the practice in question is not offering loans, but making successive withdrawal attempts, and the Associations have presented no evidence why those attempts help consumers.

The Associations also challenge the Bureau's finding that consumers can reasonably avoid the injury in question. For instance, the Associations allege consumers could (a) refuse to authorize automatic withdrawals; (b) put sufficient funds in their bank accounts; (c) renew loans or negotiate repayment options; or (d) avoid taking out a loan in the first place. Again, these arguments are unpersuasive. The Bureau, in drafting the 2017 Rule, considered whether consumers could take out loans without authorizing automatic withdrawals but found that such loans are generally unavailable. 2017 Rule Official Interpretations, 82 Fed. Reg. at 54737. The Bureau also considered whether consumers could reasonably avoid successive withdrawal attempts by contacting the lender but found that withdrawals often happen multiple times in a day—too fast for such a solution. *Id.* Similarly, the argument that overdraft fees are "reasonably avoidable" because consumers could simply put sufficient funds in their accounts or avoid taking out loans at all is unpersuasive. By that logic, no practice by a lender could *ever* be "unfair," because the consumer could have simply paid the loan back on time or avoided it altogether.

The Associations' final challenge against the Bureau's conclusion that the successive withdrawals are unfair is that the Bureau charges lenders with being the cause of the injury even though the customers' banks cause the failed-payment fees. But, as the Bureau contends, the fact that "a company's conduct was not *the most* proximate cause of an injury generally does not immunize liability from foreseeable harms." *See FTC v. Wyndham Worldwide Corp.*, 799 F.3d 236, 246 (3d Cir. 2015); *FTC v. Neovi, Inc.*, 604 F.3d 1150, 1155 (9th Cir. 2010) (in context of unfairness, "the contribution[s] of independent causal agents . . . do not magically erase the role" of others in causing harm).

"Abusive." The Associations challenge the Bureau's finding that the successive withdrawals are "abusive." The CFPA deems a practice abusive after a finding that it:

> takes unreasonable advantage of (a) a lack of understanding on the part of the consumer of the material risks, costs, or conditions of the product or service; [or] (b) the inability of the consumer to protect the interests of the consumer in selecting or using a consumer financial product or service.

12 U.S.C. § 5531(d)(2)(A)–(B).

The Bureau found, when promulgating the 2017 Rule, that successive withdrawal attempts are abusive because they take advantage of consumers' lack of understanding of the risk that a lender would attempt to charge the consumer's account again and again if withdrawal attempts failed. 2017 Rule Official Interpretations, 82 Fed. Reg. at 54,741.

The Associations complain that the Bureau has since rejected the interpretations of "lack of understanding" that led it to designate the withdrawal attempts in question as abusive. More specifically, the Associations claim it is the Bureau's belief that a consumer having a general understanding of the risk of the fees associated with failed withdrawal attempts is enough to preclude a finding that a practice takes advantage of a consumer's lack of understanding. *See* 2017 Rule Official Interpretations, 82 Fed. Reg. at 54,740. The Associations contend that because the Bureau has rejected the approach it used to find the withdrawal attempts abusive, that finding is arbitrary and capricious.

The Associations' arguments fail once again. The Bureau responds, and the court agrees, that no substantive consideration about this process has changed. Regarding the Associations' lack-of-understanding argument, the only relevant change to the Bureau's standard concerns the now-revoked Underwriting Provisions. *See* 2017 Rule Official Interpretations, 82 Fed. Reg. at 54597–98.

Failure to differentiate financial products. The Associations contend that the Bureau failed to establish a "rational connection between the facts found and the choice made" when crafting the 2017 Rule because the Bureau failed to heed important differences in the varieties of financial products covered. *See Motor Vehicle Mfrs. Ass'n*, 463 U.S. at 43. For instance, the Associations contend the Bureau failed to consider the difference between withdrawal attempts from debit or prepaid cards and those from automated clearing houses and checking accounts.

But the Bureau considered these differences. The 2017 Rule found that the harm it sought to prevent would only be prevented if the lenders "do not charge NSF, overdraft, return payment fees, or similar fees, and do not close accounts because of failed payment attempts." 2017 Rule Official Interpretations, 82 Fed. Reg. at 54,746. Finding that "all payment methods" could expose consumers to some of these fees, the 2017 Rule declined to exempt any payment types from the Payment Provisions. *Id.* That is sufficient to establish the "rational connection between the facts found and the choice made" necessary to avoid the determination the Rule was arbitrary and capricious. *See Motor Vehicle Mfrs. Ass'n*, 463 U.S. at 43.

Final "Arbitrary and Capricious" Arguments. Lastly, the Associations contend the 2017 Rule is arbitrary and capricious because the Bureau unfairly targeted high-interest loans in violation of Congress's prohibition on establishing a usury limit and that the 2017 Rule is primarily based on public policy considerations. These arguments fail as well. Specifying which loans qualify for restrictions does not establish a limit on annual percentage rate, and the 2017 Rule is supported by reasoning beyond public policy, much of which has been discussed herein.

4. Payment Provisions rest on defective cost-benefit analysis

The Associations' fourth argument is that the Payment Provisions rest on a flawed cost-benefit analysis. The CFPA requires the Bureau to consider "the potential benefits and costs to consumers and covered persons, including the potential reduction of access by consumers to consumer financial products." 12 U.S.C. § 5512(b)(2). The Associations contend the 2017 Rule's cost-benefit analysis has two "serious flaw[s]" that "render the rule unreasonable." *See Nat'l Ass'n of Home Builders v. EPA*, 682 F.3d 1032, 1040 (D.C. Cir. 2012). The Associations point to two factors they believe the Bureau did not consider in its cost-benefit analysis: (1) the increased likelihood a loan would enter into collections sooner than it otherwise would have; and (2) the additional accrued interest customers will incur as a result of the notice requirements in the Payment Provisions.

The Bureau responds that it is only required to consider "important aspect[s] of the problem" before it. *Motor Vehicle Mfrs. Ass'n*, 463 U.S. at 43. It is "not required to consider every single possible cost." *STG LLC v. United States*, 147 Fed. Cl. 790, 809 (2020). The court agrees. The rational-basis test of APA review asks "whether the [] agency provided a coherent and reasonable explanation of its exercise of discretion." *Dell Fed. Sys., L.P. v. United States*, 906 F.3d 982, 992 (Fed. Cir. 2018) (quoting *Banknote Corp. of Am., Inc. v. United States*, 365 F.3d 1345, 1351 (Fed. Cir. 2004)). That a review of the agency's cost-benefit analysis with the benefit of hindsight can produce costs not considered or not thoroughly considered by the agency does not automatically render a rule unreasonable.

5. Bureau's denial of Association member's rulemaking petition was arbitrary and capricious

A member of Plaintiff Community Financial Services Association, Advance Financial, submitted a rulemaking petition asking the Bureau to "amend" the 2017 Rule "to exclude debit card payments" from the reach of the Payment Provisions. The Associations contend the Bureau's decision to decline this request amounted to a clear error in judgment and the 2017 Rule should therefore be set aside as arbitrary and capricious. *See Safe Extensions, Inc. v. Federal Aviation Admin.*, 509 F.3d 593, 604 (D.C. Cir. 2007). The reason, similar to arguments made by the Associations above, is that debit card transactions are not usually subject to the same insufficient-funds fees. Again, the Bureau considered those transactions and chose not to make an exception for them. That the Associations disagree is insufficient to establish the "rational connection between the facts found and the choice made" necessary to avoid the determination the Rule was arbitrary and capricious. *See Motor Vehicle Mfrs. Ass'n*, 463 U.S. at 43.

6. Bureau's structure continues to violate Separation-of-Powers principles

Finally, the Associations assert the Bureau's structure continues to violate Separation of Powers principles that the Supreme Court had no opportunity to consider in *Seila Law*. The Associations contend the Bureau's Director can establish its budget, up to a set percentage of the Federal Reserve's operating expenses, and that this budget is exempt from review by the congressional Appropriations Committees. According to the Associations, this violates the constitutional proscription against taking money from the Treasury except "in Consequences of Appropriations made by Law." U.S. Const., art. I § 9, cl. 7.

The Appropriations Clause "means simply that no money can be paid out of the Treasury unless it has been appropriated by an act of Congress." *Office Pers. Mgmt. v. Richmond*, 496 U.S. 414, 424 (1990) (citing *Cincinnati Soap Co. v. United States*, 301 U.S. 308, 321 (1937)). Therefore, if a statute authorizes an agency to receive funds up to a certain cap, as the CFPA authorizes the Bureau to do, there is no Appropriations Clause issue. *See* 12 U.S.C. § 5497(a).

The Associations also contend that the Bureau violates the Constitution because Congress merely "announce[d] vague aspirations and then assign[ed] others the responsibility of adopting legislation to reach its goals." *See Gundy v. United States*, 139 S.Ct. 2116, 2133 (2019) (Gorsuch, J., dissenting). Here, the Associations assert Congress has done just that by assigning the Bureau the responsibility to prevent unfair and abusive practices in this industry. The court disagrees and does not find a remaining constitutional issue. *See Gundy*, 139 S.Ct. at 2123 (holding Congress may delegate power to agencies as long as it provides an "intelligible principle" for those agencies to follow).

7. Summary

Because the Associations have not shown they are entitled to judgment as a matter of law, the court will deny their Motion for Summary Judgment.

b. The Bureau's motion for summary judgment

The Bureau offers six reasons it is entitled to summary judgment on each of the Associations' causes of action. The court considers each of these arguments in turn.

1. The Associations' constitutional challenge provides no basis to set aside the Payment Provisions because a validly appointed director ratified them.

The Bureau first argues it is entitled to summary judgment on the issue of whether the Payment Provisions are void *ab initio*. The Supreme Court's holding in *Collins* suggests the Bureau is correct. *See Collins*, 2021 WL 2557067, at *19 n. 24 (*Seila Law*'s "holding on standing does not mean that actions taken by [an improperly appointed] officer are void *ab initio* and must be undone."). The court therefore concludes that the Payment Provisions are not void *ab initio*.

Therefore, the court considers whether the Bureau's ratification of the Payment Provisions was proper. Federal courts have held consistently that ratification by a properly appointed official remedies the constitutional problem with actions initially approved by an improperly appointed official. *See, e.g., Gordon*, 819 F.3d at 1190–91 (9th Cir. 2016) (properly appointed official's ratification cured constitutional problem caused by actions initially overseen by official appointed in violation of Article II); *Wilkes-Barre Hosp. Co. v. NLRB*, 857 F.3d 364, 372 (D.C. Cir. 2017) (same); *Advanced Disposal Servs. E., Inc. v. NLRB*, 820 F.3d 592, 602 (3d Cir. 2016) (same). The court therefore concludes that ratification can be a proper mechanism of addressing the sort of constitutional problem at issue here.

Additionally, the court finds that the Bureau's ratification of the Payment Provisions was a solution tailored to the constitutional injury sustained by the Associations. *See United States v.*

Morrison, 449 U.S. 361, 364 (1981) (noting "general rule that remedies should be tailored to the injury suffered from the constitutional violation"). A few weeks after the Supreme Court's holding in *Seila Law*, the Bureau's constitutionally appointed director ratified the Payment Provisions. *See* Ratification, 85 Fed. Reg. 41905-02. In doing so, the Director noted she "is familiar with the payment provisions and has also conducted a further evaluation of them for purposes of th[e] ratification. Based on the Director's evaluation of the payment provisions, it is the Director's considered judgment that they should be ratified." *Id.* This assurance is sufficient to establish "*de novo* review." *See Intercollegiate Broad. Sys.*, 796 F.3d at 120 ("new hearing" does not need to be "completely new proceeding" but could instead entail "*de novo* review"). Finally, as previously discussed, the Associations' arguments against the propriety, legality, and sufficiency of the Ratification all fail. The court concludes that the Ratification was valid and cured the constitutional injury caused by the 2017 Rule's approval by an improperly appointed official.

2. Payment Provisions are consistent with the Bureau's statutory authority and not arbitrary and capricious

The Bureau argues that, as a matter of law, the Payment Provisions do not exceed the Bureau's statutory authority and are not arbitrary and capricious.

The Bureau argues that it reasonably determined that the practice addressed by the Payment Provisions—repeated attempts to withdraw money from consumers' accounts after such attempts have failed twice—is "unfair." The Bureau arrived at this conclusion because it determined that such a practice caused substantial injury to consumers by subjecting them to substantial and repeated fees, was not reasonably avoidable by those consumers, and did not include some countervailing benefit to outweigh that substantial injury. The Associations' challenges to the Bureau's determination that the Payment Provisions were "unfair" fail.

The Bureau next asserts that it reasonably determined that the proscribed withdrawals were "abusive" because they take unreasonable advantage of (a) a lack of understanding on the part of the consumer of the material risks, costs, or conditions of the product or service and (b) the inability of the consumer to protect the interests of the consumer in selecting or using" the product or service. The Associations' challenges to the Bureau's determination that the Payment Provisions were "abusive" fail.

The Bureau contends that it reasonably declined to exempt certain payment methods from the Payment Provisions and that this denial was not arbitrary and capricious. More specifically, the Bureau contends it set forth a "rational connection between the facts found and the choice made" when it chose to not exempt debit-card and prepaid-card payments from the restrictions of the Payment Provisions, even though these do not usually result in insufficient-funds fees. *See Motor Vehicle Mfrs. Ass'n*, 463 U.S. at 43 (discussing "rational connection" standard to overcome arbitrary and capricious claims). The Bureau established the rational connection between the facts found and the choice made when it chose to include debit- and prepaid-card payments in the Payment Provisions.

Lastly, the Bureau contends it did not establish a usury limit or improperly rely on public policy. The Bureau is limited from "establish[ing] a usury limit applicable to an extension of credit offered or made . . . to a consumer" and from allowing public policy to "serve as a primary basis" for the determination that an act or practice is unfair. 12 U.S.C. §§ 5517(o), 5531(c)(2). As discussed above, the Associations fail in their attempt to show that the Payment Provisions run afoul of either of these statutory restrictions.

The court therefore concludes as a matter of law that the Payment Provisions are consistent with the Bureau's statutory authority and are not arbitrary and capricious.

3. Bureau reasonably considered Payment Provisions' costs and benefits

The Bureau contends it is entitled to summary judgment on the issue of whether it thoroughly considered the costs and benefits of the Payment Provisions in accordance with the CFPA. *See* 12 U.S.C. § 5512(b)(2)(A). The Associations claim that the Bureau fell short of this requirement in two ways: first by failing to consider that the Underwriting Provisions' absence would affect and enhance certain aspects of the Payment Provisions and, second, by failing to consider certain costs the Payment Provisions would impose on customers.

Both arguments fail. The Bureau noted the Underwriting Provisions could lessen certain impacts of the Payment Provisions, but also discussed and considered the impact the Payment Provisions would have independent of the Underwriting Provisions. Further, The Bureau is only required to consider "important aspect[s] of the problem" before it. *Motor Vehicle Mfrs. Ass'n*, 463 U.S. at 43. It is "not required to consider every single possible cost." *STG LLC*, 147 Fed. Cl. at 809. The Associations have failed to show that either of the issues the Bureau supposedly overlooked—the likelihood a loan would enter collections sooner or that customers might incur additional accrued interest because of the Payment Provisions—are so important as to render the entire cost-benefit analysis defective. The Bureau is entitled to summary judgment on this issue.

4. Bureau appropriately denied Advance Financial's rulemaking petition

The Bureau contends that, as a matter of law, it was not unreasonable to deny a Petition for Rulemaking submitted by Advance Financial. The petition asked the Bureau to create a new rule to exempt debit- and prepaid-card payments from the restrictions of the Payment Provisions.

Just as it was not arbitrary and capricious for the Bureau to initially refuse to exempt those payment methods from the Payment Provisions, it was not arbitrary and capricious to decline to do so via a new rule. Further, the Supreme Court has held that an agency's refusal to promulgate a rule is subject only to "extremely limited and highly deferential" review. *Massachusetts v. EPA*, 549 U.S. 497, 527–28 (2007). On this issue, too, the Bureau is entitled to summary judgment.

5. No remaining constitutional problem with the Bureau's structure

The Bureau contends it is entitled to summary judgment on the issue of whether its current structure and function violates the Constitution's Separation of Powers Doctrine and Appropriations Clause. The Associations contend that two constitutional problems remain. First, the Associations contend the Bureau violates the Appropriations clause's mandate that "[n]o Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law." U.S. Const., art. I, § 9, cl. 7. The Bureau's structure allows its director to set a budget for the Bureau up to a certain cap. *See* 12 U.S.C. § 5497(a)(1)–(2). The Appropriations Clause "means simply that no money can be paid out of the Treasury unless it has been appropriated by an act of Congress." *Richmond*, 496 U.S. at 424. Where, as here, a statute authorizes an agency to receive funds up to a certain cap, there is no Appropriations Clause issue.

Second, the Associations contend the Bureau violates the Separation of Powers Doctrine because Congress improperly vests its powers to develop regulations in the Bureau without "an intelligible principle to guide [the Bureau's] use of discretion." *See Gundy*, 139 S. Ct. at 2133 (Gorsuch, J., dissenting). Instead, the Associations argue that by assigning the Bureau the responsibility to prevent unfair and abusive practices in an industry, Congress has merely "announce[d] vague aspirations and then assign[ed] others the responsibility of adopting legislation to reach its goals." *See id.* The court disagrees and concludes that the Bureau is vested with an "intelligible principle," so no Separation of Powers problem remains.

6. Bureau observed all required procedures in promulgating Payment Provisions

Finally, the Bureau contends it is entitled to summary judgment on Count Eight of the Associations' amended complaint, which alleges that the Bureau "violated . . . procedural requirements" in promulgating the Payment Provisions.

Count Eight includes four barebones arguments: while under its previous Director, the Bureau (a) made repeated false statements, (b) allowed groups opposed to payday lending to drive the rulemaking leading to the 2017 Rule, (c) failed to comply with unnamed provisions of the Regulatory Flexibility Act, and (d) failed to give interested parties an opportunity to participate in rulemaking by creating the 2017 Rule against the wishes of many of these parties. These allegations are baseless. For instance, the Associations charge the Bureau with failing to publish a regulatory flexibility analysis. The Bureau *did* publish such an analysis. *See* 82 Fed. Reg. at 54853–70 (final regulatory flexibility analysis); 81 Fed. Reg. at 48150–66 (initial regulatory flexibility analysis). Similarly, the Associations claim the Bureau approached the rulemaking process with the preconceived intention to create the 2017 Rule and did not approach it with an open mind. But besides the Associations' failure to provide any details, the Supreme Court has rejected the "open-mindedness" requirement for the APA. *See Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania*, 140 S. Ct. 2367, 2385 (2020).

The Bureau is also entitled to summary judgment on Count Eight of the Associations' Amended Complaint.

7. Summary

The court concludes that the Bureau is entitled to summary judgment on each of the Associations' claims.

c. Compliance Date

The Associations ask that, in the event the court upholds the Payment Provisions, the court restart (or, in the alternative, resume) the compliance period, so it may have sufficient time to prepare its operations for compliance with the Payment Provisions. Because the original compliance date of August 19, 2019, has passed, the Associations ask the court to stay the compliance date because it would be unfair to penalize parties that reasonably relied on the court's stay. As the Associations put it, "[b]ecause the stay was requested with 445 days left until the implementation deadline, and it was entered with 286 days remaining, any decision upholding the Payment Provisions should leave 445 days—or alternatively, 286 days—for companies to comply with those provisions." According to the Associations, the court should establish a compliance date of at least 286 days, so they receive the full intended benefit of the court's stay—the "preserv[ation] of the status quo." *See Sierra Club v. Jackson*, 833 F. Supp. 2d 11, 19 (D.D.C. 2012). Further, the Associations believe the Bureau's request of a 30-day compliance period would be arbitrary and capricious in that it would suddenly reduce what was once a 21-month compliance period to one month. Finally, the Associations posit that a longer compliance period gives them time to appeal the court's decision.

In response to the Associations' arguments, the Bureau notes that the decision to stay the compliance period is discretionary and equitable. *See Ruiz v. Estelle*, 666 F.2d 854, 856 (5th Cir. 1982) (discussing stays pending appeal); *Texas v. EPA*, 829 F.3d 405, 424, 435 (5th Cir. 2016) (applying standards for stay pending appeal to request for stay of agency action under § 705 of the APA); *accord, e.g.*, *Bauer v. DeVos*, 325 F. Supp. 3d 74, 106 (D.D.C. 2018) (explaining that "the authority granted" under § 705 to stay rules "is equitable" (alteration omitted)). The Bureau suggests that the Associations are not entitled to an additional delay, especially because the APA requires only 30 days' notice before a rule may take effect. *See* 5 U.S.C. § 553(d). Further, the Bureau contends it warned the Associations that it would seek to promptly lift the stay, so the Associations' decision to forego preparations to bring operations into compliance with the rule was a gamble. Lastly, the Bureau responds that the 2017 Rule's original 21-month compliance period contemplated the now-revoked Underwriting Provisions, without which the compliance date would have been much shorter. The Bureau asks that the court lift the stay on the compliance date within 30 days after the court enters judgment.

The court is persuaded by the Associations' arguments that they should receive the full benefit of the temporary stay and that a more substantial compliance date allows time for appeal. The court will extend the compliance-date stay for 286 days after final judgment.

IV. CONCLUSION

Having determined the foregoing, the court renders the following orders:

IT IS ORDERED that the Associations' Motion for Summary Judgment (Dkt. No. 80) is **DENIED**.

IT IS FURTHER ORDERED that the Bureau's Cross-Motion for Summary Judgment (Dkt. No. 82) is **GRANTED**, and the Associations shall **TAKE NOTHING** by their claims against the Bureau.

IT IS FINALLY ORDERED that the August 19, 2019 compliance date of the 2017 Rule is **STAYED** until 286 days after the date of this order, at which time the stay will expire.

SIGNED this 31st day of August, 2021.

LEE YEAKEL
UNITED STATES DISTRICT JUDGE

TAB 2

Final Judgment

ECF No. 104 (Aug. 31, 2021)

FILED
2021 AUG 31 PM 4:09
CLERK, US DISTRICT COURT
WESTERN DISTRICT OF TEXAS
BY ________
DEPUTY

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

COMMUNITY FINANCIAL SERVICES ASSOCIATION OF AMERICA, LTD., CONSUMER SERVICE ALLIANCE OF TEXAS, PLAINTIFFS,	§	
V.	§	**CAUSE NO. 1:18-CV-00295-LY**
CONSUMER FINANCIAL PROTECTION BUREAU, KATHLEEN KRANINGER, IN HER OFFICIAL CAPACITY AS DIRECTOR, CONSUMER FINANCIAL BUREAU; DEFENDANTS.	§	

FINAL JUDGMENT

Before the court is the above-styled and numbered cause. On this date, the court rendered an order granting summary judgment in favor of Defendants Consumer Financial Protection Bureau and Kathleen Kraninger. As nothing remains for resolution in the cause, the court now renders the following Final Judgment pursuant to Federal Rule of Civil Procedure 58.

IT IS ORDERED that all costs of court are taxed against Plaintiffs and this case is hereby **CLOSED**.

SIGNED this 31st day of August, 2021.

LEE YEAKEL
UNITED STATES DISTRICT JUDGE

TAB 3

Order Denying Motion for Stay Pending Appeal
ECF No. 112 (Sept. 30, 2021)

FILED
2021 SEP 30 PM 3:33
CLERK, US DISTRICT COURT
WESTERN DISTRICT OF TEXAS
BY
DEPUTY

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

COMMUNITY FINANCIAL SERVICES ASSOCIATION OF AMERICA, LTD., ET AL., PLAINTIFFS,	§	
V.	§	CAUSE NO. A-18-CV-00295-LY
CONSUMER FINANCIAL PROTECTION BUREAU, ET AL., DEFENDANTS.	§	

ORDER

Before the court is the above-styled and numbered cause by which Plaintiffs Community Financial Services Association of America and others (collectively the "Associations") challenged the validity of the Consumer Financial Protection Bureau's ("Bureau") ratified Payment Provisions of the Bureau's "Payday, Vehicle Title, and Certain High-Cost Installment Loans" Rule ("Rule") that had a compliance date of August 19, 2019. 85 Fed. Reg. 41,905-02 (July 13, 2020) (the "Ratification"). The court rendered an Order on Cross-Motions for Summary Judgment that granted the Bureau's motion, denied the Associations' motion, and rendered a Final Judgment on August 31, 2021 (Docs. ##103 & 104). In summary, the court determined that the ratified Payments Provisions of the Rule were valid. Additionally, the order stayed the Payments Provisions' August 19, 2019 compliance date until 286 days after August 31, 2021, at which time the stay will expire.

On September 9, 2021, Plaintiffs filed a Notice of Appeal as to the court's order and final judgment (Doc. #106). Now pending is the Associations' Plaintiffs' Opposed Motion For Stay Pending Appeal filed September 9, 2021 (Doc. #107), Defendants' Opposition to Plaintiffs' Opposed Motion For Stay Pending Appeal filed September 23, 2021 (Doc. #110), and Plaintiffs' Reply in

Support of Plaintiffs' Opposed Motion For Stay Pending Appeal filed September 24, 2021 (Doc. #111). The Associations seek an order extending the stay of the August 19, 2019 compliance date "until 286 days after [the Associations'] appeal of this court's judgment and order is fully and finally resolved." *See* Fed. R. App. P. 8(a)(1). The Bureau opposes the request.

Four factors are relevant when courts consider a request for a stay pending resolution of an appeal: "(1) whether the [Associations have] made a strong showing that [they are] likely to succeed on the merits; (2) whether the [Associations have] will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies." *Nken v. Holder*, 556 U.S. 418, 434 (2009). Additionally, "[a] stay is not a matter of right, even if irreparable injury might otherwise result." *Id.* at 433. A court's decision to grant a stay pending appeal is "an exercise of jurisdictional discretion," and "[the] propriety of its issue is dependent upon the circumstances of the particular case." *Id.* The party requesting a stay bears the burden of showing that the circumstances justify an exercise of that discretion. *Id.*

Having considered the motion, response, reply, the case file, and the applicable law, the court concludes that the Associations have failed to make a sufficient showing to warrant a stay pending resolution of the appeal. In making this determination, the court has considered the four factors related to the decision to stay the compliance date pending resolution of the appeal. Additionally, the court finds that the equities do not support extending the stay of the compliance date beyond the court's 286-day stay from August 30, 2021.

IT IS ORDERED that the Associations' Plaintiffs' Opposed Motion For Stay Pending Appeal filed September 9, 2021 (Doc. #107) is **DENIED**.

SIGNED this 30th day of September, 2021.

LEE YEAKEL
UNITED STATES DISTRICT JUDGE

TAB 4

Docket

APPEAL

U.S. District Court [LIVE]
Western District of Texas (Austin)
CIVIL DOCKET FOR CASE #: 1:18−cv−00295−LY

Community Financial Services Association of America, Ltd. et al v. Consumer Financial Protection Bureau et al
Assigned to: Judge Lee Yeakel
Case in other court: USCA 5th, 21−50826
Cause: 05:551 Administrative Procedure Act

Date Filed: 04/09/2018
Date Terminated: 08/31/2021
Jury Demand: None
Nature of Suit: 899 Other Statutes: Administrative Procedures Act/Review or Appeal of Agency Decision
Jurisdiction: Federal Question

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Defendant

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Movant

Cooperative Baptist Fellowship
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represented by **Aaron Michael Johnson**
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Rebecca Smullin
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Date Filed	#	Docket Text
04/09/2018	1	COMPLAINT (Filing fee $ 400 receipt number 0542−10659331). No Summons requested at this time, filed by Community Financial Services Association of America, Ltd., Consumer Service Alliance of Texas. (Attachments: # 1 Civil Cover Sheet)(Durfee, Laura) (Entered: 04/09/2018)
04/09/2018	2	NOTICE *of a Constitutional Challenge Under Federal Rule of Civil Procedure 5.1* by Community Financial Services Association of America, Ltd., Consumer Service Alliance of Texas re 1 Complaint, (Durfee, Laura) (Entered: 04/09/2018)
04/09/2018	3	RULE 7 DISCLOSURE STATEMENT filed by Community Financial Services Association of America, Ltd., Consumer Service Alliance of Texas. (Durfee, Laura) (Entered: 04/09/2018)
04/09/2018	4	MOTION to Appear Pro Hac Vice by Laura Jane Durfee *on behalf of Michael A. Carvin to be admitted Pro Hac Vice* (Filing fee $ 100 receipt number 0542−10659507) by on behalf of Community Financial Services Association of America, Ltd., Consumer Service Alliance of Texas. (Attachments: # 1 Proposed Order)(Durfee, Laura) (Entered: 04/09/2018)
04/09/2018	5	MOTION to Appear Pro Hac Vice by Laura Jane Durfee *on behalf of Christian G. Vergonis to be admitted Pro Hac Vice* (Filing fee $ 100 receipt number 0542−10659623) by on behalf of Community Financial Services Association of America, Ltd., Consumer Service Alliance of Texas. (Attachments: # 1 Proposed Order)(Durfee, Laura) (Entered: 04/09/2018)
04/09/2018		Case assigned to Judge Lee Yeakel. CM WILL NOW REFLECT THE JUDGE INITIALS AS PART OF THE CASE NUMBER. PLEASE APPEND THESE JUDGE INITIALS TO THE CASE NUMBER ON EACH DOCUMENT THAT YOU FILE IN THIS CASE. (cj) (Entered: 04/09/2018)
04/10/2018	6	REQUEST FOR ISSUANCE OF SUMMONS by Community Financial Services Association of America, Ltd., Consumer Service Alliance of Texas. (Durfee, Laura) (Entered: 04/10/2018)
04/10/2018	7	REQUEST FOR ISSUANCE OF SUMMONS by Community Financial Services Association of America, Ltd., Consumer Service Alliance of Texas. *to John Michael Mulvaney* (Durfee, Laura) (Entered: 04/10/2018)

04/10/2018	8	Summons Issued as to Consumer Financial Protection Bureau. (dm) (Entered: 04/10/2018)
04/10/2018	9	Summons Issued as to John Michael Mulvaney. (dm) (Entered: 04/10/2018)
04/11/2018	10	ORDER GRANTING 4 Motion to Appear Pro Hac Vice as to Michael Carvin. Pursuant to our Administrative Policies and Procedures for Electronic Filing, the attorney hereby granted to practice pro hac vice in this case must register for electronic filing with our court within 10 days of this order. Signed by Judge Lee Yeakel. (dm) (Entered: 04/12/2018)
04/11/2018	11	ORDER GRANTING 5 Motion to Appear Pro Hac Vice as to Christian Vergonis. Pursuant to our Administrative Policies and Procedures for Electronic Filing, the attorney hereby granted to practice pro hac vice in this case must register for electronic filing with our court within 10 days of this order. Signed by Judge Lee Yeakel. (dm) (Entered: 04/12/2018)
04/17/2018	12	SUMMONS Returned Executed by Community Financial Services Association of America, Ltd., Consumer Service Alliance of Texas. Consumer Financial Protection Bureau served on 4/11/2018, answer due 6/11/2018. (Durfee, Laura) (Entered: 04/17/2018)
04/17/2018	13	SUMMONS Returned Executed by Community Financial Services Association of America, Ltd., Consumer Service Alliance of Texas. John Michael Mulvaney served on 4/11/2018, answer due 6/11/2018. (Durfee, Laura) (Entered: 04/17/2018)
05/31/2018	14	NOTICE of Attorney Appearance by Kevin Edward Friedl on behalf of Consumer Financial Protection Bureau, John Michael Mulvaney. Attorney Kevin Edward Friedl added to party Consumer Financial Protection Bureau(pty:dft), Attorney Kevin Edward Friedl added to party John Michael Mulvaney(pty:dft) (Friedl, Kevin) (Entered: 05/31/2018)
05/31/2018	15	NOTICE of Attorney Appearance by Kristin Lee Bateman on behalf of Consumer Financial Protection Bureau, John Michael Mulvaney. Attorney Kristin Lee Bateman added to party Consumer Financial Protection Bureau(pty:dft), Attorney Kristin Lee Bateman added to party John Michael Mulvaney(pty:dft) (Bateman, Kristin) (Entered: 05/31/2018)
05/31/2018	16	Joint MOTION to Stay Case *And To Stay Agency Action Pending Review* by Community Financial Services Association of America, Ltd., Consumer Service Alliance of Texas. (Attachments: # 1 Proposed Order)(Durfee, Laura) (Entered: 05/31/2018)
06/02/2018	17	NOTICE of Attorney Appearance by Aaron Michael Johnson on behalf of Public Citizen, Inc., Americans for Financial Reform Education Fund, Center for Responsible Lending, National Consumer Law Center. Attorney Aaron Michael Johnson added to party Public Citizen, Inc.(pty:dft), Attorney Aaron Michael Johnson added to party Americans for Financial Reform Education Fund(pty:dft), Attorney Aaron Michael Johnson added to party Center for Responsible Lending(pty:dft), Attorney Aaron Michael Johnson added to party National Consumer Law Center(pty:dft) (Johnson, Aaron) (Entered: 06/02/2018)
06/02/2018	18	MOTION for Leave to File Amicus Brief by Aaron Johnson. by Americans for Financial Reform Education Fund, Center for Responsible Lending, National Consumer Law Center, Public Citizen, Inc.. (Attachments: # 1 Brief Proposed Amicus Memorandum)(Johnson, Aaron) (Entered: 06/02/2018)
06/04/2018	19	MOTION to Appear Pro Hac Vice by Aaron Michael Johnson *on behalf of Rebecca Smullin* (Filing fee $ 100 receipt number 0542−10860186) by on behalf of Americans for Financial Reform Education Fund, Center for Responsible Lending, National Consumer Law Center, Public Citizen, Inc.. (Johnson, Aaron) (Entered: 06/04/2018)
06/04/2018	20	ATTACHMENT *Proposed Order* to 18 MOTION for Leave to File Amicus Brief by Aaron Johnson. by Americans for Financial Reform Education Fund, Center for Responsible Lending, National Consumer Law Center, Public Citizen, Inc.. (Johnson, Aaron) (Entered: 06/04/2018)

06/04/2018	21	RULE 7 DISCLOSURE STATEMENT filed by Americans for Financial Reform Education Fund, Center for Responsible Lending, National Consumer Law Center, Public Citizen, Inc.. (Johnson, Aaron) (Entered: 06/04/2018)
06/04/2018	22	Unopposed MOTION for Extension of Time to File Answer by Consumer Financial Protection Bureau, John Michael Mulvaney. (Attachments: # 1 Proposed Order)(Bateman, Kristin) (Entered: 06/04/2018)
06/05/2018	23	Letter regarding admission status of Nandan Joshi. (dm) (Entered: 06/05/2018)
06/05/2018	24	ORDER GRANTING 19 Motion to Appear Pro Hac Vice as to Rebecca Smullin. Pursuant to our Administrative Policies and Procedures for Electronic Filing, the attorney hereby granted to practice pro hac vice in this case must register for electronic filing with our court within 10 days of this order. Signed by Judge Lee Yeakel. (dm) (Entered: 06/05/2018)
06/11/2018	25	REPLY to Response to Motion, filed by Community Financial Services Association of America, Ltd., Consumer Service Alliance of Texas, re 18 MOTION for Leave to File Amicus Brief by Aaron Johnson. filed by Movant Public Citizen, Inc., Movant Center for Responsible Lending, Movant National Consumer Law Center, Movant Americans for Financial Reform Education Fund (Durfee, Laura) (Entered: 06/11/2018)
06/11/2018	26	DEFICIENCY NOTICE: re 25 Reply to Response to Motion. (dm) (Entered: 06/11/2018)
06/12/2018	27	ORDER GRANTING nonparties Public Citizen, Inc., Americans for Financial Reform Education Fund, Center for Responsible Lending and National Consumer Law Center's 18 Motion for Leave to File Amicus Memorandum Signed by Judge Lee Yeakel. (lt) (Entered: 06/12/2018)
06/12/2018	28	Memorandum in Opposition to Motion, filed by Americans for Financial Reform Education Fund, Center for Responsible Lending, and National Consumer Law Center, Public Citizen, Inc., re 16 Joint MOTION to Stay Case And To Stay Agency Action Pending Review. (lt) (Entered: 06/12/2018)
06/12/2018	29	ORDER GRANTING IN PART AND DENYING IN PART 16 Joint MOTION to Stay Case And To Stay Agency Action Pending Review. ORDER that the parties file joint periodic status reports that detail the matters described in their motion, with the first report due on or before August 17, 2018. ORDER DISMISSING AS MOOT Defendants' 22 Unopposed MOTION for Extension of Time to Answer Complaint. Signed by Judge Lee Yeakel. (lt) (Entered: 06/12/2018)
06/21/2018	30	Unopposed MOTION for Reconsideration re 29 Order Staying Case,, Terminate Motions, by Community Financial Services Association of America, Ltd., Consumer Service Alliance of Texas. (Attachments: # 1 Proposed Order)(Durfee, Laura) (Entered: 06/21/2018)
06/22/2018	31	Unopposed MOTION for Leave to Exceed Page Limitation *on Response in Support of Plaintiffs' Motion for Reconsideration* by Consumer Financial Protection Bureau, John Michael Mulvaney. (Attachments: # 1 Proposed Order, # 2 Proposed Response in Support of Plaintiffs' Motion for Reconsideration)(Bateman, Kristin) (Entered: 06/22/2018)
06/22/2018	34	RESPONSE in Support, filed by Consumer Financial Protection Bureau, John Michael Mulvaney, re 30 Unopposed MOTION for Reconsideration re 29 Order Staying Case,, Terminate Motions, filed by Plaintiff Community Financial Services Association of America, Ltd., Plaintiff Consumer Service Alliance of Texas (dl) (Entered: 06/27/2018)
06/25/2018	32	MOTION for Leave to File Amicus Brief by Rebecca Smullin. by Americans for Financial Reform Education Fund, Center for Responsible Lending, National Consumer Law Center, Public Citizen, Inc.. (Attachments: # 1 Proposed Order, # 2 Brief Proposed Amicus Memorandum)(Smullin, Rebecca) (Entered: 06/25/2018)
06/26/2018	33	ORDER GRANTING 31 Motion for Leave to File Excess Pages. Signed by Judge Lee Yeakel. (dl) (Entered: 06/27/2018)

06/29/2018	35	RESPONSE to Motion, filed by Consumer Financial Protection Bureau, John Michael Mulvaney, re 32 MOTION for Leave to File Amicus Brief by Rebecca Smullin. filed by Movant Public Citizen, Inc., Movant Center for Responsible Lending, Movant National Consumer Law Center, Movant Americans for Financial Reform Education Fund (Friedl, Kevin) (Entered: 06/29/2018)
08/07/2018	36	****REVERSED IN PART PER ORDER 53 **** ORDER DENYING 30 Motion for Reconsideration ; GRANTING 32 Motion for Leave to File Amicus Brief. Signed by Judge Lee Yeakel. (dm) Modified on 11/6/2018 (lt). (Entered: 08/07/2018)
08/07/2018	37	AMICUS MEMORANDUM by Public Citizen, Inc.. (dm) (Entered: 08/07/2018)
08/17/2018	38	STATUS REPORT *(Joint)* by Consumer Financial Protection Bureau, John Michael Mulvaney. (Bateman, Kristin) (Entered: 08/17/2018)
08/28/2018	39	ORDERED that the parties file a Joint Status Report on or before October 31, 2018. Signed by Judge Lee Yeakel. (dm) (Entered: 08/29/2018)
09/14/2018	40	Unopposed MOTION to Lift Stay *of Litigation* by Community Financial Services Association of America, Ltd., Consumer Service Alliance of Texas. (Attachments: # 1 Proposed Order)(Durfee, Laura) (Entered: 09/14/2018)
09/14/2018	41	MOTION for Leave to Exceed Page Limitation *in Its Motion for Preliminary Injunction* by Community Financial Services Association of America, Ltd., Consumer Service Alliance of Texas. (Attachments: # 1 Proposed Order)(Durfee, Laura) (Entered: 09/14/2018)
09/14/2018	42	MOTION for Preliminary Injunction by Community Financial Services Association of America, Ltd., Consumer Service Alliance of Texas. (Attachments: # 1 Exhibit A, # 2 Exhibit B, # 3 Exhibit C, # 4 Exhibit D, # 5 Exhibit E, # 6 Exhibit F, # 7 Exhibit G, # 8 Exhibit H, # 9 Exhibit I, # 10 Proposed Order)(Durfee, Laura) (Entered: 09/14/2018)
09/17/2018	43	MOTION for Extension of Time to File Response/Reply as to 42 MOTION for Preliminary Injunction by Consumer Financial Protection Bureau, John Michael Mulvaney. (Attachments: # 1 Proposed Order)(Friedl, Kevin) (Entered: 09/17/2018)
09/18/2018	44	ORDER, (Status Conference set for 10/4/2018 at 09:30 AM before Judge Lee Yeakel,). Signed by Judge Lee Yeakel. (dm) (Entered: 09/18/2018)
09/19/2018	45	MOTION *to Intervene as Defendant* by Cooperative Baptist Fellowship. (Attachments: # 1 Appendix In Support of Motion to Intervene, # 2 Exhibit Answer to Complaint by Proposed Defendant−Intervenor Cooperative Baptist Fellowship, # 3 Proposed Order)(Smullin, Rebecca) (Entered: 09/19/2018)
09/19/2018	46	NOTICE of Attorney Appearance by Rebecca Smullin on behalf of Cooperative Baptist Fellowship. Attorney Rebecca Smullin added to party Cooperative Baptist Fellowship(pty:mov) (Smullin, Rebecca) (Entered: 09/19/2018)
09/19/2018	47	RULE 7 DISCLOSURE STATEMENT filed by Cooperative Baptist Fellowship. (Smullin, Rebecca) (Entered: 09/19/2018)
09/19/2018	48	NOTICE of Attorney Appearance by Aaron Michael Johnson on behalf of Cooperative Baptist Fellowship (Johnson, Aaron) (Entered: 09/19/2018)
09/26/2018	49	Response in Opposition to Motion, filed by Community Financial Services Association of America, Ltd., Consumer Service Alliance of Texas, re 45 MOTION *to Intervene as Defendant* filed by Movant Cooperative Baptist Fellowship (Attachments: # 1 Proposed Order)(Durfee, Laura) (Entered: 09/26/2018)
10/01/2018	50	REPLY to Response to Motion, filed by Cooperative Baptist Fellowship, re 45 MOTION *to Intervene as Defendant* filed by Movant Cooperative Baptist Fellowship (Smullin, Rebecca) (Entered: 10/01/2018)
10/04/2018	51	Minute Entry for proceedings held before Judge Lee Yeakel: Status Conference held on 10/4/2018 (Minute entry documents are not available electronically.). (Court Reporter Arlinda Rodriguez.)(dm) (Entered: 10/04/2018)
10/26/2018	52	STATUS REPORT *(Joint)* by Consumer Financial Protection Bureau, John Michael Mulvaney. (Bateman, Kristin) (Entered: 10/26/2018)

11/06/2018	53	ORDER REVERSING the portion of 36 Order on Motion for Reconsideration denying a request for reconsideration. ORDER GRANTING 30 Unopposed MOTION for Reconsideration TO THE EXTENT that the August 19, 2019, compliance date of the "Payday, Vehicle Title, and Certain High−Cost Installment Loans" rule is STAYED pending further order of the court. ORDER continuing stay ordered June 12, 2018. ORDER for Joint Status Report no later than 3/1/2019. Signed by Judge Lee Yeakel. (lt) (Entered: 11/06/2018)
12/12/2018	54	MOTION to Withdraw as Attorney by Consumer Financial Protection Bureau. (Attachments: # 1 Proposed Order)(Joshi, Nandan) (Entered: 12/12/2018)
12/13/2018	55	ORDER GRANTING 54 Motion to Withdraw as Attorney. Signed by Judge Lee Yeakel. (dm) (Entered: 12/14/2018)
03/01/2019	56	STATUS REPORT *Joint* by Consumer Financial Protection Bureau, John Michael Mulvaney. (Bateman, Kristin) (Entered: 03/01/2019)
03/08/2019	57	STATUS REPORT *Joint* by Consumer Financial Protection Bureau, John Michael Mulvaney. (Bateman, Kristin) (Entered: 03/08/2019)
03/19/2019	58	ORDER, (Joint Status Report due by 5/17/2019,). Signed by Judge Lee Yeakel. (afd) (Entered: 03/19/2019)
05/17/2019	59	STATUS REPORT *(Joint)* by Consumer Financial Protection Bureau, Kathleen Kraninger. (Bateman, Kristin) (Entered: 05/17/2019)
05/30/2019	60	ORDERED that the stay of litigation and the stay of the August 19, 2019, compliance date are continued in full force and effect. (Joint Status Report due by 8/2/2019). Signed by Judge Lee Yeakel. (dm) (Entered: 05/30/2019)
05/31/2019	61	Transcript filed of Proceedings held on Ocober 4, 2018, Proceedings Transcribed: Status Conference. Court Reporter/Transcriber: Arlinda Rodriguez, Telephone number: 512−391−8791. Parties are notified of their duty to review the transcript to ensure compliance with the FRCP 5.2(a)/FRCrP 49.1(a). A copy may be purchased from the court reporter or viewed at the clerk's office public terminal. If redaction is necessary, a Notice of Redaction Request must be filed within 21 days. If no such Notice is filed, the transcript will be made available via PACER without redaction after 90 calendar days. The clerk will mail a copy of this notice to parties not electronically noticed Redaction Request due 6/21/2019, Redacted Transcript Deadline set for 7/1/2019, Release of Transcript Restriction set for 8/29/2019, (alr) (Entered: 05/31/2019)
06/10/2019	62	STATUS REPORT *(Joint)* by Consumer Financial Protection Bureau, Kathleen Kraninger. (Bateman, Kristin) (Entered: 06/10/2019)
08/02/2019	63	STATUS REPORT *(Joint)* by Consumer Financial Protection Bureau, Kathleen Kraninger. (Bateman, Kristin) (Entered: 08/02/2019)
08/06/2019	64	ORDER, (Joint Status Report due by 12/6/2019,). Signed by Judge Lee Yeakel. (dm) (Entered: 08/07/2019)
12/06/2019	65	STATUS REPORT *(Joint)* by Consumer Financial Protection Bureau, Kathleen Kraninger. (Bateman, Kristin) (Entered: 12/06/2019)
12/06/2019	66	ORDER, (Joint Status Report due by 4/24/2020,). Signed by Judge Lee Yeakel. (dm) (Entered: 12/09/2019)
03/13/2020	67	MOTION to Withdraw as Attorney by Consumer Financial Protection Bureau, Kathleen Kraninger. (Attachments: # 1 Proposed Order)(Friedl, Kevin) (Entered: 03/13/2020)
03/16/2020	68	ORDER GRANTING 67 Motion to Withdraw as Attorney. Signed by Judge Lee Yeakel. (dm) (Entered: 03/17/2020)
04/24/2020	69	STATUS REPORT *(Joint)* by Consumer Financial Protection Bureau, Kathleen Kraninger. (Bateman, Kristin) (Entered: 04/24/2020)
05/14/2020	70	IT IS ORDERED that the stay of litigation and the stay of the compliance date are continued in full force and effect. (Status Report due by 9/11/2020,). Signed by Judge Lee Yeakel. (dm) (Entered: 05/14/2020)

07/24/2020	71	Joint MOTION to Lift Stay *of Litigation and to Enlarge Time and Page Limits on Upcoming Briefing; Joint Status Report* by Consumer Financial Protection Bureau, Kathleen Kraninger. (Attachments: # 1 Proposed Order)(Bateman, Kristin) (Entered: 07/24/2020)
08/05/2020	72	Minute Entry for proceedings held before Judge Lee Yeakel: Telephone Conference held on 8/5/2020. Written order forthcoming. (Minute entry documents are not available electronically.). (Court Reporter Arlinda Rodriguez.)(dm) (Entered: 08/05/2020)
08/12/2020	73	Joint MOTION *for Scheduling Order* by Consumer Financial Protection Bureau, Kathleen Kraninger. (Attachments: # 1 Proposed Order)(Bateman, Kristin) (Entered: 08/12/2020)
08/20/2020	74	ORDER GRANTING 71 Motion to Lift Stay; GRANTING 73 Joint Motion for Scheduling Order. Signed by Judge Lee Yeakel. (td) (Entered: 08/20/2020)
08/20/2020	75	ORDER DISMISSING WITHUT PREJUDICE 45 Motion to Intervene. Signed by Judge Lee Yeakel. (td) (Entered: 08/20/2020)
08/28/2020	76	AMENDED COMPLAINT against Consumer Financial Protection Bureau and Kathleen Kraninger filed by Plaintiff's Consumer Service Alliance of Texas and Community Financial Services Association of America, Ltd.(so) (Entered: 08/28/2020)
08/31/2020	77	ORDER DISMISSING 41 Motion for Leave to File Excess Pages; DISMISSING 42 Motion for Preliminary Injunction; DISMISSING 43 Motion for Extension of Time to File Response. Signed by Judge Lee Yeakel. (dm) (Entered: 08/31/2020)
09/18/2020	78	NOTICE of Attorney Appearance by Kevin Edward Friedl on behalf of Consumer Financial Protection Bureau, Kathleen Kraninger (Friedl, Kevin) (Entered: 09/18/2020)
09/18/2020	79	ANSWER to 76 Amended Complaint by Consumer Financial Protection Bureau, Kathleen Kraninger.(Friedl, Kevin) (Entered: 09/18/2020)
09/25/2020	80	MOTION for Summary Judgment by Community Financial Services Association of America, Ltd., Consumer Service Alliance of Texas. (Attachments: # 1 Appendix Part 1 (A1 − A122), # 2 Appendix Part 2 (A123 − A182), # 3 Proposed Order)(Durfee, Laura) (Entered: 09/25/2020)
10/23/2020	81	NOTICE of Attorney Appearance by Karen Sarah Bloom on behalf of Consumer Financial Protection Bureau, Kathleen Kraninger. Attorney Karen Sarah Bloom added to party Consumer Financial Protection Bureau(pty:dft), Attorney Karen Sarah Bloom added to party Kathleen Kraninger(pty:dft) (Bloom, Karen) (Entered: 10/23/2020)
10/23/2020	82	Cross MOTION for Summary Judgment by Consumer Financial Protection Bureau, Kathleen Kraninger. (Attachments: # 1 Appendix Appendix part 1, # 2 Appendix Appendix part 2)(Bateman, Kristin) (Entered: 10/23/2020)
10/23/2020	83	Memorandum in Opposition to Motion, filed by Consumer Financial Protection Bureau, Kathleen Kraninger, re 80 MOTION for Summary Judgment filed by Plaintiff Community Financial Services Association of America, Ltd., Plaintiff Consumer Service Alliance of Texas (Attachments: # 1 Appendix Appendix part 1, # 2 Appendix Appendix part 2)(Bateman, Kristin) (Entered: 10/23/2020)
11/20/2020	84	Response in Opposition to Motion, filed by Community Financial Services Association of America, Ltd., Consumer Service Alliance of Texas, re 82 Cross MOTION for Summary Judgment filed by Defendant Kathleen Kraninger, Defendant Consumer Financial Protection Bureau (Attachments: # 1 Exhibit A − Declaration of James A. Ovenden)(Durfee, Laura) (Entered: 11/20/2020)
12/18/2020	85	REPLY to Response to Motion, filed by Consumer Financial Protection Bureau, Kathleen Kraninger, re 82 Cross MOTION for Summary Judgment filed by Defendant Kathleen Kraninger, Defendant Consumer Financial Protection Bureau (Friedl, Kevin) (Entered: 12/18/2020)
12/30/2020	86	NOTICE *of Supplemental Authority* by Consumer Financial Protection Bureau, Kathleen Kraninger re 82 Cross MOTION for Summary Judgment , 80 MOTION for

		Summary Judgment (Attachments: # 1 CFPB v. Seila Law LLC, No. 17−56324, 2020 WL 7705549 (9th Cir. Dec. 29, 2020))(Friedl, Kevin) (Entered: 12/30/2020)
12/31/2020	87	RESPONSE to 86 Notice (Other), by Community Financial Services Association of America, Ltd., Consumer Service Alliance of Texas. (Durfee, Laura) (Entered: 12/31/2020)
05/20/2021	88	NOTICE *of Supplemental Authority* by Community Financial Services Association of America, Ltd., Consumer Service Alliance of Texas (Attachments: # 1 CFPB v. Seila Law LLC, No. 17−56324, 2020 WL 9595879 (9th Cir. Dec. 29, 2020, amended May 14, 2021))(Durfee, Laura) (Entered: 05/20/2021)
05/21/2021	89	RESPONSE to 88 Notice (Other), by Consumer Financial Protection Bureau, Kathleen Kraninger. (Friedl, Kevin) (Entered: 05/21/2021)
06/28/2021	90	NOTICE *of Supplemental Authority* by Consumer Financial Protection Bureau, Kathleen Kraninger (Attachments: # 1 Exhibit A − Collins v. Yellen, No. 19−422 (U.S. June 23, 2021), # 2 Exhibit B − United States v. Arthrex, Inc., No. 19−1434 (U.S. June 21, 2021))(Friedl, Kevin) (Entered: 06/28/2021)
06/30/2021	91	RESPONSE to 90 Notice (Other), by Community Financial Services Association of America, Ltd., Consumer Service Alliance of Texas. (Durfee, Laura) (Entered: 06/30/2021)
07/02/2021	92	NOTICE *Reply re Notice of Supplemental Authority* by Consumer Financial Protection Bureau, Kathleen Kraninger, John Michael Mulvaney re 90 Notice (Other), 91 Response (Bateman, Kristin) (Entered: 07/02/2021)
07/13/2021	93	NOTICE *of Potentially Relevant Appellate Proceedings* by Community Financial Services Association of America, Ltd., Consumer Service Alliance of Texas (Durfee, Laura) (Entered: 07/13/2021)
07/22/2021	94	RESPONSE *to Plaintiffs' Notice of Potentially Relevant Appellate Proceedings* to 93 Notice (Other) by Consumer Financial Protection Bureau, Kathleen Kraninger. (Bateman, Kristin) (Entered: 07/22/2021)
07/22/2021	95	Opposed MOTION to Lift Stay by Consumer Financial Protection Bureau, Kathleen Kraninger. (Attachments: # 1 Proposed Order)(Bateman, Kristin) (Entered: 07/22/2021)
07/29/2021	96	ORDER For Additional Briefing. Signed by Judge Lee Yeakel. (dm) (Entered: 07/29/2021)
08/05/2021	97	Response in Opposition to Motion, filed by Community Financial Services Association of America, Ltd., Consumer Service Alliance of Texas, re 95 Opposed MOTION to Lift Stay filed by Defendant Kathleen Kraninger, Defendant Consumer Financial Protection Bureau (Attachments: # 1 Proposed Order, # 2 Exhibit A − Defendants' Supplemental Brief, CFPB v. All Am. Check Cashing, Inc., No. 18−60302 (5th Cir. July 26, 2021), # 3 Exhibit B − Plaintiffs' Supplemental Brief, Collins v. Yellen, No. 17−20364 (5th Cir. July 26, 2021))(Durfee, Laura) (Entered: 08/05/2021)
08/06/2021	98	BRIEF by Consumer Financial Protection Bureau, Kathleen Kraninger. (Bateman, Kristin) (Entered: 08/06/2021)
08/06/2021	99	BRIEF regarding 96 Order by Community Financial Services Association of America, Ltd., Consumer Service Alliance of Texas. (Attachments: # 1 Exhibit A − Order, Michigan v. EPA, No. 98−1497 (D.C. Cir. June 22, 2000))(Durfee, Laura) (Entered: 08/06/2021)
08/12/2021	100	REPLY to Response to Motion, filed by Consumer Financial Protection Bureau, Kathleen Kraninger, re 95 Opposed MOTION to Lift Stay filed by Defendant Kathleen Kraninger, Defendant Consumer Financial Protection Bureau (Bateman, Kristin) (Entered: 08/12/2021)
08/16/2021	101	BRIEF regarding 99 Brief by Consumer Financial Protection Bureau, Kathleen Kraninger. (Bateman, Kristin) (Entered: 08/16/2021)
08/16/2021	102	RESPONSE to 98 Brief by Community Financial Services Association of America, Ltd., Consumer Service Alliance of Texas. (Durfee, Laura) (Entered: 08/16/2021)

08/31/2021	103	ORDER DENYING 80 Motion for Summary Judgment; GRANTING 82 Motion for Summary Judgment. Signed by Judge Lee Yeakel. (dm) (Entered: 08/31/2021)
08/31/2021	104	FINAL JUDGMENT. Signed by Judge Lee Yeakel. (dm) (Entered: 08/31/2021)
09/08/2021	105	MOTION to Withdraw as Attorney by Americans for Financial Reform Education Fund, Center for Responsible Lending, National Consumer Law Center, Public Citizen, Inc.. (Attachments: # 1 Proposed Order)(Smullin, Rebecca) (Entered: 09/08/2021)
09/09/2021	106	Appeal of Final Judgment 104 , 103 by Community Financial Services Association of America, Ltd., Consumer Service Alliance of Texas. (Filing fee $ 505 receipt number 0542−15203446) (Durfee, Laura) (Entered: 09/09/2021)
09/09/2021		NOTICE OF APPEAL following 106 Notice of Appeal (E−Filed) by Community Financial Services Association of America, Ltd., Consumer Service Alliance of Texas. Filing fee $ 505, receipt number 0542−15203446. Per 5th Circuit rules, the appellant has 14 days, from the filing of the Notice of Appeal, to order the transcript. To order a transcript, the appellant should fill out a (Transcript Order) and follow the instructions set out on the form. This form is available in the Clerk's Office or by clicking the hyperlink above. (dm) (Entered: 09/09/2021)
09/09/2021	107	Opposed MOTION to Stay *Pending Appeal* by Community Financial Services Association of America, Ltd., Consumer Service Alliance of Texas. (Attachments: # 1 Proposed Order)(Durfee, Laura) (Entered: 09/09/2021)
09/10/2021	108	ORDER GRANTING 105 Motion to Withdraw as Attorney. Signed by Judge Lee Yeakel. (dm) (Entered: 09/10/2021)
09/15/2021	109	TRANSCRIPT REQUEST by Community Financial Services Association of America, Ltd., Consumer Service Alliance of Texas. Proceedings Transcribed: Transcript is already on file. Court Reporter: Arlinda Rodriguez.. (Vergonis, Christian) (Entered: 09/15/2021)
09/23/2021	110	Response in Opposition to Motion, filed by Consumer Financial Protection Bureau, Kathleen Kraninger, re 107 Opposed MOTION to Stay *Pending Appeal* filed by Plaintiff Community Financial Services Association of America, Ltd., Plaintiff Consumer Service Alliance of Texas (Friedl, Kevin) (Entered: 09/23/2021)
09/24/2021	111	REPLY to Response to Motion, filed by Community Financial Services Association of America, Ltd., Consumer Service Alliance of Texas, re 107 Opposed MOTION to Stay *Pending Appeal* filed by Plaintiff Community Financial Services Association of America, Ltd., Plaintiff Consumer Service Alliance of Texas (Durfee, Laura) (Entered: 09/24/2021)
09/30/2021	112	ORDER DENYING 107 Motion to Stay. Signed by Judge Lee Yeakel. (dm) (Entered: 09/30/2021)

TAB 5

Complaint

ECF No. 1 (Apr. 9, 2018)

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

COMMUNITY FINANCIAL SERVICES ASSOCIATION OF AMERICA, LTD., and CONSUMER SERVICE ALLIANCE OF TEXAS,

Plaintiffs,

v.

CONSUMER FINANCIAL PROTECTION BUREAU and JOHN MICHAEL MULVANEY, in his official capacity as Acting Director, Consumer Financial Protection Bureau,

Defendants.

Civil Action No. 1:18-cv-295

COMPLAINT

Plaintiffs Community Financial Services Association of America, Ltd., and Consumer Service Alliance of Texas allege, by and through their attorneys, on knowledge as to Plaintiffs and on information and belief as to all other matters, as follows:

1. Small-dollar, short-term loans known as payday loans or payday advances provide a financial lifeline for millions of consumers who need access to funds and choose these products over other available forms of credit. Currently, approximately twelve million Americans per year rely on payday loans to help with their financial needs. Without payday loans, these consumers would be forced into vastly inferior and more costly alternatives, such as defaults on other debts, bounced checks, overdraft fees, and the use of unregulated and illegal underground sources of credit. Consumers understand this, which is why they consistently and overwhelmingly praise the product and value the flexibility it provides.

2. Yet rather than strengthen and protect access to this critical form of consumer credit, the Consumer Financial Protection Bureau ("CFPB" or "Bureau") decided to virtually

eliminate it, and an entire industry, through its draconian final rule on payday, vehicle title, and certain high-cost installment loans (the "Final Rule"). The centerpiece of the Final Rule is an ability-to-repay requirement restricting payday loans to borrowers who have sufficient net income to satisfy all other financial obligations and repay the loan within its initial term—a limitation fundamentally inconsistent with the fact that consumers, many of whose income and expenses vary from one month to the next, use payday loans precisely *because* their net income in a particular month may be insufficient to satisfy their financial obligations.

3. The Final Rule rests on unfounded presumptions of harm and misperceptions about consumer behavior, and was motivated by a deeply paternalistic view that consumers cannot be trusted with the freedom to make their own financial decisions. In fact, the Bureau ignored and attempted to discount the available research showing that short-term, small-dollar loans result in *improved* financial conditions, not harm, because in many cases they are better than the alternative options available to consumers. By effectively eliminating a critical form of credit for millions of borrowers who are in dire need of it, the Final Rule severely injures the very consumers the Bureau is charged with protecting.

4. This fundamentally flawed rule is the product of a fundamentally flawed agency—one whose substantial power over the U.S. economy is unconstitutionally concentrated in a single, unaccountable and unchecked Director insulated from both the President and the Congress and hence from the people. The Bureau's policies—including the Final Rule—are therefore those of the Director alone, without any mechanism of political accountability.

5. Despite its vast authority and the far-reaching consequences of its actions, neither the Bureau nor its Director is supervised or directed by the President, who lacks the power to

remove and replace the Director (except for exceedingly narrow instances of misconduct), and thus lacks the ability to ensure that the Bureau's policies accord with his own.

6. The Bureau is also free of control or influence by any other official elected by the people—thus further eliminating any accountability to the citizens it regulates and who possess the ultimate sovereignty in our constitutional republic. This is because it takes federal government money without congressional appropriation: The Director has exclusive authority to set the Bureau's budget at up to 12% of the Federal Reserve System's operating expenses (over half a billion dollars), a perpetual budget that is exempt even from mere review by the House and Senate Appropriations Committees. As the Bureau itself puts it, this unfettered access to hundreds of millions of dollars in "funding outside the congressional appropriations process" ensures its "full independence" from Congress.

7. The Bureau also wields unconstitutionally delegated legislative authority when it exercises—as it did in promulgating the Final Rule—its power to define unfair, deceptive, and abusive acts and practices ("UDAAP"). Congress lacks the constitutional authority to delegate to an agency the power to create generally applicable rules of private conduct, as it purported to do here. Additionally, when Congress does confer decision-making authority upon an agency, it must lay down intelligible principles to which the agency is directed to conform. Congress's delegation of UDAAP authority here, even with the Act's attempt at further definition, affords the Bureau discretion that is far too subjective and imprecise. As former Director Cordray himself told Congress, the delegation of authority over "abusive" practices is "a little bit of a puzzle because it is a new term," which is "[p]robably not useful to try to define … in the abstract."

8. Separately and in combination, the Bureau's freedom from presidential oversight and control, exclusion from the appropriations process, and exercise of delegated, standardless legislative power contravene established principles of the Constitution's separation of powers. Accordingly, the Bureau and all power and authority exercised by it—including the Final Rule—violate the Constitution.

9. Even apart from these constitutional infirmities, the Final Rule and the rulemaking process that produced it suffer from several other critical flaws. For one, the Final Rule is fundamentally at odds with Congress's careful delineation of the Bureau's statutory authority. Congress set a clear boundary on the Bureau's powers by unequivocally declaring that the Bureau lacks the authority to establish a usury limit. The Final Rule flagrantly runs afoul of this statutory restriction by improperly targeting payday and other covered loans because of their alleged "high cost" and "unaffordability"—*i.e.*, because of their high interest rates. Likewise, Congress's express delegation of authority to impose an ability-to-repay requirement for other types of loans demonstrates that Congress intended to deprive the Bureau of the authority to impose such a requirement for short-term, small-dollar loans.

10. The Final Rule is also unlawful because the Bureau misconstrues the statutory terms "unfair" and "abusive" and because, in any event, the Bureau lacks substantial evidence for its conclusions that payday and other covered loans are unfair and abusive. In equating reborrowing with substantial injury, the Bureau arbitrarily and capriciously assumes without evidence that the extended use of payday loans is harmful to consumers. In fact, the Bureau's assumption defies common sense and basic economic analysis. There is no evidence to support it and ample evidence to contradict it. The evidence that the Bureau had before it shows that payday loans and loan sequences provide net benefits, allowing cash-strapped and credit-starved

consumers to satisfy necessary expenses without resorting to more costly and less affordable alternatives.

11. The Bureau also arbitrarily and capriciously presumes that consumers do not know or appreciate what they are doing when taking out payday and other covered loans. This contention, too, defies reality and lacks evidentiary support. Indeed, ample evidence demonstrates that consumers fully understand the costs and risks of these products, and choose to use them because their benefits outweigh their costs.

12. The Bureau is required by statute to engage in a cost-benefit analysis before adopting a rule. But the Bureau has done so here only on the most superficial level. Among other problems, it has ignored numerous costs and benefits, failed to quantify others, and engaged in inconsistent reasoning.

13. Over a million individualized comments opposing the rule and the Bureau's efforts to stamp out payday lending were submitted during the comment period by the very consumers the Bureau is charged with protecting, yet the Bureau brushed aside these objections in its zeal to finalize the rule. Similarly, throughout the rulemaking process, the Bureau tellingly ignored its own evidence of consumer satisfaction with payday loans and failed to consult with any actual borrowers, at one point even telling an industry representative that the Bureau did not need to speak to borrowers. But the Bureau may not enact a purported consumer-protection rule without properly taking the views of consumers into account.

14. If permitted to go into effect, the Final Rule will effectively eliminate payday lending. It prohibits the vast majority of payday loans currently made, and makes payday lending so unprofitable that few if any companies will be able to remain in the business, even to offer loans that the Bureau concedes are beneficial to consumers.

15. The Bureau's heavy-handed proposal is all the more arbitrary because numerous States employ alternative, less burdensome regulatory approaches, improperly ignored by the Bureau, that would adequately address the Bureau's concerns while preserving access to payday credit.

16. The Bureau's arbitrary and capricious disdain for small-dollar lenders is further demonstrated by its failure to impose the same restrictions on other financial products, offered by banks and credit unions, that are used by consumers in similar ways with similar consequences, such as overdraft protection, credit cards, and deposit advance products.

17. For these and other reasons set forth herein, the Final Rule is outside the Bureau's constitutional and statutory authority, as well as unnecessary, arbitrary, capricious, overreaching, procedurally improper, and substantially harmful to lenders and borrowers alike. Accordingly, Plaintiffs ask this Court to set aside the Final Rule under the Constitution and the Administrative Procedure Act, 5 U.S.C. §§ 551–559, 701–706 ("APA").

PARTIES

18. Plaintiff Community Financial Services Association of America, Ltd. ("CFSA") is a non-profit organization created in and existing under the laws of Maryland. CFSA is the national trade association for companies offering small-dollar, short-term payday loans and similar consumer financial products. CFSA was established in 1999 to promote laws and regulations that protect consumers while preserving their access to credit options, and to support and encourage responsible industry practices. In bringing this action, CFSA seeks to vindicate the interests of its members, who are engaged in the business of offering payday loans and similar consumer financial products, several of whom have extensive operations in Texas. CFSA's members are directly regulated and injured by the Final Rule. This lawsuit is germane

to the purpose of CFSA, which exists to preserve consumers' access to short-term credit options. CFSA's individual members are not indispensable to the proper resolution of the case.

19. Plaintiff Consumer Service Alliance of Texas ("CSAT") is a non-profit organization created in and existing under the laws of Texas. It is headquartered and maintains its principal place of business in Austin, Texas. CSAT is a trade association whose members are regulated, licensed Texas credit access businesses ("CABs") that obtain for consumers or assist consumers in obtaining extensions of consumer credit in the form of small-dollar, short-term deferred presentment transactions (*i.e.*, payday loans) and motor vehicle title loans. CSAT advocates for the protection of financial choice based on personal responsibility and seeks to help ensure that Texans have access to short-term loans and other financial-services products in compliance with the law and responsible industry practices. In bringing this action, CSAT seeks to vindicate the interests of its members, who are engaged in the business of obtaining for consumers or assisting consumers in obtaining payday and title loans, and who are thus directly regulated and injured by the Final Rule. This lawsuit is germane to the purpose of CSAT, which exists to preserve consumers' access to short-term credit options. CSAT's individual members are not indispensable to the proper resolution of this case.

20. Defendant Consumer Financial Protection Bureau ("CFPB" or the "Bureau") is an executive agency of the United States within the meaning of 5 U.S.C. § 105 and an agency within the meaning of the APA.

21. Defendant John Michael Mulvaney is the Acting Director of the Consumer Financial Protection Bureau. He is sued in his official capacity.

JURISDICTION AND VENUE

22. This Court has jurisdiction over this action pursuant to 28 U.S.C. § 1331 (federal question) and 5 U.S.C. § 702 (waiver of sovereign immunity).

23. Venue is proper in this Court under 28 U.S.C. § 1391(e)(1), because Defendants are an agency and an officer of the United States and plaintiff CSAT resides in this judicial district.

STATEMENT OF FACTS

A. The Consumer Financial Protection Bureau

24. In 2010, in response to the 2008 financial crisis, Congress enacted and President Obama signed the Dodd-Frank Wall Street Reform and Consumer Protection Act. Pub. L. No. 111-203 ("Dodd-Frank Act"). Title X of the Dodd-Frank Act is the Consumer Financial Protection Act of 2010 ("CFPA" or "Act").

25. The Act's centerpiece was the establishment, "in the Federal Reserve System," of a new "independent" regulatory agency known as the Bureau of Consumer Financial Protection ("CFPB" or "Bureau"). The Bureau is charged with regulating individuals and entities that engage in offering or providing consumer financial products or services, including loans provided primarily for personal, family, or household purposes.

26. As originally proposed by then-Professor Elizabeth Warren, the Bureau was to operate as a traditional multi-member independent agency. In the final legislation, however, Congress strayed from this well-established structure and instead provided, in Section 1011(b) of the Act, for a single "Director," appointed by the President with the advice and consent of the Senate, to "serve as the head of the Bureau."

27. Section 1011(c) of the Act provides that the Director shall serve for a term of five years; an individual may serve as Director after the expiration of his term until a successor has been appointed and qualified; and the President may remove the Director only for cause, that is, "for inefficiency, neglect of duty, or malfeasance in office." As a result, the President lacks the power to supervise or direct the Director in the exercise of his statutory authorities.

28. Section 1017(a) of the Act requires the Board of Governors of the Federal Reserve System to periodically transfer "the amount determined by the Director to be reasonably necessary to carry out the authorities of the Bureau," subject to a cap of 12% of the Federal Reserve System's operating expenses (over half a billion dollars). The Act provides further that this perpetual budget is exempt even from mere "review by the Committees on Appropriations of the House of Representatives and the Senate."

29. The Act delegates to the Bureau broad authority to create and enforce U.S. consumer protection laws. The Bureau possesses the power to "prescribe rules or issue orders or guidelines pursuant to" nineteen distinct consumer protection laws whose implementation was transferred to the Bureau from seven different government agencies. *See* CFPA § 1061(a), 12 U.S.C. § 5581(a). The Bureau may pursue actions to enforce these consumer financial laws and its own regulations in federal court, as well as in administrative actions before administrative law judges, and may issue subpoenas requesting documents or testimony in connection with those enforcement actions. CFPA §§ 1052–1054, 12 U.S.C. §§ 5562–5564. The Bureau has the power to impose a wide range of legal and equitable relief, including restitution, disgorgement, money damages, injunctions, and civil monetary penalties. *Id.* The Bureau also has supervisory power over nondepository lenders, including those who offer or provide payday loans. *Id.* § 1024, 12 U.S.C. § 5514.

30. Section 1021(a) of the Act requires the Bureau to implement and enforce consumer financial law "consistently for the purpose of ensuring that all consumers have access to markets for consumer financial products," and instructs the Bureau to ensure that "consumers are provided with timely and understandable information to make" their own "responsible decisions about financial transactions."

31. Section 1022(a) of the Act provides that, in exercising its rulemaking authority, the Bureau must consider "the potential benefits and costs to consumers and covered persons, including the potential reduction of access by consumers to consumer financial products or services resulting from such rule" and "the impact of proposed rules on covered persons … and the impact on consumers in rural areas."

32. Section 1031(b) of the Act provides that the Bureau's rulemaking authority includes the power to "prescribe rules … identifying as unlawful unfair, deceptive, or abusive acts or practices in connection with any transaction with a consumer for a consumer financial product or service, or the offering of a consumer financial product or service." Section 1031(h) further provides that "[r]ules under this section may include requirements for the purpose of preventing such acts or practices." This power to regulate unfair, deceptive, and abusive acts and practices is often referred to as the Bureau's "UDAAP" authority.

33. Pursuant to section 1031(c) of the Act, "[t]he Bureau shall have no authority … to declare an act or practice … to be unlawful on the grounds that such act or practice is unfair, unless the Bureau has a reasonable basis to conclude that—(A) the act or practice causes or is likely to cause substantial injury to consumers which is not reasonably avoidable by consumers; and (B) such substantial injury is not outweighed by countervailing benefits to consumers or to competition." Moreover, while "the Bureau may consider established public policies as evidence to be considered with all other evidence" in determining whether an act or practice is unfair, "[s]uch public policy considerations may not serve as a primary basis for such determination."

34. Pursuant to section 1031(d) of the Act, "[t]he Bureau shall have no authority … to declare an act or practice abusive … unless the act or practice—(1) materially interferes with the ability of a consumer to understand a term or condition of a consumer financial product or

service; or (2) takes unreasonable advantage of—(A) a lack of understanding on the part of the consumer of the material risks, costs, or conditions of the product or service; (B) the inability of the consumer to protect the interests of the consumer in selecting or using a consumer financial product or service; or (C) the reasonable reliance by the consumer on a covered person to act in the interests of the consumer."

35. Section 1027(o) of the Act provides that the Bureau lacks the authority to impose any usury limits on the extension of credit. It states: "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."

B. The Market for Payday Loans

36. A payday loan is small-dollar, short-term, unsecured loan based on a consumer's employment or other income. While the concept of an individual getting a loan based on future income has been around for centuries, payday lending emerged in the 1990s as check-cashing businesses began offering the service of cashing post-dated checks or agreeing to defer presentment of cashed checks. Today, thirty-five States permit—and regulate—payday lending.

37. The modern payday-lending transaction is straightforward. A borrower presents a lender evidence of a bank account and employment or other income. The borrower writes a check for a set amount or authorizes an equivalent electronic withdrawal from his bank account, and receives a cash loan of some value less than the face value of the check or electronic-withdrawal authorization. The payday lender promises not to cash the check or make the withdrawal for a short period of time, typically two weeks or a month. After that time, the borrower may pay off the loan in cash or the lender may cash the check or make the withdrawal. The difference between the face value of the check or authorized withdrawal and the cash

received by the consumer represents the fee. The typical payday transaction involves a loan of a few hundred dollars with a fee of $15 per $100 borrowed. This charge reflects the cost and risks of extending this form of credit.

38. At the end of the loan's term, a borrower may also have the option (depending on state law) of renewing, reborrowing, or rolling over the loan for another term for an additional charge. The borrower typically pays the original fee at this time. The Bureau refers to two or more payday loans taken in this manner as constituting a payday-loan "sequence."

39. Payday lenders offering these transactions provide a valued service to underserved consumers. Due to low profitability, mainstream financial institutions have largely vacated the small-dollar, short-term credit market, except for credit cards. Yet credit cards are unavailable to a significant subset of the population, and those who do have credit cards may have no remaining unused credit line. Left without access to commercial-bank credit, consumers with small, short-term credit needs must search for alternatives. Those alternatives include, for example, tapping into savings (if any), borrowing from social networks, pawn loans, and incurring fees associated with existing accounts, such as bounced-check fees or late-payment fees. Each of these types of credit has obvious drawbacks and consumers often do not have access to some types. Many consumers, for example, lack savings to tap or do not enjoy social networks populated by people with liquid assets to lend. Payday lending, by contrast, offers access to credit for consumers whose only resource is employment or other income, and it offers it on clear terms at nearby locations during convenient hours and on a quick timetable. Indeed, payday lending is not only an available and attractive option for underserved consumers, it is often the most cost-effective option.

40. By providing a source of credit to consumers with low credit scores and no viable alternatives, payday loans expand financial choices and allow individuals and households to better manage their cash flow in the face of volatile income and expenses. This in turn enables these consumers to avoid more costly alternatives, such as pawnbrokers, bank overdraft services, credit-card cash advances, over-the-limit credit-card fees, late-payment fees, utility-reconnection fees, and the like. Thus, restricting payday lending as an option for financially stressed consumers will make them worse off and force them to use inferior and less-preferred types of credit, such as pawnshops, or to go without credit.

41. Numerous studies demonstrate that consumers will substitute inferior and more costly alternative forms of credit when they lack access to payday loans. In States that have banned payday loans, the reduction in payday borrowing leads to increases in pawn loans. Consumers subject to payday-loan bans also bounce more checks and pay more bank overdraft fees. When Georgia and North Carolina banned payday lending, for example, the number of bounced checks skyrocketed. According to a Federal Reserve Board study, the number of consumer bankruptcies also increased.

42. These alternative forms of credit are both more expensive and have equivalent or higher annual percentage rates ("APRs") than payday loans. Pawn loans in many states, for example, have an average fee of $20 for each $100 borrowed, which translates to an APR of about 250 percent. And pawn shops are especially unappealing to many consumers because, even if their cost is comparable to payday loans, they require the borrower to part with valuable personal property that is forfeited upon default.

43. Similarly, overdraft fees are often more expensive than payday credit. A single overdraft charge is typically $50 (generally comprising $25 to the merchant and $25 to the bank),

which is substantially more than $15 for a $100 payday loan. One study estimated that a subset of households saves about $43 million per year in returned-check fees when States permit payday lending. Not only are overdraft fees more expensive than payday credit, but so is the overdraft "protection" offered by most banks. The Bureau itself has observed that one common overdraft scenario, involving a $34 finance charge on an overdraft of $24 borrowed for three days, carries an APR of 17,000%. The ability to charge these enormous fees has discouraged credit unions and banks from offering payday loans, and consumers have thus turned to payday lenders for their less expensive product.

44. The same is true of revolving credit and credit-card cash advances: consumers forced to engage in greater use of revolving credit likely end up paying even higher costs for credit and run into greater financial difficulty. For revolving credit, financially stressed consumers frequently find themselves pushed toward credit-line maximization and difficulty in meeting payments, thereby triggering repeated over-the-limit fees, late fees, and other behavior-based fees. And for credit-card cash advances, consumers fare even worse, showing a much higher rate of missed payments on mainstream credit loans than those who use payday loans.

45. Restricting access to payday loans hurts consumers in other ways as well. Without access to such loans, consumers are forced to miss required payments or to default on their other debts, giving rise to various collateral consequences, including late fees on utility bills or termination of crucial utility services, loss of bank accounts, and loss of a vehicle due to missed car payments or inability to pay for repairs. Further, unlike payday-loan defaults, which typically are not reported to the national credit bureaus, missed payments on other loans and invoices can damage the consumer's formal credit standing, making it even more difficult for the consumer to obtain credit and substantially harming his or her long-term financial health.

46. Finally, consumers lacking access to payday loans may turn to underground sources of credit, including illegal, unregulated lenders and criminal loan sharking, with its associated threats of violence. Research in the United States confirms that where payday credit has been restricted, consumers turn to online and unlicensed lenders. Similarly, research on foreign countries has shown that when access to consumer credit is restricted, many consumers will turn to illegal lending markets. Not surprisingly, borrowing from illegal lenders comes at a much higher cost than a payday loan, and collections by illegal lenders rest on threats, intimidation, violence, and forms of exploitation, including demands for sexual favors.

47. It is unsurprising, therefore, that payday borrowers praise the product and the companies who offer it in overwhelming numbers. The Bureau's own "Tell Your Story" and consumer-complaint portals demonstrate the overwhelmingly positive reaction of borrowers. Nearly all of the stories submitted to the "Tell Your Story" portal on payday lending and similar products are positive. The Bureau receives a minuscule number of complaints related to regulated, storefront payday lenders, far fewer than complaints about other products and services monitored by the Bureau. Social-science studies showing widespread borrower satisfaction confirm that an overwhelming number of borrowers are satisfied with the product.

48. A substantial amount of evidence confirms that access to payday loans does not harm consumers, but rather improves consumer financial health. These studies demonstrate that restricting access to payday loans injures consumers in various ways, including by increasing the number of bounced checks, or causing troubles with debt-collection agencies, delinquency on other accounts, mortgage foreclosures, bankruptcies, late payment of bills, and unemployment. They likewise show that consumer access to payday loans has no negative effect on various measures of consumer financial health.

49. Empirical research also shows that payday borrowers understand the nature of the product, including that their payday-loan indebtedness may last longer than the two-week or thirty-day initial term of the loan, and accurately predict how long it will take to repay their loans. Consumers thus fully understand and act in their own interests.

50. Under Texas law, consumers obtain payday, title, and similar small-dollar, short-term loans via regulated, licensed credit access businesses ("CABs") that obtain or assist consumers in obtaining loans made by independent third-party lenders. The CABs, rather than the lenders, maintain storefront locations, assist in qualifying borrowers, typically service and collect the loans for the lenders, and may also guaranty the loans. *See* 82 Fed. Reg. 54,472, 54,486, n.140 (Nov. 17, 2017). Consumers pay a fee to the CAB and interest on the loan capped at 10% per annum. According to the Bureau, the loans produced by such arrangements are functionally the same as those issued by a single entity. *Id.* at 54,534–35.

C. The Rulemaking Process

51. Despite the popularity and benefits of payday loans, the Bureau upon its formation promptly targeted them for elimination because of their high interest rates.

52. In developing and promulgating the Final Rule, the Bureau acted with an unalterably closed mind toward the preordained result of shutting down the payday-lending industry.

53. In targeting payday loans, the Bureau took its marching orders from special-interest groups opposed to payday lending, including Pew Charitable Trusts ("Pew") and the Center for Responsible Lending ("CRL"). *See, e.g.*, Anna Palmer, *Emails reveal consumer protection agency's cozy ties*, Politico, Nov. 19, 2015, *available at* goo.gl/DRCiTV. Among other things, the Bureau's proposed rule followed a literal outline given to it by CRL, and the Bureau later acceded when CRL directed it to speed up issuance of a final rule by abandoning

certain provisions addressing longer-term installment lending. At the same time, the Bureau cast aside independent studies submitted by payday lenders and neutral third parties—a strong indication, in itself, that the agency's preferred conclusions are not supported by evidence.

54. On June 2, 2016, the Bureau published a notice of proposed rulemaking that proposed to impose underwriting and other requirements on the extension of payday loans, vehicle-title loans (*i.e.*, loans secured by an interest in a vehicle), and installment loans with high interest rates. *See* 81 Fed. Reg. 47,863 (July 22, 2016). Although the Bureau accepted comments on the proposed rule during a four-month window ending in October 2016, the result of the rulemaking was a foregone conclusion: the elimination of longstanding payday (and vehicle-title) lending practices relied on by millions of customers, based on the Bureau's ideological and highly paternalistic view that these products are too expensive and that customers cannot be trusted with the freedom to make their own financial decisions.

55. Despite receiving substantial criticisms of the proposed rule from various constituents, as well as more than 1.4 million comments overall, the Bureau rushed the proposed rule to completion less than one year after the close of the 2016 comment period. The Final Rule was published in the Federal Register on November 17, 2017. *See* 82 Fed. Reg. 54,472 (Nov. 17, 2017).

D. The Final Rule

56. The principal element of the Final Rule is the imposition of an ability-to-pay requirement applicable to consumer loans, including payday and vehicle-title loans, with a contractual duration of forty-five days or less. *See* 12 C.F.R. § 1041.4 ("It is an unfair and abusive practice for a lender to make covered short-term loans … without reasonably determining that the consumers will have the ability to repay the loans according to their terms."). Pursuant to this requirement, a lender may not extend a covered short-term loan unless

it makes a "reasonable determination" that the consumer can make payments for major financial obligations (housing expense, debt obligations, including those under other covered loans, child-support obligations, and alimony), make all payments under the loan (*i.e.*, principal, interest, and fees), and meet basic living expenses (*e.g.*, food, utilities, transportation to work, daycare for dependent children), during the term of the loan and for thirty days thereafter. *Id.* § 1041.5(b).

57. Moreover, because the Bureau, guided by Pew and CRL, asserts that reborrowing is an indication that the consumer lacks the ability to repay the loan, the Final Rule prohibits lenders from making a covered short-term loan if it would be the fourth loan in a sequence. *Id.* § 1041.5(d)(2). (The Final Rule deems a covered loan part of a sequence if it is made during the term of, or within thirty days after, a prior covered loan. *Id.* § 1041.2(a)(14).) Loans are thus capped at three in a row followed by a mandatory thirty-day cooling off period, during which time no additional loans may be made. *Id.* § 1041.5(d)(2). In addition, the Bureau will "view extensive re-borrowing, as observed through the lender's performance metrics, as an indicator that the lender's ability-to-repay determinations may not be reasonable." 82 Fed. Reg. at 54,631.

58. The Final Rule permits lenders of payday (but not title) loans to comply with alternative requirements in lieu of the ability-to-pay requirements. Under this so-called "conditional exemption" to the ability-to-repay requirements, lenders are required, through the use of a registered information system, to verify the consumer's borrowing history and confirm that the consumer does not have, and over the preceding thirty days has not had, any outstanding covered loans, and that the loan will not result in the consumer having more than six covered loans or being in debt for more than ninety days during a twelve-month period. 12 C.F.R. § 1041.6. If a consumer meets these requirements, a lender is permitted to make (or roll over) up to three loans in a sequence without an ability-to-pay determination if the principal amount of the

first loan does not exceed $500; the principal amount of the second loan does not exceed two-thirds of that of the first loan; and the principal amount of the third loan does not exceed one-third of that of the first loan. *Id.* § 1041.6(b). Lenders must make specified written disclosures in connection with these loans, including, at time of first loan, notice of the restriction on principal amount and the restrictions on the number and principal amounts of future loans, and, at the time of the third loan, notice of the restriction on principal amount and the thirty-day cooling off period. *Id.* § 1041.6(e). A lender may not rely on this conditional exemption if a borrowing-history report is unavailable because, for example, no entity has been registered as an information system. 82 Fed. Reg. at 54,779.

59. Similar ability-to-repay requirements apply to longer-term balloon-payment loans. 12 C.F.R. § 1041.5. However, the Final Rule exempts from its ability-to-repay requirements "accommodation loans"—which the Bureau describes as "occasional small loans on an accommodation basis" made by "[s]ome depository institutions, particularly community banks and credit unions" "to their customers." 82 Fed. Reg. at 54,494. To qualify for the exemption, the lender and its affiliates collectively must have made no more than 2,500 covered loans in each of the current and preceding calendar years, and derived no more than 10% of their receipts from covered loans during the most recent completed tax year. 12 C.F.R. § 1041.3(f). Through this provision, the Final Rule permits banks and other depository institutions to offer loans, similar to payday loans, known as deposit advance products.

60. The Final Rule also prohibits, as an unfair and abusive practice, lenders of certain loans (including payday loans, vehicle-title loans, and longer-term installment loans with an APR greater than 36%) from attempting to withdraw payment from a consumer's account after the

lender's second consecutive attempt to do so has failed due to a lack of sufficient funds, without obtaining a new, specific authorization from the consumer. 12 C.F.R. §§ 1041.7–.8

61. The Final Rule also requires disclosures to consumers of payment-transfer attempts, *id.* § 1041.9; mandates the use of new credit reporting systems, *id.* §§ 1041.10–.11; imposes new compliance and record-keeping requirements, *id.* § 1041.12; and prohibits actions taken with the intent to evade any requirements of the rule, *id.* § 1041.13.

62. The Final Rule greatly increases the costs to payday lenders of doing business by imposing a slew of very costly operational requirements on lenders, including costs related to hiring new employees and investing in systems to comply with the Bureau's ability-to-repay requirements; furnishing and obtaining information from registered information services; and complying with the Final Rule's onerous record-retention obligations.

63. More significantly, the Final Rule will reduce dramatically the supply of credit by prohibiting the vast majority of payday loans that are currently made. This in turn would make payday lending so unprofitable that it would virtually eliminate the entire payday-loan industry, killing off hundreds of small businesses, eliminating thousands of jobs, and denying access to this form of credit to millions of consumers who rely on it, including those who the Bureau concedes benefit from payday loans.

64. The Bureau itself has conceded that the Rule's draconian requirements will prohibit the vast majority of payday loans that are currently made. The Bureau's own simulations project that the reborrowing restrictions imposed by the ability-to-repay requirements—requirements that by design are virtually impossible to meet—alone will cause storefront payday-loan volumes to decrease dramatically, by between 60% and 81%. 81 Fed. Reg. at 48,122. This is *in addition to* the significant reductions in loan volumes that will be

caused by the application of the ability-to-repay requirement to the first loan in a sequence. *Id.* The Bureau's own estimates are that only one-third or fewer of payday borrowers will be able to satisfy those ability-to-repay requirements. *Id.* at 48,125. Indeed, the Bureau concedes that the ability-to-repay requirements are so draconian that storefront payday lenders will be forced to eschew the ability-to-repay approach altogether and make loans "primarily" using the alternative requirements of the conditional exemption. *Id.* at 48,121. But the Bureau estimates that under the alternative requirements, loan volumes will decrease by between 55% and 62%. *Id.* at 48,122. And if a registered information service is unavailable, so is this alternative approach. 82 Fed. Reg. at 54,779.

65. The Bureau's simulations underestimate the full effect on loan volumes that would follow implementation of the Final Rule. Among other things, they improperly assume that consumers will not alter their behavior in response to the Final Rule, including that consumers will continue to borrow in the maximum amounts and durations permitted by the Final Rule (and, in particular, by the alternative requirements of the conditional exemption), even though those loans will no longer be adequate to meet the consumers' demanded amount or term, and that consumers will not immediately seek to substitute into other products, including illegal forms of credit, that completely fulfill their requirements.

66. Other studies confirm that the Bureau's already dramatic assessment of the Final Rule's devastating impact is too low. One study conducted after the Bureau proposed its rule found that the rule's ability-to-repay requirement would lead to a 90.5% to 92.7% decline in loan volumes, while the alternative requirements of the Final Rule's conditional exemption would reduce loan volumes by 81.7%. A second study concluded that the rule would result in a reduction in the supply of credit of 82.5%.

67. Of course, the most significant consequence of this vast elimination of credit from the marketplace is that the consumers who rely on it will no longer have access to it. Moreover, lenders who are no longer permitted to offer this credit will suffer severe revenue losses, making it impossible for them to stay in business and thereby eliminating even those payday loans that the Final Rule by its terms does not prohibit.

COUNT ONE

THE BUREAU VIOLATES THE SEPARATION OF POWERS AND THE RULE THEREFORE IS UNCONSTITUTIONAL AGENCY ACTION

68. Plaintiffs repeat and reallege each of the foregoing allegations in this Complaint.

69. Actions taken by an officer or agency that violate the Constitution's separation-of-powers protections are invalid. *Ryder v. United States*, 515 U.S. 177, 182–83 (1995). Private plaintiffs have the right to equitable relief to restrain government action that violates separation-of-powers principles. *Free Enter. Fund v. Public Co. Accounting Oversight Bd.*, 561 U.S. 477, 491 n.2 (2010).

70. In addition, the APA forbids agency action "contrary to constitutional right, power, privilege, or immunity." 5 U.S.C. § 706(2)(B).

71. The Constitution provides that "[t]he executive Power shall be vested in a President," U.S. Const., art. II, § 1, and that "he shall take Care that the Laws be faithfully executed," U.S. Const., art. II, § 2. These provisions vest all executive power, including the power to enforce the law, in the President of the United States. It is unconstitutional for Congress to vest executive power in officers who are not removable by, and hence not accountable to, the President. *See, e.g.*, *Myers v. United States*, 272 U.S. 52, 119 (1926). The sole exception to this rule applies only in the case of certain independent commissions headed by

bipartisan, multimember bodies (such as the Federal Trade Commission). *See Humphrey's Executor v. United States*, 295 U.S. 602, 632 (1935).

72. As set forth above, the Bureau exercises wide-ranging executive power that is insulated from Presidential supervision or control. The Bureau exercises its powers through a single presidentially appointed Director—not a bipartisan multimember commission—who may only be removed by the President "for cause," that is "for inefficiency, neglect of duty, or malfeasance in office."

73. This for-cause removal restriction enables the Bureau to exercise wide-ranging, core executive power immune from Presidential oversight, and impermissibly impedes and undermines the President's ability to perform his constitutional duties and prerogatives. As a result, the Board, as well as its implementation of its delegated responsibilities under the Act through rulemaking and otherwise, violates the separation of powers.

74. The Constitution further provides that "[n]o Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law." U.S. Const., art. I, § 9, cl. 7.

75. The Bureau takes federal government money without an appropriations act: The director has exclusive authority to set the Bureau's budget at up to 12% of the Federal Reserve System's operating expenses (over half a billion dollars), *see* CFPA § 1017(a)(2)(A), 12 U.S.C. § 5497(a)(2)(A), a perpetual budget that is exempt even from mere "review by the Committees on Appropriations of the House of Representatives and the Senate," *id*. § 1017(a)(1)–(2), 12 U.S.C. § 5497(a)(1)–(2). Both separately and in combination with the provisions shielding the Bureau from executive supervision, this improper insulation from congressional supervision renders invalid any assertion of the Bureau's regulatory authority.

76. For these reasons, the Bureau is unconstitutionally regulating plaintiffs, so the Final Rule must therefore be invalidated and enjoined. In addition, the Final Rule is contrary to constitutional right, power, privilege, or immunity, and must therefore be set aside.

COUNT TWO:

THE RULE VIOLATES THE NONDELEGATION DOCTRINE

77. Plaintiffs repeat and reallege each of the foregoing allegations in this Complaint.

78. The Constitution provides that "[a]ll legislative Powers herein granted shall be vested in a Congress of the United States." U.S. Const., art. I, § 1. This provision vests all legislative power in the Congress of the United States.

79. By virtue of its grant of legislative authority to the Bureau under the Act's provisions for prescribing rules identifying as unlawful unfair, deceptive, or abusive acts or practices, and its lack of an intelligible principle to which the Bureau is directed to conform in the exercise of that authority, the CFPA unconstitutionally delegates legislative power to an administrative agency.

80. For this reason, the Final Rule unconstitutionally regulates plaintiffs and must therefore be invalidated and enjoined. In addition, the Final Rule is contrary to constitutional right, power, privilege, or immunity, and must therefore be set aside.

COUNT THREE

AGENCY ACTION IN EXCESS OF STATUTORY AUTHORITY

81. Plaintiffs repeat and reallege each of the foregoing allegations in this Complaint.

82. The APA forbids agency action that is "in excess of statutory jurisdiction, authority, or limitations, or short of statutory right." 5 U.S.C. § 706(2)(C).

83. The Final Rule exceeds the Bureau's statutory authority in numerous respects.

84. *First*, the Final Rule's identification of unfair and abusive lending practices conflicts with the express limitations on the Bureau's authority to declare an act or practice unfair or abusive as set forth in section 1031 of the CFPA, 12 U.S.C. § 5531.

a. In order to be classified as "unfair," a practice must be "likely to cause substantial injury" that is "not reasonably avoidable by consumers." CFPA § 1031(c)(1)(A), 12 U.S.C. § 5531(c)(1)(A). Offering consumers a voluntary choice to obtain a payday or title loan (and to permit the withdrawal of loan payments from a consumer's bank account) based on fully disclosed terms cannot be considered likely to inflict "substantial injury" on consumers since it does nothing but increase the financial options available to them. To the contrary, a consumer's free and informed choice to obtain such a loan under fully disclosed terms is highly likely to confer a substantial *benefit* on the consumer, because it strongly indicates that the loan is a better option than any of the available alternatives. But in any event, any "injury" caused by payday or title loans is plainly "reasonably avoidable" because consumers are entirely free to simply refuse to take out such loans at their own discretion. As long as consumers have a free and informed choice, the amount of effort required to "avoid" the supposed "injury" cannot be considered "unreasonable," because it does not require any effort whatsoever for a consumer to avoid taking out a loan.

b. In order to be classified as "abusive," a practice must meet one of two conditions: It must either (1) interfere with a consumer's "ability . . . to understand a term or condition," or (2) take unreasonable advantage of the consumer's (A) "lack of understanding . . . of the material risks, costs, or conditions," or (B) his "inability . . . to protect [his] interests," or his (C) "reasonable reliance" on the lender to "act in the interests of the consumer." CFPA § 1031(d), 12 U.S.C. § 5531(d). These statutory criteria ensure that payday and title loan terms are fully disclosed and reasonably understood in order to facilitate a fair arms-length transaction between lenders and the consumers. By contrast, the Final Rule prohibits lending practices as "abusive" *regardless* of whether the consumer fully understands all of the terms, risks, conditions, and costs; *regardless* of whether the consumer is fully able to protect his interests by evaluating the relative costs and benefits; and *regardless* of whether the consumer has reasonably relied on the lender to act in his best interest. Instead, the agency has apparently construed the notion of consumer "understanding" to require a sophisticated knowledge of complex economic studies and industry-wide market dynamics, which would effectively allow the Bureau to prohibit *any* financial product on the ground that consumers are not sophisticated enough to "understand" their financial options.

85. *Second*, Congress set a clear boundary on the Bureau's authority by unequivocally prohibiting the Bureau from "establish[ing] a usury limit." CFPA § 1027(o), 12 U.S.C. § 5517(o). The Final Rule violates this command because it improperly targets what the Bureau deems to be "high-interest" loans; results from the Bureau's improper consideration of the cost of credit; determines the legal status of certain covered loans based solely on their interest rate; and, at bottom, rests on the Bureau's view that covered loans are harmful to consumers because of their high interest rates.

86. *Third*, the Bureau lacks statutory authority to impose an ability-to-repay requirement. An agency may not disrupt an established regulatory framework absent a clear congressional command. American law has long eschewed any legal requirement that lenders assess consumers' ability to repay extensions of consumer credit or otherwise evaluate the

appropriateness of credit for a consumer. In those few instances where Congress has authorized imposition of an ability-to-repay requirement, such as for certain mortgages and credit-card payments, it has done so clearly. In stark contrast, there is nothing in the Dodd-Frank Act authorizing the Bureau to impose an ability-to-repay requirement in the field of consumer credit. Without such an authorization, the Bureau simply is not delegated the power to impose an ability-to-repay requirement.

87. *Fourth*, the Final Rule violates Congress's statutory command that public policy considerations may not serve as a primary basis for an unfairness determination and may not be considered at all in determining whether an act or practice is abusive. *See* CFPA § 1031(c)–(d), 12 U.S.C. § 5531(c)–(d). In violation of these statutory commands, the Final Rule's UDAAP analysis is infused with, and ultimately turns on, public-policy considerations about the undesirability of expensive small-dollar loans.

88. *Fifth*, the Bureau's effort to stamp out a lawful, highly regulated product exceeds the Bureau's statutory UDAAP mandate. An agency may not prohibit a particular product when the premise of congressional lawmaking is that the product will be sold in the marketplace. By expressly authorizing the supervision of entities that offer or provide "payday loan[s]," CFPA § 1024(a)(1)(E), 12 U.S.C. § 5514(a)(1)(E); by requiring the Bureau to act with the purpose of ensuring that all consumers have access to credit and can make their own responsible decisions about financial transactions; and by empowering the Bureau to prevent practices, not products, Congress's plain premise is that payday and title loans will continue to be available to consumers who need them. Yet the Final Rule has the purpose and effect of fundamentally altering the payday- and title-loan products and eliminating them from the marketplace.

89. *Sixth*, the Final Rule is not a valid exercise of the Bureau's general rulemaking authority because the Final Rule is not "necessary or appropriate to enable the Bureau to administer and carry out the purposes and objectives of the Federal consumer financial laws, and to prevent evasions thereof." CFPA § 1022(b)(1), 12 U.S.C. § 5512(b)(1).

90. For these reasons, the Final Rule is in excess of statutory jurisdiction, authority, or limitations, or short of statutory right, and the Final Rule must therefore be set aside. 5 U.S.C. § 706(2)(A).

COUNT FOUR:

ARBITRARY AND CAPRICIOUS RULEMAKING IN VIOLATION OF THE APA

91. Plaintiffs repeat and reallege each of the foregoing allegations in this Complaint.

92. The APA forbids agency action that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A).

93. Under this provision of the APA, a court must set aside a rule if the agency's decision is unsupported by substantial evidence or if the agency has made a clear error in judgment. *See Safe Extensions, Inc. v. FAA*, 509 F.3d 593, 604 (D.C. Cir. 2007).

94. The Bureau's unfairness and abusiveness determinations are unsupported by substantial evidence and reflect a clear error in judgment.

95. The Bureau's unfairness determination rests on its assertion that covered short-term loans, as currently marketed without an ability-to-repay determination, cause or are likely to cause four types of substantial injuries to consumers: "default, delinquency, re-borrowing, and the collateral consequences caused by making unaffordable payments." 82 Fed. Reg. at 54,591. None of these asserted harms is supported by substantial evidence. To the contrary, the Bureau's conclusions rest on various suppositions and erroneous presumptions about consumer harm.

96. *First*, in equating reborrowing with substantial injury, the Bureau arbitrarily and capriciously assumes without evidence that the extended use of covered short-term loans is harmful to consumers. Indeed, the Bureau failed to conduct any research on whether reborrowing causes consumer harm—a telling omission given that reborrowing is the central purported harm addressed by the Final Rule. The Bureau also wrongly refused to assess as part of its injury analysis whether the risks and costs of the loan are likely to be outweighed by the corresponding *benefits* to the consumer in the typical loan transaction. The Bureau's failure to establish substantial injury is alone sufficient cause for setting aside the Final Rule. In fact, the available evidence, ignored by the Bureau, shows that payday loans generally, as well as loan sequences that result from reborrowing, provide net benefits, allowing cash-strapped and credit-starved consumers to satisfy necessary expenses without resorting to more costly and less affordable alternatives.

97. *Second*, the Bureau mischaracterizes the allegedly harmful consequences of payday-loan defaults and delinquencies. Moreover, these alleged harms (*e.g.*, injuries related to debt collection and bank fees for failed ACH payments) are caused by third parties involved in repayment and collection efforts, and it is arbitrary, capricious, and unreasonable for the Bureau to restrict the *availability* of small-dollar loans because of perceived abuses by non-lenders.

98. *Third*, the Bureau lacks any evidence that the "collateral consequences" it identifies are caused—rather than mitigated—by payday loans.

99. The Bureau's unfairness determination further rests on the claim that the asserted substantial injuries are not reasonably avoidable by consumers. But the Bureau's assertion that there are obstacles to the free exercise of consumer decision-making is speculative, unreasonable, and contradicted by the available evidence. Here, too, the Bureau failed to

conduct any research to support its claim that consumers are forced to reborrow on their existing loans, and the only actual research on this point establishes the opposite.

100. The Bureau's unfairness determination further rests on the claim that the asserted substantial injuries are not outweighed by countervailing benefits to consumers or to competition. The Bureau's analysis here makes three basic errors: (1) the Bureau arbitrarily assigns excessive weight to the asserted injuries, (2) it ignores the benefits to consumers of payday and title lending, and (3) it ignores the benefits to competition from current lending practices.

101. The Bureau also lacks substantial evidence for its claim that making a payday or title loan without satisfying the Final Rule's ability-to-repay requirements is abusive because (1) consumers do not understand the material risks and costs of such loans, (2) borrowers are unable to protect their own interests because they are financially vulnerable, and (3) lenders take unreasonable advantage of these consumers through a business model that profits from reborrowing activity. On all three of these points, the evidence relied on by the Bureau strongly points to the precise opposite of what the Bureau concluded.

102. The Final Rule is also arbitrary and capricious because the Bureau's actions are internally inconsistent. Under the Bureau's rationale, consumers are "harmed" to an even greater degree by higher-cost alternative short-term credit solutions like overdraft protection and credit-card late fees and by longer-duration loan products. However, not only has the Bureau failed to take any action to restrict those products, but the Final Rule will cause consumers to use them instead of payday loans. Additionally, the Final Rule's exemption for "accommodation loans" (*i.e.*, deposit advance products) arbitrarily and capriciously exempts banks and credit unions from the restrictions imposed on non-bank lenders.

103. An agency action is also arbitrary and capricious if the agency either fails to provide a reasoned explanation for its action or has "entirely failed to consider an important aspect of the problem" being regulated. *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co*., 463 U.S. 29, 43 (1983).

104. The agency has failed to engage in any reasoned explanation in support of the draconian inability-to-repay requirements imposed by the Final Rule. It points to no empirical studies showing that payday borrowing or reborrowing results in worse consumer outcomes compared to outcomes for consumers in the same financial circumstances who choose not to use or do not have access to payday loans. It uses no reliable studies of consumers of payday loans. Nor does it make any real attempt to compare consumer-welfare outcomes between states that allow payday lending and those that prohibit or restrict it. And it fails to assess how many payday borrowers are injured, and in what magnitude, compared to the alternative scenario in which payday lending were not available to them. These failures make it impossible for the Bureau to have reached any reasoned conclusion about the overall consequences of the Final Rule.

105. The Bureau has also entirely failed to consider multiple important aspects of the purported "problem" of payday lending.

106. First, the Bureau has ignored abundant evidence showing that consumers rely on payday loans and loan sequences for their own substantial benefit and would shift to far worse alternatives if these products were unavailable. As discussed above, consumers use payday loans because they need access to credit, and rationally choose payday loans and payday loan sequences because they are superior to other available alternatives. If payday loans are banned or severely restricted, then consumers will turn to other inferior and more costly alternatives,

such as pawnbrokers, illegal loan sharks, and unregulated and unlicensed lenders, or suffer the negative consequences of an inability to pay expenses, such as overdraft fees for bounced checks, late fees for missed payment of bills, and reactivation fees to restore services terminated as a result of non-payment or late payment. The Bureau has utterly failed to consider this aspect of the purported problem, pretending instead that payday lending practices are somehow the *cause* of consumers' financial woes instead of an effective part of a market-based *solution* that is far superior to the available alternatives.

107. Second, despite claiming to be acting in the interests of consumers, the Bureau failed to give any consideration to the views and desires of actual borrowers who rely on the services that will be eliminated by the Bureau's new regulations. Instead, in its paternalistic rush to judgment, the Bureau has relied on abstract, preconceived, ivory-tower theories about consumer behavior, without consulting any actual consumers who will be dramatically harmed—and whose freedom will be dramatically curtailed—by the Bureau's rulemaking. And in disregarding the views of over one million consumers who submitted comments opposing the Final Rule, the Bureau blithely asserts that its rulemaking is "not designed" to be governed by "majority sentiment." 82 Fed. Reg. at 54,518.

108. Third, in its haste to eliminate a critical source of credit for millions of consumers, the Bureau has failed to consider whether the problems it identifies can be addressed through alternative measures that mitigate or ameliorate unnecessary, harmful burdens. In particular, the Bureau has failed to consider whether any lack of consumer understanding that may exist regarding the costs and risks of payday and title loans could be addressed through an enhanced disclosure regime. Disclosure is the backbone of federal consumer credit law, from the Truth in Lending Act to the CFPA, and yet the Bureau has made no attempt to explain why disclosure

requirements that are sufficient in a host of other financial-services contexts are somehow insufficient in this context. At the same time, the Bureau has failed to consider the various approaches to short-term lending currently followed by at least thirty-five states, which are far less draconian than the Final Rule but nevertheless succeed in addressing the Bureau's purported concerns. The Bureau has also failed to consider addressing consumers' underlying need for credit by making educational efforts and encouraging saving among vulnerable populations instead of regulating their best financial options out of existence. And finally, the Bureau has failed to consider whether it could obtain better results by targeting unregulated lenders that operate offshore and online, out of the reach of existing federal and state consumer-protection measures.

109. The Bureau has failed to explain how the authorizing statute empowers it to preempt state law by regulation, especially given the strong presumption that state law should not be displaced absent a statement of clear congressional intent. At the same time, the Bureau has also failed to explain why such broad preemption is justified when more than half of the States have chosen to allow payday lending, and all of those already have consumer protections in place. Before completely eradicating all of these established state-law regulatory regimes in one fell swoop, the Bureau is at least required to engage in some examination of how each regulatory regime is functioning and whether these state-law solutions are working effectively without federal intervention.

110. The Bureau has also failed to consider whether it should allow an exemption for States that already effectively regulate the perceived risks of payday and title lending through their own consumer-protection laws. Instead of respecting federalism by analyzing whether the Bureau's perceived problems may have already been successfully addressed in some States, the

Bureau has taken a heavy-handed, one-size-fits-all approach that treats every state lending market as if it were exactly the same.

111. The Final Rule's provisions regarding payment-transfer attempts are likewise outside the scope of the Bureau's statutory UDAAP authority and otherwise arbitrary, capricious, and unsupported by substantial evidence. These provisions purport to be justified by the Bureau's professed concern about the fees that consumers' banks might impose on them for failed payment-withdrawal attempts. But, among other things, the Bureau has improperly relied on evidence about online lenders to justify provisions applicable to storefront lenders; has improperly confused the cost of a loan with injury; has made an entirely arbitrary determination that fees associated with a third (rather than, say, a fifth) attempted withdrawal constitute "substantial injury"; ignores ways that consumers can avoid fees; and improperly treats covered lenders, rather than the banks that impose and collect the fees, as the cause of the consumers' alleged injuries.

COUNT FIVE

DEFECTIVE COST-BENEFIT ANALYSIS

112. Plaintiffs repeat and reallege each of the foregoing allegations in this Complaint.

113. The Dodd-Frank Act requires the Bureau to consider "the potential benefits and costs to consumers and covered persons [*i.e.*, lenders], including the potential reduction of access by consumers to consumer financial products" and "the impact on consumers in rural areas." CFPA § 1022(b)(2), 12 U.S.C. § 5512(b)(2). Such cost-benefit analyses are inadequate if, *inter alia,* the agency: relies on estimates that "ha[ve] no basis beyond mere speculation"; fails to estimate costs that are quantifiable; completely discounts available studies in favor of relatively unpersuasive studies; fails to adopt a reasonable baseline so as to account for the marginal costs of the rule; "duck[s] serious evaluation of" certain costs; engages in internally inconsistent

reasoning; and fails to address requested exceptions for entities that are situated differently for purposes of costs and benefits. *Business Roundtable v. SEC*, 647 F.3d 1144, 1150–55 (D.C. Cir. 2011).

114. The Bureau's cost-benefit analysis fails to satisfy these standards for several reasons, including: (1) the purported benefits of the Final Rule are speculative because the Bureau simply presumes the existence of harms caused by covered short-term loans (as currently marketed without the Bureau's ability-to-repay determination) and fails to account for the benefits of those loans, (2) the costs of the Final Rule are understated because the Bureau has not seriously considered the impact on consumers of the loss of a crucial source of credit, (3) the Bureau has failed to consider the cost of depriving consumers of their free choice to make a financial decision, (4) the Bureau has failed to consider the Final Rule's impact on consumer privacy, and (5) the Bureau has failed to fully evaluate the Final Rule's impact on consumers in rural areas.

COUNT SIX:

FAILURE TO OBSERVE PROCEDURE REQUIRED BY LAW

115. Plaintiffs repeat and reallege each of the foregoing allegations in this Complaint.

116. The APA forbids agency action that is "without observance of procedure required by law." 5 U.S.C. § 706(2)(D).

117. Here, the Bureau has violated at least four procedural requirements.

118. First, for a notice-and-comment rulemaking process to be meaningful under the APA, the agency must actually evaluate the information presented during the process, rather than dismiss it to reach a pre-ordained result. Here, however, the history of the rulemaking demonstrates that the Bureau will not consider or evaluate empirical studies or evidence that diverges from the Bureau's pre-determined decision that payday lending and title lending are

harmful and must be burdened by draconian regulations. Ever since the Bureau began to consider regulating payday lending, it has repeatedly made statements and issued publications riddled with errors and misperceptions. CFSA and others have repeatedly attempted to correct these errors and misperceptions, but to no avail. Instead, the Bureau has doubled-down on its earlier errors through first the proposed rule and then the Final Rule, which suffers from the same methodological and evidentiary defects. Because the Bureau refuses to rationally consider the evidence and instead dismisses every cited study's conclusion as incorrect, it has demonstrated that its mind was unalterably closed to any result aside from promulgation of the Final Rule. Such behavior is an abuse of discretion and shows the capriciousness of the Bureau's actions.

119. Second, based on information obtained under the Freedom of Information Act (FOIA), as well as other information and belief, the Bureau has largely allowed outside groups opposed to payday lending to drive this rulemaking, and has not adequately disclosed its reliance on these groups. Because the Bureau has so allowed these special-interest groups to dictate the scope and text of the Final Rule while ignoring the concerns of lenders and borrowers, the agency has reduced the elaborate rulemaking process to little more than a sham. As a result, the outcome of the process was preordained from the beginning of the process, and the resulting Final Rule is procedurally invalid.

120. Third, the Bureau has failed to comply with the Regulatory Flexibility Act (RFA) by failing to adequately assess the Final Rule's impact on small businesses and by improperly going through the motions of a small-business-review panel process under the Small Business Regulatory Enforcement Fairness Act (SBREFA) without any meaningful thought or analysis towards a foregone conclusion. Under the SBREFA, an agency must, at the time of issuance of a

notice of proposed rulemaking, publish an initial regulatory flexibility analysis which "shall describe the impact of the proposed rule on small entities." 5 U.S.C. § 603(a). That initial analysis must also describe "any significant alternatives to the proposed rule which accomplish the stated objectives" of the applicable statute while minimizing significant economic impact on small entities. *Id.* § 603(c). And the final analysis published with the final rule must explain how the agency has minimized the impact of the rule on small entities and why it has rejected alternatives. *Id*. § 604(a)(6). Here, the Bureau failed to adequately take into account the impacts on small businesses, as demonstrated by the blistering comment submitted in opposition to the rule by the Chief Counsel for Advocacy of the Small Business Administration. The Bureau's failures in this regard are particularly egregious because the Final Rule will have a devastating impact on thousands of small businesses and the untold number of consumers that those business serve.

121. Fourth, the APA requires that the agency "shall give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments" and that the agency give "consideration" to "the relevant matter presented." 5 U.S.C. § 553(c). During the period for such submissions, the Bureau received more than 1.4 million written comments from interested persons, including over one million comments from consumers who opposed the proposed rule. Showing disdain for the views of those who will be most affected by the Final Rule, however, the Bureau failed to adequately take these highly relevant comments into account or give them the individualized consideration required by the APA.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs respectfully pray for an order and judgment in their favor and against defendants comprising the following relief:

1. an order and judgment holding unlawful, enjoining, and setting aside the Final Rule;

2. costs and attorneys' fees pursuant to any applicable statute or authority;

3. any other relief that the Court deems just and appropriate.

Dated: April 9, 2018

Respectfully submitted,

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Counsel for Plaintiffs

*Applications for admission *pro hac vice* pending

TAB 6

Amended Complaint
ECF No. 76 (Aug. 28, 2020)

FILED
August 28, 2020
CLERK, U.S. DISTRICT COURT
WESTERN DISTRICT OF TEXAS
BY: ____________
DEPUTY

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

COMMUNITY FINANCIAL SERVICES ASSOCIATION OF AMERICA, LTD., and CONSUMER SERVICE ALLIANCE OF TEXAS,

Plaintiffs,

v.

CONSUMER FINANCIAL PROTECTION BUREAU and KATHLEEN LAURA KRANINGER, in her official capacity as Director, Consumer Financial Protection Bureau,

Defendants.

Civil Action No. 1:18-cv-00295

AMENDED COMPLAINT

Plaintiffs Community Financial Services Association of America, Ltd., and Consumer Service Alliance of Texas allege, by and through their attorneys, on knowledge as to Plaintiffs and on information and belief as to all other matters, as follows:

1. Consumer credit products, including small-dollar, short-term loans known as payday loans or payday advances, as well as consumer installment loans, provide a financial lifeline for millions of consumers who need access to funds and choose these products over other available forms of credit. Currently, approximately twelve million Americans per year rely on payday loans to help with their financial needs, and millions more rely on installment lending. Without payday and installment loans, these consumers would be forced into vastly inferior and more costly alternatives, such as pawn loans, defaults on other debts, late-payment fees, and the use of unregulated and illegal underground sources of credit. Consumers understand this, which is why they consistently and overwhelmingly praise these products and value the flexibility they provide.

2. Yet rather than strengthen and protect access to these critical forms of consumer credit, the Consumer Financial Protection Bureau ("CFPB" or "Bureau") decided to virtually eliminate payday lending through its final rule on payday, vehicle title, and certain high-cost installment loans (the "2017 Rule"). Part of the 2017 Rule consisted of draconian ability-to-repay provisions, also known as underwriting provisions, that restricted payday loans to borrowers with sufficient net income to satisfy all other financial obligations and repay the loan within its initial term—a limitation fundamentally inconsistent with the fact that consumers, many of whose income and expenses vary from one month to the next, use payday loans precisely *because* their net income in a particular month may be insufficient to satisfy their financial obligations. Another part of the Rule, known as the payments provisions, imposed arbitrary, capricious, and unwarranted limitations on consumers' ability to pre-authorize future payments from their bank accounts for payday and installment loans, thereby increasing the risks of late-payment fees and loan defaults, and potentially limiting access to credit.

3. The 2017 Rule rested on unfounded presumptions of harm and misperceptions about consumer behavior, and was motivated by a deeply paternalistic view that consumers cannot be trusted with the freedom to make their own financial decisions. In fact, the Bureau ignored and attempted to discount the available research showing that the identified practices result in *improved* financial conditions, not harm, because in many cases they are better than the alternative options available to consumers. By targeting a critical form of credit for millions of borrowers who are in dire need of it, the 2017 Rule would have severely injured the very consumers the Bureau is charged with protecting.

4. This fundamentally flawed rule resulted from a fundamentally flawed agency—one whose substantial power over the U.S. economy was unconstitutionally concentrated in a

single, unaccountable and unchecked Director insulated from both the President and the Congress and hence from the people. The Bureau's policies—including the 2017 Rule—were therefore those of the Director alone, without any mechanism of political accountability.

5. Following the resignation of the Director responsible for the 2017 Rule, the Bureau acknowledged certain key flaws in the 2017 Rule, including that the evidence supporting the 2017 Rule was insufficiently robust and reliable and that the prior Director has misinterpreted the proper scope of the Bureau's statutory authority to regulate unfair, deceptive, and abusive acts and practices ("UDAAP"). The Bureau accordingly initiated rulemaking proceedings to revoke the underwriting provisions of the 2017 Rule and, on July 22, 2020, promulgated a final rule revoking those provisions.

6. Even though the payments provisions suffered from similar flaws, including the very same misinterpretation of the Bureau's UDAAP authority, the Bureau arbitrarily and capriciously declined to consider repealing those provisions at that time.

7. On June 29, 2020, while the revocation rulemaking was pending, the United States Supreme Court held that the Bureau's structure was unconstitutional, and invalidated the statutory provision that had insulated the Bureau's director from removal by the President except for cause.

8. Because the Bureau was unconstitutionally structured prior to June 29, 2020, it lacked the authority in 2016 and 2017 to undertake notice-and-comment rulemaking and promulgate the 2017 Rule. So that Rule, including the payments provisions still at issue, was void *ab initio*.

9. In response to the Supreme Court's ruling, the Bureau announced a "ratification" purporting to affirm and ratify the payment provisions of the 2017 Rule. This purported ratification did not go through notice-and-comment rulemaking and failed to explain, or even address, why the

Bureau was purporting to affirm and ratify components of a rule that had relied, in the Bureau's own assessment, on an incorrect interpretation of the Bureau's statutory UDAAP authority.

10. At the same time, the Bureau arbitrarily and capriciously denied a petition from CFSA member Advance Financial to amend the 2017 Rule to exempt debit-card payments from the payments provisions.

11. The Bureau's purported ratification of the payments provisions is legally insufficient to cure the constitutional defects in the 2017 Rule or otherwise make effective the 2017 Rule's payments provisions. Those provisions require a valid rulemaking process, which only a validly constituted agency can undertake. If the Bureau wishes to impose those provisions, it must conduct a new, valid rulemaking. To allow it to lean on ratification now would enable the agency to sidestep essential notice-and-comment requirements based on a previous agency action (an attempted rulemaking) that all now agree had no legal force whatsoever, and that cannot lawfully be given retroactive legal force through a ratification.

12. Even if this sort of ratification workaround were a coherent possibility in the abstract, the Bureau's attempted ratification here was arbitrary and capricious because the "ratified" provisions rested on an interpretation of "unfair" and "abusive" that the Bureau has since repudiated. The attempted ratification also violates principles of agency law that govern all ratifications.

13. Even apart from the flawed ratification, the payments provisions of the 2017 Rule and the rulemaking process that produced them suffer from other critical flaws. For one, the 2017 Rule is fundamentally at odds with Congress's careful delineation of the Bureau's statutory authority. Congress set a clear boundary on the Bureau's powers by unequivocally declaring that the Bureau lacks the authority to establish a usury limit. The payments provisions flagrantly run

afoul of this statutory restriction by improperly targeting installment loans with a rate higher than 36%.

14. The payments provisions also are unlawful because they rest on a construction of the statutory terms "unfair" and "abusive" that, as the Bureau itself concedes, is incorrect and because, in any event, the Bureau lacks substantial evidence for its conclusions that the prohibited payments practices are unfair and abusive. To the contrary, the Bureau simply presumed without evidence that consumers do not know or appreciate what they are doing when they provide authorizations for lenders to initiate payments by accessing their bank accounts.

15. The payments provisions are arbitrary and capricious for the further reasons that they improperly assume lenders are the *cause* of the purported injury. In fact, the alleged harms—the fees charged by the consumers' banks for failed payment-transfer attempts and the possibility of account closures—are caused by third parties involved in repayment efforts, and it is arbitrary, capricious, and unreasonable for the Bureau to restrict lender practices because of perceived abuses by non-lenders. The Bureau also acted arbitrarily and capriciously in extending the payments provisions to multi-payment installment loans (where consumers have lengthy periods of time between installments to respond to failed payment-transfer attempts) and to debit and prepaid card transactions (for which failed payment-transfer attempts typically do not result in fees).

16. For these and other reasons set forth herein, the 2017 Rule and the Bureau's purported ratification of the payments provisions are outside the Bureau's constitutional and statutory authority, as well as unnecessary, arbitrary, capricious, overreaching, procedurally improper, and substantially harmful to lenders and borrowers alike. Accordingly, Plaintiffs ask this Court to set aside the 2017 Rule and the purported ratification under the Constitution and the

Administrative Procedure Act, 5 U.S.C. §§ 551–559, 701–706 (the "APA"). In the alternative, because the Bureau's denial of Advance Financial's rulemaking petition was arbitrary and capricious, the Court should order the Bureau to undertake the rulemaking requested in Advance Financial's petition.

PARTIES

17. Plaintiff Community Financial Services Association of America, Ltd. ("CFSA") is a non-profit organization created in and existing under the laws of Maryland. CFSA is a national trade association for companies offering small-dollar, short-term payday loans and similar consumer financial products, including consumer installment loans. CFSA was established in 1999 to promote laws and regulations that protect consumers while preserving their access to credit options, and to support and encourage responsible industry practices. In bringing this action, CFSA seeks to vindicate the interests of its members, who are engaged in the business of offering payday loans, installment loans, and similar consumer financial products, several of whom have extensive operations in Texas. CFSA's members are directly regulated and injured by the 2017 Rule, and are adversely affected by the Bureau's purported ratification of the payments provisions and its denial of Advance Financial's rulemaking petition. This lawsuit is germane to the purpose of CFSA, which exists to preserve consumers' access to consumer credit options. CFSA's individual members are not indispensable to the proper resolution of the case.

18. Plaintiff Consumer Service Alliance of Texas ("CSAT") is a non-profit organization created in and existing under the laws of Texas. It is headquartered and maintains its principal place of business in Austin, Texas. CSAT is a statewide trade association whose members are regulated, licensed Texas credit access businesses ("CABs") that obtain for consumers or assist consumers in obtaining extensions of consumer credit in the form of single-

payment and multiple-payment small-dollar, short-term deferred presentment transactions (*i.e.*, payday loans), and motor vehicle title loans. CSAT advocates for the protection of financial choice based on personal responsibility and seeks to help ensure that Texans have access to short-term loans and other financial-services products in compliance with the law and responsible industry practices. In bringing this action, CSAT seeks to vindicate the interests of its members, who are engaged in the business of obtaining for consumers or assisting consumers in obtaining single- and multiple-payment payday and motor vehicle title loans, and who are thus directly regulated and injured by the 2017 Rule and are adversely affected by the Bureau's purported ratification of the payments provisions and its denial of Advance Financial's rulemaking petition. This lawsuit is germane to the purpose of CSAT, which exists to preserve consumers' access to consumer credit options. CSAT's individual members are not indispensable to the proper resolution of this case.

19. Defendant Consumer Financial Protection Bureau ("CFPB" or the "Bureau") is an executive agency of the United States within the meaning of 5 U.S.C. § 105 and an agency within the meaning of the APA.

20. Defendant Kathleen Laura Kraninger is the Director of the Consumer Financial Protection Bureau. She is sued in her official capacity.

JURISDICTION AND VENUE

21. This Court has jurisdiction over this action pursuant to 28 U.S.C. § 1331 (federal question) and 5 U.S.C. § 702 (waiver of sovereign immunity).

22. Venue is proper in this Court under 28 U.S.C. § 1391(e)(1)(A), because Defendants are an agency and an officer of the United States and plaintiff CSAT resides in this judicial district. Venue is also proper in this Court under 28 U.S.C. § 1391(e)(1)(B), because

Defendants are an agency and an officer of the United States and a substantial part of the events or omissions giving rise to the claims occurred in this District.

STATEMENT OF FACTS

A. The Consumer Financial Protection Bureau

23. In 2010, in response to the 2008 financial crisis, Congress enacted and President Obama signed the Dodd-Frank Wall Street Reform and Consumer Protection Act. Pub. L. No. 111-203 ("Dodd-Frank Act"). Title X of the Dodd-Frank Act is the Consumer Financial Protection Act of 2010 ("CFPA" or "Act").

24. The Act's centerpiece was the establishment, "in the Federal Reserve System," of a new "independent" regulatory agency known as the Bureau of Consumer Financial Protection ("CFPB" or "Bureau"). The Bureau is charged with regulating individuals and entities that engage in offering or providing consumer financial products or services, including loans provided primarily for personal, family, or household purposes.

25. As originally proposed by then-Professor Elizabeth Warren, the Bureau was to operate as a traditional multi-member independent agency. In the final legislation, however, Congress strayed from this well-established structure and instead provided, in Section 1011(b) of the Act, for a single "Director," appointed by the President with the advice and consent of the Senate, to "serve as the head of the Bureau." The Act provides that the Director shall serve for a term of five years.

26. Before it was invalidated by the Supreme Court, a provision of Section 1011(c) of the Act provided that the President may remove the Director only for cause, that is, "for inefficiency, neglect of duty, or malfeasance in office." As a result, the President lacked the power to supervise or direct the Director in the exercise of his statutory authorities.

27. The Act delegates to the Bureau broad authority to create and enforce U.S. consumer protection laws. The Bureau possesses the power to "prescribe rules or issue orders or guidelines pursuant to" nineteen distinct consumer protection laws whose implementation was transferred to the Bureau from seven different government agencies. *See* CFPA § 1061(a), 12 U.S.C. § 5581(a). The Bureau may pursue actions to enforce these consumer financial laws and its own regulations in federal court, as well as in administrative actions before administrative law judges, and may issue subpoenas requesting documents or testimony in connection with those enforcement actions. CFPA §§ 1052–1054, 12 U.S.C. §§ 5562–5564. The Bureau has the power to impose a wide range of legal and equitable relief, including restitution, disgorgement, money damages, injunctions, and civil monetary penalties. *Id.* The Bureau also has supervisory power over nondepository lenders, including those who offer or provide payday and installment loans. *Id.* § 1024, 12 U.S.C. § 5514.

28. Section 1021(a) of the Act requires the Bureau to implement and enforce consumer financial law "consistently for the purpose of ensuring that all consumers have access to markets for consumer financial products," and instructs the Bureau to ensure that "consumers are provided with timely and understandable information to make" their own "responsible decisions about financial transactions."

29. Section 1022(a) of the Act provides that, in exercising its rulemaking authority, the Bureau must consider "the potential benefits and costs to consumers and covered persons, including the potential reduction of access by consumers to consumer financial products or services resulting from such rule" and "the impact of proposed rules on covered persons … and the impact on consumers in rural areas."

30. Section 1031(b) of the Act provides that the Bureau's rulemaking authority includes the power to "prescribe rules … identifying as unlawful unfair, deceptive, or abusive acts or practices in connection with any transaction with a consumer for a consumer financial product or service, or the offering of a consumer financial product or service." Section 1031(h) further provides that "[r]ules under this section may include requirements for the purpose of preventing such acts or practices." This power to regulate unfair, deceptive, and abusive acts and practices is often referred to as the Bureau's "UDAAP" authority.

31. Pursuant to section 1031(c) of the Act, "[t]he Bureau shall have no authority … to declare an act or practice … to be unlawful on the grounds that such act or practice is unfair, unless the Bureau has a reasonable basis to conclude that—(A) the act or practice causes or is likely to cause substantial injury to consumers which is not reasonably avoidable by consumers; and (B) such substantial injury is not outweighed by countervailing benefits to consumers or to competition." Moreover, while "the Bureau may consider established public policies as evidence to be considered with all other evidence" in determining whether an act or practice is unfair, "[s]uch public policy considerations may not serve as a primary basis for such determination."

32. Pursuant to section 1031(d) of the Act, "[t]he Bureau shall have no authority … to declare an act or practice abusive … unless the act or practice—(1) materially interferes with the ability of a consumer to understand a term or condition of a consumer financial product or service; or (2) takes unreasonable advantage of—(A) a lack of understanding on the part of the consumer of the material risks, costs, or conditions of the product or service; (B) the inability of the consumer to protect the interests of the consumer in selecting or using a consumer financial product or service; or (C) the reasonable reliance by the consumer on a covered person to act in the interests of the consumer."

33. Section 1027(o) of the Act provides that the Bureau lacks the authority to impose any usury limits on the extension of credit. It states: "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."

B. The Market for Payday and Installment Loans

34. A payday loan is small-dollar, short-term, unsecured loan based on a consumer's employment or other income. While the concept of an individual getting a loan based on future income has been around for centuries, payday lending emerged in the 1990s as check-cashing businesses began offering the service of cashing post-dated checks or agreeing to defer presentment of cashed checks. Today, thirty-five States permit—and regulate—payday lending.

35. The modern payday-lending transaction is straightforward. A borrower presents a lender evidence of a bank account and employment or other income. The borrower writes a check for a set amount or authorizes an equivalent electronic withdrawal from his bank account, and receives a cash loan of some value less than the face value of the check or electronic-withdrawal authorization. The payday lender promises not to cash the check or make the withdrawal for a short period of time, typically two weeks or a month. After that time, the borrower may pay off the loan in cash or the lender may cash the check or make the withdrawal. The difference between the face value of the check or authorized withdrawal and the cash received by the consumer represents the fee. The typical payday transaction involves a loan of a few hundred dollars with a fee of $15 per $100 borrowed. This charge reflects the cost and risks of extending this form of credit.

36. At the end of the loan's term, a borrower may also have the option (depending on state law) of renewing, reborrowing, or rolling over the loan for another term for an additional

charge. The borrower typically pays the original fee at this time. The Bureau refers to two or more payday loans taken in this manner as constituting a payday-loan "sequence."

37. Another form of small-dollar consumer credit is the installment loan. These loans typically involve a larger principal balance than payday loans, and are repaid in multiple installments over a longer period of time, which each installment typically due at the consumer's payday. Like traditional payday loans, the borrower typically provides the lender with authorization to obtain repayment by withdrawing the funds from the borrower's bank account.

38. As in other contexts (*e.g.*, automatic bill payment), the use of preauthorized payments provides numerous benefits to consumers, including convenience, fewer missed payments, and lower costs.

39. Lenders offering payday and installment transactions provide a valued service to underserved consumers. Due to low profitability, mainstream financial institutions have largely vacated the small-dollar, short-term credit market, except for credit cards. Yet credit cards are unavailable to a significant subset of the population, and those who do have credit cards may have no remaining unused credit line. Left without access to commercial-bank credit, consumers with small, short-term credit needs must search for alternatives. Those alternatives include, for example, tapping into savings (if any), borrowing from social networks, pawn loans, and incurring fees associated with existing accounts, such as late-payment fees. Each of these types of credit has obvious drawbacks and consumers often do not have access to some types. Many consumers, for example, lack savings to tap or do not enjoy social networks populated by people with liquid assets to lend. Payday lending and installment lending, by contrast, offer access to credit for consumers whose only resource is employment or other income, and they offer it on clear terms at nearby locations during convenient hours and on a quick timetable. Indeed,

payday lending and installment lending are not only available and attractive options for underserved consumers, they are often the most cost-effective options.

40. By providing a source of credit to consumers with low credit scores and no viable alternatives, payday and installment loans expand financial choices and allow individuals and households to better manage their cash flow in the face of volatile income and expenses. This in turn enables these consumers to avoid more costly alternatives, such as pawnbrokers, credit-card cash advances, over-the-limit credit-card fees, late-payment fees, utility-reconnection fees, and the like. Thus, restricting payday and installment lending as options for financially stressed consumers will make them worse off and force them to use inferior and less-preferred types of credit, such as pawn shops, or to go without credit.

41. Numerous studies demonstrate that consumers will substitute inferior and more costly alternative forms of credit when they lack access to payday loans. In States that have banned payday loans, the reduction in payday borrowing leads to increases in pawn loans. Consumers subject to payday-loan bans also bounce more checks and pay more bank overdraft fees. When Georgia and North Carolina banned payday lending, for example, the number of bounced checks skyrocketed. According to a Federal Reserve Board study, the number of consumer bankruptcies also increased.

42. These alternative forms of credit are both more expensive and have equivalent or higher annual percentage rates ("APRs") than payday and installment loans. Pawn loans in many states, for example, have an average fee of $20 for each $100 borrowed, which translates to an APR of about 250 percent. And pawn shops are especially unappealing to many consumers because, even if their cost is comparable to payday loans, they require the borrower to part with valuable personal property that is forfeited upon default.

43. The same is true of revolving credit and credit-card cash advances: consumers forced to engage in greater use of revolving credit likely end up paying even higher costs for credit and run into greater financial difficulty. For revolving credit, financially stressed consumers frequently find themselves pushed toward credit-line maximization and difficulty in meeting payments. And for credit-card cash advances, consumers fare even worse, showing a much higher rate of missed payments on mainstream credit loans than those who use payday loans.

44. Restricting access to payday and installment loans hurts consumers in other ways as well. Without access to such loans, consumers are forced to miss required payments or to default on their other debts, giving rise to various collateral consequences, including late fees on utility bills or termination of crucial utility services, loss of bank accounts, and loss of a vehicle due to missed car payments or inability to pay for repairs. Further, unlike payday-loan defaults, which typically are not reported to the national credit bureaus, missed payments on other loans and invoices can damage the consumer's formal credit standing, making it even more difficult for the consumer to obtain credit and substantially harming his or her long-term financial health.

45. Finally, consumers lacking access to payday and installment loans may turn to underground sources of credit, including illegal, unregulated lenders and criminal loan sharking, with its associated threats of violence. Research in the United States confirms that where payday credit has been restricted, consumers turn to online and unlicensed lenders. Similarly, research on foreign countries has shown that when access to consumer credit is restricted, many consumers will turn to illegal lending markets. Not surprisingly, borrowing from illegal lenders comes at a much higher cost than a payday loan, and collections by illegal lenders rest on threats, intimidation, violence, and forms of exploitation, including demands for sexual favors.

46. It is unsurprising, therefore, that payday borrowers praise the product and the companies who offer it in overwhelming numbers. The Bureau's own "Tell Your Story" and consumer-complaint portals demonstrate the overwhelmingly positive reaction of borrowers. Nearly all of the stories submitted to the "Tell Your Story" portal on payday lending and similar products are positive. The Bureau receives a minuscule number of complaints related to regulated, storefront payday lenders, far fewer than complaints about other products and services monitored by the Bureau. Social-science studies showing widespread borrower satisfaction confirm that an overwhelming number of borrowers are satisfied with the product.

47. A substantial amount of evidence confirms that access to payday loans does not harm consumers, but rather improves consumer financial health. These studies demonstrate that restricting access to payday loans injures consumers in various ways, including by causing troubles with debt-collection agencies, delinquency on other accounts, mortgage foreclosures, bankruptcies, late payment of bills, and unemployment. They likewise show that consumer access to payday loans has no negative effect on various measures of consumer financial health.

48. Empirical research also shows that payday borrowers understand the nature of the product, including that their payday-loan indebtedness may last longer than the two-week or thirty-day initial term of the loan, and accurately predict how long it will take to repay their loans. Consumers thus fully understand and act in their own interests.

49. Under Texas law, consumers obtain payday, title, and similar small-dollar, short-term loans via regulated, licensed credit access businesses ("CABs") that obtain or assist consumers in obtaining loans made by independent third-party lenders. The CABs, rather than the lenders, maintain storefront locations, assist in qualifying borrowers, typically service and collect the loans for the lenders, and may also guaranty the loans. *See* 82 Fed. Reg. 54,472,

54,486, n.140 (Nov. 17, 2017). Consumers pay a fee to the CAB and interest on the loan capped at 10% per annum. According to the Bureau, the loans produced by such arrangements are functionally the same as those issued by a single entity. *Id.* at 54,534–35.

C. The Rulemaking Process

50. Despite the popularity and benefits of payday and installment loans, the Bureau upon its formation promptly targeted them for elimination because of their high interest rates.

51. In developing and promulgating the 2017 Rule, the Bureau acted with an unalterably closed mind toward the preordained result of shutting down the payday-lending industry.

52. In targeting payday loans, the Bureau took its marching orders from special-interest groups opposed to payday lending, including Pew Charitable Trusts ("Pew") and the Center for Responsible Lending ("CRL"). *See, e.g.*, Anna Palmer, *Emails reveal consumer protection agency's cozy ties*, Politico, Nov. 19, 2015, *available at* goo.gl/DRCiTV. Among other things, the Bureau's proposed rule followed a literal outline given to it by CRL, and the Bureau later acceded when CRL directed it to speed up issuance of a final rule by abandoning certain provisions addressing longer-term installment lending. At the same time, the Bureau cast aside independent studies submitted by payday lenders and neutral third parties—a strong indication, in itself, that the agency's preferred conclusions are not supported by evidence.

53. On June 2, 2016, the Bureau published a notice of proposed rulemaking that proposed to impose ability-to-repay (or underwriting) requirements and payments requirements on the extension of payday loans, vehicle-title loans (*i.e.*, loans secured by an interest in a vehicle), and installment loans with an APR higher than 36%. *See* 81 Fed. Reg. 47,863 (July 22, 2016). Although the Bureau accepted comments on the proposed rule during a four-month window ending in October 2016, the result of the rulemaking was a foregone conclusion: the

elimination of longstanding payday (and vehicle-title) lending practices relied on by millions of customers, based on the Bureau's ideological and highly paternalistic view that these products are too expensive and that customers cannot be trusted with the freedom to make their own financial decisions.

54. Despite receiving substantial criticisms of the proposed rule from various constituents, as well as more than 1.4 million comments overall, the Bureau rushed the proposed rule to completion less than one year after the close of the 2016 comment period. The 2017 Rule was published in the Federal Register on November 17, 2017. *See* 82 Fed. Reg. 54,472 (Nov. 17, 2017).

D. The Provisions of the 2017 Rule

55. One of two principal elements of the 2017 Rule was the imposition of an ability-to-pay (or underwriting) requirement applicable to consumer loans, including payday and vehicle-title loans, with a contractual duration of forty-five days or less. Under that requirement, a lender could not extend a covered short-term loan unless it made a "reasonable determination" that the consumer can make payments for major financial obligations (housing expense, debt obligations, including those under other covered loans, child-support obligations, and alimony), make all payments under the loan (*i.e.*, principal, interest, and fees), and meet basic living expenses (*e.g.*, food, utilities, transportation to work, daycare for dependent children), during the term of the loan and for thirty days thereafter.

56. The underwriting provisions have since been revoked by the Bureau and therefore are not currently at issue in this lawsuit. *See* 85 Fed. Reg. 44,382 (July 22, 2020). In accordance with the Court's instruction to omit unnecessary material from this Amended Complaint, Plaintiffs are not including herein allegations directed at the underwriting provisions. Plaintiffs reserve the right to renew their constitutional, statutory, and administrative-law

challenges to the underwriting provisions, as set forth in Plaintiffs' original complaint in this action, in the event the Bureau's revocation of those provisions is set aside as a result of legislative, executive, administrative, or judicial action, or otherwise.

57. In addition to imposing the since-revoked underwriting requirement, the 2017 Rule also prohibited, as an "unfair" and "abusive" practice, lenders of certain loans (including payday loans, vehicle-title loans, and installment loans with an APR greater than 36%) from attempting to withdraw pre-authorized payments from a consumer's account after the lender's second consecutive attempt to do so has failed due to a lack of sufficient funds, without obtaining a new, specific authorization for further withdrawals from the consumer. 12 C.F.R. §§ 1041.7–.8. This prohibition applies to payments made by debit card and prepaid card, even though card payments typically do not result in bank nonsufficient funds (NSF) fees. And the prohibition applies to the subsequent pre-authorized payments of a multi-payment installment loan, even though there typically is ample time between installments for a consumer to ensure that sufficient funds are deposited into his account or to contact the lender to obtain an extension or arrange other payment options.

58. In order to obtain a new, specific authorization for further withdrawals from the consumer, a lender must first provide the consumer with a required consumer rights notice within three business days of the second consecutive failed attempt. *Id.* §§ 1041.8(c)(3), 1041.9(c). The 2017 Rule imposes limitations on the lender's ability to obtain the new, specific authorization electronically or by telephone communication. *Id.* § 1041.8(c)(3).

59. The payments provisions of the 2017 Rule also require lenders to provide each consumer with a payment notice prior to initiating the first payment withdrawal or an unusual withdrawal from a consumer's account. *Id.* § 1041.9(b).

60. If allowed to go into effect, the payments provisions of the 2017 Rule will cause substantial harm to consumers by eliminating the convenience of pre-authorized payments and increasing the likelihood that a loan will enter into collections sooner than it otherwise would have (if at all). Some lenders may stop offering installment loans altogether, resulting in higher credits costs and fewer credit options. Due to the Rule's requirement that payment notices and unusual withdrawal notices be provided at least six business days prior to the first payment transfer and the unusual withdrawal, some consumers will face additional loan costs because of the inability to schedule earlier payments. And because the payments provisions will increase the cost to lenders of failed payment attempts, some lenders who have traditionally waived or not charged nonsufficient funds (NSF) or late fees as a customer convenience, will need to begin assessing such fees.

61. The payments provisions, if permitted to go into effect, will also cause substantial harm to lenders. The provisions will make it significantly more likely that loans will be sent to collections or written off and will impose substantial administrative, recordkeeping, and compliance costs. As a result, some lenders may stop offering installment loans altogether.

E. Events Following Promulgation of the 2017 Rule

62. Following the resignation of the Director responsible for the 2017 Rule, the Bureau, led by an Acting Director removable at will by the President, announced that it would engage in notice-and-comment rulemaking to reconsider the 2017 Rule.

63. On April 9, 2018, Plaintiffs filed the instant lawsuit, challenging the constitutionality and lawfulness of the 2017 Rule. The parties agreed to ask the Court to stay both the litigation and the compliance date of the 2017 Rule pending the Bureau's anticipated rulemaking process.

64. The 2017 Rule had been promulgated with a compliance date of August 19, 2019, reflecting a twenty-one-month implementation period that was six months longer than originally proposed. *See* 82 Fed. Reg. at 54,472. The Bureau had reasoned that "the interest of enacting protections for consumers as soon as possible" had to be balanced against "giving [lenders] enough time for an orderly implementation period," and concluded that twenty-one months were needed for "lenders [to] be able to reasonably adjust their practices to come into compliance with the rule." *Id.* at 54,814. With respect to the compliance date, the Bureau drew no distinction between the ability-to-repay provisions and the payments provisions. *See id.* at 54,472 (setting same compliance date for both).

65. With 445 days remaining before the 2017 Rule's August 19, 2019, compliance date, the parties jointly moved in this lawsuit to stay the compliance date. The Bureau joined Plaintiffs in telling this Court that, "to ensure that Plaintiffs' members … have sufficient time to prepare their operations for compliance with the Payday Rule in the event Plaintiffs' claims are unsuccessful," any stay should "preserve the amount of time for bringing their operations into compliance that Plaintiffs' members currently have from the date of this motion to the Payday Rule's current compliance date of August 19, 2019," *i.e.*, "445 days." Joint Mot. at 5, ECF No. 16

66. The Court stayed the compliance date on November 6, 2018. At that time, Plaintiffs' members still had 286 days left until the compliance date.

67. Plaintiffs' members in good faith have reasonably relied, and continue to rely, on this stay during the pendency of this litigation.

68. On December 13, 2018, CFSA member Advance Financial submitted a petition requesting that the Bureau undertake a rulemaking to amend the payments provisions of the 2017

Rule to exclude debit-card transactions on the ground, among others, that denied debit-card payments rarely (if ever) result in consumers being charged insufficient funds fees, and therefore do not present the risk of consumer harm that the Bureau relied upon as the basis for the payment provisions.

69. In early 2019, the Bureau initiated rulemaking proceedings to revoke the underwriting provisions of the 2017 Rule. *See* Notice of Proposed Rulemaking, 84 Fed. Reg. 4252 (Feb. 14, 2019). In doing so, the Bureau acknowledged certain key flaws in the 2017 Rule, including that the evidence supporting the 2017 Rule was insufficiently robust and reliable and that the prior Director has misinterpreted the proper scope of the Bureau's UDAAP authority to regulate unfair, deceptive, and abusive acts and practices. *Id.*

70. Numerous commenters, including CFSA, urged the Bureau to revoke the payments provisions as well, pointing out that they suffered from similar legal flaws as the underwriting provisions, including the very same misinterpretation of the Bureau's UDAAP authority that formed one basis for the Bureau's revocation of the underwriting provisions.

71. While the 2017 Rule was stayed, the U.S. Supreme Court vindicated Plaintiffs' position in this lawsuit by holding that the Bureau had been unconstitutionally structured. *Seila Law LLC v. CFPB*, 140 S. Ct. 2183 (2020). The Court invalidated the statutory provision that had insulated the Bureau's director from removal by the President except for cause. *Id.*

72. As a result of the Supreme Court's decision in *Seila Law*, the 2017 Rule was void *ab initio*.

73. Following the Supreme Court's decision in *Seila Law*, the Bureau promulgated a final rule revoking the underwriting provisions of the 2017 Rule. *See* 85 Fed. Reg. 44,382 (July 22, 2020) (the "Revocation Rule").

74. Among other things, the Revocation Rule disavowed the legal standard used in the 2017 Rule for assessing unfairness and abusiveness under section 1031(c) & (d) of the Act and adopted what the Bureau determined was a better interpretation of the relevant statutory language.

75. At the same time, the Bureau—now led by a Director removable by the President—published in the Federal Register a "ratification" stating that "[t]he Bureau, through its Director, hereby affirms and ratifies the payments provisions of the 2017 Final Rule." 85 Fed. Reg. 41,905 (July 13, 2020) (the "Ratification").

76. The Bureau's ratification did not address the revised legal interpretation of the Bureau's UDAAP authority that was described in the Revocation Rule and constituted one basis for revoking the 2017 Rule's underwriting provisions. Nor did the ratification address whether the evidence before the Bureau during the rulemaking for the 2017 Rule was sufficiently robust and reliable to support the payments provisions.

77. In fact, the stated rationale for the payments provisions in the preamble to the 2017 Rule is inconsistent in numerous respects with the Bureau's current interpretation of its UDAAP authority. For example, the payments provisions are premised on the Bureau's contention that a consumer's decision "not to participate in the market is not considered to be a valid means of reasonably avoiding the [alleged] injury." 82 Fed. Reg. at 54,737. The Revocation Rule, in contrast, expressly rejects this interpretation of the "not reasonably avoidable" prong of the "unfairness" inquiry, explaining that "[i]t is well-established that consumers can reasonably avoid injury through … 'anticipatory avoidance,'" such as "declin[ing] a product or service," at least where, as here, consumers "in the market for covered loans do not face a take-it-or-leave-it choice," but rather "can potentially access formal credit

options with varied terms and conditions and other informal credit options, such as borrowing from family and friends." 85 Fed. Reg. at 44,397.

78. Similarly, the stated rationale for the payments provisions in the preamble to the 2017 Rule recognized that consumers "understand as a general matter that they may incur" fees for failed payment-transfer attempts, but reasoned that "such a generalized understanding does not suffice." 82 Fed. Reg. at 54,740; *see also id.* at 54,741 ("The Bureau does not rest its legal conclusion on the premise that borrowers are unaware that when they take out covered loans with leveraged payment mechanisms, a payment will be deducted on the due date" and if "the account lacks the funds to cover the payment, they are likely to incur a fee."). Rather, the Bureau reasoned, "consumers are unaware of the severity of the risk they are exposing themselves to in the circumstances" and "underestimate the extent of the fees." *Id.* at 54,741. The Revocation Rule, in contrast, expressly rejects this understanding of the "lack of understanding" prong of the "abusiveness" inquiry, explaining that consumers need not "understand their particularized risk," but need only have an understanding of risks "sufficient to take steps to avoid or mitigate harm from those risks." 85 Fed. Reg. at 44,394 (discussing "not reasonably avoidable" standard); *id.* at 44,422 (explaining that "lack of understanding" "should be treated as similar to the requisite level of understanding for reasonable avoidability").

79. The stated rationale for the payments provisions in the preamble to the 2017 Rule also rejected as legally insufficient the argument that consumers have the ability to protect their interests "by not taking out loans in the first place." 82 Fed. Reg. at 54,743. The Revocation Rule, in contrast, makes clear that consumers' "access to alternative sources of credit" precludes a finding that consumers are unable to protect their interests. 85 Fed. Reg. at 44,424; *see also id.*

at 44,425 ("if the consumers can protect their interests before they take out the first loan …, they do not lack the ability to protect their own interests").

80. On information and belief, the Bureau ratified the payments provisions without considering whether those provisions were supportable under the revised legal interpretation of the Bureau's UDAAP authority described in the Revocation Rule.

81. On information and belief, the Bureau ratified the payments provisions without considering whether the evidence before the Bureau during the rulemaking for the 2017 Rule was sufficiently robust and reliable to support those provisions.

82. The Bureau's ratification did not contain a revised cost-benefit analysis under Section 1022(b)(2) of the Act, even though the cost-benefit analysis of the payments provisions contained in the preamble to the 2017 Rule relied on the reduced impact on lender costs caused by the now-revoked underwriting provisions. *See* 82 Fed. Reg. at 54,846 ("the ability-to-repay provisions" will "lessen the impacts of the limitation on payment withdrawal attempts and the number of instances where a lender is required to notify consumers"). Because the underwriting provisions have been revoked, the prior cost-benefit analysis is no longer valid: By the Bureau's own admission, without the underwriting provisions, the payments provisions will impose higher costs on lenders than the Bureau took into account in 2017. Thus, the prior cost-benefit analysis cannot support the payments provisions, and no other cost-benefit analysis has been done.

83. On information and belief, the Bureau ratified the payments provisions without conducting a revised cost-benefit analysis.

84. The Bureau's ratification did not contain a compliance date or address the length of the implementation period needed for lenders to be able to reasonably adjust their practices to come into compliance with the rule. Nor did the Bureau's ratification contain any discussion of

lenders' reasonable reliance on the stay of the compliance date for the payments provisions that had been entered by the Court in this litigation.

85. On information and belief, the Bureau ratified the payments provisions without considering whether lenders have enough time for an orderly implementation period.

86. On information and belief, the Bureau ratified the payments provisions without considering the amount of time needed for lenders to be able to reasonably adjust their practices to come into compliance with the payments provisions.

87. On information and belief, the Bureau ratified the payments provisions without considering the reliance interests of lenders that had reasonably relied on (i) the stay of the compliance date entered in this litigation and (ii) their correct assessment that the Bureau in 2016 and 2017 lacked the constitutional authority to promulgate the 2017 Rule.

88. On July 7, 2020, the Bureau denied Advance Financial's rulemaking petition.

89. On information and belief, the Bureau denied Advance Financial's rulemaking petition without considering whether application of the payments provisions to debit-card transactions was warranted under the revised legal interpretation of the Bureau's UDAAP authority described in the Revocation Rule.

COUNT ONE

THE 2017 RULE IS VOID BECAUSE THE BUREAU THAT PROMULGATED IT VIOLATED THE SEPARATION OF POWERS

90. Plaintiffs repeat and reallege each of the foregoing allegations in this Complaint.

91. Actions taken by an officer or agency that violate the Constitution's separation-of-powers protections are invalid. *Ryder v. United States*, 515 U.S. 177, 182–83 (1995). Private plaintiffs have the right to equitable relief to restrain government action that violates separation-

of-powers principles. *Free Enter. Fund v. Public Co. Accounting Oversight Bd.*, 561 U.S. 477, 491 n.2 (2010).

92. In addition, the APA forbids agency action "contrary to constitutional right, power, privilege, or immunity." 5 U.S.C. § 706(2)(B).

93. The Constitution provides that "[t]he executive Power shall be vested in a President," U.S. Const., art. II, § 1, and that "he shall take Care that the Laws be faithfully executed," U.S. Const., art. II, § 2. These provisions vest all executive power, including the power to enforce the law, in the President of the United States. It is unconstitutional for Congress to vest executive power in officers who are not removable by, and hence not accountable to, the President. *See, e.g.*, *Myers v. United States*, 272 U.S. 52, 119 (1926). The sole exception to this rule applies only in the case of certain independent commissions headed by bipartisan, multimember bodies (such as the Federal Trade Commission). *See Humphrey's Executor v. United States*, 295 U.S. 602, 632 (1935).

94. When the 2017 Rule was promulgated, the Bureau exercised all its powers through a single presidentially appointed Director—not a bipartisan multimember commission—who could only be removed by the President "for cause," that is "for inefficiency, neglect of duty, or malfeasance in office." As the Supreme Court has now confirmed, this structure violated the separations of powers under the Constitution. *Seila Law LLC v. CFPB*, 140 S. Ct. 2183 (2020).

95. An invalid agency cannot promulgate valid legislative rules. It cannot participate in the notice-and-comment rulemaking process because it lacks the authority to do so. The notice-and-comment process is the way rules are validly created. And if the process was done improperly—for example, if it was done by an invalid agency—then the resulting rule must also

be improper. *See Lucia v. SEC*, 137 S. Ct. 2044, 2054 (2018) ("the 'appropriate' remedy for an adjudication tainted with an appointments violation is a new 'hearing before a properly appointed' official") (quoting *Ryder v. United States*, 515 U.S. 177 (1995)). Accordingly, the 2017 Rule was void *ab initio*.

96. The Bureau's notice of ratification, promulgated without notice-and-comment rulemaking, did not and could not cure this constitutional defect. Even if the Bureau were permitted to "rubberstamp" an *enforcement* action without engaging in fresh deliberations, it cannot issue a *legislative rule* without engaging in the required rulemaking procedures.

97. The Bureau's attempted ratification violates the Constitution, because it purports to give retroactive legal force to the promulgation of a legislative rule by an invalid agency.

98. Moreover, the Bureau's attempted ratification in this case was arbitrary and capricious, procedurally improper, and contrary to established principles of agency law.

99. For these reasons, the 2017 Rule is unconstitutional and must be set aside.

COUNT TWO:

THE RATIFICATION IS UNCONSTITUTIONAL, PROCEDURALLY IMPROPER, AND ARBITRARY AND CAPRICIOUS

100. Plaintiffs repeat and reallege each of the foregoing allegations in this Complaint.

101. The APA forbids agency action that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A).

102. The APA also forbids agency action that is "without observance of procedure required by law." 5 U.S.C. § 706(2)(D).

103. The attempted ratification violates the Constitution, because it purports to give retroactive legal force to the promulgation of a legislative rule by an invalid agency.

104. The attempted ratification of the 2017 Rule was procedurally improper because the Bureau was required, but failed, to use notice-and-comment rulemaking to ratify the 2017 Rule.

105. The attempted ratification of the 2017 Rule was also procedurally improper because, for the ratification to be valid, the Bureau was required, but failed, to ratify the payments provisions in full, including with their original implementation period.

106. The attempted ratification of the 2017 Rule was arbitrary and capricious because it relied on a test for "identifying unlawful, unfair, deceptive, or abusive acts or practices," that the Bureau had disavowed. Specifically, the ratification embraced the 2017 Rule's payments provisions, in utterly conclusory terms, even though they rested on the very same UDAAP standard that the Bureau had just rejected in revoking the underwriting provisions.

107. The attempted ratification of the payments provisions was also arbitrary and capricious because it reflected an about-face about another essential matter: the time needed to implement the payments provisions. Whereas the 2017 Rule gave companies twenty-one months to implement the payments provisions before compliance would be required—and even though much of that implementation period remained when the compliance date was stayed by order of the Court—the Ratification does not contain any compliance date or implementation period.

108. This alteration of the length of the implementation period rendered the attempted ratification procedurally improper. Even if the Bureau were permitted to ratify the *same* regulatory action, it cannot *amend* that prior action without engaging in fresh deliberations.

109. The attempted ratification of the payments provisions was also arbitrary and capricious because the Bureau failed to consider numerous relevant factors, including whether those provisions are supportable under the revised legal interpretation of the Bureau's UDAAP

authority described in the Revocation Rule; whether the evidence before the Bureau during the rulemaking for the 2017 Rule was sufficiently robust and reliable to support the payments provisions; whether lenders had enough time for an orderly implementation period; the amount of time needed for lenders to be able to reasonably adjust their practices to come into compliance with the payments provisions; and the reliance interests of lenders that had reasonably relied on both (i) the stay of the compliance date entered in this litigation and (ii) their correct assessment that the Bureau in 2016 and 2017 lacked the constitutional authority to promulgate the 2017 Rule.

110. The attempted ratification was also arbitrary and capricious and not in accordance with law because the Bureau failed to conduct the cost-benefit analysis required by Section 1022(b)(2) of the Act. The Bureau could not rely on the cost-benefit analysis of the payments provisions contained in the preamble to the 2017 Rule because that analysis rested in significant part on the Bureau's conclusion that the costs imposed by the payments provisions on lenders were mitigated by the now-revoked underwriting provisions.

111. The attempted ratification was also arbitrary and capricious because the underlying payments provisions are invalid under the Administrative Procedure Act.

COUNT THREE:

THE 2017 RULE VIOLATES THE NONDELEGATION DOCTRINE

112. Plaintiffs repeat and reallege each of the foregoing allegations in this Complaint.

113. The Constitution provides that "[a]ll legislative Powers herein granted shall be vested in a Congress of the United States." U.S. Const., art. I, § 1. This provision vests all legislative power in the Congress of the United States.

114. By virtue of its grant of legislative authority to the Bureau under the Act's provisions for prescribing rules identifying as unlawful unfair, deceptive, or abusive acts or

practices, and its lack of an intelligible principle to which the Bureau is directed to conform in the exercise of that authority, the CFPA unconstitutionally delegates legislative power to an administrative agency.

115. For this reason, the 2017 Rule, and any current effort to enforce it, unconstitutionally regulates plaintiffs and must therefore be invalidated and enjoined. In addition, the Final Rule is contrary to constitutional right, power, privilege, or immunity, and must therefore be set aside.

COUNT FOUR:

THE BUREAU VIOLATES THE SEPARATION OF POWERS AND THE RULE THEREFORE IS UNCONSTITUTIONAL AGENCY ACTION

116. Plaintiffs repeat and reallege each of the foregoing allegations in this Complaint

117. The Constitution provides that "[n]o Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law." U.S. Const., art. I, § 9, cl. 7.

118. The Bureau takes federal government money without an appropriations act: The director has exclusive authority to set the Bureau's budget at up to 12% of the Federal Reserve System's operating expenses (over half a billion dollars), *see* CFPA § 1017(a)(2)(A), 12 U.S.C. § 5497(a)(2)(A), a perpetual budget that is exempt even from mere "review by the Committees on Appropriations of the House of Representatives and the Senate," *id*. § 1017(a)(1)–(2), 12 U.S.C. § 5497(a)(1)–(2). This improper insulation from congressional supervision renders invalid any assertion of the Bureau's regulatory authority.

119. For this reason, the 2017 Rule, and any current effort to enforce it, unconstitutionally regulates plaintiffs and must therefore be invalidated and enjoined. In addition, the 2017 Rule is contrary to constitutional right, power, privilege, or immunity, and must therefore be set aside.

COUNT FIVE:

THE PAYMENTS PROVISIONS OF THE 2017 RULE EXCEED THE BUREAU'S STATUTORY AUTHORITY

120. Plaintiffs repeat and reallege each of the foregoing allegations in this Complaint.

121. The APA forbids agency action that is "in excess of statutory jurisdiction, authority, or limitations, or short of statutory right." 5 U.S.C. § 706(2)(C).

122. The 2017 Rule exceeds the Bureau's statutory authority in numerous respects.

123. *First*, the 2017 Rule's identification of unfair and abusive lending practices conflicts with the express limitations on the Bureau's authority to declare an act or practice unfair or abusive as set forth in section 1031 of the CFPA, 12 U.S.C. § 5531.

a. In order to be classified as "unfair," a practice must be "likely to cause substantial injury" that is "not reasonably avoidable by consumers." CFPA § 1031(c)(1)(A), 12 U.S.C. § 5531(c)(1)(A). Offering consumers a voluntary choice to obtain a payday or installment loan, and to pre-authorize the withdrawal of loan payments from a consumer's bank account, based on fully disclosed terms cannot be considered likely to inflict "substantial injury" on consumers since it does nothing but increase the financial options available to them. To the contrary, a consumer's free and informed choice to obtain such a loan under fully disclosed terms is highly likely to confer a substantial *benefit* on the consumer, because it strongly indicates that the loan is a better option than any of the available alternatives. But in any event, any "injury" caused by payday or installment loans is plainly "reasonably avoidable" because consumers are entirely free to simply refuse to take out such loans at their own discretion. Similarly, any "injury" caused by lenders' use of pre-authorized withdrawals is "reasonably avoidable" because consumers have the means to revoke their prior authorizations.

b. In order to be classified as "abusive," a practice must meet one of two conditions: It must either (1) interfere with a consumer's "ability … to understand a term or condition," or (2) take unreasonable advantage of the consumer's (A) "lack of understanding … of the material risks, costs, or conditions," or (B) his "inability … to protect [his] interests," or his (C) "reasonable reliance" on the lender to "act in the interests of the consumer." CFPA § 1031(d), 12 U.S.C. § 5531(d). These statutory criteria ensure that payday and installment loan terms are fully disclosed and reasonably understood, facilitating a fair, arms-length transaction between lenders and the consumers. By contrast, the 2017 Rule prohibits lending practices as "abusive" *regardless* of whether the consumer fully understands all of the terms, risks, conditions, and costs; *regardless* of whether the consumer is fully able to protect his interests by evaluating the relative costs and benefits; and *regardless* of whether the consumer has reasonably relied on the lender to act in his best interest.

c. In any event, as the Bureau itself now recognizes, the unfairness and abusiveness analysis that purported to justify the payments provisions has been repudiated by the Bureau itself, which has disavowed the legal standard used in the 2017 Rule for assessing unfairness and abusiveness under section 1031(c) & (d) of the Act and adopted what the Bureau determined is a better interpretation of the relevant statutory language. The payments provisions cannot be justified—

nor has the Bureau ever tried to justify them—under this correct interpretation of the Bureau's UDAAP authority.

124. *Second*, Congress set a clear boundary on the Bureau's authority by unequivocally prohibiting the Bureau from "establish[ing] a usury limit." CFPA § 1027(o), 12 U.S.C. § 5517(o). The 2017 Rule violates this command because it improperly targets what the Bureau deems to be "high-interest" loans; results from the Bureau's improper consideration of the cost of credit; determines the legal status of certain covered loans based solely on their interest rate; and, at bottom, rests on the Bureau's view that covered loans are harmful to consumers because of their high interest rates.

125. *Third*, the 2017 Rule violates Congress's statutory command that public policy considerations may not serve as a primary basis for an unfairness determination and may not be considered at all in determining whether an act or practice is abusive. *See* CFPA § 1031(c)–(d), 12 U.S.C. § 5531(c)–(d). In violation of these statutory commands, the 2017 Rule's UDAAP analysis is infused with, and ultimately turns on, public-policy considerations about the undesirability of expensive small-dollar loans.

126. For these reasons, the 2017 Rule is in excess of statutory jurisdiction, authority, or limitations, or short of statutory right, and the 2017 Rule must therefore be set aside. 5 U.S.C. § 706(2)(A).

COUNT SIX:

THE PAYMENTS PROVISIONS OF THE 2017 RULE ARE ARBITRARY AND CAPRICIOUS

127. Plaintiffs repeat and reallege each of the foregoing allegations in this Complaint.

128. A court must set aside a rule as arbitrary and capricious if the agency's decision is unsupported by substantial evidence or if the agency has made a clear error in judgment. *See Safe Extensions, Inc. v. FAA*, 509 F.3d 593, 604 (D.C. Cir. 2007).

129. The Bureau's unfairness and abusiveness determinations are unsupported by substantial evidence and reflect a clear error in judgment.

130. The Bureau mischaracterizes the allegedly harmful consequences of failed payment-transfer attempts. Moreover, these alleged harms (*e.g.*, bank fees for failed transfer payments) are caused by third parties involved in repayment efforts, and it is arbitrary, capricious, and unreasonable for the Bureau to restrict lender and consumer conduct because of perceived abuses by non-lenders.

131. The Bureau's unfairness determination further rests on the claim that the asserted substantial injuries are not reasonably avoidable by consumers. But the Bureau's assertion that there are obstacles to the free exercise of consumer decision-making is speculative, unreasonable, and contradicted by the available evidence.

132. The Bureau's unfairness determination further rests on the claim that the asserted substantial injuries are not outweighed by countervailing benefits to consumers or to competition. The Bureau's analysis here makes three basic errors: (1) the Bureau arbitrarily assigns excessive weight to the asserted injuries, (2) it ignores the benefits to consumers of current payments practices, and (3) it ignores the benefits to competition from current payments practices.

133. An agency action is also arbitrary and capricious if the agency either fails to provide a reasoned explanation for its action or has "entirely failed to consider an important

aspect of the problem" being regulated. *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co*., 463 U.S. 29, 43 (1983).

134. The 2017 Rule's payments provisions are outside the scope of the Bureau's statutory UDAAP authority and otherwise arbitrary, capricious, and unsupported by substantial evidence. These provisions purport to be justified by the Bureau's professed concern about the nonsufficient funds (NSF) and other fees that consumers' banks might impose on them for failed payment-transfer attempts. But, among other things, the Bureau lacked sufficiently robust and reliable evidence to support the payments provisions; improperly relied on evidence about online lenders to justify provisions applicable to storefront lenders; improperly relied on evidence about single-payment loans to justify provisions applicable to installment loans; improperly confused the cost of a loan with injury; made an entirely arbitrary determination that fees associated with a third (rather than, say, a fifth) attempted withdrawal constitute "substantial injury"; ignored ways that consumers can avoid fees; improperly treated covered lenders, rather than the banks that impose and collect the fees, as the cause of the consumers' alleged injuries; and ignored that restricting payment-transfer attempts will result in consumer injury in the form of NSF and late-payment fees, defaults, and other costs.

135. Additionally, the payments provisions are unnecessary in light of numerous other federal, state, and industry rules that regulate payments.

136. Moreover, in restricting payment-transfer attempts, the Bureau failed to take into account the nuances in different types of payment transfers. The 2017 Rule's payments provisions treat debit-card and prepaid-card payments the same as check and ACH payments. But these transactions are not the same. Whereas ACH and check payment transfers may cause consumers to incur fees from multiple failed attempts to withdraw funds—which is the alleged

harm the payments provisions purport to address—debit-card transactions almost never result in insufficient funds fees. The Bureau failed to examine debit-card payment data, and instead relied on ACH transfer data to create this blanket rule.

137. The Bureau likewise failed to take into account nuances in different types of loans. The 2017 Rule's payments provisions not only limit payment-transfer attempts for single-payment loans and for payments of a single installment of a multi-payment installment loan, but also limit payment-transfer attempts across multiple installments of a multi-payment installment loan. However, the Bureau lacked reliable data analyzing NSF fees in the context of installment loans. And the payments provisions are particularly unjustifiable for installment loans because, among other things, consumers have significant opportunities to avoid fees from one installment payment to the next. For example, a consumer can ensure that sufficient funds are deposited to cover his next installment payment or can contact his lender to obtain an extension or arrange another payment option.

138. The Rule's requirements relating to *when* payment notices must be provided is also arbitrary and capricious. The Rule requires a first payment withdrawal notice or an unusual withdrawal notice to be mailed no later than six business days prior to the first payment transfer or the unusual withdrawal, thereby arbitrarily preventing consumers from scheduling earlier payments. That restriction will harm consumers by forcing some consumers to incur additional costs resulting from loans of longer duration than they would prefer.

139. The Bureau also failed to take into account the fact that the problems it identifies can be addressed through alternative measures that mitigate or ameliorate unnecessary, harmful burdens. In particular, the Bureau has failed to consider whether any lack of consumer understanding that may exist regarding the risks of payment practices associated with payday

and installment loans could be addressed through an enhanced disclosure regime. Disclosure is the backbone of federal consumer credit law, from the Truth in Lending Act to the CFPA, and yet the Bureau has made no attempt to explain why disclosure requirements that are sufficient in a host of other financial-services contexts are somehow insufficient in this context.

COUNT SEVEN:

DEFECTIVE COST-BENEFIT ANALYSIS

140. Plaintiffs repeat and reallege each of the foregoing allegations in this Complaint.

141. The CFPA requires the Bureau to consider "the potential benefits and costs to consumers and covered persons [i.e., lenders], including the potential reduction of access by consumers to consumer financial products" and "the impact on consumers in rural areas." CFPA § 1022(b)(2), 12 U.S.C. § 5512(b)(2). Such cost-benefit analyses are inadequate if, inter alia, the agency: relies on estimates that "ha[ve] no basis beyond mere speculation"; fails to estimate costs that are quantifiable; completely discounts available studies in favor of relatively unpersuasive studies; fails to adopt a reasonable baseline so as to account for the marginal costs of the rule; "duck[s] serious evaluation of" certain costs; engages in internally inconsistent reasoning; and fails to address requested exceptions for entities that are situated differently for purposes of costs and benefits. *Business Roundtable v. SEC*, 647 F.3d 1144, 1150–55 (D.C. Cir. 2011).

142. The Bureau's cost-benefit analysis of the payments provisions is defective because it improperly relied on the Bureau's conclusion that the costs imposed by the payments provisions on lenders were mitigated by the underwriting provisions. Now that the underwriting provisions have been revoked, there is no valid cost-benefit analysis supporting the payments provisions.

143. The Bureau's cost-benefit analysis is defective because the Bureau failed to consider many the costs to consumers, including the loss of convenience, the cost of depriving consumers of their free choice to make financial decisions, the increased likelihood that a loan will enter into collections sooner than it otherwise would have (if at all), and the full magnitude of increased loan costs and fewer credit options. Additionally, the Bureau failed to consider that, as a result of the Rule's requirement that payment notices and unusual withdrawal notices be provided at least six business days prior to the first payment transfer and the unusual withdrawal, some consumers will face additional loan costs because of the inability to schedule earlier payments.

COUNT EIGHT:

FAILURE TO OBSERVE PROCEDURE REQUIRED BY LAW

144. Plaintiffs repeat and reallege each of the foregoing allegations in this Complaint.

145. The APA forbids agency action that is "without observance of procedure required by law." 5 U.S.C. § 706(2)(D).

146. In promulgating the 2017 Rule, the Bureau violated at least four procedural requirements.

147. First, for a notice-and-comment rulemaking process to be meaningful under the APA, the agency must actually evaluate the information presented during the process, rather than dismiss it to reach a pre-ordained result. Here, however, the history of the rulemaking that led to the 2017 Rule demonstrates that, under its former Director (who was unconstitutionally insulated from presidential control), the Bureau failed to consider or evaluate empirical studies or evidence that diverged from the Bureau's pre-determined decision that payday lending and installment lending are harmful and must be burdened by draconian regulations. Under its former Director, the Bureau repeatedly made statements and issued publications riddled with errors and

misperceptions. CFSA and others attempted to correct these errors and misperceptions, but to no avail. Instead, the Bureau under its former Director doubled-down on its earlier errors through first the proposed rule and then the 2017 Rule, which suffers from the same methodological and evidentiary defects. Because the Bureau under its former Director refused to rationally consider the evidence and instead dismissed every cited study's conclusion as incorrect, it abused its discretion and acted arbitrarily and capriciously.

148. Second, based on information obtained under the Freedom of Information Act (FOIA), as well as other information and belief, the Bureau under its former Director largely allowed outside groups opposed to payday lending to drive the rulemaking that led to the 2017 Rule, and did not adequately disclose its reliance on these groups. Because the Bureau so allowed these special-interest groups to dictate the scope and text of the 2017 Rule while ignoring the concerns of lenders and borrowers, the agency reduced the elaborate rulemaking process to little more than a sham.

149. Third, the Bureau under its former Director failed to comply with the Regulatory Flexibility Act (RFA) by failing to adequately assess the 2017 Rule's impact on small businesses and by improperly going through the motions of a small-business-review panel process under the Small Business Regulatory Enforcement Fairness Act (SBREFA) without any meaningful thought or analysis towards a foregone conclusion. Under the SBREFA, an agency must, at the time of issuance of a notice of proposed rulemaking, publish an initial regulatory flexibility analysis which "shall describe the impact of the proposed rule on small entities." 5 U.S.C. § 603(a). That initial analysis must also describe "any significant alternatives to the proposed rule which accomplish the stated objectives" of the applicable statute while minimizing significant economic impact on small entities. *Id.* § 603(c). And the final analysis published with

the final rule must explain how the agency has minimized the impact of the rule on small entities and why it has rejected alternatives. *Id.* § 604(a)(6). Here, the Bureau failed to adequately take into account the impacts on small businesses, as demonstrated by the blistering comment submitted in opposition to the rule by the Chief Counsel for Advocacy of the Small Business Administration.

150. Fourth, the APA requires that the agency "shall give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments" and that the agency give "consideration" to "the relevant matter presented." 5 U.S.C. § 553(c). During the period for such submissions, the Bureau received more than 1.4 million written comments from interested persons, including over one million comments from consumers who opposed the proposed rule. Showing disdain for the views of those who will be most affected by the 2017 Rule, however, the Bureau failed to adequately take these highly relevant comments into account or give them the individualized consideration required by the APA.

COUNT NINE:

ARBITRARY AND CAPRICIOUS DENIAL OF RULEMAKING PETITION

151. Plaintiffs repeat and reallege each of the foregoing allegations in this Complaint.

152. Advance Financial's rulemaking petition explained why the payments provisions of the 2017 Rule should not apply to debit-card transactions. Whereas ACH and check payment transfers may cause consumers to incur fees from multiple failed attempts to withdraw funds, debit-card transactions almost never result in insufficient funds fees. The Bureau's denial of the petition was therefore arbitrary and capricious.

153. The denial of the rulemaking petition was also arbitrary and capricious because the Bureau reached its decision without considering whether application of the payments

provisions to debit-card transactions was warranted under the revised legal interpretation of the Bureau's UDAAP authority described in the Revocation Rule.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs respectfully pray for an order and judgment in their favor and against defendants comprising the following relief:

1. an order and judgment holding unlawful, enjoining enforcement of, and setting aside the 2017 Rule and the purported ratification of the 2017 Rule;

2. in the alternative, an order requiring the Bureau to engage in rulemaking to modify the payments provisions of the 2017 Rule;

2. costs and attorneys' fees pursuant to any applicable statute or authority; and

3. any other relief that the Court deems just and appropriate.

Dated: August 28, 2020

Respectfully submitted,

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Counsel for Plaintiffs

TAB 7

Joint Motion for Stay of Litigation and Stay of Agency Action Pending Review ECF No. 16 (May 31, 2018)

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

COMMUNITY FINANCIAL SERVICES ASSOCIATION OF AMERICA, LTD. *et al.*, Plaintiffs, v. CONSUMER FINANCIAL PROTECTION BUREAU *et al.*, Defendants.	Civil Action No. 1:18-cv-295

JOINT MOTION FOR STAY OF LITIGATION AND STAY OF AGENCY ACTION PENDING REVIEW

Plaintiffs Community Financial Services Association of America, Ltd., and Consumer Service Alliance of Texas, and Defendants Consumer Financial Protection Bureau (the "Bureau") and John Michael Mulvaney, by and through undersigned counsel, hereby move for (i) a stay of this litigation pending agency rulemaking to reconsider the Bureau's final rule on payday, vehicle title, and certain high-cost installment loans (the "Payday Rule" or "Rule"), 82 Fed. Reg. 54,472 (Nov. 17, 2017); (ii) a stay of the compliance date set forth in the Payday Rule until 445 days after final judgment in this litigation; and (iii) a waiver of the Bureau's obligation to file an answer in this case. In support of this motion, the parties state as follows:

1. On November 17, 2017, the Bureau published the Payday Rule in the Federal Register. *See* 82 Fed. Reg. 54,472. The Payday Rule imposes various requirements on the extension and collection of certain consumer loans, including payday loans, vehicle-title loans, and longer-term loans with balloon payments. The Bureau's economic analyses showed that the

Rule could decrease the volume of certain types of loans covered by the Rule by 51 to 93 percent. 82 Fed. Reg. at 54,826–27.

2. Although the Payday Rule became effective on January 16, 2018, the majority of the Rule's substantive provisions "have a compliance date of August 19, 2019." 82 Fed. Reg. at 54,472. The one exception is a provision governing how companies can apply to be "registered information systems" to which lenders must furnish information about covered loans. *See* 82 Fed. Reg. at 54,472; 12 C.F.R. § 1041.11. The Payday Rule set April 16, 2018, as the application deadline to submit an application for preliminary approval for registration of an information system. *Id.* at 54,472, 54,883. The twenty-one month delay between publication in the Federal Register and the compliance date reflects a judgment by the Bureau that a substantial period was needed to give entities sufficient time "to register information systems" and give lenders sufficient time "to onboard to registered information systems before the compliance date." 82 Fed. Reg. at 54,776.

3. On April 9, 2018, Plaintiffs, two trade associations whose members are engaged in the business of offering or facilitating payday loans and similar consumer financial products, filed the instant action seeking an order and judgment holding unlawful, enjoining, and setting aside the Payday Rule. Plaintiffs raised several claims, including that the Rule constitutes unconstitutional agency action because the director of the Bureau is shielded from removal by the President in violation of the separation of powers; that the Rule is in excess of the Bureau's statutory authority; and that the Rule is arbitrary and capricious under the Administrative Procedure Act (APA).

4. On January 16, 2018, the Bureau announced that it "intends to engage in a rulemaking process so that the Bureau may reconsider the Payday Rule." CFPB, *Statement on*

Payday Rule (Jan. 16, 2018), *available at* https://www.consumerfinance.gov/about-us/newsroom/cfpb-statement-payday-rule. The Bureau further stated that it would entertain requests from any potential applicants for waiver of the April 16, 2018, deadline for applications for preliminary approval to become a registered information system. *See id.* Recognizing that efforts to comply with the April 16, 2018, deadline could cause companies to engage in unnecessary or premature work, the Bureau has granted a waiver from that deadline to all companies that have requested one. *See, e.g.*, Letter from Jamie Robenseifner, Consumer Financial Protection Bureau, to Andrew Sheehan, Clarity Services, Inc. (Mar. 23, 2018), *available at* https://www.consumerfinance.gov/documents/6402/cfpb_ris-waiver-request_clarity-services_03-23-2018.pdf. Those waivers do not have a fixed expiration date or establish a new deadline. *See, e.g.*, *id.*

5. In a Spring 2018 rulemaking agenda submitted to the Office of Management and Budget (OMB), the Bureau reiterated its intent to initiate a rulemaking to reconsider the Payday Rule and informed OMB that it expects to issue a notice of proposed rulemaking for this purpose by February 2019. *See* https://reginfo.gov/public/do/eAgendaViewRule?pubId=201804&RIN=3170-AA80.

6. The rulemaking process may result in repeal or revision of the Payday Rule and thereby moot or otherwise resolve this litigation or require amendments to Plaintiffs' complaint. Staying the litigation while the Bureau reconsiders the Payday Rule would therefore conserve judicial resources, the time of this Court, and expense to the parties, and potentially avoid the need for further litigation.

7. Accordingly, the parties respectfully request that the Court stay this case for the duration of the rulemaking process. Defendants will provide the Court with periodic status

reports during the pendency of the stay, and will promptly inform the Court as soon as the rulemaking process is complete. In the event that the rulemaking process does not entirely moot Plaintiffs' claims, the parties will propose a schedule for proceeding with this case promptly thereafter.

8. The parties agree that filing an answer to the complaint would not aid in resolution of this matter and accordingly request that Defendants be excused from that obligation.

9. It is also appropriate to stay the Payday Rule's compliance date while this litigation is pending. Section 10(d) of the Administrative Procedure Act provides:

> On such conditions as may be required and to the extent necessary to prevent irreparable injury, the reviewing court … may issue all necessary and appropriate process to postpone the effective date of an agency action or to preserve status or rights pending conclusion of the review proceedings.

5 U.S.C. § 705.

10. A stay of the compliance date pending judicial review is necessary to prevent irreparable injury. Plaintiffs represent that, as reflected by the Bureau's decision to include in the Payday Rule a twenty-one-month delay of the compliance date, Plaintiffs' members will need to make time-consuming and costly changes to their business practices in order to prepare to comply with the Rule; some will have to evaluate whether they can even afford to continue operating. None of these expenditures will be compensable by money damages should the Payday Rule be invalidated or repealed. A stay of the compliance date is particularly appropriate because the Bureau's decision to initiate rulemaking to reconsider the Payday Rule creates inherent uncertainty. There is no way to know whether Plaintiffs' members will ultimately need to comply with the Payday Rule, a modified payday rule, or no rule at all. Thus, if the compliance date is not stayed, Plaintiffs' members will need to take costly steps now to prepare

to comply with regulations that may never take effect. Finally, a stay of the compliance date is necessary to preserve the status quo pending judicial review because, if the Court grants the parties' request to stay this litigation during the pendency of the Bureau's rulemaking proceedings, judicial review is unlikely to be complete before August 19, 2019, when Plaintiffs' members will have to actually comply (and not just prepare to comply) with the Payday Rule.

11. The parties agree that Plaintiffs have presented "a substantial case on the merits" on at least some of their claims. *See Texas v. EPA*, 829 F.3d 405, 424, 435 (5th Cir. 2016) (applying factors governing stays pending appeal to decision on stay under § 705 of the APA); *Weingarten Realty Investors v. Miller*, 661 F.3d 904, 910 (5th Cir. 2011) ("where there is a serious legal question involved and the balance of equities heavily favors a stay … the movant only needs to present a substantial case on the merits"). In addition, the "balance of equities heavily favors a stay," particularly in light of the irreparable injury that Plaintiffs face and the fact that the Payday Rule is currently under reconsideration. Should the court determine that additional explanation of the factors warranting a stay would help it resolve this motion, the parties stand ready to provide the Court with briefing upon request.

12. The parties therefore request that the Court stay the compliance date of the Payday Rule until final judgment in this litigation. In addition, to ensure that Plaintiffs' members and applicants for registered information systems have sufficient time to prepare their operations for compliance with the Payday Rule in the event Plaintiffs' claims are unsuccessful, the parties request that the Court's stay of the compliance date extend for 445 days from the date of final judgment. This extension of the stay would preserve the amount of time for bringing their operations into compliance that Plaintiffs' members currently have from the date of this motion to the Payday Rule's current compliance date of August 19, 2019.

Dated: May 31, 2018

Respectfully submitted,

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Counsel for Defendants

CERTIFICATE OF SERVICE

I hereby certify that on the 31st day of May 2018, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system, which will send notification of such filing to all counsel of record.

/s/ *Laura Jane Durfee*
Laura Jane Durfee

TAB 8

Order Granting Joint Motion for Stay of Litigation and Stay of Agency Action Pending Review

ECF No. 29 (June 12, 2018)

FILED

2018 JUN 12 AM 11:08

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

COMMUNITY FINANCIAL SERVICES ASSOCIATION OF AMERICA, LTD. AND CONSUMER SERVICE ALLIANCE OF TEXAS, PLAINTIFFS,	§	
V.	§	CAUSE NO. A-18-CV-0295-LY
CONSUMER FINANCIAL PROTECTION BUREAU AND JOHN MICHAEL MULVANEY, DEFENDANTS.	§	

ORDER

Before the court in the above styled and numbered cause is the parties' Joint Motion for Stay of Litigation and Stay of Agency Action Pending Review filed May 31, 2018 (Clerk's Document No. 16). By the motion the parties move the court for the following: (1) a stay of this litigation pending agency rulemaking to reconsider Defendant Consumer Financial Protection Bureau's (the "Bureau") final rule on payday, vehicle title, and certain high-cost installment loans (the "Payday Rule"); (2) a stay of the compliance date set forth in the Payday Rule until 445 days after final judgment in this litigation; and (3) a waiver of the Bureau and Defendant John Michael Mulvaney's obligation to file an answer in this action.

Having considered the case file and the applicable law,

IT IS ORDERED that the parties' Joint Motion for Stay of Litigation and Stay of Agency Action Pending Review filed May 31, 2018 (Clerk's Document No. 16) is **GRANTED TO THE FOLLOWING EXTENT**:

Defendants Consumer Financial Protection Bureau and John Michael Mulvaney are relieved of the obligation to file an answer in this action pending further order of the court and this action is **STAYED** pending further order of the court.

All other requests presented by the parties' Joint Motion for Stay of Litigation and Stay of Agency Action Pending Review filed May 31, 2018 (Clerk's Document No. 16) are **DENIED**.

IT IS FURTHER ORDERED that the parties file joint periodic status reports that detail the matters described in their motion, with the **first report due on or before August 17, 2018. Subsequent similar status reports are due on or before every 60 days thereafter** until further order of the court.

IT IS FURTHER ORDERED that because the court has relieved Defendants Consumer Financial Protection Bureau and John Michael Mulvaney of filing an answer at this time, Defendants' Unopposed Protective Motion to Extend Time to Answer Complaint filed June 4, 2018 (Clerk's Document No. 22) is **DISMISSED AS MOOT**.

SIGNED this 12th day of June, 2017.

LEE YEAKEL
UNITED STATES DISTRICT JUDGE

TAB 9

Order Granting Stay and Reversing Order Denying Request for Reconsideration
ECF No. 53 (Nov. 6, 2018)

FILED
2018 NOV -6 PM 2:30
CLERK US DISTRICT COURT
WESTERN DISTRICT OF TEXAS
BY

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

COMMUNITY FINANCIAL SERVICES ASSOCIATION OF AMERICA, LTD. AND CONSUMER SERVICE ALLIANCE OF TEXAS, PLAINTIFFS,	§	
V.	§	CAUSE NO. A-18-CV-0295-LY
CONSUMER FINANCIAL PROTECTION BUREAU AND JOHN MICHAEL MULVANEY, DEFENDANTS.	§	

ORDER

Before the court in the above styled and numbered cause is the parties' Joint Status Report filed October 26, 2018 (Clerk's Document No. 52). By way of background, on June 12, 2018, the court rendered an order that granted in part and denied in part the parties' joint motion to stay the litigation and agency action. Substantively, the June 12 order, *inter alia*, (1) stayed the litigation in this action pending further order of the court; (2) denied the parties' request to stay the August 19, 2019 compliance date for the Consumer Financial Protection Bureau's ("Bureau") "Payday, Vehicle Title, and Certain High-Cost Installment Loans" rule ("Payday Rule" or "Rule") until 455 days after judgment is rendered in this action; and (3) directed the parties to file joint status reports every 60 days informing the court about proceedings related to the Rule and the litigation.

On June 21, 2018, the Plaintiffs by an unopposed motion, requested that the court reconsider the portion of the June 12 order denying the requested stay of the Rule's August 19, 2019 compliance date. Plaintiffs reurged that they would suffer irreparable injury absent a stay and again requested that the court stay the Rule's compliance date until 455 days after judgment is rendered in this action. By Order rendered August 7, 2018, the court denied the request for reconsideration.

The parties filed their periodic joint status report on August 17, 2018, which informed the court that the Bureau was engaged in ongoing work to prepare a notice of proposed rulemaking to reconsider the Payday Rule and expects to issue a notice of proposed rulemaking by early 2019. Plaintiffs again represented that their members will continue to face substantial costs and irrerparable injury absent the court staying the Rule's compliance date. The court rendered an order on August 28, 2018, maintaining the stay of litigation and ordered the parties to file another joint status report on or before October 31, 2018.

By their October 26, 2018 status report, the Bureau informs the court that it intends to issue notices of proposed rulemaking in January 2019 to reconsider the Rule and address the Rule's August 19, 2019 compliance date. The report reflects further that the Bureau publicly announced on October 26, 2018, that it plans to propose revisiting the Rule's provisions that require lenders to assess borrowers' ability to repay before making covered loans, but not provisions that apply to lenders' withdrawing payments for covered loans from consumers' bank accounts. *See Public Statement Regarding Payday Rule Reconsideration and Delay of Compliance Date* (Oct. 26, 2018), https://go.usa.gov/xPPuR.

Having considered the parties' October 26 joint status report–particularly the information that the Bureau has publicly announced it plans to reconsider portions of the Rule and address the Rule's compliance date–and the case file, the court reconsiders the portion of the June 12, 2018 order denying the request to stay the Rule's compliance date of August 19, 2019. Upon reconsideration, and given the information in the October 26 joint report, the court concludes that to prevent irreparable injury a stay of the Rule's current compliance date of August 19, 2019, is appropriate. *See* 5 U.S.C. § 705. The court, however, declines the parties' request to stay the compliance date of August 19, 2019 until 455 days from the date of final judgment in this action. Further, the court concludes that the stay of litigation in this action ordered June 12, 2018, should be continued in full force and effect. As the Bureau has publicly announced it plans to revisit portions the Rule, including the compliance date, the court will adjust the conditions and timing for the parties to file periodic joint status reports. Therefore,

IT IS ORDERED that the portion of the Order rendered August 7, 2018 (Clerk's Document No. 36), denying a request for reconsideration filed June 21, 2018 (Clerk's Document No. 30) is **REVERSED**.

Having reconsidered the Unopposed Motion for Reconsideration filed June 21, 2018 (Clerk's Document No. 30),

IT IS ORDERED that the motion is **GRANTED TO THE EXTENT** that the August 19, 2019, compliance date of the "Payday, Vehicle Title, and Certain High-Cost Installment Loans" rule published by the Bureau of Consumer Financial Protection in the Federal Register on November 17, 2017, 82 Fed. Reg. 54,472, is **STAYED** pending further order of the court. In all other respects the motion is **DENIED**.

IT IS FURTHER ORDERED that the stay ordered June 12, 2018, is continued in full force and effect.

IT IS FURTHER ORDERED that the parties file a Joint Status Report informing the court about proceedings related to the Rule and this litigation as the parties deem appropriate, **but no later than March 1, 2019.**

SIGNED this 6th day of November, 2018.

LEE YEAKEL
UNITED STATES DISTRICT JUDGE

TAB 10

Order Granting Joint Motion to Lift Stay of Litigation
ECF No. 74 (July 24, 2020)

FILED

2020 AUG 20 AM 11:24

CLERK US DISTRICT COURT
WESTERN DISTRICT OF TEXAS
BY __________
DEPUTY

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

COMMUNITY FINANCIAL SERVICES ASSOCIATION OF AMERICA, LTD., *et al.*,

Plaintiffs,

v.

CONSUMER FINANCIAL PROTECTION BUREAU, *et al.*,

Defendants.

Civil Action No. 1:18-cv-295

[redacted] ORDER

Before the court in the above styled and numbered case is the parties' Joint Motion to Lift Stay of Litigation, filed July 24, 2020, and Joint Motion for Scheduling Order, filed August 12, 2020. Having considered the motion, the case file, and the applicable law,

IT IS ORDERED that the joint motion to lift stay of litigation is **GRANTED**, and the stay of this action entered on June 12, 2018, is lifted.

IT IS FURTHER ORDERED that the parties' Joint Motion for Scheduling Order is **GRANTED**, and the following deadlines shall apply:

8/28/20	Deadline for Plaintiffs to file first amended complaint.
9/4/20	Deadline for Defendants to produce administrative record to Plaintiffs.
9/18/20	Deadline for Defendants to answer Plaintiffs' first amended complaint.
9/25/20	Deadline for Plaintiffs to file motion for summary judgment. This motion shall not exceed 35 pages.
9/25/20	Deadline for Plaintiffs to file any unopposed motion for leave to file a second amended complaint.

10/23/20	Deadline for Defendants to file combined cross-motion for summary judgment and opposition to Plaintiffs' motion for summary judgment. This filing shall not exceed 40 pages.
10/23/20	Deadline for Defendants to file answer to any second amended complaint.
11/20/20	Deadline for Plaintiffs to file combined reply in support of their motion for summary judgment and opposition to Defendants' cross-motion for summary judgment. This filing shall not exceed 30 pages.
12/18/20	Deadline for Defendants to file reply in support of their cross-motion for summary judgment. This filing shall not exceed 25 pages.

SIGNED this 20th day of August 2020.

Lee Yeakel

THE HONORABLE LEE YEAKEL
UNITED STATES DISTRICT JUDGE

TAB 11

Declaration of James A. Ovenden in Support of Plaintiffs' Opposition to Defendants' Motion for Summary Judgment ECF No. 84-1 (Nov. 20, 2020)

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

COMMUNITY FINANCIAL SERVICES ASSOCIATION OF AMERICA, LTD. *et al.*, Plaintiffs, v. CONSUMER FINANCIAL PROTECTION BUREAU *et al.*, Defendants.	Civil Action No. 1:18-cv-295

DECLARATION OF JAMES A. OVENDEN IN SUPPORT OF PLAINTIFFS' OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

I, James A. Ovenden, declare as follows:

1. I am the President and Chief Executive Officer of Purpose Financial, Inc. (formerly known as Advance America, Cash Advance Centers, Inc.), a member of plaintiff Community Financial Services Association of America. I make this declaration in support of Plaintiffs' Opposition to Defendants' Motion for Summary Judgment based on my personal knowledge. I am over 18 years old and could testify to the facts set out herein if called upon to do so.

2. Purpose Financial is a leading cash advance company in the United States, with approximately 1,500 centers in twenty-six states. Purpose Financial offers a variety of consumer-finance products, including payday loans, title loans, and installment loans, and is subject to the payments provisions set forth in the Final Rule on Payday, Vehicle Title, and Certain High-Cost Installment Loans (the "Payday Rule").

3. The payments provisions originally had a compliance date of August 19, 2019. In order to prevent Purpose Financial and other CFSA members from incurring substantial implementation costs that would be unnecessary and unrecoverable in the event the Court invalidated the Payday Rule, CFSA and the Bureau negotiated and filed a joint motion for a stay of the compliance date pending completion of this litigation. In response, the Court stayed the compliance date until further order of the Court.

4. In reliance on the Bureau's representations and the Court's stay order, Purpose Financial has refrained from implementing the complex and costly changes to its business operations that will be required to comply with the payments provisions of the Payday Rule.

5. Before it can operate its business in full compliance with the payments provisions, Purpose Financial would need to implement complex and costly company-wide changes to its information-technology systems, its business practices and policies, and its employee training.

6. For example, a substantial amount of time, cost, and effort is needed to upgrade Purpose Financial's loan-management system, telephony system, and customer communication technology to support the requirements of the payments provisions, including their limitations on electronic withdrawals and their notice and recordkeeping requirements. This will require working with vendors to design and/or provide new functionality or to migrate to different platforms. Once implemented, the new systems will require extensive testing to ensure compliance.

7. A substantial amount of time, cost, and effort is also needed to develop the required new disclosure forms, to create new policies and training manuals, and to train our thousands of employees on how to comply with the payments provisions and how to use the new software functionality.

8. Furthermore, many of the changes needed to upgrade the information-technology systems and the coordination with vendors needed in order to enable compliance with the payment provisions has been delayed due to the immediate and urgent priorities associated with COVID-19, such as addressing consumer needs for convenient remote servicing options and increasing payment accommodation capabilities during these unprecedented times.

9. Assuming the business impacts from COVID-19 normalize in 2021, Purpose Financial estimates that it will take between six and twelve months to implement these measures at a significant cost.

10. A shortened implementation period would likely cost Purpose Financial millions of dollars in additional costs and negatively impact millions of dollars in customer payments processed remotely, among other negative implications beyond those described above. These additional costs would stem principally from the inability to have digitally integrated solutions operative by the time of an earlier compliance date. Thus, if the implementation period is shortened, Purpose Financial would be unable to use electronic means such as e-mail and text to provide required notices to consumers and improved telephony systems and/or payment authorization capabilities to comply with recordkeeping requirements. Instead, the company would either need to use the U.S. mail system to deliver paper notices to its customers or rely on our customers to make cash payments (which do not trigger the payments provisions' notice requirements). Given the urgent need to increase remote servicing capabilities during COVID-19 due to health and safety issues, the company has grave concerns if placed in a position that requires limiting customers solely to cash payments.

11. Each of these alternatives would be substantially more expensive and significantly burdensome on our customers. Based on 2019 loan volumes, mailed notices would cost

approximately $5 million in additional costs annually. Limiting customers to cash payments, rather than providing for remote authorization capabilities for digital payments, would impact approximately $160 million of remote payments annually.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed on November 18, 2020

James A. Ovenden

TAB 12

Notice of Supplemental Authority
ECF No. 90 (June 28, 2021)

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

COMMUNITY FINANCIAL SERVICES ASSOCIATION OF AMERICA, LTD., *et al.* *Plaintiffs,* v. CONSUMER FINANCIAL PROTECTION BUREAU, *et al.*, *Defendants.*	Civil Action No. 1:18-cv-00295

NOTICE OF SUPPLEMENTAL AUTHORITY

Defendant Consumer Financial Protection Bureau submits this Notice to inform the Court of additional recent authority relevant to the Court's adjudication of the parties' pending cross-motions for summary judgment—specifically, Plaintiffs' argument that the Payment Provisions of the 2017 Payday Rule are "void *ab initio*" and therefore incapable of ratification. *E.g.*, ECF No. 80 at 13, 18. The Supreme Court rejected similar arguments in two recent separation-of-powers decisions.

First, *Collins v. Yellen*, No. 19-422 (U.S. June 23, 2021) (attached as Exhibit A), considered a challenge to an exercise of executive authority by the Federal Housing Finance Agency while its single director was unconstitutionally insulated from removal. The Supreme Court rejected as "neither logical nor supported by precedent" the very view that Plaintiffs advance here—that actions by an official subject to an unconstitutional removal provision "are void *ab initio* and must be undone." Slip op. at 33-35 & n.24. The Court explained that the officials leading the FHFA were (just like the Bureau Director) properly appointed and that their purported insulation from removal created “no reason to regard any of the actions taken by the FHFA in relation to the [action] as void.” *Id.* at 33-34 & n.23. Likewise, here, the (prior) purported restriction on the President’s ability to remove the Bureau Director supplies “no reason to hold that the [Payment Provisions] must be completely undone.” *Id.* at 35.

The Court held that it was “possible” that the challengers could obtain some other relief, but only if they could show that the unconstitutional removal restriction itself caused them “compensable harm.” *Id.* at 35-36. The Court remanded for the lower courts to decide whether the removal restriction had caused any harm and, if so, what the appropriate remedy would be. Here, Plaintiffs can show no harm that would entitle them to the relief they seek: invalidation of the Payments Provisions. As the Bureau has explained, a Bureau Director appointed by and indisputably removable at will by the President considered and ratified the Payments Provisions. That confirms that the invalid removal restriction made no difference for Plaintiffs or for their members’ future obligation to comply with the Payments Provisions when they take effect.

Second, in *United States v. Arthrex, Inc.*, No. 19-1434 (U.S. June 21, 2021) (attached as Exhibit B), the Court rejected similar arguments that “the appropriate remedy” for an action by agency officials—administrative patent judges—who exercised authority without constitutionally adequate oversight was “to order outright dismissal of the proceeding below.” Slip op. at 20 (plurality op.); *see also id.* at 7 (Breyer, J., concurring on remedy). Instead, it held the statutory provisions purporting to insulate the officials’ decisions from review by the head of the relevant agency were invalid but severable, and remanded to provide an opportunity for review by the agency head. *Id.* at 22-23 (plurality op.). The equivalent remedy here, which Plaintiffs have received, was review by a properly removable official of the Bureau’s decision to issue the Payments Provisions.

Dated: June 28, 2021

Respectfully submitted,

/s/ Kevin E. Friedl
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CERTIFICATE OF SERVICE

I certify that on June 28, 2021, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system, which will send notification of such filing to the following:

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Laura Jane Durfee
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/s/ Kevin E. Friedl
Kevin E. Friedl
Counsel for Defendants

TAB 13

Response to Notice of Supplemental Authority
ECF No. 91 (June 30, 2021)

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

COMMUNITY FINANCIAL SERVICES ASSOCIATION OF AMERICA, LTD. *et al.*, Plaintiffs, v. CONSUMER FINANCIAL PROTECTION BUREAU *et al.*, Defendants.	Civil Action No. 1:18-cv-295

RESPONSE TO DEFENDANTS' NOTICE OF SUPPLEMENTAL AUTHORITY

In *Collins v. Yellen*, the Supreme Court struck down the statutory removal protection for the Director of the Federal Housing Finance Agency (FHFA) and remanded for the lower courts to consider what relief is appropriate. Nos. 19-422 & 19-563, 2021 WL 2557067 (U.S. June 23, 2021). The Bureau now argues that *Collins* somehow bars the relief that Plaintiffs seek here. It does no such thing. First, *Collins* did *not* address whether a legislative rule adopted by an unlawfully insulated agency head is void *ab initio*, because the action at issue there was a contractual agreement, and it was adopted by a duly removable agency head. Second, *Collins* created a standard for deciding when to grant "retrospective relief" that would have required hundreds of millions of dollars in payments to the federal Treasury to be "completely undone." *Id.* at *19–20. It did not purport to limit *prospective* relief, which Plaintiffs seek here by requesting an injunction against the *future* enforcement of the Payments Provisions (*see* Am. Compl. at 41). Third, even if the *Collins* test for retrospective relief did apply here, it would powerfully *support* Plaintiffs' requested remedy because it is clear that, in the absence of the unconstitutional removal restriction, the Director would have been removed.

Equally unavailing is Defendants' reliance on a second recent case, *United States v. Arthrex, Inc.*, Nos. 19-1434, 19-1452, & 19-1458, 2021 WL 2519433 (U.S. June 21, 2021), where the Court addressed a different type of constitutional violation and provided a remedy that differs from the "ratification" here in several dispositive ways.

I. *Collins* says nothing about whether rules like the Payments Provisions are void *ab initio*.

Collins did not address whether a rule promulgated by an unaccountable agency head is void *ab initio*. It did not involve rulemaking at all. Instead, it involved a contractual agreement that the Supreme Court held was valid when the FHFA entered into it, because the agency was then headed by an Acting Director who was removable at will and thus fully accountable to the President. *See* 2021 WL 2557067, at *19. The only remedies question in *Collins* was whether to undo later "implement[ation]" of the agreement by Directors who were insulated from removal. *Id.* And given that the initial agreement was created by an Acting Director answerable by the President, there was "no reason to regard" the subsequent implementation of the agreement's terms as invalid. *Id.* Here, by contrast, the 2017 rule was promulgated by a Bureau Director who was *not* subject to presidential control—and who was indeed explicitly opposed to the President's policy preferences, as detailed below. In this situation, there is *every reason* to think that the 2017 rule—including the Payments Provisions—was void *ab initio*.

II. *Collins* limited costly retrospective remedies, not the prospective relief sought here.

Collins also does not apply here because that case involved only a request for retrospective monetary relief, not the prospective injunctive relief at issue here. Under *Collins*, a party seeking "retrospective relief" from the effects of an unlawful removal restriction must show "that the [restriction] inflicted harm." 2021 WL 2557067, at *20. *Collins* required this showing of "compensable harm" for retrospective relief to ensure that separation-of-powers violations do not require every hard-to-reverse governmental action (including the collection of hundreds of millions of dollars stretching back nearly a decade) to "be completely *undone*." *Id.* at *19–20, *7 (emphasis added). Neither this holding nor its logic applies to *prospective* relief against future regulatory enforcement. Indeed, Justice Kagan joined the *Collins* Court's remedies analysis precisely on the ground that it "well explains why *backwards-looking* relief is not always necessary to redress a removal violation." *Id.* at *29 (Kagan, J., concurring in part and concurring in the judgment in part) (emphasis added).

As Justice Gorsuch's partial concurrence observed, a separation-of-powers defect in an official's authority "normally" warrants "set[ting] aside the [official's] ultra vires actions as 'contrary to constitutional right.'" *Id.* at *26 (Gorsuch, J., concurring in part) (quoting 5 U.S.C. § 706(2)(B)). The Supreme Court has held as much in cases "involving appointment and removal defects alike," and "*th[o]se cases … remain good law*." *Id.* at *29 (emphasis added). The limited remedy in *Collins* arose from "its unique context," where the plaintiffs sought retrospective relief "unwinding or disgorging hundreds of millions of dollars that have already changed hands." *Id.*; *cf. Ryder v. United States*, 515 U.S. 177, 180–81 (1995) (explaining that retrospective remedies have been denied in some separation-of-powers cases to avoid "the chaos that would result from" challenges to past actions, including criminal "conviction[s] and sentence[s]") (internal citation omitted). Although the Court in *Collins* declined to "authoriz[e] such relief," it did not disturb any of the "prior guidance authorizing more meaningful relief in other situations." 2021 WL 2557067, at *29 (Gorsuch, J., concurring in part). In particular, it says nothing about the *forward*-looking relief that Plaintiffs seek here (*see* Am. Compl. at 41): an injunction against future enforcement of the unlawful Payments Provisions, which as a result of stays entered in this case have never been in effect.

III. Even if the *Collins* test for retrospective relief applied here, it would support Plaintiffs' requested remedy.

In any event, Plaintiffs are entitled to relief even if *Collins* requires them to show that the unlawful removal restriction made a concrete difference. Here it is clear that, "[w]ere it not for that [removal] provision," the President would have "replaced" the Director before he adopted the unlawful regulation in November 2017. 2021 WL 2557067, at *20.

Replacement would have been the normal course because single-member agency heads who are not insulated from removal typically resign when a new President takes office, especially when they are of a different political party. And those who do not resign are typically removed. Thus, when the Trump administration began, virtually every significant single-member agency head was replaced *except* at the Bureau and the FHFA, where removal was restricted by the statutory provisions later held unconstitutional in *Seila Law* and *Collins*. This alone shows that Director Cordray remained in office solely because of the unconstitutional removal restriction.

Sure enough, the public record is *full* of evidence that President Trump wanted to fire Cordray, but was deterred from doing so by the statutory removal restriction. No one doubted that the two had many policy disagreements, and that the Trump administration was keen "to block the [Bureau's] new regulations" of "payday lenders" in particular.[1] As Director Cordray himself explained in a book released after he left office, "[t]he threat that I would be fired as soon as President Trump took office loomed over everything."[2] Most notably, it loomed over

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[1] Consumer Loans, *Payday lending is declining*, The Economist (Apr. 8, 2017), https://www.economist.com/finance-and-economics/2017/04/08/payday-lending-is-declining.

[2] Richard Cordray, *Watchdog: How Protecting Consumers Can Save Our Families, Our Economy, and Our Democracy* 185 (2020); Kate Berry, *In tell-all, ex-CFPB chief Cordray claims Trump nearly fired him*, American Banker (Feb. 27, 2020), https://www.americanbanker.com/news/in-tell-all-ex-cfpb-chief-cordray-claims-trump-nearly-fired-him.

what Cordray described as his last piece of unfinished business—"[o]ur last big fight[,which] was over the payday lending rule."[3] The threat of removal was so acute that Cordray had taken "steps in the final days of the Obama administration to prepare a legal case to try to keep his job, even asking President Obama to write a letter attesting to his fitness to lead the CFPB to bolster the argument that President Trump lacked the legal cause to fire him."[4]

But "President Trump was advised to hold off on firing Cordray because the Supreme Court had not yet weighed in on Dodd-Frank's 'for cause' provision,"[5] while the D.C. Circuit, less than one month into the new president's term, had vacated and agreed to reconsider en banc a panel decision invalidating the for-cause removal protection. Feb. 16, 2017 Order (per curiam), *PHH Corp. v. CFPB*, 881 F.3d 75 (D.C. Cir. 2018) (No. 15-1177). In light of this legal uncertainty, the Trump administration (according to Cordray) tasked Gary Cohn with deciding "what to do about [Cordray's] situation," and Cohn and Cordray "negotiated a temporary truce to await further legal and political events."[6]

Then on November 1, 2017—the very day on which President Trump "held a private bill-signing in the Oval Office for a congressional resolution invalidating the [Bureau's] arbitration rule," and less than three weeks before the payday lending rule issued—Cordray received "an unscheduled call from the White House," in which "a secretary asked [him] to hold to speak with the president"—only to have the call "abruptly terminated."[7] The White House Chief of Staff

[3] Cordray, *Watchdog*, *supra* at 198.

[4] Berry, *In tell-all, ex-CFPB chief Cordray claims Trump nearly fired him*, *supra*; Cordray, *Watchdog*, at 186.

[5] Berry, *In tell-all, ex-CFPB chief Cordray claims Trump nearly fired him*, *supra*.

[6] Cordray, *Watchdog*, *supra* at 187.

[7] *Id.* at 198; Berry, *In tell-all, ex-CFPB chief Cordray claims Trump nearly fired him*, *supra*; John Heltman, *Trump signs resolution killing CFPB arbitration rule*, American Banker (Nov. 1, 2017), https://www.americanbanker.com/news/trump-signs-resolution-killing-cfpb-arbitration-rule.

"apparently intervened at that point, and [Cordray] never heard anything further."[8] As one expert noted, "Trump [was] learning . . . that he doesn't have all the powers that he thought he had as president."[9]

Ultimately, before the courts could rule, Cordray promulgated the Payday Rule at issue here, and subsequently resigned, finally giving the President the chance to appoint his own director and implement his own policy preferences. The Trump administration quickly named as the Bureau's Acting Director Mick Mulvaney, who "[w]ithin weeks . . . announced that he would reconsider one of the bureau's major long-term initiatives: rules to restrict payday loans."[10] As Mulvaney put it to reporters, "[a]nybody who thinks that a Trump-administration [Bureau] would be the same as an Obama-administration [Bureau] is simply being naïve."[11]

In sum, a President known to oppose the policies of the Director who took the action challenged here sought to fire the Director but was advised to hold off until courts could rule on the lawfulness of the Director's removal protection. It is hard to imagine better evidence that the unlawful removal restriction made a difference, as required by the *Collins* test. That test, as Justice Kagan noted in concurrence, serves to protect "actions the President supports" and actions "that would never have risen to the President's notice." 2021 WL 2557067, at *31 (Kagan, J., concurring in part and concurring in the judgment in part). The payday lending rule, by contrast, was one of the Bureau's most significant and high-profile decisions, and the public

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[8] Cordray, *Watchdog*, *supra* at 198; Chris Clow, *Former CFPB Director Cordray Reveals Near Firing by Trump*, Reverse Mortgage Daily (Mar. 1, 2020), https://reversemortgagedaily.com/2020/03/01/former-cfpb-director-cordray-reveals-near-firing-by-trump/.

[9] Kate Berry, *Why hasn't Trump fired CFPB's Cordray?*, American Banker (Feb. 8, 2017) https://www.americanbanker.com/news/why-hasnt-trump-fired-cfpbs-cordray.

[10] Nicholas Confessore, *Mick Mulvaney's Master Class in Destroying a Bureaucracy From Within*, N.Y Times (Apr. 16, 2019), https://www.nytimes.com/2019/04/16/magazine/consumer-financial-protection-bureau-trump.html.

[11] *Id.*

record makes clear that the President would have fired then-Director Cordray before the Bureau's promulgation of the Payday Rule but for the unconstitutional removal restriction. This challenge thus satisfies the test for relief set forth in *Collins*.

Accordingly, Plaintiffs are entitled to a remedy on their constitutional claim, and the Court should grant Plaintiffs' motion for summary judgment and deny the Bureau's cross-motion on that claim. At a minimum, if the Court has any doubts about whether President Trump would have removed then-Director Cordray, the Court must deny the Bureau's motion for summary judgment and permit discovery on that issue. *See* Fed. R. Civ. P. 56(d); *Bisby v. Garza*, 342 F. App'x 969, 973 (5th Cir. 2009) ("Generally, summary judgment may be granted only after an adequate time for discovery.") (internal quotation marks omitted).

IV. The remedy approved in *Arthrex* is nothing like the "ratification" challenged here.

In *Arthrex*, the Supreme Court held that the adjudicatory decisions of administrative patent judges (APJs), who had been appointed as inferior officers, were not adequately subject to review by the APJs' superior officer, the Director of the Patent and Trademark Office (PTO). 2021 WL 2519433, at *11, *13. To remedy this defect, the Court invalidated a statutory provision restricting the Director's authority to review the APJs' decisions, and remanded the case to allow that review to occur. *Id.* at *12. The Bureau contends that that remedy is akin to ratification in this case, but it is not.

Arthrex had nothing to do with ratification. The only constitutional defect that the Court identified in *Arthrex* was that the statute unlawfully prohibited the PTO Director from reviewing adjudications *after* they had been conducted by patent judges. To address that defect, the proper remedy was to remand so that the Director could review the decisions in question, *i.e.*, to give the parties the full review to which they were entitled in the first instance. That is a far cry from ratification, which would allow reassessment (without required administrative procedures) of a prior director's decision by a new director.

In other words, in *Arthrex* there was no constitutional requirement that the patent judges be subject to the Director's supervision and control *during* the adjudications. Here, by contrast, Article II of the Constitution required the Bureau Director to be subject to the President's control (via the removal power) *during* the extensive rulemaking process required by the Administrative Procedure Act, so that the process itself would be properly supervised and politically accountable. *See* ECF 80 at 17–18. If President Trump's Bureau Director had been in charge, the 2017 rule would not have been promulgated at all. That problem cannot be "cure[d]" by a mere *ipse dixit* ratification now. *Id.* The agency needs to go through the constitutionally and statutorily required process for the first time with an accountable Director. Any other position would reduce the APA-mandated rulemaking process to a meaningless irrelevancy. (Indeed, *Arthrex*'s holding that the APJs' decisions are invalid absent the constitutionally required review by the PTO Director contradicts the Bureau's assertion that, under *Collins*, no remedies are required for the constitutional violation that occurred here.)

There is another contrast. Because the PTO Director has always been vested with the "powers and duties" of his agency, *Arthrex*, 2021 WL 2519433, at *4, his *post hoc* review of tainted APJ decisions fully comports with the agency law principle "that the party ratifying should be able" "to do the act ratified at the time the act was done," not just "at the time the ratification was made." *FEC v. NRA Pol. Victory Fund*, 513 U.S. 88, 98 (1994) (citation and emphasis omitted); *see also* Restatement (Third) of Agency §§ 3.04(1), 4.01(3)(b), 4.04(1) (2006). Here, by contrast, the unlawfully structured Bureau lacked authority to act when the Payments Provisions issued, so those provisions cannot now be ratified. *See* ECF 80 at 17–18.

CONCLUSION

In light of *Collins*, and fully consistent with *Arthrex*, this Court should grant Plaintiffs' motion for summary judgment and deny the Bureau's cross-motion. In the alternative, if the Court believes that the publicly available evidence is insufficient to warrant summary judgment for Plaintiffs at this time, the Court should deny summary judgment to the Bureau so that Plaintiffs may have the opportunity to take discovery on the issue whether President Trump would have removed Director Cordray but for the statutory removal restriction.

Dated: June 30, 2021

Respectfully submitted,

/s/ Laura Jane Durfee

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CERTIFICATE OF SERVICE

I hereby certify that on the 30th day of June 2021, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system, which will send notification of such filing to all counsel of record.

Dated: June 30, 2021

/s/ Laura Jane Durfee
Laura Jane Durfee
Counsel for Plaintiffs

TAB 14

Reply Regarding Notice of Supplemental Authority
ECF No. 92 (July 2, 2021)

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

COMMUNITY FINANCIAL SERVICES ASSOCIATION OF AMERICA, LTD., *et al.*

Plaintiffs,

v.

CONSUMER FINANCIAL PROTECTION BUREAU, *et al.*,

Defendants.

Civil Action No. 1:18-cv-00295

DEFENDANTS' REPLY REGARDING NOTICE OF SUPPLEMENTAL AUTHORITY

Collins v. Yellen, 141 S. Ct. 1761 (2021), explains when an unconstitutional removal restriction entitles challengers to relief: if (and only if) they can show that "[w]ere it not for th[e removal] provision," the challengers would not suffer the "harm" caused by the challenged action. *Id.* at 1789. In their Response to the Bureau's Notice of Supplemental Authority (ECF No. 91), Plaintiffs contend that *Collins*' common-sense remedial standard does not apply to rule challenges or to prospective relief or, if it does, that Plaintiffs can make the required showing. They also seek to distinguish the remedial holding in *United States v. Arthrex, Inc.*, 141 S. Ct. 1970 (2021). Plaintiffs are wrong on all counts.

1. *Collins* cannot be distinguished on the ground that it involved a contractual agreement implemented by officials subject to an unconstitutional removal provision rather than (as here) a rule promulgated by such an official. *Contra* ECF No. 91 at 2. *Collins* makes clear that "the unlawfulness of the removal provision does not strip the Director of the power to undertake the … responsibilities of his office," period, whether those responsibilities are entering contracts,

promulgating a rule, or something else. *Collins*, 141 S. Ct. at 1788. That means that the CFPA's invalid removal restriction did not deprive the Bureau Director of authority to promulgate the Payment Provisions—and there is therefore "no reason to regard any of the actions taken by [the Bureau] in relation to [those Provisions] as void" *ab initio*. *Id.* at 1787.

2. Nor can *Collins* be read to require a showing of "harm" only for retrospective relief, and not prospective relief like Plaintiffs seek here. *Contra* ECF No. 91 at 2-3. The only reason the remedial section of *Collins* did not address prospective relief was because the request for such relief was moot. *Collins*, 141 S. Ct. at 1780, 1787 ("[B]ecause the shareholders no longer have a live claim for prospective relief … the only remaining remedial question concerns retrospective relief."). The decision in no way suggested that the standard would be different for such relief. *Id.* at 1787-89; *accord id.* at 1801 (Kagan, J., concurring with respect to remedy) ("agree[ing]" with majority that "injunctive relief" is available "only when the President's inability to fire an agency head affected the complained-of decision").[1] Indeed, that would make little sense. Remedies are meant to "restore the plaintiffs to the position they would have occupied in the absence of the" violation and should not put them "in a better position." *Id.* at 1801 (Kagan, J., concurring in part) (quotations omitted). It would contravene these "usual remedial principles" to invalidate a rule that an agency would adopt even without the removal restriction. *Id.* And, worse, it would actually undermine the President's power by undoing "actions [he] supports." *Id.* at 1801-02.

[1] Plaintiffs contend that Justice Gorsuch thinks prospective remedies could be treated differently. ECF No. 91 at 3. But, in his concurrence (which no other justice joined), Justice Gorsuch acknowledged that he was "part[ing] ways" with the majority on the question of remedy. *Collins*, 141 S. Ct. at 1795 (Gorsuch, J., concurring in part).

3. Finally, Plaintiffs miss the mark in contending that they can make the showing that *Collins* requires—or, in the alternative, that they should be allowed discovery into likely-privileged executive deliberations to develop their case. Plaintiffs argue at length that, without the removal restriction, President Trump would have fired Director Cordray. ECF No. 91 at 4-7. But that is not the question. The question is whether the removal restriction caused Plaintiffs "harm"—here, their (future) obligation to comply with the Payments Provisions. *See Collins*, 141 S. Ct. at 1801 (Kagan, J., concurring in part) ("agree[ing]" with majority that relief is available only where the removal restriction "affected *the complained-of decision*" (emphasis added)). It did not. Regardless of whether President Trump would have fired Director Cordray, President Trump's own appointee expressly ratified those Provisions *after* the removal provision was held invalid. 85 Fed. Reg. 41905 (July 13, 2020). That approval by a Director removable at the President's will conclusively shows that the President had adequate oversight over the Payments Provisions and that the prior restriction on his removal power provides no basis to invalidate them.

4. Finally, Plaintiffs fail to distinguish *Arthrex*, in which the Supreme Court rejected the view that the "appropriate remedy" for action by agency officials insufficiently subject to presidential oversight was to set aside the challenged action. *Arthrex*, 141 S. Ct. at 1986. Nothing in the Court's analysis turned on whether the Constitution required officials to be subject to supervision "during" their decisionmaking process or only later. ECF No. 91 at 8. And Plaintiffs' insistence that *Arthrex* is different because the executive official there "has always been vested with" the relevant statutory authorities, while the Bureau "lacked authority to act" when it issued the Payments Provisions (ECF No. 91 at 8) simply ignores that *Collins*

rejected that very claim. *Collins*, 141 S. Ct. at 1788 (invalid removal restriction did not mean officials "lacked the authority" to carry out their statutory functions).

Dated: July 2, 2021

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on July 2, 2021, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system, which will send notification of such filing to the following:

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TAB 15

***Payday, Vehicle Title, and Certain High-Cost Installment Loans*, 82 Fed. Reg. 54,472 (Nov. 17, 2017) (Excerpts)**

54472 Federal Register / Vol. 82, No. 221 / Friday, November 17, 2017 / Rules and Regulations

BUREAU OF CONSUMER FINANCIAL PROTECTION

12 CFR Part 1041

[Docket No. CFPB–2016–0025]

RIN 3170–AA40

Payday, Vehicle Title, and Certain High-Cost Installment Loans

AGENCY: Bureau of Consumer Financial Protection.

ACTION: Final rule; official interpretations.

SUMMARY: The Bureau of Consumer Financial Protection (Bureau or CFPB) is issuing this final rule establishing regulations creating consumer protections for certain consumer credit products and the official interpretations to the rule. First, the rule identifies it as an unfair and abusive practice for a lender to make covered short-term or longer-term balloon-payment loans, including payday and vehicle title loans, without reasonably determining that consumers have the ability to repay the loans according to their terms. The rule exempts certain loans from the underwriting criteria prescribed in the rule if they have specific consumer protections. Second, for the same set of loans along with certain other high-cost longer-term loans, the rule identifies it as an unfair and abusive practice to make attempts to withdraw payment from consumers' accounts after two consecutive payment attempts have failed, unless the consumer provides a new and specific authorization to do so. Finally, the rule prescribes notices to consumers before attempting to withdraw payments from their account, as well as processes and criteria for registration of information systems, for requirements to furnish and obtain information from them, and for compliance programs and record retention. The rule prohibits evasions and operates as a floor leaving State and local jurisdictions to adopt further regulatory measures (whether a usury limit or other protections) as appropriate to protect consumers.

DATES:

Effective Date: This regulation is effective January 16, 2018. *Compliance Date:* Sections 1041.2 through 1041.10, 1041.12, and 1041.13 have a compliance date of August 19, 2019.

Application Deadline: The deadline to submit an application for preliminary approval for registration pursuant to § 1041.11(c)(1) is April 16, 2018.

FOR FURTHER INFORMATION CONTACT: Sarita Frattaroli, Counsel; Mark Morelli, Michael G. Silver, Steve Wrone, Senior Counsels; Office of Regulations; Consumer Financial Protection Bureau, at 202–435–7700 or *cfpb_reginquiries@cfpb.gov.*

SUPPLEMENTARY INFORMATION:

I. Summary of the Final Rule

On June 2, 2016, the Bureau issued proposed consumer protections for payday loans, vehicle title loans, and certain high-cost installment loans. The proposal was published in the **Federal Register** on July 22, 2016.[1] Following a public comment period and review of comments received, the Bureau is now issuing this final rule with consumer protections governing the underwriting of covered short-term and longer-term balloon-payment loans, including payday and vehicle title loans. The rule also contains disclosure and payment withdrawal attempt requirements for covered short-term loans, covered longer-term balloon-payment loans, and certain high-cost covered longer-term loans.

Covered short-term loans are typically used by consumers who are living paycheck to paycheck, have little to no access to other credit products, and seek funds to meet recurring or one-time expenses. The Bureau has conducted extensive research on these products, in addition to several years of outreach and review of the available literature. The Bureau issues these regulations primarily pursuant to its authority under section 1031 of the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act) to identify and prevent unfair, deceptive, or abusive acts or practices.[2] The Bureau is also using authorities under section 1022 of the Dodd-Frank Act to prescribe rules and make exemptions from such rules as is necessary or appropriate to carry out the purposes and objectives of the Federal consumer financial laws,[3] section 1024 of the Dodd-Frank Act to facilitate supervision of certain non-bank financial service providers,[4] and section 1032 of the Dodd-Frank Act to require disclosures to convey the costs, benefits, and risks of particular consumer financial products or services.[5]

The Bureau is not, at this time, finalizing the ability-to-repay determination requirements proposed for certain high-cost installment loans, but it is finalizing those requirements as to covered short-term and longer-term balloon-payment loans. The Bureau is also finalizing certain disclosure, notice, and payment withdrawal attempt requirements as applied to covered short-term loans, longer-term balloon-payment loans, and high-cost longer-term loans at this time.

The Bureau is concerned that lenders that make covered short-term loans have developed business models that deviate substantially from the practices in other credit markets by failing to assess consumers' ability to repay their loans according to their terms and by engaging in harmful practices in the course of seeking to withdraw payments from consumers' accounts. The Bureau has concluded that there is consumer harm in connection with these practices because many consumers struggle to repay unaffordable loans and in doing so suffer a variety of adverse consequences. In particular, many consumers who take out these loans appear to lack the ability to repay them and face one of three options when an unaffordable loan payment is due: Take out additional covered loans (''re-borrow''), default on the covered loan, or make the payment on the covered loan and fail to meet basic living expenses or other major financial obligations. As a result of these dynamics, a substantial population of consumers ends up in extended loan sequences of unaffordable loans. Longer-term balloon-payment loans, which are less common in the marketplace today, raise similar risks.

In addition, many lenders may seek to obtain repayment of covered loans directly from consumers' accounts. The Bureau is concerned that consumers may be subject to multiple fees and other harms when lenders make repeated unsuccessful attempts to withdraw funds from their accounts. In these circumstances, further attempts to withdraw funds from consumers' accounts are very unlikely to succeed, yet they clearly result in further harms to consumers.

A. Scope of the Rule

The rule applies to two types of covered loans. First, it applies to short-term loans that have terms of 45 days or less, including typical 14-day and 30-day payday loans, as well as short-term vehicle title loans that are usually made for 30-day terms, and longer-term balloon-payment loans. The underwriting portion of the rule applies to these loans. Second, certain parts of the rule apply to longer-term loans with terms of more than 45 days that have (1) a cost of credit that exceeds 36 percent per annum; and (2) a form of ''leveraged

[1] Payday, Vehicle Title, and Certain High-Cost Installment Loans, 81 FR 47864 (July 22, 2016).

[2] Public Law 111–203, section 1031(b), 124 Stat. 1376 (2010) (hereinafter Dodd-Frank Act).

[3] Dodd-Frank Act section 1022(b).

[4] Dodd-Frank Act section 1024(b)(7).

[5] Dodd-Frank Act section 1032(a).

activities, and it provides insight into the issues addressed here. Data from the Bureau's published reports were collected through its supervision function, and the Bureau's regulations protect confidential supervisory information from disclosure.[925] Courts have held that an agency can rely on confidential information in its rulemaking so long as the agency discloses information to allow interested parties to comment on the methodology and general data.[926] The Bureau disclosed how it obtained the data, the methodologies used to analyze the data, the number of accounts reviewed, characteristics about the accounts reviewed, and the results of the various studies.[927] For example, in the Bureau's payments report, most applicable to this section, the Bureau disclosed the number of accounts reviewed (19,685) and the methodology and results in a 25-page report.[928] That was enough information to allow commenters to adequately comment on the proposed rule. The Bureau believes that more detail could have revealed the identity of depository institutions, running counter to the Bureau's rules governing confidential supervisory information.

The Bureau continues to adhere to the view that its study based on 2012 data is relevant. Commenters were very concerned about impacts of the NACHA same-day ACH program, the impact of more recent enforcement actions, and more recent innovations like ApplePay, arguing that more recent market developments render the 2012 data stale. It is true that NACHA has revised some of its rules, and provided more explicit guidance on others. The NACHA Rule most relevant to lender payment presentments—the reinitiation limit of a total of three presentments per entry—was already in place during the sample period, though NACHA has since provided further guidance on that rule. Various enforcement actions relating to problematic use of payment authorizations (or lack thereof) by payday lenders—including various cases pursued by the FTC—had become public before the 2012.[929] It is also true that various enforcement actions have come after,[930] but it is the Bureau's common experience that industry often does not react uniformly to the Bureau's enforcement actions. Despite pre-existing enforcement actions, the NACHA reinitiation cap, other NACHA Rules about authorizations, and Regulation E requirements, the Bureau observed a high amount of returned presentments that were causing harm to consumers. Even if industry has stopped or lessened the prevalence of problematic payment practices since the report sample period—a claim that the Bureau did not receive any evidence on and is purely speculative—consumer harm from repeated re-presentments continues to be of concern to the Bureau. Furthermore, as some commenters acknowledged, recent changes in the market (such as the NACHA return rate inquiry threshold) do not apply to all payment channels and lenders may be continuing problematic practices through other payment channels, like remotely created checks. Moreover, the Bureau continues to receive complaints on payment practices.

Some commenters raised that NACHA has passed a 15 percent return rate inquiry threshold, which allows NACHA to request information from merchants who have high return rates, and that NACHA issued guidance to reiterate the two re-presentment threshold. For reasons discussed below, the Bureau believes that there are still significant risks to consumers despite these rule changes and clarifications. Even if this inquiry threshold has affected ACH payment practices, NACHA Rules do not apply to other types of payments. As for the 2014 clarification regarding NACHA's re-presentment cap, even assuming that clarification significantly impacted compliance rates for the pre-existing rule, there are a number of ways for lenders to avoid the cap, the cap allows more re-presentments than this rule, and again, it only applies to ACH and not other payment methods. NACHA itself raised concerns that lenders are shifting towards other payment methods when they tightened the restrictions—suggesting that the practices that the NACHA Rules were trying to address may have shifted off of the ACH network.

As for the makeup of the participants included in the study, the participant with the largest amount of ACH transactions accounted for 14 percent of the transactions, while the next largest accounted for six percent. Given the high number of transactions and that individual participants accounted for a relatively small share of the transactions, the Bureau believes that it is unlikely the overall results of its 2012 study would be primarily driven by potential departure of any one participant from the market.

More generally, the commenters only questioned whether the data is still relevant as to the current prevalence of lenders making multiple repeated payment presentments. They did not suggest that the practice has ceased entirely or that the likelihood that a payment attempt would succeed has been impacted by new NACHA Rules or intervening enforcement actions. Thus the Bureau does not find any reason to conclude that the last few years have cast in doubt the relevance of those aspects of its study.

The Bureau acknowledges that the payments report was based on online payday and payday installment loans only, and did not include loans by storefronts or depository institutions. The study, however, is informative of what occurs when a lender re-presents multiple times, and data from other sources—including public enforcement actions about depository institution practices, public filings for storefront lenders, and industry data about return rates—shows that these lenders have outlier payment practices. The Bureau believes that this information shows that lenders of loans covered by this rule are more likely to engage in harmful payment practices.

The data and analysis that the Bureau presented in the proposal is further bolstered by the studies cited by other

[925] 12 U.S.C. 5512(c)(6)(A); 12 CFR part 1070.

[926] *See NRDC* v. *Thomas,* 805 F.2d 410, 418 n.13 (D.C. Cir. 1986); *see also Riverkeeper Inc.* v. *EPA,* 475 F.3d 83, 112 (2d Cir. 2007) (Sotomayor, J.); rev'd on other grounds, 556 U.S. 208 (2009).

[927] For a summary of the Bureau's reports in this market, *see* CFPB, Payday Loans, Auto Title Loans, and High-cost Installment Loans: Highlights from CFPB Research (June 2, 2016), *available at http://files.consumerfinance.gov/f/documents/Payday_Loans_Highlights_From_CFPB_Research.pdf.*

[928] CFPB, Online Payday Loan Payments (April 2016), *available at http://files.consumerfinance.gov/f/201604_cfpb_online-payday-loan-payments.pdf.*

[929] *See, e.g.,* Press Release, FTC (Aug. 1, 2011), *FTC Charges Marketers with Tricking People Who Applied for Payday Loans; Used Bank Account Information to Charge Consumers for Unwanted Programs, available at https://www.ftc.gov/news-events/press-releases/2011/08/ftc-charges-marketers-tricking-people-who-applied-payday-loans;* Press Release, FTC, *FTC Obtains Court Order Halting Internet Payday Lenders Who Failed to Disclose Key Loan Terms and Used Abusive and Deceptive Collection Tactics* (Feb. 23, 2009), *available at https://www.ftc.gov/news-events/press-releases/2009/02/ftc-obtains-court-order-halting-internet-payday-lenders-who.*

[930] *See, e.g.,* Press Release, Bureau of Consumer Fin. Prot., *CFPB Takes Action Against Moneytree for Deceptive Advertising and Collection Practices* (Dec. 16, 2016), *https://www.consumerfinance.gov/about-us/newsroom/cfpb-takes-action-against-moneytree-deceptive-advertising-and-collection-practices/;* Press Release, Bureau of Consumer Fin. Prot., *CFPB Orders EZCORP to Pay $10 Million for Illegal Debt Collection Tactics* (Dec. 16, 2015), *available at http://www.consumerfinance.gov/newsroom/cfpb-orders-ezcorp-to-pay-10-million-for-illegal-debt-collection-tactics/;* Press Release, Bureau of Consumer Fin. Prot., CFPB Takes Action Against Online lender for Deceiving Borrowers (Nov. 18, 2015), *available at https://www.consumerfinance.gov/about-us/newsroom/cfpb-takes-action-against-online-lender-for-deceiving-borrowers/.*

commenters such as consumer groups and other research organizations. One published study on checking account activity showed that one-third of payday borrowers experienced at least one incident in which their checking account was overdrawn on the same day that the payday lender withdrew a payment, triggering one or more fees, even where the payment withdrawal itself succeeded.[931] Nearly half of them incurred an overdraft or NSF fee in the two weeks after a payday loan transaction. A 2013 report found that 27 percent of payday borrowers said that a payday lender making a withdrawal from their bank account caused an overdraft.[932] Among storefront borrowers, 23 percent had this experience while 46 percent of online borrowers reported that a payday lender's withdrawal caused an overdraft.[933] The same study went on to note that while these borrowers may choose payday loans in order to avoid overdrafts, a finding consistent with an earlier national survey which found that 90 percent of those who overdrew their account did so by mistake, many end up paying both payday loan and overdraft fees. Another national survey showed that 22 percent of borrowers reported closing their checking accounts or having them closed by the bank in connection with an online payday loan.[934]

Going back to the discussion in the proposal, these payment practices increase the risk that the payment attempt will be made in a way that triggers fees on a consumer's account. Unsuccessful payment attempts typically trigger bank fees. According to deposit account agreements, banks charge an average NSF fee of approximately $34 for returned ACH and check payments.[935] Some prepaid card providers charge fees for returned or declined payments.[936] Even if the payment goes through, the payment may exceed the funds available in the consumer's account, thereby triggering an overdraft fee, which also averages approximately $34, and in some cases ''extended'' overdraft fees ranging from $5 to $38.50, if the consumer is unable to clear the overdraft within a specified period of time.[937] These failed payment fees charged to the consumer's deposit account may be exacerbated by returned payment fees and late fees charged by lenders, since many lenders also charge a returned-item fee for any returned check or returned electronic payment.[938] The Bureau noted in the proposal that some depository institutions have charged overdraft and NSF fees for payments made within the institutions' internal systems, including a depository institution that charged overdraft and NSF fees on payments related to its own small-dollar loan product.[939] The commenters generally did not dispute that attempted withdrawals generate these kinds of fees to consumers, though some said that if the issue is the high fees that are charged, then the Bureau should pursue that problem separately rather than by adopting this rule.

Despite these potential risks to consumers, many lenders vary the timing, frequency, and amount of payment attempts over the course of the lending relationship. For example, the Bureau has received a number of consumer complaints about lenders initiating payments before the due date, sometimes causing the borrower's accounts to incur NSF or overdraft fees. The Bureau has received consumer complaints about bank fees triggered when lenders initiated payments for more than the scheduled payment amount. The Bureau is also aware of payday and payday installment lender policies that vary the days on which a payment is initiated based on prior payment history, payment method, and predictive products provided by third parties. Bureau analysis of online loan payments shows differences in how lenders space out payment attempts and vary the amounts sought in situations when a payment attempt has previously failed.[940]

Same-Day Attempts

The Bureau also noted in the proposal that some lenders make multiple attempts to collect payment on the same day, contributing to the unpredictable nature of how payment attempts will be made and further exacerbating fees on consumer accounts. For example, the Bureau has observed storefront[941] and online payday and payday installment lenders that, as a matter of course, break payment attempts down into multiple attempts on the same day after an initial attempt fails. This practice has the effect of increasing the number of NSF or overdraft fees for consumers because, in most cases when the account lacks sufficient funds to pay the balance due, attempts will trigger NSF or overdraft fees.[942] In the Bureau's analysis of ACH payments submitted by online payday lenders, approximately 35 percent[943] of the payments were attempted on the same day as another payment attempt. This includes situations in which a lender makes three attempts in one day

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931 Center for Responsible Lending, Payday Mayday: Visible and Invisible Payday Lending Defaults (March 31, 2015), *available at http://www.responsiblelending.org/research-publication/payday-mayday-visible-and.*

932 The PEW Charitable Trusts, *Payday Lending in America: Report 2, How Borrowers Choose and Repay Payday Loans,* p. 35 (Feb. 2013), *available at http://www.pewtrusts.org/~/media/assets/2013/02/20/pew_choosing_borrowing_payday_feb2013-(1).pdf.*

933 *Id.*

934 The PEW Charitable Trusts, *Payday Lending in America: Report 4, Harmful Practices in Internet Payday Lending,* p. 16 (Oct. 2014).

935 *CFPB Study of Overdraft Programs White Paper,* at 52.

936 There does not appear to be a standard charge for returned and declined payments by prepaid card providers, though the fees currently appear to be lower than those on depository accounts. The Bureau has observed fees ranging from 45 cents to $5.

937 *CFPB Study of Overdraft Programs White Paper.* Some extended overdraft fees are charged repeatedly if the overdraft is not cleared.

938 *See, e.g.,* ACE Cash Express, *Loan Fee Schedule—Texas, available at https://www.acecashexpress.com/~/media/Files/Products/Payday/Internet/Rates/TX_FeeSchedule.pdf* (last visited May 18, 2016) (charging $30 ''for any returned check, electronic payment, or other payment device''); Cash America, *Rates and Fees—Texas, available at http://www.cashamerica.com/LoanOptions/CashAdvances/RatesandFees/Texas.aspx* (last visited May 18, 2016) (''A $30 NSF charge will be applied for any returned payment.''); Advance America 2011 Annual Report (Form 10–K), at 8 (''Fees for returned checks or electronic debits that are declined for non-sufficient funds ('NSF') vary by State and range up to $30, and late fees vary by State and range up to $50. For each of the years ending December 31, 2011 and 2010, total NSF fees collected were approximately $2.9 million and total late fees collected were approximately $1 million and $0.9 million, respectively.''); *Mypaydayloan.com, FAQs, https://www.mypaydayloan.com/faq#loancost* (last visited May 17, 2016) (''If your payment is returned due to NSF (or Account Frozen or Account Closed), our collections department will contact you to arrange a second attempt to debit the payment. A return item fee of $25 and a late fee of $50 will also be collected with the next debit.''); Great Plains Finance, *Installment Loan Rates, https://www.cashadvancenow.com/rates.aspx*) (last visited May 16, 2016) (explaining returned payment fee of $25 and, for payments more than 15 days late, a $30 late fee).

939 *See, e.g.,* CFPB Consent Order, Regions Bank, CFPB No. 2015–CFPB–0009 (Apr. 28, 2015), *available at http://files.consumerfinance.gov/f/201504_cfpb_consent-order_regions-bank.pdf* (finding that Regions charged overdraft and NSF fees with its deposit advance product, despite stating that it would not do so after a change in policy. Specifically, if the bank collected payment from the consumer's checking account and the payment was higher than the amount available in the account, it would cause the consumer's balance to drop below zero. When that happened, the bank would either cover the transaction and charge an overdraft fee, or reject its own transaction and charge an NSF fee.), *available at http://files.consumerfinance.gov/f/201504_cfpb_consent-order_regions-bank.pdf.*

940 CFPB Online Payday Loan Payments, at 16–17 figs. 2–3.

941 See Consent Order, EZCORP, CFPB No. 2015–CFPB–0031 (Dec. 16, 2015), available at *http://files.consumerfinance.gov/f/201512_cfpb_ezcorp-inc-consent-order.pdf.*

942 With the exception that overdraft fees cannot be charged on one-time debit card transactions when a borrower does not opt in. 12 CFR 1005.17.

943 *CFPB Online Payday Loan Payments,* at 20 tbl.3.

(four percent of payments observed) and four or more attempts in one day (two percent of payments observed). The most extreme practice the Bureau has observed was a lender who attempted to collect payment from a single account 11 times in one day. The Bureau also has received consumer complaints about lenders making multiple attempts to collect in one day, including an instance of a lender reported to have made nine payment attempts in a single day.

When multiple payment requests are submitted to a single account on the same day by an online payday lender, the payment attempts usually all succeed (76 percent) or all fail (21 percent), leaving only three percent of cases where one but not all attempts succeed.[944] In other words, multiple presentments are seven times more likely to result in multiple NSF events for the consumer than they are to result in a partial collection by the lender.

Re-Presentment

The Bureau also finds that when a lender's presentment or multiple presentments on a single day fail, online payday lenders typically repeat the attempt to collect payment multiple times on subsequent days.[945] According to the Bureau's analysis of ACH payments, 75 percent of ACH payments presented by online payday lenders that initially fail are re-presented by the lender.[946] Because six percent of initial payments originally fail, the result is that four and half percent of all initial payments had an accompanying re-presentment. Of those re-presentments, 70 percent fail, and after the second failed attempt, 66 percent of failed payments are re-presented. That means a little over two percent of all initial payments involved three presentments (this rule would cut off the third presentment). Of these third re-presentments, 73 percent fail, and 50 percent are re-presented after three failures. Consumers have complained to the Bureau that lenders attempt to make several debits on their accounts within a short period of time, including one consumer who had taken out multiple loans from several online payday lenders and reported that the consumer's bank account was subject to 59 payment attempts over a two-month period.[947]

Online payday lenders appear to make a second payment attempt more quickly after a failed payment than after a successful payment. According to Bureau analysis, 60 percent of payment attempts following a failed payment came within one to seven days of the initial failed attempt, compared with only three percent of payment attempts following a successful payment.[948] The Bureau observed a lender that, after a returned payment, made a payment presentment every week for several weeks.

In addition to deviations from the payment schedule, some lenders adopt other divergent practices to collect post-failure payments. For example, the Bureau preliminarily found in the proposal that after an initial failure, one storefront payday and payday installment lender had a practice of breaking an ACH payment into three smaller pieces on the consumer's next payday: One for 50 percent of the amount due, one for 30 percent of the amount due, and one for 20 percent of the amount due.[949] Approximately 80 percent of these smaller attempts resulted in all three presentments being returned for non-sufficient funds, thus triggering multiple NSF fees. Some commenters suggested that they believe the Bureau's points about same-day attempts and re-presentment were overstated. For example, they cited the Bureau's data showing a high level of storefront payment failures by ACH transfer failures and bounced checks, and suggested that these figures did not take sufficient account of other cash transactions that were completed successfully. It is true that many payday loan payments are made in cash, and so not implicated by this rule. The Bureau' study also focused on only online payday and payday installment lenders, which do not take cash payments. Online payday and payday installment lenders continue to have high outlier return rates despite having all payments included in the denominator. The Bureau believes, however, that many cash transactions are likely to come from the population of consumers who would have funds in their accounts if instead the only method of payment were ACH (as in the studied online payday markets), and many would not come out of the population for which a payment withdrawal fails (because we know those consumers do have the funds to cover a payment).

The Bureau received a number of comments, including some from industry, asserting that lenders continue to engage in making repeat attempts to debit payments from consumer accounts.

b. Cumulative Impacts

These practices among payday and payday installment lenders have substantial cumulative impacts on consumers. Industry analyses, outreach, and Bureau research suggest that the industry is an extreme outlier with regard to the rate of returned items. As a result of payment practices in these industries, consumers suffer significant NSF, overdraft, and lender fees that substantially increase financial distress and the cumulative costs of their loans.

Outlier Return Rates

Financial institution analysis and Bureau outreach indicate that the payday and payday installment industry is an extreme outlier with regard to the high rate of returned items generated. These returns are most often for non-sufficient funds, but also include transactions that consumers have stopped payment on or reported as unauthorized. The high rate of returned payment attempts suggests that the industry is causing a disproportionate amount of harm relative to other markets.[950]

[944] *Id.* at 21 tbl.4.

[945] *See, e.g.,* First Cash Fin. Servs., 2014 Annual Report (Form 10–K), at 5 (Feb. 12, 2015), *available at https://www.sec.gov/Archives/edgar/data/840489/000084048915000012/fcfs1231201410-k.htm* (explaining that provider of online and storefront loans subsequently collects a large percentage of returned ACH and check payments by redepositing the customers' checks, ACH collections, or receiving subsequent cash repayments by the customers); CashNet USA, *FAQs, https://www.cashnetusa.com/faq.html* (last visited Dec. 18, 2015) (''If the payment is returned for reason of insufficient funds, the lender can and will re-present the ACH Authorization to your bank'').

[946] *CFPB Online Payday Loan Payments,* at 14. In the CFPB analysis, any payment attempt following a failed payment attempt is considered a ''re-presentment.'' Failed requests submitted on the same day are analyzed separately from re-presentments submitted over multiple days.

[947] This consumer reported that their bank account was ultimately closed with charges of $1,390 in bank fees.

[948] *CFPB Online Payday Loan Payments,* at 16.

[949] See Consent Order, EZCORP, CFPB No. 2015–CFPB–0031 (Dec. 16, 2015), available at *http://files.consumerfinance.gov/f/201512_cfpb_ezcorp-inc-consent-order.pdf.*

[950] High return rates for non-sufficient funds may also be indicative of lenders' problematic authorization practices. In developing its rules to monitor overall ACH return rates, NACHA explained:

Moreover, while some level of Returns, including for funding-related issues such as insufficient funds or frozen accounts, may be unavoidable, excessive total Returns also can be indicative of problematic origination practices. For example, although some industries have higher average return rates because they deal with consumers with marginal financial capacity, even within such industries there are outlier originators whose confusing authorizations result in high levels of Returns for insufficient funds because the Receiver did not even understand that s/he was authorizing an ACH transaction. Although such an Entry may be better characterized as ''unauthorized,'' as a practical matter it may be returned for insufficient funds before a determination regarding authorization can be made.

NACHA, *Request for Comment and Request for Information—ACH Network Risk and Enforcement Topics, Rule Proposal Description,* at 3 (Nov. 11, experience a third withdrawal attempt after two prior failures incur at least one additional NSF fee (bringing their total to three and total cost in NSF fees to over $100), 36 percent end up with at least two additional fees, and 10 percent end up with at least three additional fees (meaning in most cases they will have been charged approximately $175 in fees by their account-holding institution). When returned-item fees are added, that can double these costs. These lender fees may be imposed even for returned or declined payment withdrawal attempts for which the account-holding institution may not charge a fee, such as attempts made by debit cards and certain prepaid cards. Moreover, in the relatively small number of cases in which such a withdrawal attempt does succeed, Bureau research suggests that roughly one-third of the time, the consumer is likely to have been charged an overdraft fee of approximately $34.[1005]

In addition to incurring these types of fees, in the proposal, the Bureau preliminarily found that consumers who experience two or more consecutive failed lender payment attempts appear to be at greater risk of having their accounts closed by their account-holding institution. Specifically, the Bureau's analysis of ACH payment withdrawal attempts made by online payday and payday installment lenders indicates that 43 percent of accounts with two consecutive failed lender payment withdrawal attempts were closed by the depository institution, as compared with only three percent of accounts generally.[1006]

Comments Received

The primary thrust of the comments that claimed the Bureau had not satisfied this element was that the Bureau either had insufficient evidence or had evidence that was inapplicable to certain sub-categories of products—such as longer-term installment loans, bank loans, or loans made by Tribal entities or, relatedly, that the Bureau's evidence was only applicable to online lending.

There were also various other discrete comments. Some commenters suggested that identification of the third payment attempt as injurious as opposed to, for example, the fifth attempt, was arbitrary. Others suggested that even the second payment attempt is injurious and should be constrained under the terms of the rule. Commenters claimed that the Bureau had not shown why submitting payments more than two times is a unique characteristic of covered lenders, and had not shown why it was not similarly injurious when other industries did so. Several commenters identified that the third presentment after two consecutive failed presentments was a small portion of the total number of presentments initiated by lenders of covered loans, thereby suggesting that the injury was not substantial.

Some commenters also noted that the Bureau had not provided evidence showing that covered lenders have knowledge of the fact that their actions will result in repeated fees at consumers' authorizing banks. Others claimed that the lenders covered by the proposed rule were not the cause of the injury, but rather it was the consumers' banks that caused the injury. A number of commenters objected to the Bureau's assertion that its evidence suggested that some account closures were caused by the identified practice. A few commenters argued that fees were not necessarily injury, and others suggested that some of the affected consumers were fraudsters or never intended to repay, and thus should not be considered injured parties.

Final Rule

After having reviewed the comments received, the Bureau concludes that the practice of attempting to withdraw payment from a consumer's account in connection with a covered loan after the lender's second consecutive attempt to withdraw has failed due to a lack of sufficient funds, unless the lender obtains the consumer's new and specific authorization for the withdrawal, causes or is likely to cause substantial injury.

It is true that the Bureau's proposal relied significantly on a study of re-presentments and ACH withdrawal attempts in the online payday and payday installment lending market. But the Bureau relied on other data as well. For example, as stated above, one very large depository institution presented its own statistical analysis demonstrating that storefront and online lenders shared a 25% overall return rate, as compared to the 1.36% return rate industry-wide. And the Bureau reviewed the financial records of lenders that provide covered loans other than online loans, and preliminarily found disclosures of high return rates and/or a practice of engaging in re-presentments.[1007]

But more generally, the Bureau agrees with commenters that injury would result when any vendor initiates a third withdrawal attempt after two failed attempts (absent a new and specific authorization). The Bureau decided to take action as to lenders of the loans covered by this rule because the Bureau has reason to find, based on evidence and data available to it, that lenders in these markets are or were engaged in the identified practice, per the discussion in Market Concerns—Payments above. Were the Bureau presented with evidence that other markets are also engaged in the practice, it would consider expanding this rule.

The Bureau does not agree that the evidence before it suggests that third and subsequent presentments (which, again, are second re-presentments) result in a small amount of injury. Of the borrowers who are subjected to a third presentment, the data showed that 73 percent incur an NSF fee and an additional 8 percent incur an overdraft fee. As the Bureau noted in the Market Concerns—Payments section, and as commenters correctly noted, the Bureau's study showed that around two percent of all initial presentments were followed by two more attempts. The average overdraft and NSF fee was around $34, which means 1.6 percent of all initial payment attempts involved an estimated $34 in injury from a third payment attempt. Given the size of the market, the injury caused just by third presentments alone is substantial, amounting to millions of dollars. The Bureau also analyzed the harms of the practice in a different manner—by looking at the total percentage of payment requests that this rule would prevent, and the average overdraft and NSF fees that the rule will prevent from being charged per impacted borrower.

[1005] Thus, even when the consumer does not incur NSF fees from her account-holding institution as a result of a lender payment withdrawal attempt made in connection with a covered loan after two consecutive attempts have failed, the consumer still has a roughly one-in-three chance of incurring an overdraft fee as a result of the subsequent lender attempt. Moreover, at the time lenders choose to make further attempts to withdraw payment from the account, the lenders should be on notice that the account is severely distressed (as evidenced by the prior two consecutive returns) and that additional attempts thus are likely to cause further injury to the consumer, be it from NSF fees, lender-charged returned-item fees or, as the Bureau's analysis indicates, overdraft fees charged by the consumer's account-holding institution.

[1006] CFPB Report on Supplemental Findings, at Chapter 6.

[1007] QC Holdings 2014 Annual Report (Form 10–K), at 7 (reporting a return rate of 78.5 percent); Advance America 2011 Annual Report (Form 10–K), at 27 (reporting return rates of 63 percent for checks and 64 percent for ACH attempts); First Cash Fin. Servs., 2014 Annual Report (Form 10–K), at 5 (Feb. 12, 2015) (explaining that provider of online and storefront loans subsequently collects a large percentage of returned ACH and check payments by redepositing the customers' checks, ACH collections, or receiving subsequent cash repayments by the customers); CashNet USA, ''Frequently Asked Questions,'' *https://www.cashnetusa.com/faq.html* (last visited Dec. 18, 2015) (''If the payment is returned for reason of insufficient funds, the lender can and will re-present the ACH Authorization to your bank'').

Based on the Bureau's study, around seven to ten percent of all presentments in the studied market consisted of a presentment after at least two consecutive failed attempts, while the average borrower subjected to the practice incurred an average of $64 to $87 in overdraft and NSF fees as a result of the practice.[1008]

Notably, these estimates do not take into consideration all the further risks and harms that occur to some consumers whose accounts are closed as a result of these situations. When adding to that the fee amounts charged cumulatively for further re-presentments, which occur in certain instances, plus the unquantifiable amounts for return fees charged by lenders themselves, the injury is even more substantial.

Additionally, this injury would be incurred by borrowers who are more likely to be unable to absorb small to midsized financial burdens. The impact is likely to be significant given that impacted borrowers will have already incurred fees after the first two failed payment attempts. Also, as noted in Market Concerns—Underwriting, consumers of covered loans are typically in financial distress, which is often the reason for seeking covered loans in the first place. For a borrower that is in financial distress, incurring an average of $64–$87 in bank fees, plus any lender return fees and the risk of account closure, after having already incurred approximately $70 in bank fees and additional lender fees due to the first two failed payment attempts, would be quite substantial. As for the decision to finalize a limit of two re-presentments, the Bureau recognizes that every re-presentment—whether the first, second, third, fourth, or any other ordinal—individually generates fees, and hence causes injury to consumers. In fact, looking individually at each presentment, the fee injury is likely identical for each instance (one NSF fee, overdraft fee, and perhaps return fee). But the Bureau does not view the injury and benefits of each additional presentment individually. Instead, it takes into account the cumulative impact of the string of presentments. The Bureau did not decide on a limit of two re-presentments because the first re-presentment does not cause injury. It did so because the injury after each failed attempt is cumulative, meaning the injury after two re-presentments is approximately double the injury after one, and the first re-presentment implicates certain additional countervailing benefits.[1009] Lenders may have simply tried the first presentment at the wrong time, and consumers may find it convenient to not have to reauthorize after one failed attempt.

The Bureau draws the line at two re-presentments in an abundance of caution, in an attempt to avoid regulating potentially more legitimate justifications for re-presentment. But this discussion should not be interpreted to minimize the harms that can occur even from a single re-presentment. Indeed, depending on the facts and circumstances, even payment practices involving a single re-presentment may be unfair, deceptive, or abusive. The Bureau also notes that this rule does not provide a safe harbor against misconduct that is not explicitly addressed by the rule, and the Bureau can and will continue to monitor these practices under its supervisory and enforcement authorities, and will take appropriate action as warranted by the circumstances.[1010]

The Bureau disagrees with commenters' assertions that the identified practice does not cause the injury, either because consumers' banks were the primary cause or because the Bureau did not prove that the lender knew fees would result. One commenter argued more specifically that lenders are not responsible for overdraft fees because borrowers opt in to overdraft fees with their banks. Another argued that fees are not necessarily an injury. As an initial matter, actual knowledge of the harm is not a requirement for an unfairness finding.[1011] Even if it were, the Bureau assumes that market participants understand the natural consequences of their actions. Additionally, the fact that consumers' banks are the actors that actually charge the fees does not suggest that the identified practice does not cause the substantial injury. The ''contribution of independent causal agents'' does not erase the role lenders play in causing the harm.[1012] The Bureau's proposal provided ample evidence that lenders are aware of high rejection rates, and any industry participant should know that a natural consequence of rejected transfers is that the consumer will incur fees. The Bureau study analyzed overdraft fees charged in connection with ACH transactions. Fees on such transactions are not subject to an opt-in requirement like overdraft fees on debit card transactions, meaning that while it is true borrowers may have opted into overdraft fees for some instances, that is not true for many instances in which overdraft fees are incurred. Further, it is a settled matter that fees which borrowers cannot reasonably avoid should be considered injury.[1013]

It may be true that some of the affected consumers may be fraudsters, or never intended to repay their loans. To the extent a person had used another individual's account number, any re-presentments would further victimize a victim of identity theft. But the Bureau agrees that there may be a small population of borrowers who took out a loan with no intention of trying to repay either the loan or any associated bank fees. This small population of borrowers does not change the Bureau's overall assessment of whether there was substantial injury, or whether that injury was outweighed by countervailing benefits.

Lastly, several commenters stated that the Bureau's evidence on high account-closure rates did not prove that the identified practice caused all of the closures. The Bureau acknowledged in the proposal that some accounts could be closed for other reasons. To the extent depository institutions do involuntarily close accounts as a result of repeated failed presentments, that result is injury. And one commenter provided a study in which 22 percent of the surveyed payday consumers did self-report that their account was closed because of payday loans.[1014] The Bureau does not know the full extent of how often borrowers' accounts are closed due to multiple presentments, but it can point to evidence showing that payday borrowers' accounts are closed involuntarily much more often

[1008] CFPB Report on Supplemental Findings, at Chapter 6.

[1009] Note that the Bureau's study, CFPB Online Payday Loan Payments, found that the second payment request had a 70 percent failure rate, while the third had a 73 percent failure rate. CFPB Online Payday Loan Payments at 13.

[1010] This discussion reflects the fact that rules identifying and preventing certain unfair or abusive practices as determined on a categorical basis—as is true, for example, of this rule—do not divest the Bureau of authority to address other unfair, deceptive, or abusive acts or practices that are identified in the particular facts or circumstances of a specific examination or enforcement investigation. For example, the Bureau has taken enforcement action in cases that involved payment practices which do not specifically track the unfair and abusive practice that is identified in § 1041.7. *See, e.g.,* Consent Order, In the Matter of EZCORP, Inc., No. 2015–CFPB–0031 (Dec. 16, 2015).

[1011] *FTC* v. *Neovi,* 604 F.3d 1150, 1156 (9th Cir. 2010).

[1012] *Neovi,* 604 F.3d at 1155 (9th Cir. 2010).

[1013] FTC Statement on Unfairness, Appended to International Harvester Co., 104 F.T.C. 949, 1070 (1984) (''In most cases a substantial injury involves monetary harm.'').

[1014] Pew Charitable Trusts, ''Payday Lending in America Fraud and Abuse Online: Harmful Practices in Internet Payday Lending, at 16 (Report 4, 2014), *available at http://www.pewtrusts.org/~/media/Assets/2014/10/Payday-Lending-Report/Fraud_and_Abuse_Online_Harmful_Practices_in_Internet_Payday_Lending.pdf.*

than other consumers. It is reasonable to assume that some portion of the closures result from the practice and some are a result of other circumstances. Either way, the Bureau neither thinks this injury is necessary to make the total injury ''substantial,'' nor that it tips the balance regarding whether the injury is outweighed by countervailing benefits.

2. Injury Not Reasonably Avoidable

Proposed Rule

As previously noted in part IV, under the FTC Act and Federal precedents that inform the Bureau's interpretation and application of the unfairness test, an injury is not reasonably avoidable where ''some form of seller behavior . . . unreasonably creates or takes advantage of an obstacle to the free exercise of consumer decision-making,'' or unless consumers have reason to anticipate the injury and the means to avoid it. In the proposal, the Bureau observed that in a significant proportion of cases, unless the lender obtains the consumer's new and specific authorization to make further payment withdrawals from the account, consumers may be unable to reasonably avoid the injuries that result from the lender practice of attempting to withdraw payment from a consumer's account in connection with a covered loan after two consecutive payment withdrawal attempts by the lender have failed.

The Bureau noted that consumers could avoid the above-described substantial injury by depositing into their accounts enough money to cover the lender's third payment withdrawal attempt and every attempt that the lender may make after that, but that for many consumers this is not a reasonable or even an available way of avoiding the substantial injury discussed above. Even if a consumer had sufficient funds to do so and knew the amount and timing of the lender's next attempt to withdraw payment, which are unlikely to be the case, any funds deposited into the consumer's account likely would be claimed first by the consumer's bank to repay the NSF fees charged for the prior two failed attempts. Thus, even a consumer who had some available cash could have difficulties in avoiding the injury resulting from the lender's third attempt to withdraw payment, as well as in avoiding the injury resulting from any attempts that the lender may make after the third one.[1015]

Moreover, as a practical matter, in the vast majority of cases in which two consecutive attempts to withdraw payment have failed, the consumer is in severe financial distress and thus does not have the money to cover the next payment withdrawal attempt.[1016] Although the Bureau's consumer testing indicates that consumers generally have a strong commitment to repaying their legal obligations,[1017] a consumer who has already experienced two consecutive failed payment attempts and incurred well over $100 in related fees may at that point consider, as the only other options to avoid further fee-related injury, either closing the account or attempting to stop payment or revoking authorization. Given that consumers use their accounts to conduct most of their household financial transactions, the Bureau did not believe that voluntarily closing down the account was a reasonable means for consumers to avoid injury.

Further, as discussed in the proposal, the option of attempting to stop payment or revoke authorization is not a reasonable means of avoiding the injuries either, for several reasons. First, as listed in the Market Concerns—Payments section above, consumers often face considerable challenges in issuing stop-payment orders or revoking authorization as a means to prevent lenders from continuing to attempt to make payment withdrawals from their accounts. Complexities in payment processing systems and the internal procedures of consumers' account-holding institutions, combined with lender practices, often make it difficult for consumers to stop payment or revoke authorization effectively. With respect to preauthorized EFTs authorized by the consumer, for example, even if the consumer successfully stops payment on one transfer, the consumer may experience difficulties in blocking all future transfers by the lender. In addition, payment withdrawal attempts made via RCC or RCPO can be especially challenging for the consumer's account-holding institution to identify and be able to stop payment on them.

Various lender practices exacerbate these challenges. Lenders often obtain several different types of authorizations from consumers—*e.g.,* authorizations to withdraw payment via both ACH transfers and RCCs—such that if the consumer successfully revokes one type of authorization, the lender has the ability to continue making payment collection attempts using another type of authorization. The procedures of consumers' account-holding institutions for stopping payment often vary depending on the type of authorization involved. Thus, when a lender has obtained two different types of authorizations from the consumer, the considerable challenges associated with stopping payment or revocation in connection with just one type of authorization are effectively doubled. Many consumers also may not understand that they must navigate two different sets of stop-payment or revocation procedures to prevent the lender from making additional withdrawal attempts.

In addition, the costs to the consumer for issuing a stop-payment order or revoking authorization are often as high as some of the fees that the consumer is trying to avoid, as depository institutions charge consumers a fee of approximately $32, on average, for placing a stop-payment order. The consumer incurs this fee regardless of whether the consumer is seeking to stop payment on a check, a single EFT, or all future EFTs authorized by the consumer. Moreover, issuing a stop-payment order at a cost of $32 does not guarantee success. Some depository institutions require the consumer to provide the exact payment amount or the lender's merchant ID code, and thus fail to block payments when the payment amount varies or the lender varies the merchant code. In addition, some depository institutions require consumers to renew stop-payment orders after a certain period of time. In such cases, consumers may incur more than one stop-payment fee in order to continue blocking future payment withdrawal attempts by the lender.

As a result of these stop-payment fees, the cost to the consumer of stopping payment with the consumer's account-holding institution is comparable to the NSF or overdraft fee that the institution would charge the consumer if the payment withdrawal attempt that the consumer is seeking to stop were made. Thus, even if the consumer successfully

[1015] In proposed § 1041.15, the Bureau proposed to require lenders to provide a notice to consumers in advance of each payment withdrawal attempt. The Bureau believed that the notices would help consumers make choices that may reduce potential harms from a payment withdrawal attempt—by reminding them, for example, to deposit money into their accounts prior to the attempt and thus avoid a late payment fee. The Bureau's treatment of these issues is discussed further below in the section-by-section analysis of § 1041.9 of the final rule.

[1016] The Bureau noted that even when consumers have agreed to make a series of payments on an installment loan, the substantial injuries discussed above are not reasonably avoidable, based on its analysis of ACH payment withdrawal attempts made by online payday and payday installment lenders, which indicates that after two failed presentments, even payment withdrawal attempts timed to the consumer's next payday, which is likely to be the date of the next scheduled payment on an installment loan, are likely to fail.

[1017] FMG Report, ''Qualitative Testing of Small Dollar Disclosures, Prepared for the Consumer Financial Protection Bureau,'' at 53 (Apr. 2016) *available at http://files.consumerfinance.gov/documents/Disclosure_Testing_Report.pdf.*

stops payment, they would not avoid this particular fee-related injury, but rather would be exchanging the cost of one comparable fee for another. In addition, some consumers may be charged a stop-payment fee by their account-holding institution even when, despite the stop-payment order, the lender's payment withdrawal attempt goes through. In such cases, the consumer may be charged both a fee for the stop-payment order and an NSF or overdraft fee triggered by the lender's payment withdrawal attempt.

In addition to the challenges consumers face when trying to stop payment or revoke authorization with their account-holding institutions, consumers often face lender-created barriers that prevent them from pursuing this option as an effective means of avoiding injury. Lenders may discourage consumers from pursuing this course of action by including language in loan agreements purportedly prohibiting the consumer from stopping payment or revoking authorization. In some cases, lenders may charge consumers a substantial fee in the event that they successfully stop payment with their account-holding institution. Lenders' procedures for revoking authorizations directly with the lender create additional barriers. As discussed in the proposal, lenders often require consumers to provide written revocation by mail several days in advance of the next scheduled payment withdrawal attempt. A consumer who took out the loan online, but now wishes to revoke authorization, may have difficulty even identifying the lender that holds the authorization, especially if the consumer was paired with the lender through a third-party lead generator. These lender-created barriers make it difficult for consumers to stop payment or revoke authorization.

Comments Received

Several industry commenters stated that the substantial injury identified by the Bureau could be reasonably avoided by consumers because consumers could choose not to borrow, and do not need to agree to a leveraged payment mechanism. Others claimed that borrowers have the ability to revoke authorizations and stop payments, and that these options make the injury reasonably avoidable. Some also claimed that the Bureau overestimated or had no evidence of the difficulty in obtaining a stop-payment order or revoking the authorization.

A number of industry commenters argued that borrowers should simply place sufficient funds in their account or pay the lender before the scheduled transfer date, and should generally be aware that fees would result from failed payment withdrawals. Still other commenters claimed that borrowers could avoid the injury by re-borrowing.

Final Rule

After reviewing the comments received, the Bureau concludes that the substantial injury identified above is not reasonably avoidable by consumers.

As an initial matter, the Bureau disagrees with comments that claimed that the Bureau did not have any convincing evidence of the difficulty of obtaining a stop-payment order or revoking an authorization. The proposed rule and the Market Concerns—Payments sections refer to significant evidence on this point.[1018] As described above, many lenders have obfuscated or interfered with consumers' ability to revoke authorization, and stop-payment orders can involve their own fees and are not always comprehensive. In particular, they are quite difficult to process for RCCs and RCPOs.

One lender noted that it cancels hundreds of payment authorizations each year, and argued that lenders cannot be held responsible if third-party financial institutions mishandle stop-payments or charge excessive fees. Again, lenders are causing harm that is not reasonably avoidable. That harm manifests itself, and is difficult to avoid, in part because of the actions of third-party financial institutions. Although it is fair to say that lenders do not necessarily bear all the responsibility for any problems that ensue, this does not change the fact that consumers are not able to withdraw their prior authorizations or stop payments in a reasonably effective manner. That one lender may process hundreds of canceled payment authorizations each year neither suggests that all of its borrowers who seek to cancel payment authorization are successful, nor suggests that many other lenders do the same thing.

The Bureau does not agree that simply repaying is a viable way to avoid the harm. Many borrowers will not have the funds (again, only approximately 20 percent of third presentments succeed without an overdraft fee). But, additionally, as laid out in the Market Concerns—Payments section, subsequent presentments can occur very quickly, often on the same day, making it difficult to ensure funds are in the right account before the re-presentment hits.[1019]

As in the section-by-section analysis for § 1041.4, the Bureau finds that simply replacing the injury with re-borrowing is not a satisfactory mechanism for reasonably avoiding the harm because it simply substitutes one injury for another. The Bureau has discussed, at length, the harms incurred by repeated re-borrowing in the section-by-section analysis of part B.

Moreover, under the traditional unfairness analysis established by prior precedents, the suggestion that a consumer can simply decide not to participate in the market is not considered to be a valid means of reasonably avoiding the injury.[1020] The Bureau addressed a similar line of comments in subpart B, and noted that if this view were adopted, no market practice could ever be determined to be unfair. That response is applicable here as well.

As stated in the proposal and above, lenders often take broad, ambiguous payment authorizations from consumers and vary how they use these authorizations, thereby increasing the risk that consumers will be surprised by the amount, timing, or channel of a particular payment. Borrowers do not have the ability to shop, at the time of origination, for covered loans without leveraged payment mechanisms, as that is a central feature of these loans. As some commenters noted, leveraged payment mechanisms are sometimes even required by State law.

3. Injury Not Outweighed by Countervailing Benefits to Consumers or Competition

Proposed Rule

As noted in part IV, the Bureau's interpretation of the various prongs of the unfairness test is informed by the FTC Act, the FTC Policy Statement on Unfairness, and FTC and other Federal agency rulemakings and related case law. Under those authorities, the countervailing benefits prong of the unfairness standard makes it appropriate to consider both the costs of imposing a remedy and any benefits that consumers enjoy as a result of the practice; yet this determination does not require a precise quantitative analysis of benefits and costs.

The Bureau preliminarily found that the lender practice of making additional

[1018] *See* specific Market Concerns—Payments sub-section entitled ''Consumers Have Difficulty Stopping Lenders' Ability to Access Their Accounts'' for that evidence.

[1019] In one demonstrative enforcement case, the Bureau found a payday and installment lender that regularly made three debit attempts on the same day. Consent Order, In the Matter of EZCORP, Inc., No. 2015–CFPB–0031 (Dec. 16, 2015).

[1020] *See, e.g.,* 49 FR 7740 (Mar. 1, 1984).

payment withdrawal attempts from a consumer's account in connection with a covered loan after two consecutive attempts have failed does not generate benefits to consumers or competition that outweigh the injuries caused by the practice. As discussed above, a substantial majority of additional attempts are likely to fail. Indeed, the Bureau's analysis in the proposal of ACH payment withdrawal attempts made by online payday and payday installment lenders preliminarily found that the failure rate on the third attempt is 73 percent, and it increases to 83 percent on the fourth attempt, and to 85 percent on the fifth attempt. Furthermore, of those attempts that succeed, 33 percent or more succeed only by overdrawing the consumer's account and generally incurring fees for the consumer.

When a third or subsequent attempt to withdraw payment does succeed, the consumer making the payment may experience some benefit in the form of avoiding further collection activity and consumer reporting, to the extent the lender is reporting the delinquency. According to the Bureau's study, it appears that third presentments succeed approximately 20 percent of the time without an overdraft fee, while an additional eight percent succeed with an overdraft fee. In any event, the Bureau preliminarily found that to the extent some consumers are able, after two consecutive failed attempts, to muster sufficient funds to make the next required payment or payments, these consumers would be able to arrange to make their payment or payments even if lenders were first required to get a new and specific authorization from the consumer before making additional payment attempts.

Turning to the potential benefits of the practice to competition, the Bureau recognizes that to the extent payment withdrawal attempts succeed when made after two consecutive failed attempts, lenders may collect larger payments or may collect payments at a lower cost by seeking payment from the consumer's account rather than being required to seek payment directly from the consumer. Given their high failure rates, however, these additional attempts generate relatively small amounts of revenue for lenders. For example, the Bureau's analysis of ACH payment withdrawal attempts made by online payday and payday installment lenders indicates that whereas the expected value of a first payment request is $152, the expected value of a third successive payment attempt is only $46, and that the expected value drops to $32 for the fourth attempt and to $21 for the fifth attempt.[1021]

Furthermore, the Bureau indicated that lenders could obtain much of this revenue without making multiple attempts to withdraw payment from demonstrably distressed accounts. For instance, lenders could seek payments in cash or ''push'' payments from the consumer or, in the alternative, could seek a new and specific authorization from the consumer to make further payment withdrawal attempts. Indeed, coordinating with the consumer to seek a new authorization may be more likely to result in successful payment withdrawal attempts than does the practice of repeatedly attempting to withdraw or transfer funds from an account in distress. Finally, in view of the pricing structures observed in the markets for loans that would be covered under the proposed rule, the Bureau preliminarily found that any incremental revenue benefit to lenders from subsequent attempts, including revenue from the fees charged for failed attempts, does not translate into more competitive pricing. In other words, the Bureau preliminarily found that prohibiting such attempts would not adversely affect pricing. In sum, the Bureau preliminarily determined in the proposal that consumers incur substantial injuries as a result of the identified practice that are not outweighed by the minimal benefits that this practice generates for consumers or competition.

Comments Received

Several industry commenters stated that the cost of credit would increase as a result of the remedy proposed by the Bureau, which the commenters interpreted to include the burden of sending payment reminders and of tracking unsuccessful debit attempts and new payment authorizations. Many commenters argued more generally that covered loans help borrowers, improve financial health, or are otherwise beneficial. Some commenters argued that recurring payment authorizations are a benefit to consumers because they are more convenient and enable consumers to designate their due date around the timing of when they will have available funds. Some commenters argued that consumers would feel frustrated and inconvenienced whenever a lender is required to request a new and specific authorization. Still others argued that barring withdrawals after the second attempt would limit payment options that are available to consumers. Finally, some argued that limiting payment attempts would harm consumers by causing them to default or slip further into delinquency.

Final Rule

After reviewing the comments received, the Bureau concludes that the substantial injury identified above is not outweighed by countervailing benefits to consumers or competition. A number of industry commenters presented arguments that would be inappropriate to consider in the weighing of countervailing benefits against consumer injury. First, several commenters argued that the costs of complying with the notices and disclosures that would be provided in proposed § 1041.15 constitute compliance costs that should be considered as the Bureau weighs countervailing benefits. Because that remedy is a result of exercising the Bureau's authority under section 1032 of the Dodd-Frank Act, and does not result from this finding of unfairness, the Bureau does not consider that remedy as part of its countervailing benefits analysis. Instead, it considers only the cost of those remedies that are being required to remediate the injury from the identified practice. It also did not identify the notices contained in proposed § 1041.15 as a remedy for the identified practice.

Second, commenters' claims that covered loans are generally beneficial, and that this should be accounted for in the weighing of benefits, cast too wide a net. The Bureau is not identifying the unfair practice as making covered loans, or even making covered loans with leveraged payment mechanisms. The Bureau is taking a much narrower approach here, by identifying the unfair practice as being limited to making a third payment request after two failed attempts, without first obtaining a new and specific payment authorization. The general benefits these commenters posit from the making of covered loans are not a result of that practice, and the Bureau has no reason to believe lenders will not make covered loans because they are unable to re-present after two attempts without obtaining a new authorization.

Third, because the Bureau is not prohibiting leveraged payment mechanisms, it does not consider the convenience of recurring payment authorizations, or scheduled payments, to be a benefit for purposes of this analysis. Lenders can still provide the benefits to consumers of convenience and scheduling after this rule is finalized. In other words, those benefits

[1021] Expected values are calculated by multiplying the average successful payment amount by the success rate.

are not a result of the identified practice, which is the initiation of additional payment requests after two failed attempts, absent a new and specific authorization.

Commenters have correctly identified the cost of tracking unsuccessful debits and of either securing new payment authorizations or obtaining payment through other means if two consecutive presentments fail as a cost of compliance applicable to this analysis. The effect that this cost will have on pricing is mitigated by other market forces including the fact that, as noted in the proposal, many loans in this market are priced at the maximum possible price permitted under State law. Nonetheless, these are costs the market must bear and some of those costs may be passed to consumers. Our analysis suggests that those costs likely will not be overly substantial because lenders already have processes in place to track payment attempts, and thus will only need to augment them slightly to accommodate the particular details for this rule (see Section 1022(b)(2) Analysis in part VII for more on this point). These costs are not sufficient to change the Bureau's overall conclusion that the substantial injury to consumers outweighs the countervailing benefits.

The Bureau does not agree that the consumer frustration caused by requests for new and specific payment authorizations would be significant. These requests would provide consumers with a choice about whether the lender can debit the consumer's bank account. Especially after two failed attempts, and the likely resulting fees, the Bureau judges that it is very likely that consumers will benefit from the opportunity to decide whether another attempt should occur. The Bureau's conclusion on this point is consistent with its statutory objective to ensure that ''consumers are provided with timely and understandable information to make responsible decisions about financial transactions.'' [1022]

Commenters argued that some borrowers could default or slip further into delinquency if the payment would have succeeded, but had not gone through because of the limitations created by the rule. As the Bureau stated in the proposal, however, borrowers will retain the ability to choose to pay their loans as they wish, including by reauthorizing automatic debits. Although there may be some borrowers for whom a third or subsequent presentment would succeed but who would not manage to repay the loan absent such presentments, the Bureau believes that this population is too small to affect the countervailing benefits analysis.

Lastly, the Bureau addressed the fact that the rule will limit consumers' payment options in the proposal. The rule covers all payment methods, and thus affects them evenly. To the extent that it limits payment options after two attempts, it limits them to any optional payment method at the specific initiation of the borrower. As consumers will have the choice of whether to re-authorize a payment authorization after two consecutive failed attempts—and they can always use any specifically initiated method for payment—the Bureau determines that the costs associated with limiting payment options (and thus the countervailing benefits of no limits) are quite minimal.

4. Consideration of Public Policy

Proposed Rule

Section 1031(c)(2) of the Dodd-Frank Act allows the Bureau to ''consider established public policies as evidence to be considered with all other evidence'' in determining whether a practice is unfair, as long as the public policy considerations are not the primary basis of the determination. This is an optional basis for justifying the rule, and in the proposal the Bureau did not make a preliminary determination to cite public policy as evidence to be considered in deciding that the identified payment practices are unfair. Yet some of the comments received invite further scrutiny of whether public policy should be viewed as a basis for either supporting or undermining the proposed rule. For that reason, the issue will be considered further here.

Comments Received

Some industry and other commenters suggested that the Bureau's purported role here is superfluous, since State law governs consumer credit. They argued that some States already cap presentments. They also suggested that the proposed rule may obstruct State efforts to craft regulatory approaches that appropriately protect consumers, because the Bureau's proposed intervention would interfere with policy experimentation by the States, and would shift the balance between consumer protection and access to credit in ways not intended by different State regulatory regimes. Rather than develop new provisions in a Federal rule to address these issues, these commenters argued that the Bureau instead should support changes in State law to address concerns about the misuse of payment instruments; or that it should increase its enforcement of existing Federal laws like the EFTA, Regulation E, and the Bureau's authority to enforce against unfair, deceptive, or abusive acts or practices.

Final Rule

The Bureau does not find that the public policy considerations raised by some of the commenters militate against the adoption of this final rule. Federal law has governed consumer credit, and specifically electronic payments, for 50 years, dating as far back as the Truth in Lending Act (TILA). The EFTA is the most applicable example, and a Federal rule in this area would be consistent with that history. Ultimately, the issue here is simply whether the Bureau has the legal authority to adopt rules to address the identified practice of making repeated withdrawal attempts after two consecutive failures by first determining that the identified practice is unfair and abusive. Under the Dodd-Frank Act, the Bureau is authorized to do so. That authority is not affected by other provisions of Federal and State law, most notably because those provisions preceded this authorization by Congress. Thus, the more recent statute opened the door to policy changes that would affect the application of those pre-existing legal requirements. Moreover, Congress placed it within the Bureau's discretion whether to address unfair, deceptive, or abusive acts or practices through enforcement, supervision, regulation, or some combination of these authorities.[1023] By expressly permitting the Bureau to adopt UDAAP rules, as it is doing here, Congress authorized this very endeavor as fully consistent with current notions of sound public policy and the established framework of Federal and State law.

b. Abusive Practice

Under section 1031(d)(2)(A) and (B) of the Dodd-Frank Act, the Bureau may declare an act or practice abusive if it takes unreasonable advantage of ''a lack of understanding on the part of the consumer of the material risks, costs, or conditions of the product or service,'' or of ''the inability of the consumer to protect the interests of the consumer in selecting or using a consumer financial product or service.'' [1024] In the proposal, the Bureau preliminarily found that, with respect to covered loans, it is an abusive act or practice for a lender to attempt to withdraw payment from a consumer's account in connection with a covered loan after two consecutive

[1022] 12 U.S.C. 5511(b)(1).

[1023] *See* 12 U.S.C. 5531(c).

[1024] 12 U.S.C. 5531(d).

failed attempts, unless the lender obtains the consumer's new and specific authorization to make further withdrawals from the account.

After reviewing the comments received, as described and responded to below, the Bureau now concludes that the practice identified in the proposal is abusive. Borrowers do not understand the material risks, costs, or conditions that are posed by lenders engaging in repeated re-presentments. Similarly, borrowers are unable to protect their interests in using the product by revoking authorizations or enacting stop payments. Lenders take advantage of these conditions by re-presenting, and those re-presentments are unreasonable.

Before delving into the statutory prongs of abusiveness on which the Bureau relies for these conclusions, two broader comments can be addressed here. First, some commenters argued that the Bureau only has the authority to identify a practice as abusive if it ''materially interferes with the ability of a consumer to understand a term or condition of a consumer financial product or service.'' This suggestion, that section 1031(d)(1) must be satisfied in order to make a finding of abusiveness, is a misreading of the statute. Section 1031(d) articulates four disjunctive categories of abusive practices—this one set forth in section 1031(d)(1), and three others that are set forth in section 1031(d)(2). Congress defined a practice to be ''abusive'' if it satisfies any of these four independent criteria. Congress clearly indicated as much with its use of the conjunction ''or'' throughout the text of section 1031(d).

Other commenters argued that Congress only intended abusiveness to cover conduct beyond what is prohibited as unfair or deceptive. The Bureau agrees that the abusiveness standard can reach practices that are not covered by the unfairness or deception standards if the prongs of abusiveness are met, but it does not agree that it can *only* reach practices that are not covered by the unfairness or deception standards. The Bureau is guided and limited by the definitional prongs of unfairness and abusiveness that are expressly articulated in the statute. A practice might meet these standards either alone or in combination (and, of course, lawful practices will meet none of the standards). There is little practical effect of any such overlap, as a practice is just as illegal if it violates one, two, or three of the standards. But as a matter of statutory interpretation, the Bureau has no textual basis to conclude that a practice meeting the statutory prongs of abusiveness cannot be considered abusive because it also meets the prongs of one of the other two standards.

1. Consumers Lack Understanding of Material Risks and Costs

Proposed Rule

In the proposal, the Bureau stated that when consumers grant lenders an authorization to withdraw payment from their account, they understand as a general matter that they may incur an NSF fee from their account-holding institution as well as a returned-item fee charged by the lender. However, the Bureau preliminarily found that such a generalized understanding does not suffice to establish that consumers understand the material costs and risks of a product or service. Rather, the Bureau determined that it is reasonable to interpret ''lack of understanding'' in this context to mean more than mere awareness that it is within the realm of possibility that a particular negative consequence may follow or a particular cost may be incurred as a result of using the product. For example, consumers may not understand that such a risk is very likely to happen or that—though relatively rare—the impact of a particular risk would be severe. In this instance, precisely because the practice of taking advance authorizations to withdraw payment is so widespread across markets for other credit products and non-credit products and services, the Bureau preliminarily concluded that consumers lack understanding of the risk they are exposing themselves to by granting authorizations to lenders that make covered loans. Rather, consumers are likely to expect these payment withdrawals to operate in a convenient and predictable manner, similar to the way such authorizations operate when they are granted to other types of lenders and in a wide variety of other markets. Consumers' general understanding that granting authorization can sometimes lead to fees does not prepare them for the substantial likelihood that, in the event their account becomes severely distressed, the lender will continue making payment withdrawal attempts even after the lender should be on notice (from two consecutive failed attempts) of the account's distressed condition. Nor does it prepare them for the result that thereby they will be exposed to substantially higher overall loan costs in the form of cumulative NSF or overdraft fees from their account-holding institution and returned-item fees from their lender, as well as the increased risk of account closure. Moreover, this general understanding does not prepare consumers for the array of significant challenges they will encounter if, upon discovering that their lender is still attempting to withdraw payment after their account has become severely distressed, they take steps to try to stop the lender from using their authorizations to make any additional attempts.

Comments Received

Industry commenters argued that the Bureau's findings on abusiveness rested on the unsubstantiated assumption that consumers did not understand the risks of covered loans, or the effects of leveraged payment mechanisms. These commenters questioned the Bureau's purported reliance on ''optimism bias.'' Others commented that consumers generally did understand the risks and benefits of covered loans before taking them out. They advanced that awareness of due dates and the fact that payment requests will be initiated, often provided by lenders in conjunction with TILA disclosures, suggest that borrowers understand the material costs and risks of covered loans. Some commenters provided data on borrower expectations about default and re-borrowing, but not about practices around how a lender would use a leveraged payment mechanism to initiate multiple payment requests. Consumer group commenters suggested that the industry acknowledges that covered borrowers do not understand the risks, costs, and conditions of these loans. To support this assertion, one commenter cited a 2016 law review article written by Jim Hawkins, stating that consumers ''are overly optimistic.''

One industry commenter stated that ''understanding'' did not mean anything more than a general sense that a negative consequence would follow. It asserted that consumers did not need to understand both the probability and depth of potential adverse consequences, and cited as support a dictionary definition of ''understanding,'' which is ''to know how (something) works or happens.'' It further argued that the level of understanding the Bureau required under the proposed rule was equivalent to expecting a borrower to become an expert on the lending industry.

Other commenters said that the Director of the Bureau had once publicly stated that whether a borrower has a lack of understanding is ''unavoidably situational'' and that abusiveness claims ''can differ from circumstance to circumstance.'' These commenters claimed that the statements confirmed that the Bureau could not address abusiveness in the market with a general rule, and must exercise its abusiveness authority on a case-by-case basis instead.

Final Rule

The Bureau now concludes that consumers lack understanding of material risks, costs, or conditions of the product or service, specifically the practice of repeated re-presentments.

Evidence suggests that lenders in many non-covered markets take advanced authorizations to initiate electronic payments, yet do not appear to engage in the practice with any particular frequency. This means borrowers do not have experience with the practice, and thus, likely do not understand the specific risks at issue. The contrast in these markets again was shown by the analysis performed by a major financial institution of its consumer depository account data, which estimates ACH return rates for payday lenders, including both storefront and online companies, at 25 percent, with individual lender return rates ranging from five percent to almost 50 percent,[1025] whereas the average return rate for debit transactions in the ACH network across all industries was just 1.36 percent (with the next highest return rate of any other industry being cable television at 2.9 percent, auto and mortgage at 0.8 percent, utilities at 0.4 percent, and credit cards at 0.4 percent).[1026] It is reasonable to assume that many of that 25 percent consisted of rejected re-presentments, given that the Bureau's own data showed a failure rate for first presentments of only six percent for transactions initiated by online payday and payday installment lenders.[1027] Six percent is very close to the rejection rates of payday lenders with rejection rates at the low end in the financial institution's analysis (five percent), suggesting that lenders at the low end may not have been re-presenting. Lenders at the high end, with 50 percent total rejection rates, were likely re-presenting, bringing up the average. The failure rates for re-presentments in the Bureau's study (70 to 85 percent) were much higher than those for initial presentments.[1028] The comparatively much lower return rates in other markets do not similarly suggest high rates of re-presentment, and are more likely to simply constitute the typical rejection rate for initial presentments. This evidence suggests that the covered markets have much higher rates of re-presentment than consumers experience in other markets.

Additionally, the Bureau concludes that the complexity of payment presentment practices and their effects makes it likely that a significant number of borrowers lack a sufficient understanding of those practices and their effects. These presentment practices are material because they could result in significant risks and costs to the borrower, including NSF fees, overdraft fees, returned payment fees, and potentially account closures.

The Bureau does not rest its legal conclusion on the premise that borrowers are unaware that when they take out covered loans with leveraged payment mechanisms, a payment will be deducted on the due date. Nor does it rest on the premise that borrowers are unaware that when a payment is deducted, and the account lacks the funds to cover the payment, they are likely to incur a fee. Rather, the Bureau concludes that consumers are unaware of the severity of the risk they are exposing themselves to in the circumstances of the identified practice. In other words, the Bureau's analysis rests on the fact that borrowers are not aware of the risks and harms associated with engaging in the identified practice of *multiple* re-presentments. The risks, costs, or conditions of covered loans that borrowers do not understand are based on the fact that lenders will re-present *repeatedly* when borrowers default. Those risks, costs, or conditions are material because—as stated in the unfairness analysis above—borrowers incur substantial injury in the form of fees that are charged and other consequences of the identified practice when lenders repeatedly re-present payments. Data provided by commenters on borrower expectations about default and re-borrowing did not pertain to how lenders use leveraged payment mechanisms to initiate multiple payment requests and thus were not germane to the identified practice here.

Many of the commenters' arguments around whether consumers understand the risks, costs, or conditions of the covered loans focused on the fact that consumers knew a payment would be requested once, knew there would be fees, or knew about the likelihood of default. But those are not the risks, costs, or conditions at issue here, which, again, stem from multiple re-presentments. Similarly, commenters' assertions about the Bureau's reliance on ''optimism bias''—which rests on the assumption that borrowers are overly optimistic that they will be able to repay their loans—are misplaced here. The Bureau is not relying on the premise that borrowers underestimate the likelihood of default or re-borrowing for this part of the rule. Instead, the Bureau is merely concluding that borrowers underestimate the extent of fees resulting from default, because most of them have no basis to recognize that a lender will present multiple times in quick succession after the first payment request fails.

The Bureau also disagrees with the complaint that the proposal sets too high a standard for what borrowers are able to understand. The statute merely states that when risks, costs, or conditions are material and consumers lack understanding of them, lenders cannot take unreasonable advantage of that fact. The Bureau agrees with the industry commenters that it is unreasonable to expect borrowers to understand the lending, banking, and payments system well enough to fully understand all the details of how lenders will initiate repeated re-presentments if the borrower defaults. But if the identified practice constitutes a material risk of the product, as the Bureau concludes here, then lenders are not at liberty to take unreasonable advantage of their consumers' lack of understanding.

The Bureau also disagrees with the claim that it is using a definition of ''understanding'' that differs from ''to know how (something) works or happens.'' This suggestion is flawed because it obfuscates the material risks, costs, or conditions to which that definition should be applied. The Bureau has found that most consumers do not realize that the identified practice involving multiple failed re-presentments happens. This conclusion is consistent with the accepted dictionary definition of ''understanding.''

Lastly, the Bureau rejects the claim that it cannot base any rule on the abusiveness authority defined in the statute, and instead can only enforce against abusive practices on a case-by-case basis, even where the Bureau has evidence and data that would justify a more general rule. Congress granted the Bureau explicit authority under section 1031(b) of the Dodd-Frank Act to issue rules grounded on its abusiveness

[1025] Beth Anne Hastings, ''Monitoring for Abusive ACH Debit Practices,'' (Presentation by JP Morgan Chase at Spring 2014 NACHA Conference in Orlando, FL, Apr. 7, 2014). *See also* First Cash Fin. Servs., 2014 Annual Report (Form 10–K), at 5 (''Banks return a significant number of ACH transactions and customer checks deposited into the Independent Lender's account due to insufficient funds in the customers' accounts.'') (discussion later in the document indicates that the CSO section covers both online and storefront loans).

[1026] NACHA Q4 2014.

[1027] CFPB Online Payday Loan Payments, at 13.

[1028] CFPB Online Payday Loan Payments, at 13.

authority. The Bureau believes that by giving the Bureau rulemaking authority using its abusiveness authority, Congress expressed its clear intent to give the Bureau authority to make more general assessments where it has evidence and data regarding an identified practice that meets the statutory prongs for abusiveness. Based on the facts and evidence described in the proposed rule, this section, and Market Concerns—Payments, the Bureau is concluding that consumers generally lack an understanding of the material costs, risks, or conditions of lenders' repeated re-presentment practices, especially the extent of the risks and the severity of the costs. Accordingly, the Bureau is authorized to exercise its rulemaking authority in this area.

2. Consumers Are Unable To Protect Their Interests

Proposed Rule

The Bureau proposed that when a lender attempts to withdraw payment from a consumer's account in connection with a covered loan after the lender's second consecutive failed attempt, unless the lender obtains the consumer's new and specific authorization to make further withdrawals from the account, consumers are unable to protect their interests. By the time consumers discover that lenders are using their authorizations in this manner, it is often too late for them to take effective action. Although consumers could try to protect themselves from the harms of additional payment withdrawal attempts by closing down their accounts entirely, the Bureau did not interpret taking this action as being a practicable means for consumers to protect their interests, given that consumers use their accounts to conduct most of their household financial transactions. As discussed in the proposal, often the only option for most consumers to protect themselves (and their accounts) from the harms of lender attempts to withdraw payment after two consecutive attempts have failed is to stop payment or revoke authorization.[1029] However, as also explained in the proposal, consumers often face considerable challenges and barriers when trying to stop payment or revoke authorization, both with their lenders and with their account-holding institutions. These challenges and barriers thus also make this option an impracticable means for consumers to protect themselves from the harms of further payment withdrawal attempts.

As discussed in the proposal, lenders sometimes discourage consumers from stopping payment or revoking authorization by including language in loan agreements purporting to prohibit revocation. For instance, some lenders may charge consumers a substantial fee for stopping payment with their account-holding institutions. Others may have in place procedures for revoking authorizations directly with the lender that create additional barriers to stopping payment or revoking authorization effectively. For example, as discussed above, lenders often require consumers to provide written revocation by mail several days in advance of the next scheduled payment withdrawal attempt, among other requirements. Some consumers may even have difficulty identifying the lender that holds the authorization, particularly if the consumer took out the loan online and was paired with the lender through a third-party lead generator. These and similar lender-created barriers—while challenging for consumers in all cases—can make it particularly difficult for consumers to revoke authorizations for repayment by recurring transfers, given that a consumer's account-holding institution is permitted under Regulation E to confirm the consumer has informed the lender of the revocation (*e.g.,* by requiring a copy of the consumer's revocation as written confirmation to be provided within 14 days of an oral notification). Thus, if the institution does not receive the required written confirmation within this time frame, then it may continue to honor subsequent debits to the account.

In the proposal, the Bureau explained that consumers encounter additional challenges when trying to stop payment with their account-holding institutions. For example, due to complexities in payment processing systems and the internal procedures of consumers' account-holding institutions, consumers may be unable to stop payment on the next payment withdrawal attempt in a timely and effective manner. Even if the consumer successfully stops payment with her account-holding institution on the lender's next payment attempt, the consumer may experience difficulties blocking all future attempts by the lender, particularly when the consumer has authorized the lender to make withdrawals from her account via recurring EFTs. Some depository institutions require the consumer to provide the exact payment amount or the lender's merchant ID code, and thus fail to block payments when the payment amount varies or the lender varies the merchant code. Consumers are likely to experience even greater challenges in stopping payment on lender attempts made via RCCs or RCPOs, given the difficulty that account-holding institutions have identifying such payment attempts. Further, if the lender has obtained multiple types of authorizations from the consumer—such as authorizations to withdraw payment via both ACH transfers and RCCs—the consumer likely will have to navigate different sets of complicated stop-payment procedures for each type of authorization held by the lender, thereby making it even more challenging to stop the payment effectively.

As further laid out in the proposal, the fees charged by consumers' account-holding institutions for stopping a payment are often comparable to the NSF fees or overdraft fees from which the consumers are trying to protect themselves. Depending on the policies of their account-holding institutions, some consumers may be charged a second fee to renew a stop-payment order after a period of time. As a result of these costs, even if the consumer successfully stops payment on the next payment withdrawal attempt, the consumer will not have effectively protected herself from the fee-related injury that otherwise would have resulted from the attempt, but rather will have just exchanged the cost of one fee for another. Additionally, in some cases, consumers may be charged a stop-payment fee by their account-holding institution even when the stop-payment order fails to stop the lender's payment withdrawal attempt from occurring. As a result, such consumers may incur both a fee for the stop-payment order and an NSF or overdraft fee for the lender's withdrawal attempt.[1030]

Comments Received

One commenter suggested that the statutory phrase ''inability of the

[1029] As discussed in the proposal, even if consumers have enough money to deposit into their accounts prior to the next payment withdrawal attempt, those funds likely would be claimed first by the consumer's account-holding institution to repay the NSF fees charged for the prior two failed attempts. Thus, there is still a risk of additional consumer harm from a third attempt in such situations, as well as from any attempts the lender may make after the third one, unless the consumer carefully coordinates the timing and amounts of the attempts with the lender, which is generally not possible.

[1030] Even when consumers' account-holding institutions may not charge a fee for returned or declined payment withdrawal attempts made using a particular payment method, such as attempts made by debit cards and certain prepaid cards, consumers still incur lender-charged fees from which they cannot protect themselves. In addition, consumers sometimes incur lender-charged fees for successfully stopping payment or revoking authorization.

consumer to protect the interests of the consumer in selecting or using a consumer financial product or service'' is similar to section 4(c)(1) of the Uniform Consumer Sales Practices Act. That provision bans unconscionable contracts that take ''advantage of the inability of the consumer reasonably to protect his interests because of his physical infirmity, ignorance, illiteracy, [or] inability to understand the language of an agreement.'' This commenter suggested that the Bureau should thus deem this prong met only if the consumers in question are physically infirm, ignorant, illiterate, or unable to understand. Several commenters suggested again that borrowers typically are able to appreciate the general consequences of failing to pay, or contended that this prong of the definition of abusiveness is only met where it is literally impossible for consumers to protect their interests in selecting or using the product.

Many other comments pointed to the mechanisms that the Bureau identified in the proposal—authorization revocations, account closures, and stop payments—stating that these prove borrowers do have the ability to protect their interests. Some commenters argued more simply that borrowers can protect their interests by just making a payment when it is due, or by not taking out loans in the first place.

Consumer groups, by contrast, argued that it is difficult, if not impossible, for consumers to revoke account access or stop payment withdrawals when lenders initiate multiple attempts.

Final Rule

The Bureau now concludes, as discussed below, that consumers are unable to protect their interests—specifically the interest of preventing the harms identified—in selecting or using a consumer financial product or service.

The Bureau does not agree that the language in the Dodd-Frank Act should be interpreted as synonymous with the passage cited from the Uniform Consumer Sales Practices Act. In fact, there is no basis whatsoever for this suggestion. The statutory definition of abusiveness does not limit instances where a company can take advantage of an inability to protect one's own interests to a narrow set of instances where that inability is caused by infirmity, ignorance, illiteracy, or inability to understand the language of an agreement.

The Bureau also rejects the interpretation, presented by commenters, that the prong of ''inability of the consumer to protect the interests of the consumer in selecting or using a consumer financial product or service'' can be met only when it is literally impossible for consumers to take action to protect their interests.[1031] One dictionary defines ''inability'' to mean a ''lack of sufficient power, strength, resources, or capacity,''[1032] and the Bureau believes the clause ''inability of the consumer to protect'' is similarly reasonably interpreted to mean that consumers are unable to protect their interests when it is impracticable for them to do so in light of the circumstances.

As for comments that mechanisms are available to avoid undesirable outcomes, or that borrowers can protect their interests by just making a payment when it is due or by not taking out loans in the first place, these are arguments the Bureau already addressed in the ''reasonable avoidability'' part of the unfairness section above, and its responses to those points apply here.

As stated in the proposal and discussed further above in Market Concerns—Payments, evidence in the record supports the conclusion that consumers are, in fact, unable to protect their own interests in relation to payment re-presentments by initiating stop payments or revoking authorizations.[1033] Commenters' assertions that borrowers have a literal ability to protect their interests in some conceivable but impractical circumstances rest on a misunderstanding of the statutory test and the actual facts of these types of situations. On the basis of the evidence presented, the Bureau thus concludes that consumers are generally and practicably unable to use these methods to protect their interests.

3. Practice Takes Unreasonable Advantage of Consumer Vulnerabilities

Proposed Rule

Under section 1031 of the Dodd-Frank Act, an act or practice is abusive when it takes ''unreasonable advantage'' of consumers' lack of understanding of the material risks, costs, or conditions of selecting or using a consumer financial product or service or of their inability to protect their interests in selecting or using such a product or service. The Bureau proposed that, with respect to covered loans, the lender act or practice of attempting to withdraw payment from a consumer's account after two consecutive attempts have failed, unless the lender obtains the consumer's new and specific authorization to make further withdrawals, may take unreasonable advantage of consumers' lack of understanding and inability to protect their interests and is therefore abusive. In making this proposal, the Bureau was informed by the evidence discussed in the proposal and above in Markets Concerns—Payments.

In the proposal, the Bureau recognized that in any transaction involving a consumer financial product or service, there is likely to be some information asymmetry between the consumer and the financial institution. Often, the financial institution will have superior bargaining power as well. Section 1031(d) of the Dodd-Frank Act does not prohibit financial institutions from taking advantage of their superior knowledge or bargaining power to maximize their profit. Indeed, in a market economy, market participants with such advantages generally pursue their self-interests. However, section 1031 of the Dodd-Frank Act makes plain that at some point, a financial institution's conduct in leveraging consumers' lack of understanding or inability to protect their interests becomes unreasonable advantage-taking that is abusive.[1034]

The Dodd-Frank Act delegates to the Bureau the responsibility for determining when that line has been crossed. In the proposal, the Bureau stated that such determinations are best made with respect to any particular practice by taking into account all of the facts and circumstances that are relevant to assessing whether the practice takes unreasonable advantage of consumers' lack of understanding or inability to protect their interests. The Bureau recognized that taking a consumer's authorization to withdraw funds from her account without further action by the consumer is a common practice that frequently serves the interest of both lenders and consumers, and does not believe that this practice, standing alone, takes unreasonable advantage of consumers. However, at least with respect to covered loans, the Bureau proposed to conclude, based on the evidence discussed in the proposal and above in Markets Concerns—Payments, that when lenders use such

[1031] At least one court has rejected a similar interpretation. *See Consumer Financial Protection Bureau* v. *ITT Educational Services, Inc.,* 219 F. Supp. 3d 878, 919 (S.D. Ind. 2015).

[1032] ''Webster's Third New International Dictionary,'' (Merriam Webster Inc., 2002).

[1033] *See* specific Market Concerns—Payments subsection entitled ''Consumers Have Difficulty Stopping Lenders' Ability to Access Their Accounts'' for that evidence.

[1034] A covered person also may take unreasonable advantage of one or more of the three consumer vulnerabilities identified in section 1031(d) of the Dodd-Frank Act in circumstances in which the covered person lacks such superior knowledge or bargaining power.

authorizations to make another payment withdrawal attempt after two consecutive attempts have failed, lenders take unreasonable advantage of consumers' lack of understanding and inability to protect their interests, absent the consumer's new and specific authorization.

As discussed above, with respect to covered loans, the lender practice of continuing to make payment withdrawal attempts after a second consecutive failure generates relatively small amounts of revenues for lenders, particularly as compared with the significant harms that consumers incur as a result of the practice. Moreover, the cost to the lender of re-presenting a failed payment withdrawal attempt is nominal; for this reason, lenders often repeatedly re-present at little cost to themselves, and with little to no regard for the harms that consumers incur as a result of the re-presentments.

Specifically, the Bureau's analysis of ACH payment withdrawal attempts made by online payday and payday installment lenders, laid out in greater detail in the proposal, indicates that the expected value of a third successive payment withdrawal attempt is only $46 (as compared with $152 for a first attempt), and that the expected value drops to $32 for the fourth attempt and to $21 for the fifth attempt. And yet, despite these increasingly poor odds of succeeding, many lenders continue to re-present. This further suggests that at this stage, the consumers' payment authorizations have ceased to serve their primary purpose of convenience, but instead have become a means for the lenders to seek to extract small amounts of revenues from consumers any way they can. In addition, lenders often charge consumers a returned-item fee for each failed attempt.[1035] This provides lenders with an additional financial incentive to continue attempting to withdraw payment from consumers' accounts even after two consecutive attempts have failed. Although lenders may not be able to collect such fees immediately, the fees are added to the consumer's overall debt and thus can be pursued and perhaps collected later through the debt collection process. The Bureau preliminarily concluded that lenders could obtain much of this revenue without engaging in the practice of trying to withdraw payment from consumers' accounts after the accounts have exhibited clear signs of being in severe distress. For example, lenders could seek further payments in cash or ACH ''push'' payments from the consumer or, in the alternative, could seek a new and specific authorization from consumers to make further payment withdrawal attempts. Indeed, the Bureau determined that coordinating with the consumer to seek a new authorization may be more likely to result in successful payment withdrawal attempts than does the practice of repeatedly attempting to withdraw payments from an account that is known to be in distress.

Comments Received

Most of the comments relevant to this prong were already addressed in the two sections above. The Bureau also received comments suggesting that it provided no evidence that the practice takes unreasonable advantage of consumers. Commenters also argued that the Bureau should focus on how certain roadblocks imposed by financial institutions relating to stop-payment orders take unreasonable advantage of consumers rather than on the identified practice engaged in by lenders.

Final Rule

As described more fully above in Market Concerns—Payments, the Bureau does have ample evidence that the identified practice takes unreasonable advantage of consumers. Lenders take advantage by imposing financial harm on consumers when they make repeated efforts to extract funds from consumer accounts, and those actions are unreasonable in light of the low expected value of those re-presentments. Indeed, lenders should be well aware that borrowers will likely not have funds in their distressed accounts, as shown by the two prior failed presentments and the lenders' general experience of the low expected value of multiple re-presentments. They also should be well aware of the kinds of harms that consumers are likely to experience in these situations; nonetheless, they routinely make a conscious choice to engage in the identified practice by proceeding with their re-presentments.

It may be the case that financial institutions engage in practices that hinder borrowers' ability to stop payments. Whether this takes unreasonable advantage of consumers has no bearing on whether lenders also take unreasonable advantage of consumers by engaging in the identified practice.

The Bureau finalizes its conclusion that the practice of attempting to withdraw payment from a consumer's account in connection with a covered loan after the lender's second consecutive failed attempt to withdraw payment from the account, unless the lender obtains the consumer's new and specific authorization to make further withdrawals from the account, takes unreasonable advantage of consumers' lack of understanding of the material risks, costs, or conditions of the product or service, as well as their inability to protect their interests in selecting or using a consumer financial product or service.

Section 1041.8 Prohibited Payment Transfer Attempts

For the reasons discussed in the section-by-section analysis of § 1041.7, the Bureau has concluded that it is an unfair and abusive practice for a lender to attempt to withdraw payment from a consumer's account in connection with a covered loan after the lender's second consecutive attempt to withdraw payment from the account has failed due to a lack of sufficient funds, unless the lender obtains the consumer's new and specific authorization to make further withdrawals from the account. Thus, after a lender's second consecutive attempt to withdraw payment from a consumer's account has failed, the lender could avoid engaging in the unfair or abusive practice either by not making any further payment withdrawals or by obtaining from the consumer a new and specific authorization and making further payment withdrawals pursuant to that authorization.

Section 1031(b) of the Dodd-Frank Act provides that the Bureau may prescribe rules ''identifying as unlawful unfair, deceptive, or abusive acts or practices'' and may include requirements in such rules for the purpose of preventing unfair, deceptive, or abusive acts or practices. The Bureau is preventing the unfair and abusive practice described above by including in § 1041.8 specific requirements for determining when making a further payment withdrawal attempt constitutes an unfair or abusive act and for obtaining a consumer's new and specific authorization to make further payment withdrawals from the consumer's account. In addition to its authority under section 1031(b), the Bureau is issuing two other provisions—§ 1041.8(c)(3)(ii) and (c)(3)(iii)(C)—pursuant to its authority under section 1032(a) of the Dodd-Frank Act. Section 1032(a) authorizes the Bureau to prescribe rules to ensure that the

[1035] In addition, as discussed in the proposal, the Bureau is aware of some depository institutions that have charged NSF and overdraft fees for payment attempts made within the institutions' internal systems, including a depository institution that charged such fees in connection with collecting payments on its own small-dollar loan product.

features of consumer financial products and services, ''both initially and over the term of the product or service,'' are disclosed ''fully, accurately, and effectively . . . in a manner that permits consumers to understand the costs, benefits, and risks associated with the product or service, in light of the facts and circumstances.'' [1036] Both of the proposed provisions relate to the requirements for obtaining the consumer's new and specific authorization after the prohibition on making further payment withdrawals has been triggered.

In addition to the provisions in § 1041.8, the Bureau is finalizing a complementary set of provisions in § 1041.9, pursuant to its authority under section 1032 of the Dodd-Frank Act, to require lenders to provide notice to a consumer prior to initiating a payment withdrawal from the consumer's account. These disclosures inform consumers in advance of the timing, amount, and channel of upcoming initial and unusual withdrawal attempts, in order to help consumers detect errors or problems with upcoming payments and contact their lenders or account-holding institutions to resolve them in a timely manner. The disclosures will also help consumers take steps to ensure that their accounts contain enough money to cover the payments, when taking such steps is feasible for consumers. In § 1041.9, the rule also provides for a notice that lenders are required to provide to consumers, alerting them to the fact that two consecutive payment withdrawal attempts to their accounts have failed—thus triggering operation of the requirements in § 1041.8(b)—so that consumers can better understand their repayment options and obligations in light of their accounts' severely distressed conditions. The two payments-related sections in the proposed rule thus complement and reinforce each other.

As described earlier, because the Bureau is not finalizing at this time the provisions relating to the underwriting of covered longer-term loans by assessing the borrower's ability to repay (other than for covered longer-term balloon-payment loans), various sections of the final rule have been renumbered differently than in the proposed rule. In particular, § 1041.14 of the proposed rule on prohibited payment transfer attempts, and § 1041.15 of the proposed rule on disclosure of payment transfer attempts, have now been renumbered, respectively, as §§ 1041.8 and 1041.9 of the final rule.

8(a) Definitions

Proposed § 1041.14(a) defined key terms to be used throughout proposed §§ 1041.14 and 1041.15. The central defined term in both proposed sections was ''payment transfer,'' which would apply broadly to any lender-initiated attempt to collect payment from a consumer's account, regardless of the type of authorization or instrument used. The Bureau also proposed to define ''single immediate payment transfer at the consumer's request,'' which is described below.

8(a)(1) Payment Transfer

Proposed Rule

Proposed § 1041.14(a)(1) defined a payment transfer as any lender-initiated debit or withdrawal of funds from a consumer's account for the purpose of collecting any amount due or purported to be due in connection with a covered loan. It also provided a non-exhaustive list of specific means of debiting or withdrawing funds from a consumer's account that would constitute payment transfers if the general definition's conditions are met. They included a debit or withdrawal initiated through: (1) An EFT, including a preauthorized EFT as defined in Regulation E, 12 CFR 1005.2(k); (2) a signature check, regardless of whether the transaction is processed through the check network or another network, such as the ACH network; (3) a remotely created check as defined in Regulation CC, 12 CFR 229.2(fff); (4) a remotely created payment order as defined in 16 CFR 310.2(cc); and (5) an account-holding institution's transfer of funds from a consumer's account that is held at the same institution.

The Bureau proposed a broad definition focused on the collection purpose of the debit or withdrawal rather than on the particular method by which the debit or withdrawal is made, to help ensure uniform application of the proposed rule's payment-related consumer protections. In the proposal the Bureau stated that in markets for loans that would be covered under the proposed rule, lenders use a variety of methods to collect payment from consumers' accounts. Some lenders take more than one form of payment authorization from consumers in connection with a single loan. Even lenders that take only a signature check often process the checks through the ACH system, particularly for purposes of re-submitting a returned check that was originally processed through the check system.

At the proposal stage the Bureau believed that, for a rule designed to apply across multiple payment methods and channels, a single defined term was necessary to avoid the considerable complexity that would result if the rule merely adopted existing terminology that may be unique to every specific method and channel. The Bureau believed that defining payment transfer in this way would enable the rule to provide for the required payment notices to be given to consumers regardless of the payment method or channel used to make a debit or withdrawal. Similarly, the Bureau believed that the proposed definition would ensure that the prohibition in proposed § 1041.14(b) on additional failed payment transfers would apply regardless of the payment method or channel used to make the triggering failed attempts and regardless of whether a lender moves back and forth between different payment methods or channels when attempting to withdraw payment from a consumer's account.

Proposed comment 14(a)(1)–1 explained that a transfer of funds meeting the general definition would be a payment transfer regardless of whether it is initiated by an instrument, order, or other means not specified in § 1041.14(a)(1). Proposed comment 14(a)(1)–2 explained that a lender-initiated debit or withdrawal includes a debit or withdrawal initiated by the lender's agent, such as a payment processor. Proposed comment 14(a)(1)–3 provided examples to illustrate how the proposed definition would apply to a debit or withdrawal for any amount due in connection with a covered loan. Specifically, proposed comments 14(a)(1)–3.i through (a)(1)–3.iv explained, respectively, that the definition would apply to a payment transfer for the amount of a scheduled payment, a transfer for an amount smaller than the amount of a scheduled payment, a transfer for the amount of the entire unpaid loan balance collected pursuant to an acceleration clause in a loan agreement for a covered loan, and a transfer for the amount of a late fee or other penalty assessed pursuant to a loan agreement for a covered loan.

Proposed comment 14(a)(1)–4 clarified that the proposed definition would apply even when the transfer is for an amount that the consumer disputes or does not legally owe. Proposed comment 14(a)(1)–5 provided three examples of covered loan payments that, while made with funds transferred or withdrawn from a consumer's account, would not be

[1036] 12 U.S.C. 5532(a).

covered by the proposed definition of a payment transfer. The first two examples, provided in proposed comments 14(a)(1)–5.i and (a)(1)–5.ii, were of transfers or withdrawals that are initiated by the consumer—specifically, when a consumer makes a payment in cash withdrawn by the consumer from the consumer's account and when a consumer makes a payment via an online or mobile bill payment service offered by the consumer's account-holding institution. The third example, provided in proposed comment 14(a)(1)–5.iii, clarified that the definition would not apply when a lender seeks repayment of a covered loan pursuant to a valid court order authorizing the lender to garnish a consumer's account.

Additionally, proposed comments relating to § 1041.14(a)(1)(i), (ii), and (v) clarified how the proposed payment transfer definition applies to particular payment methods. Specifically, proposed comment 14(a)(1)(i)–1 explained that the general definition of a payment transfer would apply to any EFT, including but not limited to an EFT initiated by a debit card or a prepaid card. Proposed comment 14(a)(1)(ii)–1 provided an illustration of how the definition of payment transfer would apply to a debit or withdrawal made by signature check, regardless of the payment network through which the transaction is processed. Lastly, proposed comment 14(a)(1)(v)–1 clarified, by providing an example, that an account-holding institution initiates a payment transfer when it initiates an internal transfer of funds from a consumer's account to collect payment on a deposit advance product.

Comments Received

NACHA agreed with the Bureau's decision to cover all payment methods with the rule, noting that their presentment cap is only applicable to payments processed on the ACH system and that since they clarified the cap on ACH presentments, they have seen vendors shift towards using other payment methods.

The Bureau received a number of comments arguing that the compliance burden of, among other things, tracking payment presentments across multiple payment methods would be significant.

Other commenters argued that payment withdrawal rules should be relaxed in cases where a depository institution is both the lender and the deposit account holder, provided that the depository institution does not charge a fee after attempting and failing to collect from the account. Similarly, a group representing community banks argued that the Bureau should not prohibit community banks from accessing consumer accounts held by the bank to pay for a loan made by the bank. This commenter claimed that the disclosures provided to borrowers before the authorization should suffice. More generally, commenters asked for further clarity on the rule's treatment of internal transfers at account-holding institutions.

Consumer group commenters were generally supportive of the proposed definition but argued that the Bureau should amend it in two ways. First, they argued that it should include both transactions initiated by the lender and transactions initiated by the lender's agent in the definition of payment transfer. Second, the commenters argued that the definition should not be tied to the term ''account'' because a nonbank might be able to evade this requirement by pulling funds from a source of funds other than an ''account.''

Commenters suggested that the Bureau use the term ''installment'' instead of ''payment'' in the definition so as to clarify that the rule covers each payment on an installment contract, which the commenters believed would expand the rule and be more consistent with State and local laws.

Several commenters, including State Attorneys General, argued that payments made using debit cards should be exempt because they generally do not engender NSF fees, and thus, the harm justifying the identified unfair and abusive act or practice is diminished for debit card payments.

Final Rule

The Bureau is generally finalizing the rule as proposed, with some technical changes, and the addition of an exclusion for lenders that are also acting as the borrower's account-holding institution when certain conditions are met. The Bureau concludes, in particular, that it is essential for the rule to cover all payment methods in order to prevent harm to consumers from the practice identified as unfair and abusive. Additionally, the Bureau maintains its view that a single definition is a simpler approach that is more administrable as a practical matter than using separate terminology for each type of payment method.

In adding the exclusion, the Bureau is reorganizing the numbering of § 1041.8(a)(1). The Bureau is also converting proposed comment 14(a)(1)–1 into the text of the regulation at § 1041.8(a)(1)(i). The initial examples of covered payment methods are now all listed there. The Bureau had proposed, as an example of a payment method included in the definition, ''[a]n account-holding institution's transfer of funds from a consumer's account that is held at the same institution.'' In light of the added conditional exclusion relating to account-holding institutions, the Bureau is adding at the end of that sentence ''other than such a transfer meeting the description in paragraph (a)(1)(ii) of this section.''

In response to the sound suggestion received from several commenters, the Bureau is adding paragraph (a)(1)(ii) to § 1041.8, which is a conditional exclusion for certain lenders that are also the borrower's account-holding institution. That exclusion only applies to instances where the lender has set forth in the original loan agreement or account agreement that it will not charge the consumer a fee for payment attempts when the account lacks sufficient funds to cover the payment, and that it will not close the account in response to a negative balance that results from a transfer of funds initiated in connection with the covered loan. If lenders do not charge NSF, overdraft, return payment fees, or similar fees, and do not close accounts because of failed payment attempts, the harms underpinning the unfair and abusive practice identified in § 1041.7 would not occur, and thus the Bureau concludes that the rule does not need to cover those instances.

The Bureau did not exclude transfers made by lenders that are also the borrower's account-holding institution where the harms would continue (*i.e.,* fees are charged or accounts are closed) because that would be inconsistent with the Bureau's efforts in the rule to prevent the harms associated with the unfair and abusive practice. Paragraph (a)(1)(ii) would allow late fees because the Bureau considers those charges to be distinct from, and not caused by, the practice identified in § 1041.7. It bears emphasis that, under the terms of the rule, the borrower's account or loan agreement must state, at the time the consumer takes out the first covered loan, that the account-holding institution does not charge such fees in connection with a failed payment attempt on a loan made by the institution or close the account in response to a negative balance resulting from the lender's collection of a payment on the covered loan. This is meant to prevent lenders from avoiding the presentment cap for failed payments involving fees by simply switching back and forth between charging fees and not charging fees, as well as to ensure that both conditions apply for the duration of the covered loan. The Bureau has not finalized a similar exclusion for non-account-holding lenders where the account-holding institution otherwise does not charge fees or close accounts, because those lenders do not have control over whether those events occur, as do the lenders excluded by paragraph (a)(1)(ii).

In light of changes made to the text of the rule and the incorporation of proposed comment 14(a)(1)–1 into the text, the commentary to the rule has been renumbered accordingly. In addition, the Bureau has amended proposed comment 14(a)(1)(v)–1, now comment 8(a)(1)(i)(E)–1 of the final rule, to reflect the changes made to accommodate the conditional exclusion. In response to requests from commenters, the Bureau also has added comment 8(a)(1)(i)(E)–2, which to further clarifies the application of the payment transfer definition to internal transfers of funds within an account-holding institution. The Bureau notes that under the final rule, the payment transfer definition—and thus the cap on failed payment transfers—still applies to such lenders when the conditions for the exclusion from the definition are not met. The additional examples include: (1) Initiating an internal transfer from a consumer's account to collect a scheduled payment on a covered loan; (2) sweeping the consumer's account in response to a delinquency on a covered loan; and (3) exercising a right of offset to collect against an outstanding balance on a covered loan.

The Bureau also added some comments on the conditional exclusion. Comment 8(a)(1)(ii)(A)–1 clarifies that the loan or account agreement must contain a term to restrict the charging of fees that is in effect at the time the covered loan is made, which must remain in effect for the duration of the loan. Again, this comment is intended to ensure that lenders that are account-holding institutions do not avoid the rule's cap on failed payment attempts by switching back and forth between charging fees and not charging fees for failed attempts. Comment 8(a)(2)(ii)(A)–2 provides examples of the types of fees that must be restricted in order to qualify for the conditional exclusion. It clarifies that those fees include NSF fees, overdraft fees, and returned-item fees. It also explains that a lender may charge late fees if such fees are permitted under the terms of the loan agreement, and still qualify for the conditional exclusion if the conditions in § 1041.8(a)(1)(ii) are met.

Comment 8(a)(1)(ii)(B)–1 clarifies that in order to be eligible for the exclusion in § 1041.8(a)(1)(ii), the lender cannot close the borrower's account in response to a negative balance that results from a lender-initiated transfer of funds in connection with the covered loan, but that the lender is not restricted from closing the account in response to another event. Specifically, the comment provides that a lender is not restricted from closing the consumer's account in response to another event, even if the event occurs after a lender-initiated transfer of funds has brought the account to a negative balance. Further, the comment provides, as examples, that a lender may close the account at the consumer's request, for purposes of complying with other regulatory requirements, or to protect the account from suspected fraudulent use or unauthorized access, and still meet the condition in § 1041.8(a)(1)(ii)(B). The Bureau believes it is important to clarify that lenders collecting payments pursuant to the conditional exclusion in § 1041.8(a)(1) are not restricted from closing a consumer's account when circumstances unrelated to the covered loan payments dictate that they do so. Finally, comment 8(a)(1)(ii)(B)–2 clarifies that the loan or account agreement must contain a term providing that the lender will not close the consumer's account in the circumstances specified in the rule at the time the covered loan is made, and that the term must remain in effect for the duration of the loan.

The Bureau recognizes the industry commenters' concern that lenders will incur compliance burdens associated with keeping track of payment presentments across different payment methods. However, as stated in the proposal, the Bureau continues to maintain ongoing compliance costs associated with tracking presentments will likely be minimal following the initial investment. There may be additional compliance burdens associated with tracking presentments across payment methods, but the alternative of only tracking presentments on certain payment methods would undermine the purposes of the rule, and would not fully prevent the full scope of consumer harm identified above in Market Concerns—Payments, and further discussed in the section-by-section analysis of § 1041.7.

The Bureau also does not find it helpful to use the term ''installment'' to make clear that the rule applies to multiple payments initiated under an installment agreement. The definition of ''payment transfer'' is meant to cover any kind of payment attempt, including multiple attempts made to cover a single installment under a loan agreement. Replacing the term ''payment'' with ''installment'' may confuse that point.

In addition, the Bureau does not see the need for further clarification with regard to how the rule covers agents of lenders that initiate payment presentments on the lender's behalf. A lender's use of third-party processors or servicers does not provide a basis to circumvent the payment presentment cap. In fact, a lender using a third-party service provider is still liable under the rule, as the service provider also may be, depending on the facts and circumstances. Lastly, the Bureau is not aware of any methods by which a non-bank lender could circumvent the rule based on the definition of the term ''account.'' The definition is the same as in 12 CFR 1005.2, and therefore includes normal deposit accounts at financial institutions, payroll card accounts, and (by the time compliance with §§ 1041.2 through 1041.10, 1041.12, and 1041.13 is required) prepaid accounts. To the extent a lender is debiting something other than an ''account,'' that event may not involve the same kinds of fees associated with the identified practice. To provide greater clarity to industry, the Bureau finds it appropriate at this time to use a pre-existing definition. If in the future a lender or lenders cause repeated fees to consumers by attempting to take funds from something other than an ''account'' after multiple failed attempts, the Bureau would consider exercising its supervision, enforcement, or rulemaking authority to address the problem, as appropriate.

Lastly, the Bureau has decided not to exempt payments made using debit cards from the rule. First, while failed debt 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.

8(a)(2) Single Immediate Payment Transfer at the Consumer's Request

Proposed Rule

Proposed § 1041.14(a)(2) would have defined a single immediate payment transfer at the consumer's request as, generally, a payment transfer that is initiated by a one-time EFT or by processing a consumer's signature check within one business day after the lender obtains the consumer's authorization or check. Such payment transfers would be exempted from certain requirements in the proposed rule. The principal characteristic of a single immediate payment transfer at the consumer's request is that it is initiated at or near the time the consumer chooses to authorize it. During the SBREFA process, and in outreach with industry in developing the proposal, the Bureau received feedback that consumers often authorize or request lenders to make an immediate debit or withdrawal from their accounts for various reasons including, for example, to avoid a late payment fee. As discussed in the proposed rule, stakeholders expressed concerns primarily about the potential impracticability and undue burden of providing a notice of an upcoming withdrawal in advance of executing the consumer's payment instructions in these circumstances. More generally, the SERs and industry stakeholders suggested that a transfer made at the consumer's immediate request presents fewer consumer protection concerns than a debit or withdrawal authorized by the consumer several days or more in advance, presuming that the consumer makes the immediate request based on current and first-hand knowledge of their account balance.

In the proposal, the Bureau stated that applying fewer requirements to payment transfers initiated immediately after consumers request the debit or withdrawal was both warranted and consistent with the important policy goal of providing consumers with greater control over their payments on covered loans. Accordingly, the proposed definition would be used to apply certain exceptions to the proposed rule's payments-related requirements in two instances. First, a lender would not be required to provide the payment notice in proposed § 1041.15(b) when initiating a single immediate payment transfer at the consumer's request. Second, a lender would be permitted under proposed § 1041.14(d) to initiate a single immediate payment transfer at the consumer's request after the prohibition in proposed § 1041.14(b) on initiating further payment transfers has been triggered, subject to certain requirements and conditions.

Proposed § 1041.14(a)(2) provided that a payment transfer is a single immediate payment transfer at the consumer's request when it meets either one of two sets of conditions. The first of these prongs applied specifically to payment transfers initiated via a one-time EFT. Proposed § 1041.14(a)(2)(i) generally defined the term as a one-time EFT initiated within one business day after the consumer authorizes the transfer. The Bureau believed that a one-business-day time frame would allow lenders sufficient time to initiate the transfer, while providing assurance that the account would be debited in accordance with the consumer's timing expectations. Proposed comment 14(a)(2)(i)–1 explained that for purposes of the definition's timing condition, a one-time EFT is initiated at the time that the transfer is sent out of the lender's control and that the EFT thus is initiated at the time the lender or its agent sends the payment to be processed by a third party, such as the lender's bank.

The proposed comment further provided an illustrative example of this concept. The second prong of the definition, in proposed § 1041.14(a)(2)(ii), applied specifically to payment transfers initiated by processing a consumer's signature check. Under this prong, the term would apply when a consumer's signature check is processed through either the check system or the ACH system within one business day after the consumer provides the check to the lender. Proposed comments 14(a)(2)(ii)–1 and –2 explained how the definition's timing condition in proposed § 1041.14(a)(2)(ii) applies to the processing of a signature check. Similar to the concept explained in proposed comment 14(a)(2)(i)–1, proposed comment 14(a)(2)(ii)–1 explained that a signature check is sent out of the lender's control and that the check thus is processed at the time that the lender or its agent sends the check to be processed by a third party, such as the lender's bank. The proposed comment further cross-referenced proposed comment 14(a)(2)(i)–1 for an illustrative example of how this concept applies in the context of initiating a one-time EFT. Regarding the timing condition in proposed § 1041.14(a)(2)(ii), proposed comment 14(a)(2)(ii)–2 clarified that when a consumer mails a check to the lender, the check is deemed to be provided to the lender on the date it is received.

As with the similar timing condition for a one-time EFT in proposed § 1041.14(a)(2)(i), the Bureau believed that these timing conditions would help to ensure that the consumer has the ability to control the terms of the transfer and that the conditions would be practicable for lenders to meet. In addition, the Bureau noted that the timing conditions would effectively exclude from the definition the use of a consumer's post-dated check, and instead would limit the definition to situations in which a consumer provides a check with the intent to execute an immediate payment. The Bureau believed that this condition was necessary to ensure that the exceptions concerning single immediate payment transfers at the consumer's request apply only when it is clear that the consumer is affirmatively initiating the payment by dictating its timing and amount. Under the proposal, these criteria would not be met when the lender already holds the consumer's post-dated check.

Comments Received

The Bureau received some comments pertaining to the definition of a single immediate payment transfer at the consumer's request. Because the definition is closely related to the exception in § 1041.8(d), the Bureau addresses those comments below in the discussion of final § 1041.8(d).

Final Rule

The Bureau is finalizing this definition as proposed, except for renumbering proposed § 1041.14(a) as § 1041.8(a).

8(b) Prohibition on Initiating Payment Transfers From a Consumer's Account After Two Consecutive Failed Payment Transfers

Proposed Rule

Proposed § 1041.14(b) stated that a lender cannot attempt to withdraw payment from a consumer's account in connection with a covered loan when two consecutive attempts have been returned due to a lack of sufficient funds. This proposal was made pursuant to section 1031(b) of the Dodd-Frank Act, which provides that the Bureau may prescribe rules for the purpose of preventing unlawful unfair, deceptive, or abusive acts or practices.[1037] As discussed in the section-by-section analysis of proposed § 1041.13, it appeared that, in connection with a covered loan, it was an unfair and abusive practice for a lender to attempt to withdraw payment from a consumer's account after the lender's second consecutive attempt to withdraw payment from the account fails due to a lack of sufficient funds, unless the lender obtains the consumer's new and specific authorization to make further payment withdrawals. This proposed finding would have applied to any lender-

[1037] 12 U.S.C. 5531(b).

initiated debit or withdrawal from a consumer's account for purposes of collecting any amount due or purported to be due in connection with a covered loan, regardless of the particular payment method or channel used.

In accordance with this proposed finding, a lender would be generally prohibited under proposed § 1041.14(b) from making further attempts to withdraw payment from a consumer's account upon the second consecutive return for nonsufficient funds, unless and until the lender obtains the consumer's authorization for additional transfers under proposed § 1041.14(c), or obtains the consumer's authorization for a single immediate payment transfer in accordance with proposed § 1041.14(d). The prohibition under proposed § 1041.14(b) would apply to, and be triggered by, any lender-initiated attempts to withdraw payment from a consumer's checking, savings, or prepaid account. In addition, the prohibition under proposed § 1041.14(b) would apply to, and be triggered by, all lender-initiated withdrawal attempts regardless of the payment method used including, but not limited to, signature check, remotely created check, remotely created payment orders, authorizations for one-time or recurring EFTs, and an account-holding institution's withdrawal of funds from a consumer's account that is held at the same institution.

In developing the proposed approach to restricting lenders from making repeated failed attempts to debit or withdraw funds from consumers' accounts, the Bureau had considered a number of potential interventions. As detailed in Market Concerns—Payments of the proposal and final rule, for example, the Bureau is aware that some lenders split the amount of a payment into two or more separate transfers and then present all of the transfers through the ACH system on the same day. Some lenders make multiple attempts to debit accounts over the course of several days or a few weeks. Also, lenders that collect payment by signature check often alternate submissions between the check system and ACH system to maximize the number of times they can attempt to withdraw payment from a consumer's account using a single check. These and similarly aggressive payment practices potentially cause harms to consumers and may each constitute more specific unfair, deceptive, or abusive acts or practices, as well as fitting within the broader unfair and abusive practice identified in the proposal. However, the Bureau believed that tailoring requirements in this rulemaking for each discrete payment practice would add considerable complexity to the proposed rule and yet still could leave consumers vulnerable to harms from aggressive practices that may emerge in markets for covered loans in the future.

Accordingly, while the Bureau stated that it would continue to use its supervisory and enforcement authorities to address such aggressive payment practices in particular circumstances as appropriate, it proposed to address categorically the broader practice of making repeated failed attempts to collect payment on covered loans, which it preliminarily believed to be unfair and abusive. In addition, the Bureau proposed requirements to prevent that practice which would help protect consumers from a range of harmful payment practices in a considerably less complex fashion. For example, as applied to the practice of splitting payments into multiple same-day presentments, the proposed approach would effectively curtail a lender's access to the consumer's account when any two such presentments fail. As applied to checks, the proposed approach would permit a lender to resubmit a returned check no more than once, regardless of the channel used, before triggering the prohibition if the resubmission failed. The Bureau framed the proposed prohibition broadly so that it would apply to depository lenders that hold the consumer's asset account, such as providers of deposit advance products or other types of proposed covered loans that may be offered by such depository lenders. Because depository lenders that hold consumers' accounts have greater information about the status of those accounts than do third-party lenders, the Bureau believed that depository lenders should have little difficulty in avoiding failed attempts that would trigger the prohibition. Nevertheless, if such lenders elect to initiate payment transfers from consumers' accounts when—as the lenders know or should know—the accounts lack sufficient funds to cover the amount of the payment transfers, they could assess the consumers substantial fees permitted under the asset account agreement (including NSF and overdraft fees), as well as any late fees or similar penalty fees permitted under the loan agreement for the covered loan. Accordingly, the Bureau believed that applying the prohibition in this manner would help to protect consumers from harmful practices in which such depository lenders may sometimes engage. As discussed above in Market Concerns—Payments, for example, the Bureau notably found that a depository institution that offered loan products to consumers with accounts at the institution charged some of those consumers NSF fees and overdraft fees for payment withdrawals initiated within the institution's internal systems.

Proposed comment 14(b)–1 explained the general scope of the prohibition. Specifically, it provided that the prohibition would restrict a lender from initiating any further payment transfers from the consumer's account in connection with the covered loan, unless the requirements and conditions in either proposed § 1041.14(c) or (d) were satisfied. To clarify the ongoing application of the prohibition, proposed comment 14(b)–1 provided an example to show that a lender would be restricted from initiating transfers to collect payments that later fall due or to collect late fees or returned-item fees. The Bureau believed it was important to make clear that the proposed restriction on further transfers—in contrast to restrictions in existing laws and rules like the NACHA cap on re-presentments—would not merely limit the number of times a lender could attempt to collect a single failed payment. Lastly, proposed comment 14(b)–1 explained that the prohibition would apply regardless of whether the lender held an authorization or instrument from the consumer that was otherwise valid under applicable law, such as an authorization to collect payments via preauthorized EFTs under Regulation E or a post-dated check.

Proposed comment 14(b)–2 clarified that when the prohibition is triggered, the lender is not prohibited under the rule from initiating a payment transfer in connection with a bona fide, subsequent covered loan made to the consumer, provided that the lender had not attempted to initiate two consecutive failed payment transfers in connection with the bona fide subsequent covered loan. The Bureau believed that limiting the restriction in this manner was appropriate to ensure that a consumer who had benefitted from the restriction at one time would not be effectively foreclosed from borrowing a covered loan from the lender after their financial situation had improved.

Proposed 14(b)(1) General

Proposed § 1041.14(b)(1) provided specifically that a lender must not initiate a payment transfer from a consumer's account in connection with a covered loan after the lender has attempted to initiate two consecutive failed payment transfers from the consumer's account in connection with that covered loan. It further proposed that a payment transfer would be deemed to have failed when it resulted in a return indicating that the account lacks sufficient funds or, for a lender that was the consumer's account-holding institution, if it resulted in the collection of less than the amount for which the payment transfer was initiated because the account lacked sufficient funds. The specific provision for an account-holding institution thus would apply when such a lender elected to initiate a payment transfer resulting in the collection of either no funds or a partial payment.

Proposed comments 14(b)(1)–1 to 14(b)(1)–4 provided clarification on when a payment transfer would be deemed to have failed. Specifically, proposed comment 14(b)(1)–1 explained that for purposes of the prohibition, a failed payment transfer included but was not limited to a debit or withdrawal that was returned unpaid or is declined due to nonsufficient funds in the consumer's account. This proposed comment clarified, among other things, that the prohibition applied to debit card transactions that were declined. Proposed comment 14(b)(1)–2 stated that the prohibition would apply as of the date on which the lender or its agent, such as a payment processor, received the return of the second consecutive failed transfer or, if the lender was the consumer's account-holding institution, the date on which the transfer was initiated. The Bureau believed that, in contrast to other lenders, a consumer's account-holding institution would or should have the ability to know that an account lacked sufficient funds before initiating a transfer (or immediately thereafter, at the latest). Proposed comment 14(b)(1)–3 clarified that a transfer that would result in a return for a reason other than a lack of sufficient funds was not a failed transfer for purposes of the prohibition, citing as an example a transfer that returned due to an incorrectly entered account number. Lastly, proposed comment 14(b)(1)–4 explained how the concept of a failed payment transfer would apply to a transfer initiated by a lender that was the consumer's account-holding institution. Specifically, the proposed comment provided that if the consumer's account-holding institution had initiated a payment transfer that resulted in the collection of less than the amount for which the payment transfer was initiated, because the account lacked sufficient funds, then the payment transfer would be a failed payment transfer for purposes of the prohibition. This would be the case regardless of whether the result was classified or coded as a return for nonsufficient funds in the lender's internal procedures, processes, or systems. The Bureau believed that, unlike other lenders, such a lender would or should have the ability to know the result of a payment transfer and the reason for that result, without having to rely on a ''return'' as classified in its internal procedures, processes, or systems, or on a commonly understood reason code. Proposed comment 14(b)(1)–4 further stated that a consumer's account-holding institution would not be deemed to have initiated a failed payment transfer if the lender had merely deferred or forgone the debit or withdrawal of a payment from a consumer account, based on having observed a lack of sufficient funds. For such lenders, the Bureau believed it was important to clarify that the concept of a failed payment transfer incorporates the central concept of the proposed definition of payment transfer that the lender must engage in the affirmative act of initiating a debit or withdrawal from the consumer's account in order for the term to apply.

During the SBREFA process and in outreach with industry in developing the proposal, some lenders recommended that the Bureau take a narrower approach in connection with payment attempts by debit cards. One such recommendation suggested that the prohibition against additional withdrawal attempts should not apply when neither the lender nor the consumer's account-holding institution charges an NSF fee in connection with a second failed payment attempt involving a debit card transaction that is declined. As explained in the proposal, the Bureau understood that depository institutions generally do not charge consumers NSF fees or declined authorization fees for such transactions, although it was aware that such fees are charged by some issuers of prepaid cards. It thus recognized that debit card transactions present somewhat less risk of harm to consumers.

For a number of reasons, however, the Bureau did not believe that this potential effect was sufficient to propose excluding such transactions from the rule. First, the recommended approach would not protect consumers from the risk of incurring an overdraft fee in connection with the lender's third withdrawal attempt. As discussed in Market Concerns—Payments, the Bureau's research focusing on online lenders' attempts to collect covered loan payments through the ACH system indicates that, in the small fraction of cases in which a lender's third attempt succeeds—*i.e.,* after the lender has sufficient information indicating that the account is severely distressed—up to one-third of the successful attempts are paid out of overdraft coverage. Second, the Bureau believed that the recommended approach would be impracticable to comply with and enforce, as the lender initiating a payment transfer would not necessarily know the receiving account-holding institution's practice with respect to charging fees on declined or returned transactions. Additionally, the Bureau was concerned that lenders might respond to such an approach by seeking to evade the rule by re-characterizing their fees in some other manner. It thus believed that it was not appropriate to propose that payment withdrawal attempts by debit cards or prepaid cards be carved out of the rule, in light of the narrow range of those situations, the administrative challenges, and the residual risk to consumers.

During the SBREFA process that preceded its issuance of the proposal, the Bureau received two other recommendations regarding the proposed restrictions on payment withdrawal attempts. One SER suggested that the Bureau delay imposing any restrictions until the full effects of NACHA's recent 15 percent return rate threshold rule could be observed. As discussed in Markets Background—Payments, the NACHA rule that went into effect in 2015 can trigger inquiry and review by NACHA if a merchant's overall return rate for debits made through the ACH network exceeds 15 percent. The Bureau considered the suggestion carefully but did not believe that a delay would be warranted. As noted, the NACHA rule applies only to returned debits through the ACH network. Thus, it places no restrictions on lenders' attempts to withdraw payment through other channels. In fact, as discussed in the proposal (and confirmed by NACHA's comment to the proposed rule), anecdotal evidence suggests that lenders are already shifting to use other channels to evade the NACHA rule. Further, exceeding the threshold merely triggers closer scrutiny by NACHA. To the extent that lenders making covered loans were to become subject to the review process, the Bureau believed that they might be able to justify their higher return rates by arguing that those higher rates are consistent with the rates for their market as a whole.

Another SER recommended before the proposal was issued that lenders should be permitted to make up to four payment collection attempts per month when a loan is in default. The Bureau's evidence indicates that for the covered loans studied, after a second consecutive attempt to collect payment fails, the third and subsequent attempts are also very likely to fail. The Bureau therefore believed that two consecutive failed payment attempts, rather than four presentment attempts per month, was the appropriate point at which to trigger the rule's payment protections. In addition, the Bureau believed that in many cases where the proposed prohibition would apply, the consumer could technically be in default on the loan, considering that the lender's payment attempts would have been unsuccessful. Thus, the suggestion to permit a large number of payment withdrawal attempts when a loan is in default could have effectively circumvented the proposed rule.

Proposed 14(b)(2) Consecutive Failed Payment Transfers

Proposed § 1041.14(b)(2) would have defined a first failed payment transfer and a second consecutive failed payment transfer for purposes of determining when the prohibition in proposed § 1041.14(b) applies; the proposed commentary to this provision presented illustrative examples to explain and clarify the application of these terms. Proposed § 1041.14(b)(2)(i) provided that a failed transfer would be the first failed transfer if it met any of three conditions. First, proposed § 1041.14(b)(2)(i)(A) stated that a transfer would be the first failed payment transfer if the lender had initiated no other transfer from the consumer's account in connection with the covered loan. This would apply to the scenario in which a lender's very first attempt to collect payment on a covered loan had failed. Second, proposed § 1041.14(b)(2)(i)(B) provided that, generally, a failed payment transfer would be a first failed payment transfer if the immediately preceding payment transfer had been successful, regardless of whether the lender had previously initiated a first failed payment transfer. This proposed provision set forth the general principle that any failed payment transfer that followed a successful payment transfer would be the first failed payment transfer for the purposes of the prohibition in proposed § 1041.14(b). Lastly, proposed § 1041.14(b)(2)(i)(C) provided that a payment transfer would be a first failed payment transfer if it was the first failed attempt after the lender obtained the consumer's authorization for additional payment transfers pursuant to proposed § 1041.14(c). Proposed comment 14(b)(2)(i)–1 provided two illustrative examples of a first failed payment transfer.

Proposed § 1041.14(b)(2)(ii) provided that a failed payment transfer would be the second consecutive failed payment transfer if the previous payment transfer was a first failed transfer, and defined the concept of a previous payment transfer to include a payment transfer initiated at the same time or on the same day as the failed payment transfer. Proposed comment 14(b)(2)(ii)–1 provided an illustrative example of the general concept of a second consecutive failed payment transfer, while proposed comment 14(b)(2)(ii)–2 provided an illustrative example of a previous payment transfer initiated at the same time and on the same day. Given the high failure rates for same-day presentments, the Bureau believed it was important to clarify that the prohibition would be triggered when two payment transfers initiated on the same day fail, including instances where they had been initiated concurrently. Proposed comment 14(b)(2)(ii)–3 clarified that if a lender initiated a single immediate payment transfer at the consumer's request pursuant to the exception in § 1041.14(d), then the failed transfer count would remain at two, regardless of whether the transfer succeeded or failed. Thus, as the proposed comment further provided, the exception would be limited to the single transfer authorized by the consumer. Accordingly, if a payment transfer initiated pursuant to the exception failed, then the lender would not be permitted to reinitiate the transfer—*e.g.,* by re-presenting it through the ACH system—unless the lender had first obtained a new authorization from the consumer, pursuant to § 1041.14(c) or (d). The Bureau believed this limitation was necessary, as the authorization for an immediate transfer would be based on the consumer's understanding of their account's condition only at that specific moment in time, as opposed to its possible condition in the future.

Proposed § 1041.14(b)(2)(iii) would have provided the principle that alternating between payment channels does not reset the failed payment transfer count. Specifically, it proposed that a failed payment transfer meeting the conditions in proposed § 1041.14(b)(2)(ii) is the second consecutive failed transfer, regardless of whether the first failed transfer was initiated through a different payment channel. Proposed comment 14(b)(2)(iii)–1 provided an illustrative example of this concept.

Comments Received

Several industry representatives and lender commenters generally opposed the Bureau's proposal. These commenters stated that new industry guidelines issued by NACHA were sufficient to address the harms identified by the Bureau. Specifically, those new rules set return thresholds, including a 15 percent rate of total returns, a three percent rate of administrative returns, and a 0.5 percent rate of unauthorized transaction returns, and clarified the limits on payment splitting and re-presentments, as noted above. Conversely, other commenters argued against delaying or forgoing the proposed approach because, as the Bureau noted in the proposal, NACHA's new guidelines do not impact payment transfers initiated outside the ACH system.

Various stakeholders commented on the number of failed payment transfers that the proposed rule allowed. Some noted that NACHA operating rules and general industry standards allow three attempts to collect a single payment. Others expressed concerns that the proposed rule would in effect reduce the allowance to two attempts, which would require NACHA to amend its operating rules, and depository institutions and lenders to adjust their systems. Yet others argued that the Bureau should not measure all presentments against the presentment cap, but should instead measure presentments of the same payment, consistent with NACHA's approach. A few commenters objected to counting payment attempts towards the cap cross-payment method, and expressed concerns about the compliance costs associated with tracking payments across channels.

However, some industry participants agreed with the proposed two-attempt limit proposed, which they claimed to already have adopted. Other stakeholders argued that the rule should prohibit payment transfer attempts after one failed attempt. One such commenter claimed that gaining the ability to debit a borrower's account would reduce the lender's incentive to determine whether the borrower would have the ability to repay the loan and cover other obligations. It also argued that even one overdraft or NSF fee could generate additional debt and fees that would quickly snowball.

Some commenters argued that the Bureau should *only* declare the initiation of repeated presentments as unfair or abusive. In other words, this commenter believed that just finalizing this section, and not any of the ability-to-repay requirements, would suffice to address the identified harms without imposing significant industry costs. One commenter also was concerned that, as written, the proposal could be interpreted to require depository institutions to: (1) Monitor lenders' use of the payment system; (2) determine when a lender may be in violation of proposed §§ 1041.14 and 1041.15; and (3) act as an enforcer of the regulation even where the consumer authorized the transaction. This commenter asked the Bureau to clarify that the responsibility of ensuring compliance with these provisions would be exclusively an obligation of the lender, and not an obligation of the lender's or the consumer's depository institution.

Other commenters stated that instead of prohibiting additional payment transfers after a number of previous failed attempts, the Bureau should require lenders to provide payment notices that include reminders that consumers have the ability to stop payments or revoke existing payment authorizations. These commenters shared the sentiment of commenters, discussed in the section-by-section analysis of § 1041.7 above, that borrowers should be able to avoid the harm by initiating stop payments or revoking payment authorizations with lenders, and argued that disclosure would help improve the efficacy of those mechanisms to a point where the harms would largely be eliminated.

One commenter asked the Bureau to additionally require reauthorization from the consumer after three failed attempts in a 12-month period, even when those attempts are not consecutive.

A number of comments from State Attorneys General and consumer groups also touted the benefits of the approach described in the proposed rule. These commenters noted that the limit on payment transfer attempts was essential because it would reduce fees and bolster the ability-to-repay determination.

Final Rule

The Bureau is finalizing the cap on payment presentments in § 1041.8(b), consistent with the conclusions reached above in the section-by-section analysis of § 1041.7 of the final rule. The Bureau is, however, making some changes to the proposed rule.

First, to clarify that the presentment cap will apply across all loans with the lender, the Bureau is replacing, in two places in § 1041.8(b)(1), the phrase ''in connection with a covered loan'' with ''in connection with any covered loan that the consumer has with the lender.'' Similarly, the Bureau is adding ''or any other covered loan that the consumer has with the lender'' at the end of § 1014.8(b)(2)(i)(A). A lender will need to seek a new authorization, or cease payment attempts, after two failed attempts on any loan the borrower has with the lender. Accordingly, if a borrower has two outstanding covered loans and a lender makes a failed payment attempt for each such loan in succession, then the cap is met. The proposed rule could have been interpreted to apply only to two failed attempts on one loan, and then two failed attempts on a different loan, and so forth. Yet the Bureau has adopted this change in order to ensure that the rule fully prevents the scope of harms intended to be covered under the rule in light of its understanding and description of the practice that it has identified as unfair and abusive. Regardless of whether the multiple presentments are for one loan, or spread across multiple loans, the borrower harm and expected value would be the same.[1038] To the extent lenders are not currently tracking payments across multiple loans, there may be some additional costs associated with this adjustment. However, the Bureau does not expect, once systems are updated, any additional compliance costs.

Comment 8(b)–1 is amended to incorporate this point, and a new comment 8(b)–3 is added for further clarity and to add an example as well. In addition, the comments related to § 1014.8(b) have been revised to clarify the prohibition's application to situations in which a consumer has more than one covered loan with a lender. The Bureau is also adding an example of a consumer with two covered loans who has a second failed payment transfer, in comment 8(b)(2)(ii)–1.ii.

The second modification of this provision is intended to clarify, in § 1041.8(b)(1) and elsewhere in the final rule, that the presentment cap applies on a per-consumer-account basis. That means if a lender attempts to withdraw payments from multiple accounts, the lender is limited to two consecutive failed attempts each. The Bureau makes this clarification because the presumption that funds are unlikely to be available for a third presentment does not follow when the presentment is made from a different account. Two consecutive failed attempts from one account tell the lender nothing about the condition of another account. However, the prohibition applies to the other account if the lender then initiates two consecutive failed payment transfers from that account. The Bureau is adding a new comment 8(b)–2 to clarify this point.

Third, the Bureau is making technical edits to the description, in § 1041.8(b)(1), of what constitutes a failed payment transfer when the lender is also the consumer's account-holding institution. That description, both in the proposal and in the final rule, provides that for such lenders, presentments resulting in non-sufficient funds, partial payments, or full payments paid out of overdraft all count toward the cap. The Bureau is making these edits for consistency with the new conditional exclusion in § 1041.8(a)(1). The Bureau also is making similar conforming edits to comment 8(b)(1)–4.

Lastly, the Bureau has made some other technical edits to § 1041.8(b)(2)(ii) for consistency with § 1041.8(b)(2)(i).

In Market Concerns—Payments and the section-by-section analysis of § 1041.7, the Bureau has already addressed the comments about whether this rule is necessary in light of NACHA's new guidelines. But to summarize again briefly, the Bureau believes that NACHA guidelines do not suffice to prevent all of the harms associated with the practice identified in § 1041.7. In particular, they would not prevent the second presentment or the third payment attempt. Commenters noted this difference and asserted that complying with the rule as proposed would require companies to change their systems. As explained in the section-by-section analysis of § 1041.7, the Bureau finds that there is a significant amount of injury in that third presentment: The Bureau's study showed that approximately 80 percent of such presentments caused an overdraft fee or failed (and likely caused an NSF fee and/or returned-item fee). Importantly, not only do the NACHA Rules apply only to payments made through the ACH network, but NACHA's own comment noted that it had already seen vendors shift to using other payment methods, likely in an effort to evade the NACHA Rules.

The Bureau has chosen to use a two-presentment cap to prevent consumer harms from the practice that it has identified as unfair and abusive. It did so not because the first re-presentment causes no injury, but rather because the injury after each failed attempt is cumulative and thus the injury becomes more significant over time. In addition, the first re-presentment implicates certain additional countervailing

[1038] The Bureau's Online Payday Loans Payments report on online payday and payday installment lending did not distinguish between multiple payments for individual loans and multiple payments for multiple loans. *CFPB Online Payday Loan Payments.*

benefits, as lenders may have simply tried the first presentment at the wrong time, and consumers may find it more convenient not to have to reauthorize after just one failed attempt. Additionally, if lenders only have one try, it may cause them to be overly circumspect about when to use it, which could undermine the benefits of ease and convenience for consumers. The Bureau therefore is drawing the line at two re-presentments in an abundance of caution, in an attempt to avoid regulating potentially more legitimate justifications for re-presentment. Nonetheless, the Bureau is aware of the harms that can occur even from a single re-presentment, and that the manner in which a lender engages in re-presentment activities more generally could be unfair, deceptive, or abusive. The rule does not provide a safe harbor against misconduct that it does not explicitly address, and the Bureau could in appropriate circumstances address problems through its supervisory and enforcement authority.[1039]

For purposes of determining whether the cap has been met, the Bureau has decided not to distinguish between re-presentments of the same payment and new presentments to cover new loan installments, as NACHA does. As the Bureau stated in the proposal, and now affirms, the tailoring of individualized requirements for each discrete payment practice would add considerable complexity to the rule and yet still could leave consumers vulnerable to harms from aggressive and evasive practices that may emerge in markets for covered loans in the future. Accordingly, the Bureau is addressing a somewhat broader practice that it has determined to be unfair and abusive by providing significant consumer protections from a range of harms in a considerably less complex fashion. Notably, the Bureau's study that showed very high rates of rejection and overdraft fees for third presentments did not distinguish between re-presentments of the same payment and new presentments for new installments. And the Bureau believes that after two failed attempts to the same account, even if two weeks or a month has passed, there is reason to believe a third would fail, and that obtaining a new authorization would be appropriate. The Bureau thus concludes that considerable injury is likely occurring from such new payment attempts and thus inclusion of those payments towards the cap is warranted.

As noted above, one commenter suggested finalizing this portion of the rule as a standalone, without the underwriting provisions requiring lenders to make a reasonable, ability-to-repay determination. The Bureau declines to follow this approach, as it continues to believe that § 1041.8 alone could not prevent all of the harms that flow from the practice identified in § 1041.7, including those stemming from the practice identified in § 1041.4. If lenders continue to make covered loans without assessing borrowers' ability to repay, consumers would still confront the harms associated with unaffordable loans—default, delinquency, re-borrowing, or other collateral injuries as described above in Market Concerns—Underwriting. The payment provisions of this rule address one of the potential collateral injuries from an unaffordable loan—which is itself an important source of harm—but they do not address the whole scope of harm that the Bureau seeks to address in part 1041. Therefore, the Bureau concludes that it would be quite insufficient to finalize subpart C of this rule by itself.

Furthermore, the Bureau concludes that disclosures alone would not suffice to prevent all of the harms caused by the unfair and abusive practice identified in § 1041.7 of the final rule. As explained above in Market Concerns—Payments and the section-by-section analysis of § 1041.7, the Bureau has observed significant difficulty when borrowers seek to stop payments or revoke authorizations. Disclosures may be effective in helping consumers know their rights, and understand what is occurring, but they would not help consumers stop the multiple attempts. Furthermore, while the Bureau believes its model disclosures will be effective in informing some consumers, the Bureau knows there are many others they will not reach or for whom they will not be as effective. As discussed below, one commenter described that it had tested the Bureau's ''notice of restrictions on future loans,'' which does not pertain to this particular part of the rule. The Bureau believes the methodology of that testing may have been flawed as noted in the section-by-section analysis of § 1041.6, but as we noted above, it is a reminder of the fact that disclosures in complicated areas, such as the payment attempt practices at issue here, are unlikely to be as effective as a substantive intervention shaped to respond more directly to the harms caused by the practice identified as unfair and abusive. That conclusion here is also consistent with the Bureau's conclusion about the effectiveness of disclosures as a possible alternative to the ability-to-repay requirements laid out above in Market Concerns—Underwriting and the section-by-section analysis of § 1041.4.

The principal obligation to comply with §§ 1041.8 and 1041.9 rests on the lender. Of course, if the lender uses a service provider to manage its payment withdrawals, that service provider may also be liable for any violation of the rule, as provided in the Dodd-Frank Act.[1040] The Bureau does not intend for this rule to have the effect of changing the obligations of non-lender depository institutions.

The Bureau also has decided not to require reauthorization after three failed attempts in a 12-month period. The effect of this change would be to establish a one-attempt cap where the lender had previously reached the two-attempt cap in the same 12-month period, or trigger the cap where, for example, every other payment fails. The Bureau has set the two-attempt cap to track the practice identified as unfair and abusive, and to avoid being overly restrictive by allowing the lender to make one more payment attempt after the first failed attempt following an authorization. The Bureau concludes that adding this requirement about the number of attempts in a 12-month period would add further complexity to the rule and would increase the burdens associated with tracking payment attempts.

8(c) Exception for Additional Payment Transfers Authorized by the Consumer

Proposed Rule

Whereas proposed § 1041.14(b) would have established the prohibition on further payment withdrawals, proposed § 1041.14(c) and (d) would have established requirements for obtaining the consumer's new and specific authorization to make further payment withdrawals. Proposed § 1041.14(c) was framed as an exception to the prohibition, even though payment withdrawals made pursuant to its requirements would not fall within the scope of the unfair and abusive practice preliminarily identified in proposed § 1041.13 (now § 1041.7 of the final rule).

Under the proposal, a new authorization obtained pursuant to

[1039] *See, e.g.,* Press Release, Bureau of Consumer Fin. Prot., ''CFPB Orders EZCORP to Pay $10 Million for Illegal Debt Collection Tactics,'' (Dec. 16, 2015), *available at http://www.consumerfinance.gov/newsroom/cfpb-orders-ezcorp-to-pay-10-million-for-illegal-debt-collection-tactics/;* Press Release, Bureau of Consumer Fin. Prot., ''CFPB Takes Action Against Online lender for Deceiving Borrowers,'' (Nov. 18, 2015), *available at https://www.consumerfinance.gov/about-us/newsroom/cfpb-takes-action-against-online-lender-for-deceiving-borrowers/.*

[1040] 12 U.S.C. 5531; 12 U.S.C. 5536(a).

proposed § 1041.14(c) would reset to zero the failed payment transfer count under proposed § 1041.14(b), whereas an authorization obtained pursuant to proposed § 1041.14(d) would not. Accordingly, a lender would be permitted under proposed § 1041.14(c) to initiate one or more additional payment transfers that are authorized by the consumer in accordance with certain requirements and conditions, and subject to the general prohibition on initiating a payment transfer after two consecutive failed attempts. The proposed authorization requirements and conditions in proposed § 1041.14(c) were designed to assure that, before a lender initiated another payment transfer (if any) after triggering the prohibition, the consumer did in fact want the lender to resume making payment transfers and that the consumer understands and had agreed to the specific date, amount, and payment channel for those succeeding payment transfers. The Bureau stated that requiring the key terms of each transfer to be clearly communicated to the consumer before the consumer decides whether to grant authorization would help assure that the consumer's decision is an informed one and that the consumer understands the consequences that may flow from granting a new authorization and help the consumer avoid future failed payment transfers. The Bureau believed that, when this assurance was provided, it no longer would be unfair or abusive for a lender to initiate payment transfers that accord with the new authorization, at least until such point that the lender initiated two consecutive failed payment transfers pursuant to the new authorization.

The Bureau recognized that, in some cases, lenders and consumers might want to use an authorization under this exception to resume payment withdrawals according to the same terms and schedule that the consumer had authorized prior to the two consecutive failed attempts. In other cases, lenders and consumers might want to establish a new authorization to accommodate a change in the payment schedule—as might be the case, for example, when the consumer entered into a workout agreement with the lender. Accordingly, the proposed exception was designed to be sufficiently flexible to accommodate both circumstances. In either circumstance, however, the lender would be permitted to initiate only those transfers authorized by the consumer under proposed § 1041.14(c).

Proposed § 1041.14(c)(1) would establish the general exception to the prohibition on additional payment transfer attempts under § 1041.14(b), while the remaining subparagraphs would specify particular requirements and conditions. First, proposed § 1041.14(c)(2) would establish the general requirement that for the exception to apply to an additional payment transfer, the transfer's specific date, amount, and payment channel must be authorized by the consumer. In addition, proposed § 1041.14(c)(2) would address the application of the specific date requirement to re-initiating a returned payment transfer and also address authorization of transfers to collect a late fee or returned item fee, if such fees are incurred in the future. Second, proposed § 1041.14(c)(3) would establish procedural and other requirements and conditions for requesting and obtaining the consumer's authorization. Lastly, proposed § 1041.14(c)(4) would address circumstances in which the new authorization becomes null and void. Each of these sets of requirements and conditions is discussed in detail below. Proposed comment 14(c)–1 summarized the exception's main provisions, and noted the availability of the exception in proposed § 1041.14(d).

Proposed § 1041.14(c)(1) provided that, notwithstanding the prohibition in proposed § 1041.14(b), a lender would be permitted to initiate additional payment transfers from a consumer's account after two consecutive transfers by the lender had failed if the transfers had been authorized by the consumer as required by proposed § 1041.14(c), or if the lender had executed a single immediate payment transfer at the consumer's request under proposed § 1041.14(d). Proposed comment 14(c)(1)–1 explained that the consumer's authorization required by proposed § 1041.14(c) would be in addition to, and not in lieu of, any underlying payment authorization or instrument required to be obtained from the consumer under applicable laws. The Bureau noted, for example, that an authorization obtained pursuant to proposed § 1041.14(c) would not take replace an authorization that a lender would be required to obtain under applicable laws to collect payments via RCCs, if the lender and consumer wished to resume payment transfers using that method. However, in cases where lenders and consumers wished to resume payment transfers via preauthorized EFTs, as that term is defined in Regulation E, the Bureau believed that—given the high degree of specificity required by proposed § 1041.14(c)—lenders could comply with the authorization requirements in Regulation E, 12 CFR 1005.10(b) and the requirements in proposed § 1041.14(c) within a single authorization process. Proposed § 1041.14(c)(2)(i) would establish the general requirement that for the exception in proposed § 1041.14(c) to apply to an additional payment transfer, the transfer's specific date, amount, and payment channel must be authorized by the consumer. The Bureau believed that requiring lenders to explain these key terms of each transfer to consumers when seeking authorization would help ensure that consumers could make an informed decision between granting authorization for additional payment transfers, and other convenient repayment options—*e.g.,* payments by cash or money order, ''push'' bill payment services, and single immediate payment transfers authorized pursuant to proposed § 1041.14(d)—which would help them avoid future failed payment transfers.

With respect to lenders that wished to obtain permission to initiate ongoing payment transfers from a consumer whose account has already been subject to two consecutive failed attempts, the Bureau believed it was important to require such lenders to obtain the consumer's agreement to the specific terms of each future transfer from the outset, rather than to provide for less specificity upfront and rely instead on the fact that under proposed § 1041.15(b), every consumer with a covered loan will receive notice containing the terms of each upcoming payment transfer. As discussed above, the Bureau believed that, in general, the proposed required notice for all payment transfers would help to reduce harms that may occur from payment transfers by alerting the consumers to the upcoming attempt in sufficient time for them to arrange to make a required payment when they could afford it, and to make choices that might minimize the attempt's impact on their accounts when the timing of a payment is not aligned with their finances. However, the Bureau believed that consumers whose accounts have already experienced two failed payment withdrawal attempts in succession would have demonstrated a degree of financial distress that would make it unlikely that a notice of another payment attempt would enable them to avoid further harm.

Proposed comment 14(c)(2)(i)–1 explained the general requirement that the terms of each additional payment transfer must be authorized by the consumer in order to qualify for the exception. It further clarified that for the as a firm baseline—but none of them appears to be consistent with the general terms that Congress used to articulate and confer this authority. Nor was any sound justification offered for the suggestion that the Bureau should extend a safe harbor against its use of the anti-evasion provision for at least the first year after the effective date of the final rule. As stated in the commentary, the pertinent analysis instead is and should be the ''actual substance of the lender's action as well as other relevant facts and circumstances'' and thus the Bureau made no changes to the commentary in this regard.

Finally, in light of this discussion, the Bureau concludes that the final anti-evasion provision is not arbitrary and capricious. Lenders are on notice about the substantive provisions of the final rule and they are on notice that if they act with knowing or reckless intent to evade those provisions, they may be subject to the anti-evasion provision. Congress expressly authorized the Bureau to enact such a provision pursuant to the Dodd-Frank Act, and through this rulemaking process the Bureau has considered the relevant factors, including numerous public comments and its own analysis, to adopt this anti-evasion provision in § 1041.13 of the final rule.

Section 1041.14 Severability

Proposal

Proposed § 1041.20 would have made the provisions of this rule separate and severable from one another.

Comments Received

Several commenters argued that the proposed rule should not include a severance provision because the various provisions of the proposal are interconnected and the proposal would create a whole new comprehensive regulatory framework. As such, if one provision is deemed invalid, they argued, the entire system should be deemed invalid. Commenters noted their impression that the proposal repeatedly emphasized that the provisions were designed to work in tandem, noting specifically the relationship between proposed §§ 1041.5 and 1041.7.

Final Rule

The Bureau is finalizing proposed § 1041.20 as final § 1041.14, such that it now reads: ''The provisions of this part are separate and severable from one another. If any provision is stayed or determined to be invalid, the remaining provisions shall continue in effect.'' The final rule removes the phrase ''it is the Bureau's intention that'' from the provision to clarify that the provision is not dependent on the Bureau's intention.

This is a standard severability clause of the kind that is included in most regulations and much legislation to clearly express agency intent about the course that is preferred if such events were to occur.

The Bureau disagrees with commenters that the provisions are so interconnected that if one provision should fail, the others should, as well. The Bureau specifically designed the framework of the rule so that the fundamental protections will continue regardless of whether one or another provision is not effectuated. The rule anticipates certain contingencies. For example, lenders can still enter into loans made pursuant to final § 1041.5, regardless of whether there is a registered information system pursuant to § 1041.11. Lenders may not be able to do so under § 1041.6. In the absence of such protections, then under the terms of the rule itself, such lending is not available, and that framework should thus continue.

Further, § 1041.6 is an exemption from § 1041.5, and thus, § 1041.5 alone should be more than sufficient to prevent the unfair and abusive practice identified in § 1041.4 if § 1041.6 should be overturned. Additionally, part B (§§ 1041.4 through 1041.6) and part C (§§ 1041.7 through 1041.9) are entirely separate, based on separate identified unfair and abusive practices, and thus, if either should fall, the other should remain intact and continue to operate.

These examples are merely illustrative, and do not constitute a complete list of sections which are severable from each other, nor of reasons that sections can operate independently from each other. The Bureau designed *each* individual provision to operate independently and, thus the Bureau is finalizing the severability clause, as proposed.

VI. Effective Date

Proposed Rule

The Bureau proposed that, in general, the final rule would take effect 15 months after publication in the **Federal Register**. The Bureau believed that 15 months struck the appropriate balance between providing consumers with necessary protections while giving covered persons adequate time to comply with all aspects of the final rule. In particular, the Bureau gave thought to the time necessary to implement the consumer reporting components of the proposal, in addition to the time that lenders would need to adjust their underwriting practices and prepare to provide new consumer disclosures. The Bureau proposed that proposed § 1041.17 (now final § 1041.11) would take effect 60 days after publication in the **Federal Register** with regard to registered information systems. The Bureau believed that this earlier effective date for § 1041.17 was appropriate to allow the standards and process for registration to be in place, which would be necessary for the information systems to be operational by the effective date of the other provisions of the final rule.

Comments Received

The Bureau received several comments suggesting that it should extend the effective date as to the general rule, with particular focus on 24 months after publication in the **Federal Register** as a proposed alternative. Commenters argued that 2 years would be necessary because they believed the rule would substantially change the core structure of the industry. One commenter cited the experience with the TILA–RESPA Integrated Disclosure Rule as evidence that complicated regulations require significant implementation time. That rule was initially published in the **Federal Register** on December 31, 2013, with an effective date of August 1, 2015,[1114] but the effective date was extended to October 3, 2015, roughly 21 months after the initial rule was published.[1115] Other commenters, more generally, suggested it would take more than 15 months, or ''years,'' to revise underwriting standards, develop new loan origination processes, train staff, upgrade systems to meet the new underwriting, disclosure, and recordkeeping requirements, and integrate their systems with the registered information systems.

Commenters also asked the Bureau more specifically to delay the date after which lenders will need to obtain a consumer report from a registered information system, citing concerns that lenders would be unable to make loans under the exemption in § 1041.6 if an information system is not registered sufficiently in advance of that data to allow lenders to rely on a consumer report from a registered information system as required under § 1041.6.

Final Rule

In light of comments received, and extended deadlines elsewhere in the rule, the Bureau is extending by six

[1114] 78 FR 79730 (Dec. 31, 2013).

[1115] 80 FR 43911 (July 24, 2015).

months the compliance date for §§ 1041.2 through 141.10, 1041.12, and 1041.13. The final rule will have an effective date of January 16, 2018, 60 days after publication in the **Federal Register**, and a compliance date for §§ 1041.2 through 1041.10, 1041.12, and 1041.13 of August 19, 2019, 21 months after publication in the **Federal Register**. The deadline to submit an application for preliminary approval for registration pursuant to § 1041.11(c)(1) is April 16, 2018, 150 days after publication in the **Federal Register**. Accordingly, the standards and processes for registration as registered information systems will become operative 60 days after the final rule's publication. However, it was persuaded that other time frames, based on the comments it received, should be extended. See the section-by-section analysis for §§ 1041.10 and 1041.11 for more details.

The Bureau has extended deadlines for applying to be a registered information system found in § 1041.11(c)(3). It has also extended the amount of time an information system must be registered before a lender must furnish to it under § 1041.10(b). The combined amount of time extended for registration and preparation to furnish is 5 months. It is the Bureau's intent to have information systems registered at least 180 days prior to the compliance date of §§ 1041.2 through 1041.10, 1041.12, and 1041.13 such that lenders can furnish to and obtain reports from a registered information system, and make loans under § 1041.6, immediately upon that effective date. To help ensure that occurs, the Bureau needed to extend the compliance date of §§ 1041.2 through 1041.10, 1041.12, and 1041.13, in light of the extended deadlines in §§ 1041.10 and 1041.11, by at least 5 months.

The timeline for implementation of the rule is as follows. The rule goes into effect 60 days after publication of the rule in the **Federal Register**. The deadline to submit an application for preliminary approval to become a registered information system before August 19, 2019 is 90 days from the effective date of § 1041.11 (it was 30 days in the proposal). That means the deadline for applicants seeking preliminary approval is 150 days after publication in the **Federal Register.** Once the Bureau grants preliminary approval, the applicant will have an additional 120 days to submit an application to become a registered information system (it was 90 days in the proposal). Under § 1041.10(b), lenders will be required to furnish to a registered information system that has been registered for 180 days or more (it was 120 days or more in the proposal), or upon the compliance date of § 1041.10, whichever is later. This will allow a period of at least 180 days for lenders to onboard to the registered information system and prepare to furnish. The Bureau believes a compliance date for §§ 1041.2 through 1041.10, 1041.12, and 1041.13 of 21 months after publication of the final rule in the **Federal Register** will accommodate these new periods and give the Bureau enough time to review applications.

The Bureau also agrees that the industry may need additional time to implement the requirements of this rule. The Bureau seeks to balance giving enough time for an orderly implementation period against the interest of enacting protections for consumers as soon as possible. The Bureau believes that by providing an additional 6 months for compliance with §§ 1041.2 through 1041.10, 1041.12, and 1041.13, lenders should be able to reasonably adjust their practices to come into compliance with the rule. Of course, the Bureau will monitor the implementation period and make adjustments as appropriate.

VII. Section 1022(b)(2) Analysis

A. Overview

In developing this final rule, the Bureau has considered the potential benefits, costs, and impacts as required by section 1022(b)(2) of the Dodd-Frank Act. Specifically, section 1022(b)(2) calls for the Bureau to consider the potential benefits and costs of a regulation to consumers and covered persons, including the potential reduction of access by consumers to consumer financial products or services, the impact on depository institutions and credit unions with $10 billion or less in total assets as described in section 1026 of the Dodd-Frank Act, and the impact on consumers in rural areas.

In the proposal, the Bureau set forth a preliminary analysis of these effects and requested comments that could inform the Bureau's analysis of the benefits, costs, and impacts of the proposal. In response, the Bureau received a number of comments on the topic. The Bureau has consulted with the prudential regulators and the Federal Trade Commission, including consultation regarding consistency with any prudential, market, or systemic objectives administered by such agencies.

The Bureau specifically invited comment on all aspects of the data that it used to analyze the potential benefits, costs, and impacts of the proposed provisions. While some commenters provided additional empirical analyses and data, the Bureau notes that in some instances, the requisite data are not available or are quite limited. As a result, portions of this analysis rely, at least in part, on general economic principles, the Bureau's experience and expertise in consumer financial markets, and qualitative evidence provided by commenters, while other portions rely on the data that the Bureau has collected and analyzed about millions of these loans. Many of the benefits, costs, and impacts of the final rule are presented in ranges, rather than as point estimates.

The Bureau also discussed and requested comment on several potential alternatives, which it listed in the proposal's Initial Regulatory Flexibility Analysis (IRFA) and also referenced in its Section 1022(b)(2) Analysis. A further detailed discussion of potential alternatives considered is provided in part VII.J and the Final Regulatory Flexibility Analysis (FRFA) in part VIII below.

B. Major Provisions and Coverage

In this analysis, the Bureau focuses on the benefits, costs, and impacts of the four major elements of the final rule: (1) The requirement to reasonably determine borrowers' ability to repay covered short-term and longer-term balloon-payment loans according to their terms (along with the exemption allowing for a principal step-down approach to issuing a limited number of short-term loans); (2) certain limitations on attempts to initiate payment for covered loans; (3) the recordkeeping requirements associated with (1) and (2); and (4) the rule's requirements concerning registered information systems.

The discussion of impacts that follows is organized into these four main categories. Within each, the discussion is organized to facilitate a clear and complete consideration of the benefits, costs, and impacts of the major provisions of the rule. Impacts on depository institutions with $10 billion or less in total assets and on rural consumers are discussed separately below.

There are two major classes of short-term lenders the Bureau expects to be affected by the ability-to-repay provisions of the rule: Payday/unsecured short-term lenders, both storefront and online, and short-term vehicle title lenders. The Bureau also believes there is at least one bank that makes deposit advance product loans that are likely to be covered by these provisions. The Bureau recognizes that some community banks and credit unions occasionally make short-term secured or unsecured loans, but the Bureau believes that those loans will generally fall within the exemption for alternative loans or the exemption for accommodation loans under § 1041.3(e) and (f). Similarly, the Bureau recognizes that some firms in the financial technology (fin tech) space are seeking to offer products designed to enable consumers to better cope with liquidity shortfalls, but the Bureau believes that those products, to a significant extent, will fall within the exclusion for wage advance programs under § 1041.3(d)(7) or the exclusion for no-cost advances under § 1041.3(d)(8).[1116]

In addition to short-term lenders, lenders making longer-term balloon-payment loans (either vehicle title or unsecured) are also covered by the ATR requirements and the rule's requirements concerning registered information systems. The Bureau believes there are many fewer such lenders, but notes that the following discussion applies to these lenders as well.

The provisions relating to payment practices and related notices apply to any lender making a covered loan, either covered short-term loans, covered longer-term balloon-payment loans, or covered longer-term loans. However, payment withdrawals by lenders who also hold the consumer's deposit account are exempt if they meet certain conditions. The payment provisions affect certain online lenders, who make loans with an APR above 36 percent and normally receive payments via ACH or other electronic means. In addition, storefront payday or payday installment lenders that receive payment via ACH or post-dated check, either for regular payments or when a borrower has failed to come to the store and make a cash payment in person, will be affected, as will some traditional finance companies if they make loans that meet the criteria for a covered longer-term loan. Lenders making vehicle title loans often do not obtain the same forms of account access, but those that do will also be affected.

The provisions relating to recordkeeping requirements apply to any lender making covered loans, with additional requirements for lenders making covered short-term and longer-term balloon-payment loans. The provisions relating to the application process for entities seeking to become registered information systems govern any and all entities that apply to become such information systems.[1117] The provisions relating to the requirements to operate as a provisionally registered or registered information system apply to any entity that becomes a provisionally registered or registered information system.

The Bureau received many comments that seemed to mistakenly interpret the rule as a ban on payday and/or vehicle title loans. It should be noted that none of the above provisions, either on their own or in combination, constitutes a ban on covered lending. As such, the rule does not explicitly ban payday, vehicle title, longer-term balloon, or any other covered loans. While the Bureau estimates that there will be a substantial reduction in the volume of covered short-term payday loans made in response to the rule prior to any reforms that may occur in the market, the Bureau believes such loans will remain available to the vast majority of consumers facing a truly short-term need for credit (where permitted by State law). In fact, as described in greater detail below, the Bureau's simulations suggest that the rule will only restrict roughly 6 percent of borrowers from initiating a payday borrowing sequence they would have initiated absent the rule. In the case of short-term vehicle title loans, the Bureau acknowledges that a more substantial portion of lending will be curtailed.[1118]

C. Baseline for Consideration of Benefits, Costs, and Impacts

In considering the potential benefits, costs, and impacts of the rule, the Bureau takes as the baseline for the analysis the regulatory regime that currently exists for the covered products and covered persons.[1119] Given that the Bureau takes the status quo as the baseline, the analysis below focuses on providers that currently offer short-term loans and longer-term loans with balloon features, the potential entrants into the market for registered information systems required under this rule (although their participation is voluntary), and, to a lesser extent, providers of covered longer-term loans that face limits on their activities only through the intervention affecting payment practices.

The baseline considers economic attributes of the relevant markets and the existing legal and regulatory structures applicable to providers. Most notably, the baseline recognizes the wide variation in State-level restrictions that currently exist. As described in greater detail in part II above, there are now 35 States that either have created a carve-out from their general usury cap for payday loans or have no usury caps on consumer loans.[1120] The remaining 15 States and the District of Columbia either ban payday loans or have fee or interest rate caps that payday lenders apparently find too low to sustain their business models. Further variation exists within States that allow payday loans, as States vary in their payday loan size limits and their rules related to rollovers (*e.g.,* when rollovers are permitted and whether they are subject to certain limitations such as a numerical cap or requirements that the borrower must amortize the rollover by repaying part of the original loan

[1116] The Bureau also believes many of the current ''fintech'' offerings fall outside of at least the ability-to-repay requirements of the rule, as they often focus on longer-term lending without balloon payments.

[1117] In this section the Bureau's references to registered information systems will generally include both provisionally registered information systems and registered information systems, as lenders will be required to report to both types of systems, and incur similar costs to do so.

[1118] In this section the Bureau focuses most of its analysis on payday and vehicle title loans, rather than the longer-term balloon-payment loans that face similar coverage. The Bureau has observed that longer-term balloon-payment loans are currently less common, and have arisen mostly in response to regulatory regimes restricting or banning payday loans. As such, the Bureau has substantially less evidence about these loans. The Bureau does possess data for a single lender that made longer-term vehicle title loans with both balloon and amortizing payment schedules. These data show that loans with balloon payments defaulted at a substantially higher rate (see ''CFPB Report on Supplemental Findings,'' at 30), but do not provide much insight into the broader market for these loans. Still, the Bureau has concluded that they generally lead to similar harms due to their payment structures, and will experience similar effects from this rule.

[1119] The Bureau has discretion in each rulemaking to choose the relevant provisions to discuss and to choose the most appropriate baseline for that particular rulemaking.

[1120] *See* Pew Charitable Trusts, ''State Payday Loan Regulation and Usage Rates,'' (Jan. 14, 2014), *available at http://www.pewtrusts.org/en/multimedia/data-visualizations/2014/state-payday-loan-regulation-and-usage-rates* (for a list of States). Other reports reach slightly different totals of payday authorizing States depending on their categorization methodology. *See, e.g.,* Susanna Montezemolo, ''The State of Lending in America & Its Impact on U.S. Households: Payday Lending Abuses and Predatory Practices,'' at 32–33 (Ctr. for Responsible Lending 2013), *available at http://www.responsiblelending.org/sites/default/files/uploads/10-payday-loans.pdf;* Consumer Fed'n of Am., ''Legal Status of Payday Loans by State,'' *available at http://www.paydayloaninfo.org/state-information* (last visited Apr. 6, 2016) (lists 32 States as having authorized or allowed payday lending). Since publication of these reports, South Dakota enacted a 36 percent usury cap for consumer loans. Press Release, S.D. Dep't of Labor and Reg., ''Initiated Measure 21 Approved'' (Nov. 10, 2016), *available at http://dlr.sd.gov/news/releases16/nr111016_initiated_measure_21.pdf.* Legislation in New Mexico prohibiting short-term payday and vehicle title loans will go into effect on January 1, 2018. Regulatory Alert, N.M. Reg. and Licensing Dep't, ''Small Loan Reforms,'' *available at http://www.rld.state.nm.us/uploads/files/HB%20347%20Alert%20Final.pdf.*

payment).[1245] Additionally, the findings rely on a small survey conducted across only two States where idiosyncratic effects may drive many of the results. As such, the Bureau believes the actual welfare implications from this study are hard to generalize.

Priestly (2014), another paper frequently mentioned in industry comments, is more clear on the welfare implications of payday, and specifically re-borrowing. The author's results indicate, for example, that each rollover in 2008–2009 was associated with a .109-point increase in a customer's VantageScore (a credit score similar to FICO). The Bureau believes these benefits are quite small, as Priestly's findings suggest that the average consumer in her sample would need to roll a payday loan over more than nine times (at a cost of approximately $135 per $100 borrowed) in order to increase his or her VantageScore by one point. For the average customer in Priestly's sample, this would represent an increase from 587 to 588, deep enough into the subprime range that such a change would be unlikely to have any practical value.

The Morse (2011) study differs from the other intent-to-treat studies most cited by commenters, as it focuses on a source of variation more relevant to this rule (endogenous concentrations of lenders, rather than restrictions on locations), and its welfare implications are more nuanced. Specifically, Morse finds that borrowers appear ''better off'' in the face of unexpected shocks (*i.e.,* those that lead to discrete needs) with access to payday loans. While the outcome measures used in the study (*e.g.,* home foreclosures) limit the generalizability of the findings (as homeowners may not be representative of the typical payday borrower), the Bureau believes this study is methodologically sound and the findings are large and significant enough to warrant deep consideration. However, the Bureau has found little in this study to imply that a limit on continued use of payday loans (rather than a limit on the availability of short-term credit for discrete needs) would necessarily decrease borrowers' welfare.

ii. Individual-Level Studies

Other studies, rather than using differences across States in the availability of payday loans, have used data on the actual borrowers who apply for loans and are either offered loans or are rejected. These individual-level studies offer more direct insight into the effects of payday loans, rather than the effect of access measured by the intent-to-treat studies. Skiba and Tobacman (2009) used this approach to find that taking out a payday loan increases the likelihood that the borrower will file for Chapter 13 bankruptcy.[1246] They found that initial approval for a payday loan essentially doubled the bankruptcy rate of borrowers. Bhutta, et al., (2015) used a similar approach to measure the causal effects of storefront borrowing on borrowers' credit scores.[1247] They found that obtaining a loan had no impact on how the consumers' credit scores evolved over the following months. The authors noted, however, that applicants generally had very poor credit scores both prior to and after borrowing (or being rejected for) a payday loan. In each of these studies, the authors were unable to determine whether borrowers that were rejected by the lender from which they had data were able to take out a loan from another lender.

Two other studies have used data on payday borrowing and repayment behavior to compare changes over time in credit scores for different groups of borrowers. Priestley (2014), discussed above, measured changes over time in credit scores for borrowers who re-borrowed different numbers of times, and found that in some cases it appeared that borrowers who re-borrowed more times had slightly more positive changes in their credit scores.[1248] These differences were not economically meaningful, however, implying borrowers would need to rollover a loan more than nine times (at an average total cost of $135 per $100 borrowed) to see a one-point increase in their VantageScores.[1249] Mann (2014) compared the changes in credit scores of borrowers who defaulted on their loans with borrowers who did not, and also found no difference.[1250] Similar to the Bhutta, et al. (2015) study, neither the Priestly nor Mann studies found a meaningful effect of payday loan borrowing behavior on credit scores. Unlike Bhutta, et al. (2015), however, if either had measured an effect it would have simply been a finding of correlation, as neither had a way of identifying an effect as causal.

Gathergood, et al. (2016),[1251] used an approach similar to that used by Skiba and Tobacman (2014) and Bhutta, et al., (2015) to study the effects of taking out payday loans on United Kingdom borrowers' future overdrafting, rates of delinquency on other loan products, subjective well-being, and feelings of regret about borrowing. The products studied are similar to payday loans in the United States, primarily single-payment loans due in roughly 30 days. While the UK market includes storefront lenders, it is dominated by online lenders. The authors found that online payday loans led to higher rates of bank overdraft and delinquencies on other loans. While it had no effect on subjective measures of well-being, borrowers did report regretting the decision to take out the payday loan.

Baugh (2015) used the closure of dozens of online payday lenders, which cut off borrowers' access to such loans and other high-cost online credit, to measure the effects of these loans on consumers' consumption, measured via expenditures on debit and credit cards, and on overdrafts and insufficient funds transactions.[1252] He found that losing access to these loans, especially for consumers who had been heavy users of these loans, led to increased consumption and fewer overdrafts or NSF transactions.

iii. Experimental Studies

There have also been at least three studies of the impacts of payday loans that rely on experimental approaches. Bertrand and Morse (2011) run an experiment providing three types of information disclosures about the costs and re-borrowing rates of payday loans at the time borrowers receive their loans

[1245] Phone disconnections were explored in greater detail in the working paper version. *See* Jonathan Zinman, ''Restricting Consumer Credit Access: Household Survey Evidence on Effects Around the Oregon Rate Cap,'' (Dartmouth College, 2008), *available at http://www.dartmouth.edu/~jzinman/Papers/Zinman_RestrictingAccess_oct08.pdf.*

[1246] Paige Marta Skiba and Jeremy Tobacman. ''Do Payday Loans Cause Bankruptcy?,'' (Vand. U. Sch. of L., L. and Econ., Working Paper No. 11–13, 2011), *available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1266215.*

[1247] Neil Bhutta et al., ''Payday Loan Choices and Consequences,'' 47 J. of Money, Credit and Banking 223 (2015).

[1248] Jennifer Priestly, ''Payday Loan Rollovers and Consumer Welfare'' (Kennesaw State U., Dep't of Stats. and Analytical Sciences 2014).

[1249] The Priestley study also compared changes over time in credit scores of payday borrowers in different States, and attributed those differences to differences in the States' payday regulations. This ignores differences in who chooses to take out payday loans in different States, and ignores the different changes over time in the broader economic conditions in different States.

[1250] Ronald Mann, ''Do Defaults on Payday Loans Matter?,'' (Colum. L. and Econ., Working Paper No. 509, 2015), *available at https://papers.ssrn.com/sol3/Papers.cfm?abstract_id=2560005.*

[1251] John Gathergood et al., ''Comments on: How do Payday Loans Affect Consumers?'' (NBER Summer Institute–L. and Econ. 2015).

[1252] Brian Baugh, ''What Happens When Payday Borrowers Are Cut Off From Payday Lending? A Natural Experiment,) (Ph.D. dissertation, Ohio State Univ., 2015), *available at http://fisher.osu.edu/supplements/10/16174/Baugh.pdf.*

from a storefront payday lender.[1253] The disclosures are found to reduce the incidence of re-borrowing by 6–11 percent and the average amount borrowed by 12–23 percent relative to the control group, with stronger results for borrowers self-reporting higher degrees of self-control.

Fusaro and Cirillo (2011) conduct an experiment in which some borrowers are given no-fee loans and their re-borrowing rates are compared to borrowers who are given loans with normal fees.[1254] They find that re-borrowing rates are not different between the two groups. This could lead to at least two possible and compatible conclusions: That the cost does not drive a cycle of debt, and/or that the single-payment structure is a key factor that drives unaffordability, not merely the fee.

Commenters also referenced a third experimental study, Wilson et al. (2010).[1255] In this study the authors conducted a laboratory experiment designed to test whether access to payday loans improves or worsens the likelihood of ''financial survival'' or financial health in the face of expense shocks. The authors found that the students engaged in the game were more likely to successfully manage financial shocks if they had access to payday loans. However, when they explore the intensity of usage, they find that participants who utilize 10 or more loans over the 30 experimental months find themselves at greater risk than they would under a regime that bans payday loans.

iv. Discussion of Literature

The Bureau received numerous comments selectively citing the studies listed above, and making reference to particular results of interest to the commenters. Generally, industry and trade group commenters favored studies that imply access improves consumer outcomes (*e.g.,* Priestly (2014), Zinman (2010)); consumer groups favored studies that imply access harms consumers (*e.g.,* Skiba and Tobacman (2015), Baugh (2015)); and academic researchers referenced numerous studies highlighting the ambiguity or uncertainty illustrated by the literature. The Bureau has considered the comments carefully and gives weight to the studies in proportion to their applicability to the rule, generalizability, and methodological soundness.[1256] Additionally, and as much as possible, the Bureau has endeavored to rely on the descriptive (positive) findings of the studies, and not the authors' interpretations (often normative) of those findings.

In reviewing the existing literature, the Bureau notes that the evidence on the impacts of the availability of payday loans on consumer welfare indeed varies. In general, the evidence to date suggests that access to payday loans appears to benefit consumers in circumstances where they use these loans for short periods to address an unforeseen and discrete need, such as when they experience a transitory and unexpected shock to their incomes or expenses. However, in more general circumstances, access to and intensive use of these loans appears to make consumers worse off. A more succinct summary is: Access to payday loans may well be beneficial for those borrowers with discrete, short-term needs, but only if they can succeed in avoiding long sequences of loans.

There is also some limited evidence about the welfare effects of ''intensive'' users of payday. It should be noted, however, that there are no studies the Bureau is aware of that directly evaluate the welfare impacts of the seventh and later loans taken by a borrower in a 12-month span.[1257] There are also no studies on the welfare effects of payday loans made specifically to borrowers who would have failed an ATR assessment. Since the rule's restrictions should only bind for individuals who demand a seventh loan in a 12-month period and cannot demonstrate an ability to repay, there are no studies that speak directly to the likely impacts of the regulation.

As this rule will allow for continued access to the credit that appears to benefit consumers with discrete needs, the Bureau believes that the rule limits the potential harm other borrowers may experience while maintaining much of the welfare gains consumers realize from access to these loans.

G. Benefits and Costs of the Rule to Covered Persons and Consumers—Payments and Notices

The rule limits how lenders initiate payments on a covered loan from a borrower's account and imposes two notice requirements relating to such payments. Specifically, if two consecutive prior attempts to withdraw payment through any channel from a borrower's account have failed due to insufficient funds, lenders are prohibited from continuing to attempt to withdraw payment from a borrower's account, unless the lender obtains a new and specific authorization to make further withdrawals from the consumer's account. The rule also requires lenders of covered loans to provide a notice to a borrower before the initial withdrawal attempt and before initiating an unusual withdrawal attempt. A special notice is also required to be sent to the borrower if the lender can no longer continue to initiate payment directly from a borrower's account because two consecutive prior attempts had failed due to insufficient funds. The impacts of these proposals are discussed here for all covered loans.

Note that the Bureau expects that unsuccessful payment withdrawal attempts will be less frequent under the rule. This is because of the notice of irregular withdrawals; and it is also true because the ability-to-repay provisions or the requirements of the conditional exemption loans will reduce the frequency with which borrowers receive loans that they do not have the ability to repay. This should in turn lessen the impacts of the limitation on payment withdrawal attempts and the number of instances where a lender is required to notify consumers that the lender is no longer permitted to attempt to withdraw payments from a borrower's account.

Most if not all of the requirements in this portion of the rule are activities that lenders could have chosen to engage in absent the rule. As such, the Bureau

[1253] Marianne Bertrand, and Adair Morse, ''Information, Disclosure, Cognitive Bias, and Payday Borrowing,'' 66 J. of Fin. and Econ. 1865 (2011).

[1254] Marc A. Fusaro & Patricia J. Cirillo, ''Do Payday Loans Trap Consumers in a Cycle of Debt?,'' (2011), *available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1960776.*

[1255] Bart J. Wilson et al., ''An Experimental Analysis of the Demand for Payday Loans,'' 10 B.E. J. of Econ. Analysis & Policy (2010).

[1256] The Bureau received numerous comments calling into question the objectivity of some studies funded by industry. These issues have also been noted in the press. *See, e.g.,* Ben Walsh and Ryan Grim, ''Emails Show Pro-Payday Loan Study Was Edited by the Payday Loan Industry,'' Huffington Post, Nov. 2, 2015, *available at http://www.huffingtonpost.com/entry/payday-loan-study_us_5633d933e4b00aa54a4e4273*; Christopher Werth, ''Tracking the Payday-Loan Industry's Ties to Academic Research,'' Freakonomics, Apr. 6, 2014, *available at http://freakonomics.com/podcast/industry_ties_to_academic_research/*. At least one of these studies appears to have given editorial and content control to an industry lobbyist. Others failed to reference the financial and other support received from the group in any of their acknowledgements, as is the best practice in such research. Still others mention the support received, but assert the group had no influence on the study or its findings (a similar assertion was made in the study where influence was documented). Such comments are to be expected in any contentious policy debate. Overall, the Bureau attempted to judge each study on its merits. As such, findings from these industry studies are generally weighted by their methodological soundness (in terms of data collection and analysis).

[1257] Bart J. Wilson et al., ''An experimental analysis of the demand for payday loans,'' 10 B.E. J. of Econ. Analysis & Policy (2010) (This analysis does show that once a participant takes 10 or more loans in a 30-month span, the loans appear to be more harmful than helpful to financial survival.)

believes that, while there are potential benefits to lenders, the restrictions are expected to impose some costs on these covered persons.[1258] That said, the Bureau is aware that many lenders have practices of not continuing to attempt to withdraw payments from a borrower's account after one or more failed attempts, and that some depository institutions do not assess additional fees to customers when continued attempts to withdraw from their accounts are made. In addition, some lenders provide upcoming-payment notices to borrowers in some form.

1. Limitation on Payment Withdrawal Attempts

The rule prevents lenders from attempting to withdraw payment from a consumer's account if two consecutive prior payment attempts made through any channel are returned for nonsufficient funds. The lender can resume initiating payment if the lender obtains from the consumer a new and specific authorization to collect payment from the consumer's account.

a. Benefits and Costs to Covered Persons

The rule will impose costs on lenders by limiting their use of payment methods that allow them to withdraw funds directly from borrowers' accounts, and by imposing the cost of obtaining a renewed authorization from the consumer or using some other method of collecting payment. There may be some benefits to lenders of reduced attempts to withdraw funds following repeated failures, as other methods of collecting may be more successful.

The impact of this restriction depends on how often a lender previously attempted to collect from a consumers' account after more than two consecutive failed transactions, and how often the lender was successful in doing so. Based on industry outreach, the Bureau understands that some lenders had already established a practice of not continuing to attempt to collect using these means after one or two failed attempts. These lenders would not incur costs from the restriction. Additionally, some depository institutions have disallowed repeated attempts to collect using these means; lenders attempting to collect from such depositories would also not incur costs from this restriction.

The Bureau has analyzed the ACH payment request behavior of lenders making payday or payday installment loans online. The Bureau found that about half the time that an ACH payment request fails, the lender makes at least two additional ACH payment requests.[1259] The likelihood of a successful payment request after a request that was returned for insufficient funds is quite low. Only 30 percent of requests that follow a failed request succeed, only 27 percent of third requests succeed, and after that the success rate is below 20 percent.[1260] The Bureau found that only 7 to 10 percent of the payments attempted through the ACH system came after two failed payments requests, equivalent to $55 to $219 per borrower from whom a payment was collected after the two failed attempts.[1261] These payments would have been prevented if the rule had been in place at the time. The Bureau notes that under the restriction, lenders can still seek payment from borrowers by engaging in other lawful collection practices. As such, the preceding are high-end estimates of the impact this restriction would have had on the collection efforts of these lenders. These other forms of lawful collection practices, however, may be more costly for lenders than attempting to collect directly from a borrower's account.

After the limitation is triggered by two consecutive failed attempts, lenders are required to send a notice to consumers. To seek a new and specific authorization to collect payment from a consumer's account, the lender can send a request with the notice and may need to initiate additional follow-up contact with the consumer. The Bureau believes that this will most often be done in conjunction with general collections efforts and will impose little additional cost on lenders, other than the costs associated with the disclosures, discussed below.

To the extent that lenders assess returned item fees when an attempt to collect a payment fails and are subsequently able to collect on those fees, this rule may reduce lenders' revenues.

Lenders will also need the capability of identifying when two consecutive payment requests have failed. The Bureau believes that the systems lenders use to identify when a payment is due, when a payment has succeeded or failed, and whether to request another payment will have the capacity to identify when two consecutive payments have failed, and therefore this requirement will not impose a significant new cost.

b. Benefits and Costs to Consumers

Consumers will benefit from the restriction because it will reduce the fees they are charged by the lender and the fees they are charged by their depository institution. Many lenders charge a returned item fee when a payment is returned for insufficient funds. Borrowers will benefit if the reduced number of failed ACH payment requests also results in reductions in the number of these fees, to the extent that they are eventually paid. Borrowers may also benefit from a reduction in the frequency of checking account closure, to be discussed below.

Each time an ACH transaction is returned for insufficient funds, the borrower is likely to be charged an NSF fee by her financial institution. In addition, each time a payment is paid by the borrower's financial institution when the borrower does not have sufficient funds in the account to cover the full amount of the payment, the borrower is likely to be charged an overdraft fee. Overdraft and NSF fees each average $34 per transaction.[1262] As noted above, most re-presentments[1263] of failed payment requests themselves fail, leading to additional NSF fees. In addition, about a third of all re-presentments that succeed only succeed because the borrower's financial institution paid it as an overdraft, likely leading to an overdraft fee. The Bureau's analysis of online lender payment practices shows that borrowers who have two payment withdrawal attempts fail are charged additional fees on subsequent payment attempts of $64 to

[1258] This is simply a revealed preference argument that to the extent that lenders did not voluntarily choose to engage in the activities, it is likely the case that the benefits to lenders do not outweigh the costs to lenders (at least in the lenders' views).

[1259] CFPB Online Payday Loan Payments, at 14 tbl. 2. Lenders make at least one additional request after a failed payment request 74 percent of the time. Two-thirds of these are followed by a third request, if the second also fails. These calculations exclude multiple requests made on the same day, as those requests are unlikely to be intentional re-presentments of failed attempts because the lender is unlikely to know that a payment failed on the same day it was submitted and be able to re-present the request on the same day. The data used in the Bureau's analysis were for 18 months in 2011 and 2012. Changes to the rules governing the ACH system in the fall of 2015 may have reduced the frequency with which lenders continue to make payment requests after one or more payment attempts have failed.

[1260] CFPB Online Payday Loan Payments, at 13 tbl. 1.

[1261] CFPB Report on Supplemental Findings, at 150. These impacts may be lower now than they were at the time covered by the data analyzed by the Bureau, due to changes in industry practices and to changes in the rules governing the ACH system referred to in note CFPB Online Payday Loan Payments, at 14 tbl. 2.

[1262] CFPB Online Payday Loan Payments, at 2.

[1263] For the purposes of its analysis, the Bureau referred to any payment request following a failed payment request as a ''re-presentment.'' The only exception was when multiple payment requests were submitted on the same day; if two or more failed, only the first failed payment request was considered a re-presentment.

TAB 16

***Payday, Vehicle Title, and Certain High-Cost Installment Loans; Ratification of Payment Provisions*,**
85 Fed. Reg. 41,905-02 (July 13, 2020)

41905

Rules and Regulations

Federal Register

Vol. 85, No. 134

Monday, July 13, 2020

DEPARTMENT OF AGRICULTURE

Animal and Plant Health Inspection Service

9 CFR Part 161

[Docket No. APHIS–2017–0065]

RIN 0579–AE40

National Veterinary Accreditation Program; Correction

AGENCY: Animal and Plant Health Inspection Service, Agriculture (USDA).

ACTION: Correcting amendment.

SUMMARY: In a final rule that was published in the **Federal Register** on February 25, 2020, and effective on March 26, 2020, we amended the regulations governing the National Veterinary Accreditation Program by, among other things, replacing all instances of the term ''Veterinarian-in-Charge'' with the term ''Veterinary Official.'' However, we inadvertently left two instances of the term ''Veterinarian-in-Charge'' in the regulations. This document corrects that oversight in the final rule.

DATES: Effective July 13, 2020.

FOR FURTHER INFORMATION CONTACT: Dr. Todd Behre, Coordinator, National Veterinary Accreditation Program; National Animal Disease Traceability and Veterinary Accreditation Center, APHIS Veterinary Services; (518) 281–2157; *todd.h.behre@usda.gov.*

SUPPLEMENTARY INFORMATION: On February 25, 2020, we published in the **Federal Register** (85 FR 10562–10565, Docket No. APHIS–2017–0065) a final rule that amended the National Veterinary Accreditation Program regulations in 9 CFR parts 160, 161, and 162. Among other changes to these regulations, we replaced the term ''Veterinarian-in-Charge'' with the term ''Veterinary Official'' throughout. However, in § 161.1(e)(4), we inadvertently left two instances of ''Veterinarian-in-Charge'' unchanged. This document corrects that error.

List of Subjects in 9 CFR Part 161

Reporting and recordkeeping requirements, Veterinarians.

Accordingly, we are amending 9 CFR part 161 as follows:

PART 161—REQUIREMENTS AND STANDARDS FOR ACCREDITED VETERINARIANS AND SUSPENSION OR REVOCATION OF SUCH ACCREDITATION

■ 1. The authority citation for part 161 continues to read as follows:

Authority: 7 U.S.C. 8301–8317; 15 U.S.C. 1828; 7 CFR 2.22, 2.80, and 371.4.

§ 161.1 [Amended]

■ 2. In § 161.1, paragraph (e)(4) introductory text is amended by removing the words ''Veterinarian-in-Charge'' both times they appear and adding the words ''Veterinary Official'' in their place.

Done in Washington, DC, this 22nd day of June 2020 .

Mark Davidson,

Acting Administrator, Animal and Plant Health Inspection Service.

[FR Doc. 2020–13920 Filed 7–10–20; 8:45 am]

BILLING CODE 3410–34–P

BUREAU OF CONSUMER FINANCIAL PROTECTION

12 CFR Part 1041

Payday, Vehicle Title, and Certain High-Cost Installment Loans; Ratification of Payment Provisions

AGENCY: Bureau of Consumer Financial Protection.

ACTION: Ratification.

SUMMARY: The Bureau of Consumer Financial Protection (Bureau), through its Director, is ratifying certain provisions of its November 17, 2017 rule regarding payday, vehicle title, and certain high-cost installment loans.

DATES: This ratification is issued on July 13, 2020 and relates back to the Rule published on November 17, 2017.

FOR FURTHER INFORMATION CONTACT: Christopher Shelton, Counsel, Legal Division, at 202–435–7700. If you require this document in an alternative electronic format, please contact *CFPB_Accessibility@cfpb.gov.*

SUPPLEMENTARY INFORMATION:

I. Background

The Bureau was established by the Consumer Financial Protection Act of 2010 (CFPA).[1] Section 1011(c)(3) of the CFPA provided that the President may remove the Director of the Bureau only for inefficiency, neglect of duty, or malfeasance in office.[2]

The Bureau's rule regarding Payday, Vehicle Title, and Certain High-Cost Loan Installments (2017 Final Rule or Rule)[3] contained two primary components: (1) Mandatory underwriting provisions requiring lenders to assess borrowers' ability to repay before making covered loans;[4] and (2) payments provisions governing lenders' withdrawing payments for covered loans from consumers' bank accounts.[5]

On June 29, 2020, the Supreme Court held in *Seila Law LLC* v. *CFPB* that the CFPA's removal provision violates the separation of powers.[6] The Court further held that ''the CFPB Director's removal protection is severable from the other statutory provisions bearing on the CFPB's authority. The agency may therefore continue to operate, but its Director, in light of our decision, must be removable by the President at will.''[7] ''The only constitutional defect we have identified in the CFPB's structure is the Director's insulation from removal.''[8]

The Bureau is separately issuing a rule that rescinds the mandatory underwriting provisions of the 2017 Final Rule. That rule does not affect the separate payments provisions, and this ratification is independent of that rule.

II. Ratification

The Bureau, through its Director, hereby affirms and ratifies the payment provisions[9] of the 2017 Final Rule.

[1] Public Law 111–203, title X, 124 Stat. 1376, 1955–2113 (2010).

[2] 12 U.S.C. 5491(c)(3).

[3] 82 FR 54472 (Nov. 17, 2017).

[4] 12 CFR 1041.4–1041.6, 1041.10, 1041.11, 1041.12(b)(1)–(3).

[5] 12 CFR 1041.2, 1041.3, 1041.7–1041.9, 1041.12(a), (b) introductory text, (b)(4)–(5), 1041.13.

[6] 591 U.S.—(2020) (slip op.).

[7] *Id.* at 3.

[8] *Id.* at 32.

[9] 12 CFR 1041.2, 1041.3, 1041.7–1041.9, 1041.12(a), (b) introductory text, (b)(4)–(5), 1041.13.

The Bureau's Director is familiar with the payment provisions and has also conducted a further evaluation of them for purposes of this ratification. Based on the Director's evaluation of the payment provisions, it is the Director's considered judgment that they should be ratified.[10]

Dated: July 7, 2020.

Kathleen L. Kraninger,

Director, Bureau of Consumer Financial Protection.

[FR Doc. 2020–14937 Filed 7–10–20; 8:45 am]

BILLING CODE 4810–AM–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2018–0180; Project Identifier 2017–CE–043–AD; Amendment 39–21146; AD 2020–13–01]

RIN 2120–AA64

Airworthiness Directives; Daher Aircraft Design, LLC (Type Certificate Previously Held by Quest Aircraft Design, LLC), Airplanes

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule.

SUMMARY: The FAA is adopting a new airworthiness directive (AD) for all Daher Aircraft Design, LLC (type certificate previously held by Quest Aircraft Design, LLC), Model KODIAK 100 airplanes. This AD was prompted by reports of cracks found in certain nose landing gear (NLG) forks. This AD requires a one-time inspection to determine if an affected NLG fork is installed, repetitive inspections of the affected NLG fork for cracks, repetitive inspections of the shimmy damper bracket for looseness, and of the shimmy damper system for damaged components if an affected NLG fork is installed, and rework/replacement of parts as necessary. The FAA is issuing this AD to address the unsafe condition on these products.

DATES: This AD is effective August 17, 2020.

The Director of the Federal Register approved the incorporation by reference of certain publications listed in this AD as of August 17, 2020.

ADDRESSES: For service information identified in this final rule, contact Kodiak Aircraft Company, Inc., 1200 Turbine Drive, Sandpoint, Idaho 83864; phone: (208) 263–1111 or 1 (866) 263–1112; email: *KodiakCare@daher.com;* internet: *http://Kodiak.aero/support.* You may view this service information at the FAA, Airworthiness Products Section, Operational Safety Branch, 901 Locust, Kansas City, Missouri 64106. For information on the availability of this material at the FAA, call 816–329–4148. It is also available on the internet at *https://www.regulations.gov* by searching for and locating Docket No. FAA–2018–0180.

Examining the AD Docket

You may examine the AD docket on the internet at *https://www.regulations.gov* by searching for and locating Docket No. FAA–2018–0180; or in person at Docket Operations between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The AD docket contains this final rule, the regulatory evaluation, any comments received, and other information. The address for Docket Operations is U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE, Washington, DC 20590.

FOR FURTHER INFORMATION CONTACT: Wade Sullivan, Aerospace Engineer, Airframe Section, FAA, Seattle ACO Branch, 2200 South 216th St., Des Moines, WA 98198; phone and fax: 206–231–3530; email: *Wade.Sullivan@faa.gov.*

SUPPLEMENTARY INFORMATION:

Discussion

The FAA issued a notice of proposed rulemaking (NPRM) to amend 14 CFR part 39 by adding an AD that would apply to all Quest Aircraft Design, LLC (type certificate now held by Daher Aircraft Design, LLC), Model KODIAK 100 airplanes. The NPRM published in the **Federal Register** on March 8, 2018 (83 FR 9820). The NPRM was prompted by reports of cracks on the NLG fork on Model KODIAK 100 airplanes. The NPRM proposed to require a one-time inspection to determine if an affected NLG fork is installed, repetitive inspections of the affected NLG fork for cracks, repetitive inspections of the shimmy damper bracket for looseness if an affected NLG fork is installed, and rework/replacement of parts as necessary. The FAA is issuing this AD to prevent separation of the NLG fork and consequent reduced control on landing. If the NLG fork separates on an unimproved surface, the risk of the NLG digging in and the airplane overturning on the ground increases.

Since the FAA issued the NPRM, the type certificate holder for the Model KODIAK 100 airplane changed from Quest Aircraft Design, LLC (Quest), to Daher Aircraft Design, LLC. This final rule reflects that change and updates the contact information to obtain service documentation.

Comments

The FAA gave the public the opportunity to participate in developing this final rule. The following presents the comments received on the NPRM and the FAA's response to each comment.

Request To Revise Proposed AD To Lessen Economic Impact

Quest requested numerous changes to paragraphs (h), (i), and (j) of the proposed AD. In support, Quest stated that these changes would address all sources of shimmy and lessen the economic impact to operators in international locations where nondestructive testing (NDT) inspection methods are less accessible.

First, Quest requested that the FAA change paragraphs (h)(1) and (i)(1) of the proposed AD to require the initial inspections only if there is shimmy. Quest stated that its analysis and review of the NLG fork determined that extended shimmy with the existing design (type A NLG fork) could result in fatigue cracks at the locations reported.

The FAA disagrees with this request because there is no regulatory requirement for all pilots to report a nosewheel shimmy event. If the initial inspections were conditional on reported shimmy events, the unsafe condition would go unaddressed each time a pilot forgot or neglected to report an event.

Quest also requested that the FAA revise the service information that would be required throughout the proposed AD to allow later revisions.

The FAA disagrees with this request. Requiring the use of a service document that does not yet exist at the time an AD is published violates 1 CFR 51.1(f), regarding approval by the Director of the Federal Register of a publication incorporated by reference. In order for operators to use later revisions of a referenced document (issued after the publication of the AD), either the AD must be revised to reference the specific later revisions, or operators must request approval to use a later revision as an alternative method of compliance (AMOC) using the procedures in paragraph (l) of this AD.

[10] In ratifying the payment provisions, the Bureau ratifies the procedural steps that were necessary to issue the payment provisions, including the decision to propose the payment provisions for public comment. *See* 81 FR 47863 (proposed July 22, 2016).

TAB 17

***Payday, Vehicle Title, and Certain High-Cost Installment Loans*, 85 Fed. Reg. 44,382 (July 22, 2020) (Excerpts)**

BUREAU OF CONSUMER FINANCIAL PROTECTION

12 CFR Part 1041

[Docket No. CFPB–2019–0006]

RIN 3170–AA80

Payday, Vehicle Title, and Certain High-Cost Installment Loans

AGENCY: Bureau of Consumer Financial Protection.

ACTION: Final rule.

SUMMARY: The Bureau of Consumer Financial Protection (Bureau) is issuing this final rule to amend its regulations governing payday, vehicle title, and certain high-cost installment loans. Specifically, the Bureau is revoking provisions of those regulations that: Provide that it is an unfair and abusive practice for a lender to make a covered short-term or longer-term balloon-payment loan, including payday and vehicle title loans, without reasonably determining that consumers have the ability to repay those loans according to their terms; prescribe mandatory underwriting requirements for making the ability-to-repay determination; exempt certain loans from the mandatory underwriting requirements; and establish related definitions, reporting, recordkeeping, and compliance date requirements. The Bureau is making these amendments to the regulations based on its re-evaluation of the legal and evidentiary bases for these provisions.

DATES: This rule is effective October 20, 2020.

FOR FURTHER INFORMATION CONTACT: Joseph Baressi, Lawrence Lee, or Adam Mayle, Senior Counsels, Office of Regulations, at 202–435–7700. If you require this document in an alternative electronic format, please contact *CFPB_Accessibility@cfpb.gov.*

SUPPLEMENTARY INFORMATION:

Summary of the Rule

On November 17, 2017, the Bureau published a final rule (2017 Final Rule or Rule [1]) establishing consumer protection regulations for payday loans, vehicle title loans, and certain high-cost installment loans, relying on authorities under title X of the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act or Act).[2] The 2017 Final Rule addressed two discrete topics. First, the Rule contained a set of provisions with respect to the underwriting of covered short-term and longer-term balloon-payment loans, including payday and vehicle title loans, and related recordkeeping and reporting requirements.[3] These provisions are referred to herein as the ''Mandatory Underwriting Provisions'' of the 2017 Final Rule. Second, the Rule contained a set of provisions, applicable to the same set of loans and also to certain high-cost installment loans,[4] establishing certain requirements and limitations with respect to attempts to withdraw payments on the loans from consumers' checking or other accounts.[5] These provisions are referred to herein as the ''Payment Provisions'' of the 2017 Final Rule.

The Rule became effective on January 16, 2018, although most provisions (12 CFR 1041.2 through 1041.10, 1041.12, and 1041.13) had a compliance date of August 19, 2019.[6] On January 16, 2018, the Bureau issued a statement announcing its intention to engage in rulemaking to reconsider the 2017 Final Rule.[7] A legal challenge to the Rule was filed on April 9, 2018, and is pending in the United States District Court for the Western District of Texas.[8] On October 26, 2018, the Bureau issued a statement announcing it expected to issue notices of proposed rulemaking to reconsider certain provisions of the 2017 Final Rule and to address the Rule's compliance date.[9]

On February 14, 2019, the Bureau published a notice of proposed rulemaking (2019 NPRM) to revoke the Mandatory Underwriting Provisions of the 2017 Final Rule.[10] The 2019 NPRM did not propose to amend the ''Payment Provisions'' of the 2017 Final Rule.

The Bureau is finalizing the amendments to the regulations as proposed in the 2019 NPRM. Specifically, the Bureau is revoking: (1) The ''identification'' provision, which states that it is an unfair and abusive practice for a lender to make covered short-term loans or covered longer-term balloon-payment loans without reasonably determining that consumers will have the ability to repay the loans according to their terms; [11] (2) the ''prevention'' provision, which establishes specific underwriting requirements for these loans to prevent the unfair and abusive practice; [12] (3) the ''principal step-down exemption'' provision for certain covered short-term loans; [13] (4) the ''furnishing'' provisions, which require lenders making covered short-term or longer-term balloon-payment loans to furnish certain information regarding such loans to registered information systems (RISes) and create a process for registering such information systems; [14] (5) those portions of the recordkeeping provisions related to the mandatory underwriting requirements; [15] and (6) the portion of the compliance date provisions related to the mandatory underwriting requirements.[16] The Bureau also is revoking the Official Interpretations relating to these provisions. The Bureau is making these changes to the regulations based on a re-evaluation of the legal and evidentiary bases for these provisions.

The Bureau revokes the 2017 Final Rule's determination that it is an unfair practice for a lender to make covered short-term loans or covered longer-term balloon-payment loans without reasonably determining that consumers will have the ability to repay the loans according to their terms. For the reasons discussed below, the Bureau withdraws the Rule's determination that consumers cannot reasonably avoid any substantial injury caused or likely to be caused by the failure to consider a borrower's ability to repay.[17] The Bureau also determines that, even if the Bureau had not revoked its reasonable avoidability finding, the countervailing benefits to

[1] 82 FR 54472 (Nov. 17, 2017) (codified at 12 CFR part 1041).

[2] Public Law 111–203, 124 Stat. 1376 (2010).

[3] 12 CFR 1041.4 through 1041.6, 1041.10, 1041.11, and portions of § 1041.12.

[4] The 2017 Final Rule refers to all three of these categories of loans together as covered loans. 12 CFR 1041.3(b).

[5] 12 CFR 1041.7 through 1041.9, and portions of § 1041.12.

[6] 82 FR 54472, 54814.

[7] *See* Bureau of Consumer Fin. Prot., *Statement on Payday Rule* (Jan. 16, 2018), *https://www.consumerfinance.gov/about-us/newsroom/cfpb-statement-payday-rule/.*

[8] *Cmty. Fin. Servs. Ass'n of Am.* v. *Consumer Fin. Prot. Bureau,* No. 1:18–cv–295 (W.D. Tex. filed Apr. 9, 2018). On November 6, 2018, the court issued an order staying the August 19, 2019 compliance date of the Rule pending further order of the court. *See id.,* ECF No. 53. The litigation is currently stayed. *See id.,* ECF No. 66 (Dec. 6, 2019).

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

[10] *Payday, Vehicle Title, and Certain High-Cost Installment Loans,* 84 FR 4252 (proposed Feb. 14, 2019). On the same day, the Bureau published a notice of proposed rulemaking to delay the compliance date for the Mandatory Underwriting Provisions of the 2017 Final Rule. *See Payday, Vehicle Title, and Certain High-Cost Installment Loans; Delay of Compliance Date,* 84 FR 4298 (proposed Feb. 14, 2019). On June 17, 2019, the Bureau published a final rule delaying the compliance date for the Mandatory Underwriting Provisions. *See* 84 FR 27907 (June 17, 2019).

[11] 12 CFR 1041.4.

[12] 12 CFR 1041.5.

[13] 12 CFR 1041.6.

[14] 12 CFR 1041.10 and 1041.11.

[15] 12 CFR 1041.12(b)(1) through (3).

[16] 12 CFR 1041.15(d).

[17] *See* 12 U.S.C. 5531(c)(1)(A).

material risks, costs, or conditions of the product or service; or (2) a consumer's inability to protect the interests of the consumer in selecting or using a consumer financial product or service.

In addition to section 1031 of the Dodd-Frank Act, the Bureau relied on other legal authorities for certain aspects of the Mandatory Underwriting Provisions.[95] These include: The principal step-down exemption for certain loans in § 1041.6; two provisions (§§ 1041.10 and 1041.11) that facilitate lenders' ability to obtain certain information about consumers' borrowing history from information systems that have registered with the Bureau; and certain recordkeeping requirements in § 1041.12.

In adopting each of these provisions, the Bureau relied on one or more of the following authorities. Section 1022(b)(3)(A) of the Dodd-Frank Act authorizes the Bureau, in a rulemaking, to conditionally or unconditionally exempt any class of covered persons, service providers, or consumer financial products or services from any rule issued under title X, which includes a rule issued under section 1031, as the Bureau determines is necessary or appropriate to carry out the purposes and objectives of title X. In doing so, the Bureau must take into consideration the factors set forth in section 1022(b)(3)(B) of the Dodd-Frank Act.[96] Section 1022(b)(3)(B) specifies three factors that the Bureau shall, as appropriate, take into consideration in issuing such an exemption.[97] The Bureau also relied, in adopting certain provisions, on its authority under section 1022(b)(1) of the Dodd-Frank Act to prescribe rules as may be necessary or appropriate to enable the Bureau to administer and carry out the purposes and objectives of the Federal consumer financial laws.[98] The term ''Federal consumer financial law'' includes rules prescribed under title X of the Dodd-Frank Act, including those prescribed under section 1031.[99] Additionally, the Bureau relied, for certain provisions, on other authorities, including those in sections 1021(c)(3), 1022(c)(7), 1024(b)(7), and 1032 of the Dodd-Frank Act.[100]

The Bureau's decisions to use these authorities were premised on its decision to use its authority under section 1031 of the Dodd-Frank Act. In light of the Bureau's decision to revoke its use of section 1031 authority in the Mandatory Underwriting Provisions, the Bureau now concludes that it must also revoke its uses of these other authorities in the Mandatory Underwriting Provisions. The specific provisions of the 2017 Final Rule that the Bureau is revoking are discussed further in the section-by-section analysis in part VIII below.

V. Amendments to 12 CFR Part 1041 To Eliminate the Mandatory Underwriting Provisions—Revoking the Identification of an Unfair Practice

The Bureau has determined that the grounds provided in the 2017 Final Rule do not support its determination that the identified practice is unfair, thereby eliminating the basis for the Mandatory Underwriting Provisions to address that conduct.[101]

This part explains the Bureau's reasons for determining that the identified practice in the 2017 Final Rule is not unfair under section 1031 of the Dodd-Frank Act. Combined with the Bureau's determinations concerning abusive practices set out in part VI below, the Mandatory Underwriting Provisions are therefore not supported by an appropriate legal or evidentiary basis.[102]

Part V.A reviews certain of the factual predicates and legal conclusions underlying this use of authority. Part V.B sets forth the Bureau's legal and factual bases, under section 1031(c) of the Dodd-Frank Act, for withdrawing its previous finding that an injury associated with the identified practice is not reasonably avoidable. Part V.C analyzes the reasons why the Bureau has revalued the countervailing benefits under the unfairness analysis and determined that they were greater than the Bureau found in the 2017 Final Rule, and that the benefits to consumers and competition in the aggregate from the practice outweigh any such injury.

A. Overview of the Factual Predicates and Legal Conclusions Underlying the Identification of an Unfair Practice in § 1041.4

As noted above, section 1031(c)(1)(A) of the Dodd-Frank Act states that the Bureau has no authority to declare an act or practice to be unfair unless the Bureau has a reasonable basis to conclude that the act or practice causes or is likely to cause substantial injury which is not reasonably avoidable by consumers and that such substantial injury is not outweighed by countervailing benefits to consumers or to competition.[103]

In the 2017 Final Rule, the Bureau found that the practice of making covered short-term or longer-term balloon-payment loans to consumers without reasonably determining if the consumers have the ability to repay them according to their terms causes or is likely to cause substantial injury to consumers. The Bureau reasoned that where lenders were engaged in this identified practice and the consumer in fact lacks the ability to repay, the consumer will face choices—default, delinquency, and reborrowing, as well as the negative collateral consequences of being forced to forgo major financial obligations or basic living expenses to cover the unaffordable loan payment—each of which the Bureau found in the 2017 Final Rule leads to injury for many of these consumers and ''the sum of that injury is very substantial.'' [104]

[95] *See* 82 FR 54472, 54522.

[96] 12 U.S.C. 5512(b)(3)(A).

[97] 12 U.S.C. 5512(b)(3)(B).

[98] 12 U.S.C. 5512(b)(1). The Bureau also interprets section 1022(b)(1) of the Dodd-Frank Act as authorizing it to revoke or amend a previously issued rule if it determines such rule is not necessary or appropriate to enable the Bureau to administer and carry out the purposes and objectives of the Federal consumer financial laws, including a rule issued to identify and prevent unfair, deceptive, or abusive acts or practices.

[99] 12 U.S.C. 5481(14).

[100] *See* 82 FR 54472, 54522; *see also* 12 U.S.C. 5511(c)(3), 5512(c)(7), 5514(b)(7), 5522.

[101] The rulemaking addresses the legal and evidentiary bases for particular rule provisions identified in this final rule. It does not prevent the Bureau from exercising other tool choices, such as appropriate exercise of supervision and enforcement tools, consistent with the Dodd-Frank Act and other applicable laws and regulations. It also does not prevent the Bureau from exercising its judgment in light of factual, legal, and policy factors in particular circumstances as to whether an act or practice causes or is likely to cause substantial injury to consumers which is not reasonably avoidable by consumers, and whether such substantial injury is not outweighed by countervailing benefits to consumers or to competition.

[102] The Bureau notes that, alongside covered short-term loans, the 2017 Final Rule included covered longer-term balloon-payment loans within the scope of the identified unfair and abusive practice. The Bureau stated that it was concerned that the market for covered longer-term balloon-payment loans, which is currently quite small, could expand dramatically if lenders were to circumvent the Mandatory Underwriting Provisions by making these loans without assessing borrowers' ability to repay. 82 FR 54472, 54583–84. The Bureau did not separately analyze the elements of unfairness and abusiveness for covered longer-term balloon-payment loans. *See id.* at 54583 n.626. Because the Bureau's identification in the 2017 Final Rule that the failure to determine ability to repay was unfair for covered longer-term balloon-payment loans was predicated on its identification that it was unfair to fail to determine ability to repay for covered short-term loans, in the 2019 NPRM the Bureau proposed that if the identification for covered short-term loans is revoked then the identification for covered longer-term balloon-payment loans also should be revoked. The Bureau received no comments on this proposed treatment of covered longer-term balloon-payment loans and so finalizes it as proposed.

[103] 12 U.S.C. 5531(c)(1).

[104] 82 FR 54472, 54590–94.

The Bureau in the 2017 Final Rule found that consumers could not reasonably avoid this substantial injury. The Bureau stated that, under section 1031(c)(1)(A) of the Dodd-Frank Act, an injury is reasonably avoidable if consumers ''have reasons generally to anticipate the likelihood and severity of the injury and the practical means to avoid it.'' [105] The Bureau added: ''[t]he heart of the matter here is consumer perception of risk, and whether borrowers are in [a] position to gauge the likelihood and severity of the risks they incur by taking out covered short-term loans in the absence of any reasonable assessment of their ability to repay those loans according to their terms.'' [106]

In applying this standard, the 2017 Final Rule focused on borrowers' ability to predict their individual outcomes prior to taking out loans. The Bureau acknowledged that it ''is possible that many borrowers accurately anticipate their debt duration.'' [107] However, the Bureau stated that its ''primary concern is for those longer-term borrowers who find themselves in extended loan sequences'' and that for those borrowers ''the picture is quite different, and their ability to estimate accurately what will happen to them when they take out a payday loan is quite limited.'' [108] That led the Bureau to conclude that ''many consumers do not understand or perceive the probability that certain harms will occur'' [109] and that therefore it would not be reasonable to expect consumers to take steps to avoid injury.[110] Note that, although the Bureau made these statements about consumers who take out payday loans as part of an extended sequence, the identified practice and the corresponding Mandatory Underwriting Provisions to address that practice apply to all consumers who take out all payday loans, including those that are not part of an extended sequence.

The 2017 Final Rule based that finding primarily on the Bureau's interpretation of limited data from a study by Professor Mann of Columbia Law School. The Mann study compared consumers' predictions when taking out a payday loan about how long they would be in debt with administrative data from lenders showing the actual duration consumers were in debt.[111]

[105] *Id.* at 54594.

[106] *Id.* at 54597.

[107] *Id.*

[108] *Id.*

[109] *Id.*

[110] *Id.* at 54594.

[111] Ronald J. Mann, *Assessing the Optimism of Payday Loan Borrowers,* 21 Supreme Court Econ. Rev. 105 (2013) (discussed at 82 FR 54472, 54568–70, 54592, 54597); *see also* 82 FR 54472, 54816–17, 54836–37 (section 1022(b)(2) analysis discussion of the Mann study).

The Bureau did not base its central findings on the conclusions in Professor Mann's study. Rather, the Bureau selected limited data compiled in the course of that study, conducted its own analysis of the data, and interpreted the results as ''provid[ing] the most relevant data describing borrowers' expected durations of indebtedness with payday loan products.'' [112] The Bureau's interpretation of limited data from the Mann study is discussed in part V.B.1 below.[113]

In further support of the finding in the 2017 Final Rule that some consumers were not in a position to evaluate the likelihood and severity of these risks and therefore it would not be reasonable to expect consumers to take steps to avoid the injury, the Bureau in the 2017 Final Rule relied on other findings, including those related to the marketing and servicing practices of providers of short-term loans,[114] and on the Bureau's own expertise and experience in supervisory matters and enforcement actions concerning covered lenders in the markets for covered short-term and longer-term balloon-payment loans.[115] These additional factors are discussed in detail in part V.C.2 below.

B. Reasonable Avoidability

1. Reasonable Avoidability—Legal Standard

The Bureau's Proposal

The Bureau determined in the 2017 Final Rule that making covered short-term or longer-term balloon-payment loans without reasonably assessing a borrower's ability to repay the loan according to its terms is an unfair act or practice. In making this determination, the Bureau concluded that this practice: (1) Caused or was likely to cause substantial injury to consumers; (2) which is not reasonably avoidable by consumers; and (3) that such injury was not outweighed by countervailing benefits to consumers or competition.[116]

[112] 82 FR 54472, 54816.

[113] The Bureau also referenced two academic studies, one of which compared borrowers' belief about the average borrower with data about the average outcome of borrowers and the other of which compared borrowers' predictions of their own borrowing with average outcomes of borrowers in another State. These studies found that borrowers appear, on average, somewhat optimistic about the length of their indebtedness. *See id.* at 54568, 54836. However, the Bureau noted the weaknesses of these studies, *id.* at 54568, and, as discussed, relied primarily on the Bureau's interpretation of limited data from the Mann study.

[114] *See, e.g., id.* at 54616.

[115] *Id.* at 54505–07.

[116] *Id.* at 54588.

In the 2017 Final Rule, the Bureau interpreted section 1031(c)(1)(A) of the Dodd-Frank Act to mean that for an injury to be reasonably avoidable consumers must ''have reason generally to anticipate the likelihood and severity of the injury and the practical means to avoid it.'' [117] The Bureau interpreted this standard as requiring consumers to have a specific understanding of the magnitude and severity of their personal risks such that they could accurately predict how long they would be in debt after taking out a covered short-term or longer-term balloon-payment loan.[118] The Bureau stated in the 2017 Final Rule that such borrowers ''typically understand that they are incurring a debt which must be repaid within a prescribed period of time and that, if they are unable to do so, they will either have to make other arrangements or suffer adverse consequences.'' [119] The Bureau also stated that its interpretation of limited data from the Mann study indicated that most payday borrowers expected some repeated sequences of loans.[120] Nonetheless, the Bureau stated that ''[t]he heart of the matter here is consumer perception of risk, and whether borrowers are in [a] position to gauge the likelihood and severity of the risks they incur by taking out covered short-term loans in the absence of any reasonable assessment of their ability to repay those loans according to their terms.'' [121] Because it found that consumers do not understand or perceive the probability that certain harms will occur, including the substantial injury that can flow from default, reborrowing, and the negative collateral consequences of making unaffordable payments, the Bureau found that consumers could not reasonably avoid the harm.[122]

The Bureau in the 2019 NPRM expressed concern about the standard that it applied in the 2017 Final Rule for reasonable avoidability under section 1031(c)(1)(A) of the Dodd-Frank Act. The 2019 NPRM stated that, in assessing whether consumers could reasonably avoid harm, the Bureau in the 2017 Final Rule concluded that they could not without a *specific* understanding of their *individualized* risk, as determined by their ability to accurately predict how long they would be in debt after taking out a covered short-term or longer-term balloon-payment loan.[123] In

[117] *Id.* at 54594.

[118] *Id.* at 54594–96.

[119] *Id.* at 54615.

[120] *Id.* at 54569.

[121] *Id.* at 54597.

[122] *Id.* at 54594; *see also id.* at 54597.

[123] *Id.* at 54597–98.

reconsidering this interpretation of reasonable avoidability, the Bureau preliminarily determined that consumers need not have a specific understanding of their individualized likelihood and magnitude of harm such that they could accurately predict how long they would be in debt after taking out a covered short-term or longer-term balloon-payment loan for the injury to be reasonably avoidable. The Bureau reasoned that requiring consumers to know their individualized likelihood and magnitude of risk of harm for that harm to be reasonably avoidable would overstate consumer injury and effectively shift the burden to lenders to make such determinations. This burden shifting would deter lenders from offering products or product features, which would suppress rather than facilitate consumer choice.

The 2019 NPRM stated that the particular problem with the 2017 Final Rule is illustrated by how the Bureau responded to several comments that urged the Bureau to mandate consumer disclosures instead of imposing an ability-to-repay requirement. In rejecting that suggestion, the Bureau stated that ‘‘generalized or abstract information’’ about the attendant risks would ‘‘not inform the consumer of the risks of the particular loan in light of the consumer's *particular* financial situation.’’ [124] Upon further consideration, in the 2019 NPRM the Bureau preliminarily determined that there was a better reasonable avoidability standard than the one set out in the 2017 Final Rule. The 2019 NPRM explained that FTC Act precedent informs the Bureau's understanding of the unfairness standard under section 1031(c)(1)(A) of the Dodd-Frank Act. In analyzing unfairness under the FTC Act, the FTC and courts have held that ‘‘an injury is reasonably avoidable if consumers have reason to anticipate the impending harm and the means to avoid it,’’ [125] meaning that ‘‘people know the physical steps to take in order to prevent’’ injury,[126] but also ‘‘understand the necessity of actually taking those steps.’’ [127] The 2019 NPRM noted that the Bureau in the 2017 Final Rule had not identified relevant precedent suggesting that consumers must understand their own specific individualized likelihood and magnitude of harm to reasonably avoid injury.

The Bureau also stated in the 2019 NPRM that its approach to reasonable avoidability was consistent with trade regulation rules promulgated by the FTC over several decades to address unfair or deceptive practices that occur on industry-wide bases.[128] To prevent such conduct, the Bureau stated that the FTC has routinely established disclosure requirements that mandate that businesses provide to consumers general information about material terms, conditions, or risks related to products or services.[129] However, according to the 2019 NPRM, no FTC trade regulation rule based on unfairness has required businesses to provide individualized forecasts or disclosures of each customer's or prospective customer's own specific likelihood and magnitude of potential harm.[130]

The Bureau stated in the 2019 NPRM its preliminary conclusion that injury is reasonably avoidable if payday borrowers have an understanding of the likelihood and magnitude of risks of harm associated with payday loans sufficient for them to anticipate those harms and understand the necessity of taking reasonable steps to prevent resulting injury. Specifically, this means consumers need only understand that a significant portion of payday borrowers experience difficulty repaying and that if such borrowers do not make other arrangements they may either end up in extended loan sequences, default, or struggle to pay other bills after repaying their payday loan. The Bureau preliminarily determined in the 2019 NPRM that this approach, consistent with the FTC's longstanding approach on informed consumer decision-making in its interpretation of the unfairness standard, is the better interpretation of section 1031(c)(1)(A) as a legal and policy matter. In the Bureau's preliminary judgment, this approach appropriately emphasized prohibiting practices that prevent or hinder informed consumer decision-making in the marketplace.[131]

Applying an interpretation in the 2019 NPRM that was more consistent with FTC precedent, the Bureau preliminarily concluded that, assuming for purposes of argument that the identified practice causes or is likely to cause substantial injury, consumers could reasonably avoid that injury. As noted above, in the 2017 Final Rule, the Bureau found that payday loan borrowers ‘‘typically understand they are incurring a debt which must be repaid within a prescribed period of time and that, if they are unable to do so, they will either have to make other arrangements or suffer adverse consequences.’’ [132] The 2019 NPRM stated that consumers who have reborrowed in the past would seem particularly likely to have an understanding that such reborrowing is relatively common even if they cannot predict specifically how long they will need to borrow. Further, the 2019 NPRM noted a Bureau analysis of a study of State-mandated payday loan disclosures—which inform consumers about repayment and reborrowing rates—in which the majority of consumers in the study continued to take out payday loans despite the disclosures.[133] The 2019 NPRM stated that a plausible explanation for the limited effect of disclosures on consumer behavior in this study is that payday loan users were already aware that such loans can result in extended loan sequences.

The 2019 NPRM stated that the Bureau in the 2017 Final Rule did not offer evidence that would support the conclusion that consumers cannot reasonably avoid substantial injury from

[124] *Id.* at 54637 (emphasis added).

[125] *See Davis* v. *HSBC Bank Nev.,* 691 F.3d 1152, 1168 (9th Cir. 2012).

[126] *See Int'l Harvester,* 104 F.T.C. at 1066.

[127] *Id.*

[128] Section 18 of the FTC Act provides that the FTC is authorized to prescribe ‘‘rules which define with specificity acts or practices which are unfair or deceptive acts or practices in or affecting commerce’’ within the meaning of section 5 of the FTC Act. 15 U.S.C. 57a. The FTC's trade regulation rules are codified at 16 CFR part 400.

[129] *See, e.g., Use of Prenotification Negative Option Plans Rule,* 16 CFR 425.1(a)(1) (promotional material must clearly and conspicuously disclose material terms); *Funeral Industry Practices Rule,* 16 CFR 453.2(b) (requiring itemized price disclosures of funeral goods and services and other non-consumer specific disclosures); *Credit Practices Rule,* 16 CFR 444.3 (prohibiting certain practices and requiring disclosures about cosigner liability).

[130] For example, the Credit Practices Rule requires that a covered creditor to provide a ‘‘Notice to Cosigner’’ disclosure prior to a cosigner becoming obligated on a loan. This notice advises in a concise and general manner consumers who cosign obligations about their potential liability. This notice is not individually tailored and does not require a covered creditor to disclose information about the severity or likelihood of risks related to cosigner liability. *See* 16 CFR 444.3.

[131] As the FTC stated in the FTC Unfairness Policy Statement: ‘‘[W]e expect the marketplace to be self-correcting, and we rely on consumer choice—the ability of individual consumers to make their own private purchasing decisions without regulatory intervention—to govern the market. We anticipate that consumers will survey the available alternatives, choose those that are most desirable, and avoid those that are inadequate or unsatisfactory.’’ FTC Unfairness Policy Statement, *Int'l Harvester,* 104 F.T.C. at 1074. *See also Orkin Exterminating Co.* v. *FTC,* 849 F.2d 1354, 1365 (11th Cir. 1988) (‘‘The Commission's focus on a consumer's ability to reasonably avoid injury ‘stems from the Commission's general reliance on free and informed consumer choice as the best regulator of the market.'’’) (quoting *Am. Fin. Servs. Ass'n* v. *FTC,* 767 F.2d 957, 976 (D.C. Cir. 1985) (*AFSA*)).

[132] 82 FR 54472, 54615.

[133] *Id.* at 54577–78; *see* Tex. Office of Consumer Credit Comm'r, *Credit Access Businesses, http://occc.texas.gov/industry/cab.*

taking out payday loans applying a standard that focuses on understanding that is sufficient to alert consumers of the need to take steps to protect themselves from the harm from taking out such loans. The Bureau also found in the 2017 Final Rule that consumers who would not be offered a payday loan under either § 1041.5 or § 1041.6 would have alternatives to payday loans.[134] Accordingly, the Bureau preliminarily determined that there is not a sufficient evidentiary basis on which to find that consumers cannot reasonably avoid substantial injury caused or likely to be caused by lenders making covered short-term and longer-term balloon-payment loans without assessing borrowers' ability to repay.[135]

The Bureau sought comments on reasonable avoidability, including the Bureau's revised interpretation of reasonable avoidability under section 1031(c)(1) of the Dodd-Frank Act. The Bureau requested comment about the types or sources of information with respect to consumer understanding about covered short-term and longer-term balloon-payment loans that would be pertinent to a determination of whether consumers can reasonably avoid the substantial injury caused or likely to be caused by the identified practice.

Comments Received—Reasonable Avoidability Standard

Industry commenters and a group of 12 State attorneys general stated that the 2019 NPRM's proposed application of reasonable avoidability in unfairness was consistent with established principles of consumer protection law. A group of 12 State attorneys general stated that the Dodd-Frank Act requires the Bureau to look to the FTC Act when interpreting its unfair, deceptive, or abusive act or practice (UDAAP) authorities. A commenter asserted that understanding has been long understood to mean a general awareness of possible outcomes, not an understanding of one's individual likelihood of being exposed to risks. Commenters stated that requiring covered lenders to assess whether consumers can avoid harm by repaying a loan would shift the risk calculus from consumers to lenders and deprive consumers of choice.

Several commenters opined on the legal standards the Bureau should use when assessing reasonable avoidability more broadly. Citing *Katharine Gibbs School (Inc.)* v. *FTC,* a commenter stated that FTC precedent does not support the use of unfairness authority to prescribe core economic terms, such as imposing an ability-to-repay requirement.[136] Industry commenters and 12 State attorneys general commented that the proper focus of reasonable avoidability is on free and informed consumer choice. According to the commenters, unless a lender's conduct interferes with free choice, such as through deception or coercion, harm from a financial product is reasonably avoidable. In other words, according to the commenters, if any of the reasons that consumers could not avoid harm caused by a lender was not itself also caused by the lender, the act or practice is not unfair.

Consumer groups and a group of 25 State attorneys general stated that the 2019 NPRM's proposed standard was unreasonably restrictive and misapplied lessons from FTC precedent. Some commenters stated that FTC precedent indicates that consumers must understand their individualized likelihood and magnitude of harm—a general understanding of risk is insufficient. Citing *International Harvester,* a group of 25 State attorneys general stated that for consumers to understand the necessity of taking steps to avoid harm, they must understand the ''full consequences'' that might follow from their decision to use covered loans.[137]

Other commenters stated that the 2019 NPRM mischaracterized the 2017 Final Rule's standard for reasonable avoidability.[138] According to these commenters, the 2017 Final Rule did not state that consumers had to have a specific understanding of their individualized risks for a harm to be reasonably avoidable. Rather, a general awareness of the specific risks of injury was sufficient. Thus, according to these commenters, the 2019 NPRM's standard for reasonable avoidability is essentially identical to the 2017 Final Rule's standard.

At least one commenter stated that the 2019 NPRM's application of reasonable avoidability is inconsistent with the Bureau's proposed standard. The 2019 NPRM stated that for harm to be reasonably avoidable, ''consumers need only to understand that a significant portion of payday borrowers experience difficulty repaying and that if such borrowers do not make other arrangements they either end up in long loan sequences, default, or struggle to pay other bills after repaying their payday loan.'' A commenter argued that this statement appears to omit the ''likelihood and magnitude of risks of harm'' language in the standard and ignores whether consumers have the means to avoid the harm.

Some commenters stated that in crafting the 2019 NPRM's proposed standard, the Bureau misread portions of *International Harvester.* One commenter stated that the specific disclosure that the 2019 NPRM cited as making harm reasonably avoidable was criticized by the Commission for failing to spell out the exact nature of the hazard at a level of detail that would effectively motivate compliance.[139]

Comments Received—Consumer Understanding of the Risk of Harm

In applying the proposed standard and assessing whether injury is reasonably avoidable, industry commenters and a group of 12 State attorneys general stated that consumers have sufficient information to understand the likelihood and magnitude of covered loan risk. Commenters asserted that consumers rationally choose to use covered loan products and a lack of understanding does not drive covered loan use.

In support of the proposition that consumers have requisite understanding about covered loan risk of harm, a non-profit research and advocacy organization commenter stated that the 2017 Final Rule recognized that consumers generally understand how covered loans function and that non-payment has consequences.[140] Twelve State attorneys general agreed with the 2019 NPRM's interpretation of a Bureau analysis of a study of State-mandated payday loan disclosures to conclude that the disclosures' limited impact on reborrowing suggests that consumers are already aware that such loans can result in extended loan sequences.[141] Another

[134] 82 FR 54472, 54840–41.

[135] Relatedly, the 2019 NPRM proposed to find that ''robust and reliable'' evidence was necessary in order to support a determination that consumers cannot reasonably avoid injury, in light of the dramatic impacts of the Rule on the market; this approach to requiring ''robust and reliable'' evidence is discussed in part V.B.2 of this preamble.

[136] 612 F.2d 658 (2d Cir. 1979).

[137] *Int'l Harvester,* 104 F.T.C. at 1066.

[138] The 2019 NPRM stated that ''[i]n assessing whether consumers could reasonably avoid harm, the Bureau in the 2017 Final Rule concluded that they could not without a specific understanding of their individualized risk, as determined by their ability to accurately predict how long they would be in debt after taking out a covered short-term or longer-term balloon-payment loan.'' 84 FR 4252, 4269.

[139] *Int'l Harvester,* 104 F.T.C. at 1054.

[140] 82 FR 54472, 54615 (''[B]orrowers who take out a payday, title, or other covered short term loan typically understand that they are incurring a debt which must be repaid within a prescribed period of time and that if they are unable to do so, they will either have to make other arrangements or suffer adverse consequences.'').

[141] 84 FR 4252, 4271.

commenter identified two studies—the Mann study and the Miller study [142]—that the commenter stated demonstrate that consumers make informed choices when using covered loans. Commenters also pointed to the purportedly low frequency of consumer complaints about covered loans to the Bureau, FTC, and State regulatory agencies as evidence that consumers understand covered loan products and appreciate their access and use.

In contrast, consumer group commenters and 25 State attorneys general disagreed with the 2019 NPRM's preliminary determination that the 2017 Final Rule wrongly found that consumers do not understand the likelihood and magnitude of risk of harm. A commenter stated that the 2017 Final Rule specifically found that consumers do not understand the risks and costs of unaffordable loans made without assessing ability to repay, including how long they would be in debt or the consequences of extended reborrowing.[143] Commenters stated that the 2019 NPRM did not provide a reasoned explanation to disregard that finding. Further, these commenters stated that the 2019 NPRM offered no evidence that payday loan users understand the various harms that flow from extended reborrowing, that a significant portion of payday borrowers experience difficulty repaying and that if such borrowers do not make other arrangements they either end up in long loan sequences, or that such users even have a general awareness about the risks of covered loans.

These commenters also objected to the Bureau's preliminary determination in the 2019 NPRM that the record supports the finding that consumers affirmatively understand the likelihood and magnitude of risk of harm related to covered loans. Several commenters stated that the Bureau's interpretation of a study of State-mandated payday loan disclosures was not plausible and was speculative. An academic commenter stated that this interpretation is contradicted by a study that the Bureau had not previously considered that found a significant proportion of payday loan users understand neither loan terms nor costs.[144] This commenter asserted that a more plausible interpretation of the study is that the State-mandated disclosures are simply ineffective. A commenter also objected to the 2019 NPRM's suggestion that consumers can infer certain risks associated with covered loans, either because of their limited options or the fact payday loans are advertised as products designed to assist those in financial distress. This commenter stated that this suggestion ignores informational asymmetry between consumers and lenders regarding the performance of credit products. Further, this commenter stated that any mere inference that short-term loans are risky does not reveal information about the likelihood and magnitude of that risk. A commenter also questioned the 2019 NPRM's proposed presumption that borrowers' prior experience with covered loans imparts sufficient understanding about risk, noting that the Mann study found that heavy users ''are least likely'' to predict how long they will be in loan sequences.

In arguing that harm is not reasonably avoidable, commenters noted that the 2019 NPRM did not address seller behavior that can hinder understanding and consumer choice. Such conduct cited by these commenters includes deceptive advertising and marketing, providing misleading or incomplete information, failing to comply with State small-dollar lending laws, such as disclosures rules and rollover limits, preventing borrowers from self-amortizing, and coercing or steering borrowers into unaffordable reborrowing.

Several commenters stated that lack of understanding need not always be present to establish that harm is not reasonably avoidable and that the pervasiveness and widespread substantial injury is itself significant evidence of unavoidable harm. At least one commenter suggested that the fact that consumers experience payday lending problems and continue using them is evidence that the harm is not reasonably avoidable.

Several commenters also discussed how behavioral factors—such as financial distress and optimism bias—impair understanding and skew consumer perception of risk. A commenter noted that storefront loan borrowers frequently have unrealistic expectations about their ability to repay loans because they focus on short-term, emergency needs over potentially devastating future long-term losses. Another commenter stated that consumers cannot reasonably understand the dramatically higher levels of risk involved with covered loans compared to conventional credit, given the open-ended costs associated with long loan sequences.

Comments Received—Means To Avoid Harm

With respect to whether consumers have the means to avoid harm, consumer group commenters and 25 State attorneys general stated that consumers have alternatives to payday loans. Alternatives identified by these and other commenters include credit cards, non-recourse pawn loans, payday loan alternatives (*e.g.,* wage access products), fintech offerings, borrowing from friends, family, and community organizations, and cutting back on expenses.[145] Commenters cited the millions of consumers living in States where payday lending is banned or restricted as evidence that consumers have alternatives to covered loans. In the absence of payday loans, consumer group commenters and 25 State attorneys general stated that consumers do not turn to illegal loans—a point with which some industry commenters disagreed. At least one commenter stated that access to more reliable and transparent credit options—like low-cost personal loans, payday loan alternatives, and safer products from mainstream financial institutions—exist for most consumers and are consistently expanding. Another commenter stated that banks and credit unions are well-positioned to responsibly issue small-dollar loans if they are provided with proper guidelines.

Notwithstanding a general consensus reflected in the comments that payday loan alternatives exist, some commenters stated that consumers lack

[142] *See* Ronald J. Mann, *Assessing the Optimism of Payday Loan Borrowers,* 21 Supreme Court Econ. Rev. 105 (2013) (60 percent of borrowers can accurately predict how long they would take to repay their loan); Thomas W. Miller, Jr., *Differences in Consumer Credit Choices Made by Banked and Unbanked Mississippians,* 11 J.L. Econ. & Pol'y 367 (2015) (60 percent of unbanked borrowers understand the loans terms that they had taken out).

[143] In 2017, the Bureau found ''evidence showing that a significant proportion of consumers do not understand the kinds of harms that flow from unaffordable loans, including those imposed by default, delinquency, re-borrowing, and the collateral consequences of making unaffordable payments to attempt to avoid these other injuries.'' 82 FR 54472, 54617.

[144] Nathalie Martin, *1,000% Interest—Good While Supplies Last: A Study of Payday Loan Practices and Solutions,* 52 Ariz. L. Rev. 563 (2010) (Martin study), *https://www.regulations.gov/contentStreamer?documentId=CFPB-2019-0006-27713&attachmentNumber=3&contentType=pdf* (interviews with approximately 130 payday loan users in Albuquerque found that 60 percent of consumers who had just taken out loans could not accurately estimate their APR and 52 percent could not accurately describe the dollar costs of their loans).

[145] *See, e.g.,* Nat'l Consumer Law Ctr., *After Payday Loans: How do Consumers Fare When States Restrict High-Cost Loans?* (Oct. 2018), *https://www.nclc.org/images/pdf/high_cost_small_loans/payday_loans/ib_how-consumers-fare-restrict-high-cost-loans-oct2018.pdf;* Southern Bancorp Community Partners, *Into the Light: A Survey of Arkansas Borrowers Seven Years after State Supreme Court Bans Usurious Payday Lending Rates* (Apr. 2016), *https://southernpartners.org/pp/PP_V43_2016.pdf.*

the means to avoid harm. Some consumer groups stated that the 2017 Final Rule had found limited alternatives and borrowers' perceptions of their alternatives. At least one commenter stated that borrowers using covered loans have limited options and limited time in which to assess them and that most do not have access to other formal sources of credit and informal sources of credit have high search costs. Other commenters stated that even when alternatives do exist, consumers do not pursue lower-cost credit because of the ubiquity and convenience of payday lenders.

A consumer group and an academic commenter commented that the fact that a consumer can avoid harm by not using covered loans is not sufficient. Citing *AFSA* v. *FTC,* commenters stated that consumers can generally decline a product or service, and ''if the mere existence of that right'' were the end of the inquiry, then no practice would be subject to unfairness regulation.[146] As articulated by another commenter, the ''just say no'' option does not constitute reasonable avoidability.

Numerous commenters, including consumer groups, community financial service institutions, and faith groups, stated that consumers cannot avoid injury once they have taken out a covered loan and are unable to repay. According to a consumer group and an academic commenter, once a borrower takes out an initial unaffordable loan, the only options are to choose between the harms associated with default, reborrowing, or forgoing other major financial obligations or basic living expenses.

Final Rule

After reviewing the comments, the Bureau is finalizing its interpretation of the standard for reasonable avoidability under section 1031(c)(1)(A) of the Dodd-Frank Act as proposed, with some clarification. Under this standard, the facts and the law in the record do not support the 2017 Final Rule's conclusion that the assumed substantial injury from making covered short-term or longer-term balloon-payment loans without reasonably assessing a borrower's ability to repay the loan according to its terms was not reasonably avoidable.

Final Rule—Reasonable Avoidability Standard

Pursuant to section 1031(c)(1)(A) of the Dodd-Frank Act, the Bureau determines that injury from making covered short-term or longer-term balloon-payment loans without reasonably assessing a borrower's ability to repay the loan according to its terms is reasonably avoidable if payday borrowers have an understanding of the likelihood and magnitude of risks of harm associated with payday loans sufficient for them to anticipate those harms and understand the necessity of taking reasonable steps to prevent resulting injury. Specifically, this means consumers need only understand that a significant portion of payday borrowers experience difficulty repaying and that if such borrowers do not make other reasonable arrangements they may either end up in extended loan sequences, default, or struggle to pay other bills after repaying their payday loan.

The interpretation of reasonable avoidability the Bureau is finalizing closely tracks FTC precedent.[147] The Bureau determines that FTC precedent is not inconsistent with the use of unfairness authority to prescribe what some commenters termed ''core economic terms.'' For instance, in *Katharine Gibbs,* the court did not strike down the FTC's tuition refund requirements based on the innate character of the remedy. Instead, the court faulted the FTC for attempting to create ''structural incentives for discriminate enrollment'' to address problematic sales and enrollment practices without finding that refund practices at issue were deceptive or unfair.[148] As the court noted, ''the Commission contented itself with treating violations of its 'requirements prescribed for the purpose of preventing' unfair practices as themselves the unfair practices.''[149] Thus, the tuition refund requirement's flaw was not that it prescribed core economic terms. Further, the Bureau is aware of other examples of unfairness authority being used to establish substantive requirements in consumer financial transactions.[150] These examples include a Federal banking agency imposing requirements requiring that financial institutions make ability-to-repay determinations before making subprime mortgage loans.[151]

The Bureau also determines that, contrary to the suggestion of some comments, following the approach in *International Harvester* does not require that consumers understand their individualized risk in order for injury to be reasonably avoidable. As noted in that case, reasonable avoidability depends on whether risks are ''adequately disclosed.''[152] The Commission did not base its reasonable avoidability determination on whether consumers knew the probability that they would personally experience fuel geysering.[153] Instead, the Commission found the harm not reasonably avoidable because consumers ''did not realize that a fuel geyser was possible'' and might engage in a dangerous practice (*i.e.,* loosening the fuel cap on farm equipment) ''without consciousness of any particular risk.''[154] Thus, the Bureau's current application of reasonable avoidability is consistent with *International Harvester* as it requires consumers to be aware of the particular risks associated with payday lending (such as extended loan sequences, default, etc.) sufficient to

[146] *See AFSA,* 767 F.2d at 976–77 (holding that prohibited contract provisions were unavoidable in part because of industry-wide boilerplate that prevented consumers ''from making meaningful efforts to search, compare, and bargain'').

[147] *See Int'l Harvester,* 104 F.T.C. at 1066 (for an injury to be reasonably avoidable consumers must not only ''know the physical steps to take in order to prevent it'' but also ''understand the necessity of actually taking those steps.''); *Davis,* 691 F.3d at 1168 (''[A]n injury is reasonably avoidable if consumers have reason to anticipate the impending harm and the means to avoid it.'') (quoting *Orkin,* 849 F.2d at 1365–66).

[148] *Katharine Gibbs School,* 612 F.2d at 662–63 (''Instead of defining with specificity the advertising, sales, and enrollment practices it deemed unfair and deceptive and setting forth requirements for preventing them, the Commission decided to make it financially unattractive for schools covered by the Rule to accept a student who, for any reason whatever, was unlikely to finish the course in which he or she had enrolled.'').

[149] *Id.* at 662.

[150] *See Credit Card Rule,* 74 FR 5498 (Jan. 29, 2009) (Board, OTS, and NCUA concluded that it is an unfair act or practice to treat a payment on a consumer credit card account as late unless the consumer has been provided a reasonable amount of time to make that payment); *Credit Practices Rule,* 49 FR 7740 (Mar. 1, 1984) (prohibiting certain remedies that creditors frequently included in credit contracts for use when consumers defaulted on the loans were unfair, including confessions of judgments, irrevocable wage assignments, security interests in household goods, waivers of exemption, pyramiding of late charges, and cosigner liability).

[151] *Higher-Priced Mortgage Loan Rule,* 73 FR 44522 (July 30, 2008) (Board considered the FTC Act's unfairness standard when finding that extending credit without regard to borrowers' ability to repay was an unfair practice). *See also Credit Practices Rule,* 49 FR 7740 (Mar. 1, 1984) (prohibiting certain remedies that creditors frequently included in credit contracts for use when consumers defaulted on the loans were unfair, including confessions of judgments, irrevocable wage assignments, security interests in household goods, waivers of exemption, pyramiding of late charges, and cosigner liability).

[152] *Int'l Harvester,* 104 F.T.C. at 1066.

[153] *Id.*

[154] *Id.* (''Farmers may have known that loosening the fuel cap was generally a poor practice, but they did not know from the limited disclosures made, nor could they be expected to know from prior experience, the full consequences that might follow from it.'').

take steps to avoid or mitigate harm from those risks.

Moreover, aside from their criticisms of the Bureau's reading in the 2019 NPRM of certain FTC precedents (which the Bureau does not accept), commenters have not provided a compelling reason why the Bureau should interpret the reasonable avoidability element of section 1031(c)(1)(A) of the Dodd-Frank Act to require payday borrowers to have a specific understanding of their personal risks—such that they can accurately predict how long they will be in debt after taking out a covered short-term or longer-term balloon-payment loan. As the 2019 NPRM explained, the 2017 Final Rule's approach would mean that consumers cannot reasonably avoid injury even if they understand that a significant portion of payday borrowers experience difficulty repaying and that if such borrowers do not take reasonable steps they may either end up in extended loan sequences, default, or struggle to pay other bills after repaying their payday loan. The ''focus on a consumer's ability to reasonably avoid injury 'stems from the Commission's general reliance on free and informed consumer choice as the best regulator of the market.' '' [155] The Bureau is not persuaded that, if consumers have that level of understanding, they should be viewed as unable to take reasonable steps to avoid that harm. Accordingly, the Bureau does not believe that it should rely upon a legal standard that would treat such consumers as not knowing that they should consider taking steps to reasonably avoid injury.

The Bureau also concludes, contrary to the suggestion of some commenters, that the 2019 NPRM did not mischaracterize the 2017 Final Rule's approach to reasonable avoidability. The Bureau acknowledges that the 2017 Final Rule at times used language that was similar to the 2019 NPRM when summarizing the reasonable avoidability standard at a high level of generality.[156] However, as explained in the 2019 NPRM, the 2017 Final Rule actually applied a different legal standard as it relates to payday borrowers. The 2017 Final Rule principally relied on the Bureau's interpretation of limited data from the Mann study regarding borrowers' abilities to predict personal likelihood of reborrowing in assessing whether consumers adequately understood the likelihood and severity of harms. The 2017 Final Rule determined that borrowers lacked requisite understanding because some borrowers were unable to predict their individual likelihood of reborrowing.[157] In other words, the 2017 Final Rule used the Bureau's interpretation of limited data from the Mann study about individual likelihood of reborrowing as a proxy for understanding that is sufficient to alert consumers of the need to take steps to protect themselves from potential payday loan harm. Thus, notwithstanding the 2017 Final Rule's use of some language similar to that used in the 2019 NPRM when generally summarizing the reasonable avoidability standard, in substance the 2017 Final Rule interpreted the standard to require all consumers to have a specific understanding of individualized risk.

Moreover, contrary to the suggestions of some commenters, the 2019 NPRM did not omit the standard's requirement that consumers must appreciate the ''likelihood and magnitude'' of risk. The 2019 NPRM stated that the Bureau preliminarily concluded that injury is reasonably avoidable if payday borrowers have an understanding of the likelihood and magnitude of risks of harm associated with payday loans sufficient for them to anticipate those harms and understand the necessity of taking reasonable steps to prevent resulting injury.[158] The 2019 NPRM elaborated that this requires that consumers understand that a *significant portion* of payday borrowers experience difficulty repaying and that if such borrowers do not make other arrangements they either end up in *extended loan sequences, default, or struggle to pay other bills after repaying their payday loan.*[159] The Bureau notes that if consumers understand that a significant portion of payday borrowers experience adverse outcomes, they grasp the likelihood of risk. If consumers understand the potential outcomes arising from difficulty repaying, they appreciate the magnitude of those risks.

However, the Bureau agrees with comments that consumers must not only have a sufficient awareness of the risk of significant injury, but they also must have reasonable steps they can take to avoid that injury. The 2019 NPRM recognized that the means to avoid injury is a necessary component of the reasonable avoidability standard.[160] The Bureau discusses its application to covered loans below.

The Bureau does not regard as significant the considerations of the efficacy of disclosures discussed in *International Harvester.*[161] What is significant is that *International Harvester* stands for the proposition that harm is reasonably avoidable if consumers have requisite understanding of risks related to a product. The Bureau's revised application of the reasonable avoidability standard is more consistent with *International Harvester* as it incorporates criteria that would indicate whether consumers have a requisite understanding.

Accordingly, the Bureau concludes that the 2017 Final Rule applied a problematic standard for reasonable avoidability under section 1031(c)(1)(A) of the Dodd-Frank Act and adopts the better interpretation of reasonable avoidability set forth in the 2019 NPRM.

Final Rule—Consumer Understanding of Risk of Harm

Applying the revised standard for reasonable avoidability pursuant to section 1031(c)(1)(A) of the Dodd-Frank Act, the Bureau concludes that there is not a sufficient evidentiary basis for the Bureau to conclude that consumers cannot reasonably avoid substantial injury from lenders making covered short-term and longer-term balloon-payment loans without assessing borrowers' ability to repay the loan according to its terms.

As discussed in part V.B.2 below of this preamble, the 2019 NPRM proposed and the Bureau finalizes a determination that evidence is only sufficient for purposes of finding that injury is not reasonably avoidable if that evidence is robust and reliable, in light of the dramatic impacts of the Rule on the payday market. Thus, the relevant question here is whether there is robust and reliable evidence for that finding, under the Bureau's revised standard for reasonable avoidability.[162]

[155] 84 FR 4252, 4271 n.242 (quoting *Orkin Exterminating Co.,* 849 F.2d at 1365 (quoting *AFSA,* 767 F.2d at 976)).

[156] *Compare* 82 FR 54472, 54596 (''[U]nless consumers have reason generally to anticipate the likelihood and severity of the injury, and the practical means to avoid it, the injury is not reasonably avoidable.''), *with* 84 FR 4252, 4270 (''[I]njury is reasonably avoidable if payday borrowers have an understanding of the likelihood and magnitude of risks of harm associated with payday loans sufficient for them to anticipate those harms and understand the necessity of taking reasonable steps to prevent resulting injury.'').

[157] *See* 82 FR 54472, 54597–98.

[158] 84 FR 4252, 4270.

[159] *Id.* (emphasis added).

[160] *See id.* at 4269 (citing *Davis,* 691 F.3d at 1168).

[161] *See* 104 F.T.C. at 1054. *International Harvester* is not entirely clear on whether the disclosure in question was efficacious. *See id.* at 1006 n.165 (the alternative disclosure ''would have been the most effective [ ] warning up to that time, had it been adequately disseminated . . . . It did communicate the fact that a hazard existed and the principal steps an operator should take to avoid it.'').

[162] The Bureau does not make any comment as to the appropriate evidentiary standard that would apply to unfairness citations or claims brought through the enforcement or the supervisory process.

The Bureau concludes that the 2019 NPRM provided a reasoned explanation for reconsidering the 2017 Final Rule's finding on reasonable avoidability. Specifically, the 2017 Final Rule's determination that a significant population of consumers do not understand the risks of substantial injury from covered loans is not adequately supported. The Bureau's determination was primarily extrapolated from its own interpretation of limited data from the Mann study. In support of its finding of lack of understanding, the 2017 Final Rule emphasized that ''consumers who experience long sequences of loans often do not expect those long sequences to occur when they make their initial borrowing decision.'' [163] In its reasonable avoidability analysis, the 2017 Final Rule did not significantly rely on other evidence of consumer understanding with respect to covered loans. The 2017 Final Rule's broad pronouncement about consumer understanding is based on evidence that goes to the different question of whether consumers can predict their individual likelihood of reborrowing, rather than to the question of whether consumers understand the magnitude and likelihood of risk of harm associated with covered loans sufficient for them to anticipate that harm and understand the necessity of taking reasonable steps to prevent resulting injury. Thus, the evidence that the 2017 Final Rule presented on consumer understanding does not satisfy the reasonable avoidability analysis pursuant to the Bureau's better interpretation of section 1031(c)(1)(A).

The Bureau concludes that other studies, such as the Martin study,[164] which found that most consumers cannot identify the precise APR or dollar cost of their payday loans, only suggest a lack of understanding as to specific features of payday loans. These studies do not ask the direct and relevant question of whether consumers understand the magnitude and likelihood of risk of harm associated with covered loans sufficient for them to anticipate that harm and understand the need to take steps to avoid injury.

Other lender behavior or structural or behavioral factors that can impact consumer understanding do not bear on the reasonable avoidability of the identified practice. Citing, among other things, Bureau enforcement and supervisory activities, numerous commenters identified covered lender behavior that may cause consumer harm or hinder consumer choice. The behavior that allegedly produces these effects included steering borrowers into unaffordable reborrowing, preventing borrowers from self-amortizing, engaging in deceptive advertising or marketing, and failing to comply with State laws. The Bureau notes that, depending on the facts and circumstances, some of this behavior could violate Federal consumer financial law. The Bureau has cited covered lenders for similar acts or practices in the past.[165] But there can be unlawful or harmful practices by some market participants in all markets, and that does not establish that other practices—specifically here lenders' failure to assess the ability to repay—in those markets is unlawful. The Bureau concludes that the existence of other practices in the markets for covered loans that could be harmful to consumers or violate other laws does not establish that the harm from a lender's decision to lend without assessing a borrower's ability to repay is itself not reasonably avoidable.

Further, the Bureau declines to infer from the conclusion that making payday loans without assessing the ability to repay causes or is likely to cause substantial injury (a conclusion from the 2017 Final Rule the Bureau assumed to be correct for purposes of the unfairness analysis in the 2019 NPRM) the further conclusion that consumers cannot reasonably avoid that injury. While the same facts in a rulemaking record may support conclusions as to each of the three elements of unfairness, to identify a practice as unfair the Bureau must separately analyze and find adequate support for each of these three elements. As discussed above, the Bureau based its conclusion on the evidence in the record that was the most direct and most probative on the question of reasonable avoidability. Having done so, the Bureau declines to rely on indirect and less probative evidence, including that drawn from inferences as some commenters have suggested.

The Bureau also declines to follow recommendations that it give further consideration to behavioral factors. The 2017 Final Rule considered whether behavioral economics factors make it difficult for consumers to understand the implications of taking out a covered loan.[166] However, these considerations did not form an independent basis for the 2017 Final Rule and, as set out in the 2019 NPRM, the Bureau need not address them.

With respect to the 2019 NPRM's preliminary determination that goes beyond withdrawing the 2017 Final Rule's reasonable avoidability determination and posited that consumers affirmatively have the requisite understanding of the likelihood and magnitude sufficient for any harm to be reasonably avoidable, the Bureau has decided it is not necessary to finalize this determination. As discussed above, the Bureau has concluded that robust and reliable evidence in the rulemaking record does not support the 2017 Final Rule's determination that payday borrowers cannot reasonably avoid substantial injury from lenders not assessing their ability to repay their loans.

Accordingly, the Bureau concludes that the Mandatory Underwriting Provisions at 12 CFR part 1041 must be revoked in light of the Bureau's determination to revoke the 2017 Final Rule's finding that consumers lack sufficient understanding of the likelihood and magnitude or risks of covered loans such that they cannot reasonably avoid substantial injury from lenders making covered short-term and longer-term balloon-payment loans without assessing borrowers' ability to repay.

Final Rule—Means To Avoid Harm

As explained above, the revised reasonable avoidability standard adopted by the Bureau in this final rule requires that covered loan borrowers have an understanding of the likelihood and magnitude of risks of harm associated with payday loans sufficient for them to anticipate those harms and understand the necessity of taking

[163] 82 FR 54472, 54617.

[164] Nathalie Martin, *1,000% Interest—Good While Supplies Last: A Study of Payday Loan Practices and Solutions,* 52 Ariz. L. Rev. 563 (2010). This study is discussed further below.

[165] *See, e.g., Consumer Fin. Prot. Bureau* v. *Navient Corp.,* No. 3:17–cv–00101–RDM (M.D. Penn. Jan. 18, 2017), *https://www.consumerfinance.gov/documents/2297/201701_cfpb_Navient-Pioneer-Credit-Recovery-complaint.pdf.* The Bureau has also filed lawsuits against payday lenders for deceptive advertising. *See, e.g.,* Press Release, Bureau of Consumer Fin. Prot., *CFPB Takes Action Against Moneytree for Deceptive Advertising and Collection Practices* (Dec. 16, 2016), *https://www.consumerfinance.gov/about-us/newsroom/cfpb-takes-action-against-moneytree-deceptiveadvertising-and-collection-practices/.*

[166] The Bureau in the 2017 Final Rule cited research stating that certain consumer behaviors may make it difficult for them to predict accurately the future implications of taking out a covered short-term or longer-term balloon-payment loan. As the Bureau made clear, however, this research helped to explain the Bureau's findings from the Mann study but was not in itself an independent basis to conclude that consumers do not predict whether they will remain in reborrowing sequences. 82 FR 54472, 54571 (explaining that ''[r]egardless of the underlying explanation, the empirical evidence indicates that many borrowers who find themselves ending up in extended loan sequences did not expect that outcome'').

reasonable steps to prevent resulting injury. The requirement that consumers ''understand the necessity of taking reasonable steps to prevent injury'' presupposes that reasonable steps exist and are available to the consumer, *i.e.,* there are practical means to avoid harm. The Bureau concludes that the evidence in the record does not support the conclusion in the 2017 Final Rule that, even assuming consumers were adequately aware of the risk of substantial injury from the failure of lenders to assess their ability to repay, consumers could not take reasonable steps to prevent or mitigate that injury. The Bureau reaches this conclusion in part based on the fact that consumers continue to have access to short-term credit in States where covered loans are prohibited or severely restricted as well as on the expanding availability of alternatives to payday and other covered loans in the marketplace.

The 2017 Final Rule found that ''once borrowers find themselves obligated on a loan they cannot afford to repay,'' the resulting injury is ''generally not reasonably avoidable *at any point thereafter,*'' because after that point the relevant long-term borrowers lack the means to avoid injury.[167] The Bureau has not sought to reconsider that determination in this rulemaking. However, the 2017 Final Rule did not assert that that determination was by itself *sufficient* to support its finding that injury was not reasonably avoidable *overall.* It is well-established that consumers can reasonably avoid injury through either ''anticipatory avoidance'' or ''subsequent mitigation,'' so a finding that consumers lack the means to avoid injury at a later time is not generally sufficient if they could do so at an earlier time.[168] And the 2017 Final Rule did not rest its reasonable avoidability analysis on a finding that consumers lack the means to avoid injury before they have taken out any covered loans. Instead, the 2017 Final Rule explained that the ''heart of the matter here is consumer perception of risk,'' and whether borrowers are in a position before taking out covered loans ''to gauge the likelihood and severity of the risks they incur.'' [169] It is that critical issue from the 2017 Final Rule that the 2019 NPRM reconsidered.

The Bureau does not find persuasive these arguments in these comments that before consumers have taken out any payday loans they lacked the ability to take reasonable steps to avoid injury from the lenders' failure to assess their ability to repay.

Consumers generally have viable alternatives to payday loans, which is evidenced by the fact that millions of consumers live in States where covered loans are prohibited or severely restricted and these consumers obtain access to other alternative forms of credit.[170] Evidence submitted by commenters that payday loan alternatives are consistently expanding are persuasive and confirmed by the Bureau's market monitoring. These alternatives include credit offered by fintechs, credit unions, and other mainstream financial institutions.[171] Consistent with their incentive to make a profit, creditors who offer products that compete with payday loans engage in marketing and advertising to make consumers aware of the availability of their products.

Consumers do not lack the practical ability to take advantage of these alternatives. Arguments based on behavioral factors that attempt to explain why borrowers may not seek out readily available covered loan alternatives are hypothetical and do not compellingly rebut available real-world evidence to the contrary. Further, that consumers may choose payday and other covered loans over other credit options because payday loans are ubiquitous and convenient is not evidence of a lack of alternatives. It is consistent with some consumers preferring payday or other covered loans based on speed and convenience of the borrowing process, easy loan approval, the ability to take out a loan without a traditional credit check, or other considerations as some commenters suggested.

And contrary to some comments, the Bureau's approach would not make any harm reasonably avoidable simply because a consumer can decline a product or service. The small-dollar loan market is not comparable to the circumstances addressed in *AFSA,* where the court found that industry-wide use of boilerplate provisions prevented consumers from making meaningful efforts to identify alternatives that did not feature those provisions.[172] Consumers in the market for covered loans do not face a take-it-or-leave-it choice; they can potentially access formal credit options with varied terms and conditions and other informal credit options, such as borrowing from family and friends.[173]

Regarding comments that consumers cannot avoid injury after they take out a loan, are trapped in an extended sequence, and are unable to repay, the Bureau acknowledges, as it did in the 2017 Final Rule, that some borrowers in extended sequences suffer financial harm. But the identified unfair practice pertains to lender conduct when borrowers are making an initial decision to take out a new loan. The fact that some subgroup of borrowers may have limited options at a later point in a repayment cycle does not negate the fact that all consumers had alternatives to covered loans before taking out an initial loan, which is the relevant inquiry where the identified practice and related rule provisions apply to all covered loans to all consumers.

Conclusion

Accordingly, as discussed above, the Bureau is withdrawing the conclusion in the 2017 Final Rule that any substantial injury from lenders making covered short-term and longer-term balloon-payment loans without assessing borrowers' ability to repay the loan according to its terms is not reasonably avoidable.

2. Reconsidering the Evidence for the Factual Analysis of Reasonable Avoidability in Light of the Impacts of the Mandatory Underwriting Provisions

The Bureau has decided to adopt a different, better interpretation of the level of understanding that payday borrowers need in order to reasonably avoid injury, as discussed in part V.B.1.

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[167] 82 FR 54472, 54598 (emphasis added).

[168] *Orkin Exterminating Co.,* 849 F.2d at 1365 (quoting *Orkin Exterminating Co.,* 108 F.T.C. at 366).

[169] 82 FR 54472, 54597.

[170] *See* discussion at part II.A.1. For example, Colorado is one State where payday loans are restricted. Following its reform, the number of payday lenders in Colorado substantially contracted, but the lending volume remained stable and the cost of loans dropped. *See* Pew Charitable Trusts, *Trial, Error, and Success in Colorado's Payday Lending Reforms* (Dec. 2014), *https://www.pewtrusts.org/~/media/assets/2014/12/pew_co_payday_law_comparison_dec2014.pdf.*

[171] *See, e.g.,* Fin. Health Network, *Financially Underserved Market Size Study 2019,* at 6 (2019), *https://finhealthnetwork.org/research/2019-financially-underserved-market-size-study/* (noting the transition in small-dollar credit markets away from payday and title loans toward installment loans); CURO Group, *Presentation at Jefferies Consumer Finance Summit,* at 9 (Dec. 2018), *https://ir.curo.com/events-and-presentations* (19 percent of a prominent payday lender's revenue came from multi-payment loans in 2010, but by the third quarter of 2018, that figure had quadrupled to 77 percent); Pew Charitable Trusts, *From Payday to Small Installment Loans: Risks, Opportunities, and Policy Proposals for Successful Markets* (Aug. 2016), *https://www.pewtrusts.org/en/research-and-analysis/issue-briefs/2016/08/from-payday-to-small-installment-loans* (noting that non-bank small-dollar lenders already offered installment loans in 26 of 39 States where they operated).

[172] *AFSA,* 767 F.2d at 977.

[173] *See* Pew Charitable Trusts, *Payday Lending in America: Who Borrows, Where They Borrow, and Why,* at 16–28, *https://www.pewtrusts.org/~/media/legacy/uploadedfiles/pcs_assets/2012/pewpaydaylendingreportpdf.pdf.*

But independent of that interpretive question, the Bureau has concluded that it should withdraw the 2017 Final Rule's determination regarding reasonable avoidability because it was supported by insufficiently robust and reliable evidence. The Bureau believes that more robust and reliable evidence for this key determination should be required, in light of the impacts of the Mandatory Underwriting Provisions would have on the market.

a. Background on the Impacts of the Mandatory Underwriting Provisions

Before reconsidering the evidence supporting the 2017 Final Rule's determinations below in parts V.B.2.c and V.B.2.d, the Bureau discusses the dramatic impacts of the Mandatory Underwriting Provisions that give rise to the Bureau's application of the robust and reliable evidence standard. The Bureau stated and explained in the 2019 NPRM its preliminary belief that the Mandatory Underwriting Provisions would have ''dramatic impacts'' on the market.[174] As the 2019 NPRM explained, the section 1022(b)(2) analysis for the 2017 Final Rule observed that the primary impacts of the Rule on covered persons derived mainly from the restrictions on who could obtain payday and single-payment vehicle title loans and the number of such loans that could be obtained. To simulate the impacts of the Mandatory Underwriting Provisions, the section 1022(b)(2) analysis for the 2017 Final Rule assumed, on the basis of a number of studies by the Bureau and outside researchers concerning payday borrowers, that only 33 percent of current payday and vehicle title borrowers would be able to satisfy the Rule's ability-to-repay requirements when initially applying for a loan and that for each succeeding loan in a sequence only one-third of borrowers would satisfy the mandatory underwriting requirement (*i.e.,* 11 percent of current borrowers for a second loan and 3.5 percent for a third loan).[175] Applying these assumptions to data with respect to current patterns of borrowing and reborrowing, the section 1022(b)(2) analysis estimated that, absent the principal step-down exemption in § 1041.6, the Mandatory Underwriting Provisions of the Rule would reduce payday loan volume and lender revenue by approximately 92 to 93 percent relative to lending volumes in 2017 and vehicle title volume and lender revenue by between 89 and 93 percent.[176] Factoring in the expected effects of the novel principal step-down exemption, and assuming that payday lenders would endeavor to take full advantage of that novel exemption before seeking to qualify consumers for a loan under the mandatory underwriting requirements of § 1041.5, the analysis estimated that the Mandatory Underwriting Provisions would result in a decrease in the number of payday loans of 55 to 62 percent and, because of the step-down feature of the principal step-down exemption, a decrease in payday lender revenue of between 71 and 76 percent.[177]

The section 1022(b)(2) analysis that accompanied the 2017 Final Rule stated that these revenue impacts would have a substantial effect on the market. The analysis projected that unless lenders were able to replace their reduction in revenue with other products, there would be a contraction in the number of storefronts of similar magnitude to the contraction in revenue, *i.e.,* a contraction of between 71 and 76 percent for storefront payday lenders and of between 89 and 93 percent for vehicle title lenders.[178]

The section 1022(b)(2) analysis for the 2017 Final Rule identified a number of impacts that the Mandatory Underwriting Provisions would have on consumers' ability to access credit. Specifically, the analysis estimated that approximately 6 percent of existing payday borrowers would be unable to initiate a new loan because they would have exhausted the loans permitted under the principal step-down exemption and would not be able to satisfy the ability-to-repay requirement.[179] The section 1022(b)(2) analysis that accompanied the 2017 Final Rule identified, but did not quantify, certain other potential impacts of the Mandatory Underwriting Provisions on consumers' access to credit. Consumers seeking to borrow more than $500 after the 2017 Final Rule's compliance date may find their ability to do so limited because of the cap on the initial loan amount under the principal step-down exemption and because of the impact of the Rule on vehicle title loans, which tend to be for larger amounts.[180] Additionally, because of the principal step-down feature of the exemption, consumers obtaining loans under that exemption would be forced to repay their loans more quickly than they are required to do today. The analysis stated that 40 percent of the reduction in payday revenue estimated to result from the Mandatory Underwriting Provisions would be the result of the cap on loan sizes under the principal step-down exemption and the remainder would be the result of the restriction on the number of loans available to consumers under that exemption coupled with the mandatory underwriting requirement for any additional loans.[181] Finally, the analysis concluded, based on research concerning the implementation of various State regulations, that although the reduction in the number of storefronts would not substantially affect consumers' geographic access to payday locations in most areas, a small share of potential borrowers would lose easy access to stores.[182]

The section 1022(b)(2) analysis that accompanied the 2017 Final Rule went on to observe that consumers who are unable to obtain a new loan because they cannot satisfy the Rule's mandatory underwriting requirement or cannot qualify for a loan under the principal step-down exemption will have reduced access to credit. They may be forced at least in the short term to forgo certain purchases, incur high costs from delayed payment of existing obligations, incur high costs and other negative impacts by defaulting on bills, or they may choose to borrow from sources that are more expensive or otherwise less desirable.[183] Some borrowers may overdraft their checking accounts; depending on the amount borrowed, an overdraft on a checking account may be more expensive than taking out a payday or single-payment vehicle title loan.[184] Similarly, ''borrowing'' by

[174] 84 FR 4252, 4264.

[175] 82 FR 54472, 54826–34.

[176] *Id.* at 54826, 54834.

[177] *Id.* at 54826. Given that short-term vehicle title loans are not eligible for the principal step-down exemption, the analysis estimated that the Mandatory Underwriting Provisions would result in a decrease in the number of short-term vehicle title loans of between 89 and 93 percent, with an equivalent reduction in loan volume and revenue. *Id.* at 54834.

[178] *Id.* at 54835.

[179] *Id.* at 54840. Vehicle title borrowers would be more likely to be unable to obtain an initial loan because the principal step-down exemption does not extend to such loans. *Id.* The analysis noted that while those borrowers could pursue a payday loan, there are three States that permit some form of vehicle title loans (either single-payment or installment) but not payday loans and that 15 percent of vehicle title borrowers do not have a checking account and thus may not be eligible for a payday loan. *Id.*

[180] *Id.* at 54841.

[181] *Id.*

[182] *Id.* at 54842 & n.1224. Research conducted by the Bureau had found that in one State where regulatory restrictions resulted in a substantial contraction of payday stores, the median distance between stores in counties outside of metropolitan areas increased from 0.2 miles to 13.9 miles. Supplemental Findings at 87.

[183] *See* 82 FR 54472, 54841.

[184] *Id.*

student loans, secured credit cards, and reverse mortgages. However, the examples of particular consumer financial products set out in the 2019 NPRM were illustrative. There are other alternative products that do not require an ability-to-repay assessment, such as long-term installment loans, as set out in the 2016 NPRM.[330]

Assuming for the sake of the argument that lenders making payday loans without determining that consumers have the ability to repay them is an atypical lending practice, it does not follow that lenders are taking unreasonable advantage of consumers through this different lending practice. Neither the 2017 Final Rule nor commenters have explained why the atypicality of this practice shows that lenders use it to take unreasonable advantage of consumers. A commenter argued that atypicality is relevant because if a lender's practice is unusual, then consumers may not expect the lender to engage in it, which, in turn, could permit the lender to take unreasonable advantage of them. But even if it was atypical in the experience of consumers with other financial products for lenders not to make an ability-to-repay determination before extending credit, millions of consumers take out payday loans without providing lenders with the information or the access to information that lenders would need to make traditional credit underwriting decisions. The 2017 Final Rule offered no evidence that consumers erroneously thought that payday lenders were making such an ability-to-repay determination when they in fact were not. So, even if payday lenders not conducting an ability-to-repay analysis was atypical (which the Bureau does not determine is the case), there is no evidence to support the conclusion that lenders used that atypicality to take unreasonable advantage of consumers.

The Bureau emphasizes that an especially careful and close analysis is needed before concluding that the acts and practices of firms take unreasonable advantage of and abuse consumers simply because those acts and practices are atypical. As the 2019 NPRM explained, innovators and new entrants into product markets (for instance, in this context, providers of wage access and fintech products) often engage in acts and practices that deviate from established industry norms and conventions. Such atypical acts and practices can be beneficial to consumers and they can be an important form of competition among firms, which, in turn, may also benefit consumers.

The 2017 Final Rule further concluded that the differences between how payday lenders marketed their loans and their business model shows that payday lenders took unreasonable advantage of consumers. The Bureau received few comments that addressed this factor, but those which did primarily focused on the potential for consumer misunderstanding, arising in large part from lender advertising and marketing, that would allow payday lenders to take unreasonable advantage of them. However, this is not a concern resulting from a mismatch between payday lending marketing and the payday lending business model. Because there does not seem to be a viable theory linking this mismatch to payday lenders taking unreasonable advantage of consumers, much less evidence that the lenders are actually doing so, the Bureau concludes that the record does not support the 2017 Final Rule's conclusion that this factor indicates that payday lenders took unreasonable advantage of consumers through making loans to consumers without determining their ability to repay those loans.

Finally, the 2019 NPRM preliminarily determined that, in contrast to the 2017 Final Rule, a payday lender's decision not to offer conditions that would eliminate or sharply limit feasible conditions that would reduce harm for a substantial portion of consumers is not of significant probative value concerning whether the identified practice constitutes unreasonable advantage-taking.[331] Several commenters noted that the 2019 NPRM did not cite examples of State laws that prevent lenders from offering products with features, such as longer loan terms or amortization options, that would reduce potential harm related to reborrowing and default. The Bureau is persuaded by these comments and the real-world examples of lenders shifting to alternative loan products (discussed above in the reasonable avoidability section) and concludes that the majority of State laws may not constrain covered lenders from designing covered loan products that would incorporate such features.

However, the Bureau determines that a decision not to offer products with such features may be reasonable given business considerations, including a lender's desire not to assume credit risk over a longer period of time. The 2017 Final Rule did not suggest that the identified practice interfered with consumers taking steps on their own to reduce or mitigate harm. Virtually every credit product presents some risks to consumers that could potentially be limited, although doing so likely would come at the cost of the lender's profits and potentially its viability as an ongoing concern. If it were the case that lenders in a systematic fashion offered an inferior, ''risky'' product to one group of consumers and a superior, ''safe'' product to another, this could indicate that lenders were taking advantage of some consumers through the offering of that risky product. But there is no evidence that payday lenders are engaged in such conduct.

Accordingly, the Bureau finalizes the 2019 NPRM and concludes based on an application of the factual cirumstances cited in the 2017 Final Rule that payday lenders do not take unreasonable advantage of consumers through engaging in the identified practice.

b. Consumer Lack of Understanding of Material Risks, Costs and Conditions

(1) Legal

The Bureau's Proposal

Under section 1031(d)(2)(A) of the Dodd-Frank Act it is an abusive practice to take unreasonable advantage of a lack of understanding on the part of the consumer of the material risks, costs, or conditions of a consumer financial product or service. In the Mandatory Underwriting Provisions of the 2017 Final Rule, the Bureau took a similar approach to interpreting this provision as it took with respect to the reasonable avoidability element of unfairness. The Bureau in the 2017 Final Rule interpreted this statutory language to mean that consumers lack understanding if they fail to understand either their personal ''likelihood of being exposed to the risks'' of the product or service in question or ''the severity of the kinds of costs and harms that may occur.''[332]

The 2019 NPRM stated that, unlike the elements of unfairness specified in section 1031(c) of the Dodd-Frank Act, the elements of abusiveness do not have a long history or governing precedents. Rather, the Dodd-Frank Act marked the first time that Congress defined ''abusive acts or practices'' as generally

[330] 81 FR 47863, 47886 (''The Bureau believes based on market outreach, that some lenders use similar underwriting practices for both single-payment and payday installment loans (borrower identification, and information about income and a bank account) so long as they have access to the borrower's bank account for repayment.'').

[331] The 2019 NPRM offered a lender's decision to offer longer-term, amortizing products as an example of a condition that would eliminate or reduce harm for a substantial population of consumers. *See* 84 FR 4252, 4276.

[332] 82 FR 54472, 54617.

unlawful in the consumer financial services sphere. The Bureau preliminarily determined in the 2019 NPRM that this element of the abusiveness test should be treated as similar to reasonable avoidability. That is, the Bureau preliminarily determined that the approach taken in the 2017 Final Rule was problematic. As discussed below, in the 2019 NPRM the Bureau applied an approach under which ''lack of understanding'' would not require payday borrowers to have a specific understanding of their personal risks such that they can accurately predict how long they will be in debt after taking out a covered short-term or longer-term balloon-payment loan. Rather, the Bureau preliminarily believed that consumers have a sufficient understanding under section 1031(d)(2)(A) of the Dodd-Frank Act if they understand the magnitude and likelihood of risk of harm associated with covered loans sufficient for them to anticipate that harm and understand the necessity of taking reasonable steps to prevent resulting injury. The Bureau in the 2017 Final Rule did not offer evidence that consumers lack such an understanding with respect to the material risks, costs or conditions on covered short-term and longer-term balloon-payment loans. In the absence of such evidence, the Bureau preliminarily determined it should not have concluded in the 2017 Final Rule that the identified practice was an abusive act or practice pursuant to section 1031(d)(2)(A) of the Dodd-Frank Act.

For these reasons, which are set forth in more detail in part V.B.1 above regarding reasonable avoidability, the Bureau preliminarily determined in the 2019 NPRM that its interpretation of ''lack of understanding on the part of the consumer of the material risks, costs, or conditions of the product or service'' in the 2017 Final Rule was too broad. The Bureau sought comment on how the Bureau should interpret section 1031(d)(2)(A) of the Dodd-Frank Act.

Comments Received

Some commenters stated that the 2019 NPRM properly links the ''lack of understanding'' analysis pursuant to section 1031(d)(2)(A) of the Dodd-Frank Act with whether a consumer's injury is reasonably avoidable. At least one commenter stated that consumer ''understanding'' in this context has long been understood to mean a general awareness of possible outcomes and that the 2019 NPRM correctly determined that section 1031(d)(2)(A) does not require payday borrowers to accurately predict how long they individually will be in debt after taking out a loan. Commenters also stated that the 2017 Final Rule's interpretation of this element was inconsistent with the statutory language, which focuses on ''understanding'' the risks and costs of ''the product,'' not on predictions about the consequences of an individual consumer's use of it.

Trade association commenters stated that the plain text of the Dodd-Frank Act and its supplemental history, including legislative history, indicate that the abusiveness standard as set forth in section 1031 is intended to be viewed on an individual, case-by-case basis.

In contrast, other commenters, including consumer groups, disagreed with the proposal, stating that the 2017 Final Rule applied an appropriate standard for section 1031(d)(2)(A) of the Dodd-Frank Act and correctly determined that a significant population of consumers do not understand the material risks and costs of unaffordable loans that are made without reasonably assessing the borrower's ability to repay the loan according to its terms. Commenters also cited behavioral economics factors and other research to suggest that consumers do not understand covered loan costs and terms.[333]

Some consumer groups and a group of 25 State attorneys general argued that the 2019 NPRM erroneously conflated the unfairness and abusiveness standards by treating the lack of understanding analysis as similar to reasonable avoidability. Some commenters asserted that the statutory standard requires understanding of ''material risks, costs, or condition'' of a product—not the knowledge of lending generally.

Final Rule

After reviewing the comments received, while the statutory language for reasonable avoidability and lack of understanding is different, the Bureau determines that the lack of understanding element of abusiveness pursuant to section 1031(d)(2)(A) of the Dodd-Frank Act should be treated as similar to the requisite level of understanding for reasonable avoidability. For the same reasons that the Bureau concluded that there was an insufficient basis to support the 2017 Final Rule's finding that substantial injury from the identified practice was not reasonably avoidable, the Bureau now concludes that there is an insufficient basis to conclude that consumers lack understanding of the material risks, costs, or conditions of covered loans.

The Bureau declines to follow certain recommendations in comments suggesting that the statutory language of Dodd-Frank Act section 1031(d)(2)(A) requires merely a general awareness of possible outcomes.

In finalizing the 2019 NPRM's preliminary determination, the Bureau concludes that the 2017 Final Rule should have applied a different interpretation and incorrectly determined that consumers lack requisite understanding. As discussed in the reasonable avoidability section, the 2017 Final Rule did not offer specific evidence on what consumers specifically understand with respect to material risks, costs, or conditions of covered loans. Although the 2017 Final Rule concluded that a significant population of consumers do not understand the material risks and costs of covered loans, the 2017 Final Rule extrapolated or inferred this conclusion from the Bureau's interpretation of limited data from the Mann study, which examined the different question of whether consumers are unable to predict how long they would be in debt. The limited data from the Mann study does not address whether consumers lack an understanding of the material risks, costs, or conditions of covered loans. For instance, the 2017 Final Rule did not consider evidence that directly addressed whether consumers are aware of the particular risks flowing from extended loan sequences or understand that a significant portion of consumers end up in extended loan sequences. Commenters point to evidence that the Bureau had considered in the 2016 NPRM preceding the 2017 Final Rule, which suggests a lack of understanding about particular terms of covered loans—principally, the Martin study[334]—but this evidence has limitations as described below in part VI.C.2.b, and does not offer support for the 2017 Final Rule's findings as to consumer understanding of covered loan risks, costs, or conditions more broadly.

In addition, the Bureau disagrees with comments that the 2019 NPRM erroneously conflates unfairness and abusiveness in analyzing the ''lack of understanding'' element. Although the

[333] *See* section VI of Bates White Economic Consulting, *Report Reviewing Research on Payday, Vehicle Title, and High-Cost Installment Loans* (May 2019), *https://lawyerscommittee.org/wp-content/uploads/2019/05/Report-reviewing-research-on-payday-vehicle-title-and-high-cost-installment-loans.pdf* (providing an overview of studies addressing consumer understanding); *see also* Martin study.

[334] *See* Martin, 52 Ariz. L. Rev. at 563.

2019 NPRM proposed to evaluate understanding in the unfairness and abusiveness analyses in a similar manner, reasonable avoidability has a ''means to avoid'' requirement that is absent from the abusiveness standard. Thus, in certain circumstances, abusiveness could prohibit some conduct that unfairness would permit. But in light of the Bureau's proposal, and an analysis of the comments received, the Bureau determines that it is appropriate to treat reasonable avoidability and ''lack of understanding'' as similar but distinct.

Accordingly, the Bureau concludes that the 2017 Final Rule failed to show that consumers lack understanding of the material risks, costs, or conditions of the practice of making covered short-term loans without reasonably assessing the borrower's ability to repay the loan according to its terms.

(2) Reconsidering the Evidence for the Factual Analysis of Consumer Lack of Understanding in Light of the Impacts of the Mandatory Underwriting Provisions

In the 2019 NPRM, the Bureau preliminarily believed that the Mann study was not sufficiently robust and reliable, in light of the Rule's dramatic impacts in restricting consumer access to payday loans, to be the linchpin for a finding that consumers lack understanding of the material risks, costs, or conditions of such loans. The 2019 NPRM also proposed that other findings and evidence were not sufficiently robust and reliable to support the Bureau's finding in the 2017 Final Rule that consumers lacked an understanding of the possible risks and consequences associated with taking out payday loans.

The Bureau finds that the analysis of the factual underpinnings of consumer lack of understanding is the same as it is for the reasonable avoidability analysis. The same factual underpinnings supported, in the 2017 Final Rule, the finding that consumers lacked understanding for purposes of abusiveness and unfairness. Similarly, the 2019 NPRM addressed the same set of shared facts in reconsidering the 2017 Final Rule's analysis of lack of understanding and reasonable avoidability. The consideration of comments and additional analysis, addressed above in parts V.B.2.a through V.B.2.d, therefore apply equally here to the factual underpinnings of consumer lack of understanding.

For the reasons set out above in parts V.B.2.a through V.B.2.d and VI.C.1.b(1), the Bureau concludes that the available evidence does not provide a sufficiently robust and reliable basis to conclude that consumers who use covered short-term or longer-term balloon-payment loans lack understanding of the material risks, costs and conditions of payday loans.

2. Takes Unreasonable Advantage of Consumers' Inability To Protect Themselves

a. Takes Unreasonable Advantage

For the reasons set out above in part VI.C.1.a, the Bureau finalizes the 2019 NPRM and concludes that the factors cited in the 2017 Final Rule do not constitute unreasonable advantage-taking of consumers' inability to protect themselves. The Bureau withdraws its determination in the 2017 Final Rule that the four factors it identified—atypicality, taking advantage of particular vulnerabilities, reliance on a business model inconsistent with the manner in which the product is marketed to consumers, and limitations on means of reducing or mitigating harm for many consumers—constituted unreasonable advantage taking of consumers' inability to protect themselves, assumed for purposes of this analysis.

b. Consumers' Inability To Protect Themselves—Factual Reconsideration

(1) The Pew Study and the Finding Based On It

The Bureau's Proposal

In part V.B.3 of the 2019 NPRM, the Bureau preliminarily found that a survey of payday borrowers conducted by the Pew Charitable Trusts (Pew study) [335] does not provide a sufficiently robust and reliable basis for the Bureau's finding in the 2017 Final Rule that consumers who use covered short-term or longer-term balloon-payment loans lack the ability to protect themselves in selecting or using these products. In the study, 37 percent of borrowers answered in the affirmative to the question ''Have you ever felt you were in such a difficult situation that you would take [a payday loan] on pretty much any terms offered?''

The 2019 NPRM stated that the Pew study asked respondents about their feelings, not about their actions; and, that respondents were not asked whether they had in fact taken out a payday loan at a time when they would have done so on any terms. The 2019 NPRM also stated that the Pew study contains a number of other findings that cast doubt on whether payday borrowers cannot explore available alternatives that would protect their interests. For example, the Pew study found that 58 percent of respondents had trouble meeting their regular monthly bills half the time or more, suggesting that these borrowers are, in fact, accustomed to exploring alternatives to payday loans to deal with cash shortfalls.

The 2019 NPRM also cited to other evidence that it preliminarily determined casts doubt on the robustness and reliability of the Pew study.[336]

Comments Received

Industry commenters and others stated that the Pew study provided an inadequate basis for the 2017 Final Rule to have drawn broad conclusions about consumers' ability to protect their own interests. Industry commenters stated that the inverse of the Pew study's 37 percent is that 63 percent of consumers would seek alternatives if they perceived the payday loans as harmful. Industry commenters further stated that consumers generally act in a utility-enhancing way when opting for and using a payday loan. They also stated that payday loan consumers have numerous alternatives to obtain short-term financial assistance, including through check cashing and pawn broking as well as through loans from personal finance companies and financial institutions.

Consumer group commenters and others noted that the Pew study was limited to payday loans borrowers. That sample set, they stated, indicates that respondents were speaking about actual payday loan experience. Moreover, in their view a reasonable reading of the study's survey question is that it asks for respondents to recall a situation in the past when they took out a payday loan. They stated that the 2019 NPRM provides no basis for assuming that respondents were not answering in the affirmative based on an actual experience with payday loans. Further, they stated, the survey responses about regular difficulty paying bills does not indicate that borrowers are accustomed to exploring alternatives. The more straightforward interpretation, they said, is that many payday borrowers often find themselves in situations where payday loans appear to be the only alternative.

Consumer group commenters stated that the other evidence cited by the 2019 NPRM as casting doubt on the Pew study was itself dubious or not applicable to payday borrowers. These

[335] Pew Charitable Trusts, *How Borrowers Choose and Repay Payday Loans* (2013), *http://www.pewtrusts.org/~/media/assets/2013/02/20/pew_choosing_borrowing_payday_feb2013-(1).pdf.*

[336] 84 FR 4252, 4267–68.

TAB 18

Neil Bhutta et al., Payday Loan Choices and Consequences (Vanderbilt L. Sch., L. & Econ., Working Paper No. 12-30, 2013), ECF No. 80-1 (Sept. 25, 2020)

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Abstract

High-cost consumer credit has proliferated in the past two decades, raising regulatory scrutiny. We match administrative data from a payday lender with nationally representative credit bureau files to examine the choices of payday loan applicants and assess whether payday loans help or harm borrowers. We find consumers apply for payday loans when they have limited access to mainstream credit. In addition, the weakness of payday applicants' credit histories is severe and longstanding. Based on regression discontinuity estimates, we show that the long-run effect of payday borrowing on credit scores and other measures of financial well-being is close to zero.

JEL Codes: D14 (Personal Finance), D12 (Consumer Economics: Empirical Analysis)

Introduction

In the wake of the recent financial crisis, consumer financial protection has received substantial attention from policy makers. The 2010 Dodd-Frank Wall Street Reform and Consumer Protection Act established the Consumer Financial Protection Bureau (CFPB) to improve enforcement of federal consumer financial laws, while also expanding the scope for protective regulation. One notable new provision in Dodd-Frank is the prohibition on "abusive" acts and practices by financial firms, including taking "unreasonable advantage of — (A) a lack of understanding on the part of the consumer of the material risks, costs or conditions of the product or service; [or] (B) the inability of the consumer to protect the interests of the consumer in selecting or using a consumer financial product or service."[1] This new prohibition represents a shift away from the neoclassical view of consumer financial protection, which assumes people can costlessly protect their own interests when costs and terms are clearly disclosed, toward a view that acknowledges the potential for financial firms, despite making disclosures, to exploit consumer biases and cognitive limitations.

It is possible that high-interest consumer credit like payday loans will be found to be abusive and restricted by the CFPB.[2] Payday lenders typically charge 10–20 percent interest for a one-to-two-week loan, implying an annualized percentage rate (APR) between 260 and 1040 percent. Given such terms, and the fact that borrowers often owe more than half of their next paycheck to the lender, some question whether payday loans are used rationally. Payday loans might exploit overoptimistic consumers who wrongly predict they will be able retire the debt quickly. If that is so, payday loans could exacerbate financial distress and reduce consumer welfare. In a recent public lecture, the new CFPB chief, Richard

[1] 12 USC §5531.

[2] Prior to Dodd-Frank, with the 2007 Talent-Nelson Amendment, Congress imposed price caps and prohibitions on certain lending practices, effectively banning payday lending to military personnel and their families. A Department of Defense (2006) report had concluded that "predatory" lenders, including payday lenders, target young and financially inexperienced borrowers, who are less likely to compare such loans to lower-cost alternatives.

Cordray, stated that "The Bureau will be giving payday lenders much more attention... [although the Bureau] recognize[s] the need for emergency credit … it is important that these products actually help consumers, rather than harm them."[3]

In this paper, we draw on a novel dataset to study the circumstances in which people turn to payday loans and the effect payday loans have on financial well-being. The data consist of payday loan application histories from a large payday lender merged at the individual level. We merged these data to a decade of quarterly credit record information. Payday borrowing is not generally reported to the major consumer credit bureaus, and thus it is not possible to study payday borrowing using mainstream credit record data alone. Merging these two datasets gives us an unprecedented, detailed and dynamic look at the financial circumstances of payday loan applicants.

Our first finding is that initial payday loan applications occur precisely when consumers' access to liquidity from mainstream creditors is lowest. Although some individuals may make quite costly pecuniary mistakes by using payday loans instead of their credit cards (Agarwal et al. 2009; Carter et al. 2011), in our data this is rare. Instead, nearly 80 percent of payday applicants have no credit available on credit cards and 90 percent have less than $300 of credit available on credit cards just before applying for a payday loan.[4,5] In addition, measures of shopping for—and failing to obtain—cheaper, mainstream credit surge around the time initial payday loan applications occur, especially for those with few existing credit accounts. These findings suggest that payday loans are generally sought as a last resort, with such loans near the bottom of the "pecking order" hypothesized by Lusardi et al. (2011).

[3] http://www.consumerfinance.gov/pressreleases/consumer-financial-protection-bureau-examines-payday-lending/

[4] The median checking account balance payday applicants reported to the payday lender on their applications is just $58, although about 15 percent had balances of at least $500.

[5] Recent survey research has indicated many payday borrowers confuse the fee quoted for payday loans (e.g., $15 per $100 borrowed on a two-week loan) with an APR, and thus may believe that payday loan costs are comparable to the costs of credit cards (Bertrand and Morse 2011; Levy and Tasoff 2012; Pew 2012).

Second, we investigate the long-term relationship between credit file characteristics and payday borrowing. With their short durations and high interest rates, payday loans are designed for managing temporary shocks. We find, however, extremely persistent weakness in credit record attributes among payday applicants. Payday applicants' average credit scores are 1.5 standard deviations below the general population average throughout the entire ten-year observation span. Payday applicants fall behind on payments and apply for new credit accounts much more frequently than the general population, long before and long after their initial payday loan application. This suggests payday loan users—12 million American adults in 2010 (Pew, 2012)—rarely accumulate precautionary savings to deal with shocks, perhaps because of difficulties committing to a budget.[6] Similarly, Skiba and Tobacman (2008) find that payday loan borrowers' renewal and repayment behavior is consistent with naïve hyperbolic discounting, and Pew (2012) emphasizes that the majority of first-time borrowers use payday loans for everyday, recurring expenses rather than unexpected ones, consistent with the theory that payday borrowers have budgeting difficulties. By further relaxing credit constraints for those with commitment problems, payday loans could be welfare decreasing (Laibson 1997). That said, high-cost alternatives to payday loans play a similar role, and thus limits on payday borrowing *alone* may not improve welfare.[7]

To better understand the financial consequences of access to payday loans, we take advantage of a discontinuity in the payday loan approval process to estimate short- and long-run effects of getting a payday loan. Our regression discontinuity approach, following Skiba and Tobacman (2011), uses payday loan application scores (hereafter "Teletrack scores") to econometrically compare

[6] Lusardi et al. (2011) document that a large fraction of U.S. households are "financially fragile," in the sense of being unable to come up with $2,000 on short notice.
[7] As Campbell et al. (2011b) note that banning payday loans would not address the underlying behavioral factors that give rise to demand for the product.

applicants who were barely approved to applicants who were barely rejected.[8] The main outcome of interest is a traditional consumer credit score (similar to a FICO score), which conveniently summarizes creditworthiness and reflects one's success in managing financial obligations. Traditional scores are distinct from the Teletrack score, computed from different information for a different purpose. Moreover, unlike consumers' use of more traditional credit such as credit cards, use of and performance on payday loans does not directly affect traditional credit scores. Rather, payday loans can only affect one's credit score *indirectly*, insofar as they help or hinder one's ability to meet financial obligations in general. For example, if payday loans help people manage cash flow and smooth financial shocks, they may in fact sustain or improve overall creditworthiness. Alternatively, if payday loans are misused due to cognitive limitations or behavioral biases, they could dig people into a deeper financial hole and increase the chance of a downward financial spiral, damaging (or impeding recovery of) borrowers' creditworthiness.

This paper's most important result is that the path of traditional credit scores after initial payday loan applications differ very little between those barely accepted and those barely rejected for payday loans. The point estimates are precise zeros: effects of more than one-tenth of the gap between payday loan applicants and the average for all consumers are excluded from the 95-percent confidence interval. Payday applicants have very poor credit, and payday loan access appears irrelevant to its repair or further deterioration.

As mentioned before, the availability of high-cost substitutes for payday loans could be one reason we find no effect. Another possible explanation is that because payday loans are small, uncollateralized loans, their potential benefits and risks are limited.

A third possibility arises because we only observe payday borrowing at one lender. This biases our baseline estimates toward zero because rejected applicants may succeed in getting payday loans at another lender. We discuss this issue in

[8] Teletrack is an alternative consumer credit reporting agency. Agarwal et al. (2009) provide more information on Teletrack scoring.

Case 1:18-cv-00295-LY Document 94-1 Filed 02/25/20 Page 11 of 124

detail and take advantage of multiple data sources on the presence of other nearby payday lenders to address it formally. In most of these specifications, we continue to find precise zero estimates of the impact of payday loans.

Overall, we believe we are able to credibly reject economically substantive effects of payday loans on creditworthiness, and thus we provide important new evidence on the effects of payday loans. A second, complementary contribution of this paper is that our rich data yield a number of important insights about the financial circumstances under which people use payday loans.

One advantage of our approach is that we are able to study individual payday applicants, as opposed to studying groups of people who have access to payday loans based on their geographic location.[10] Moreover, because we have panel data and know the precise timing of when people first apply for payday loans, we can control for pre-application differences to improve precision and strengthen identification. Finally, this paper is the first to study the credit scores of payday applicants as an outcome variable. These scores reflect many of the outcomes studied previously, such as foreclosure and bankruptcy, but allow detection of less extreme effects of payday loans and summarize the entire liability side of the household balance sheet. Thus, null results are meaningful. Our findings complement the previous research, which includes evidence that payday loans help (Zinman 2010, Morse 2011, Morgan et al. 2012) and harm (Carrell and Zinman 2008, Melzer 2011, Skiba and Tobacman 2011, Campbell et al. 2011a) consumers.[11]

The rest of the paper is organized as follows. Section I provides some additional background on payday lending. Section II describes the data and matching procedures. Section III explores static and dynamic credit record information, to understand the factors that may drive the decision to apply and the

[10] An exception is Skiba and Tobacman (2011), who use the same payday applicant data, but matched to public bankruptcy records. We carefully distinguish that paper's contributions and ours below.

[11] Bhutta (2012) identifies the effect of borrowing on payday loans from ZIP code variation and also finds payday loan access has no effect on credit scores.

differences between payday loan applicants and the general population. Section IV describes the regression discontinuity strategy, presents results from this analysis and discusses their interpretation and important caveats. In Section V we conclude.

I. Payday Lending

The payday loan industry has grown dramatically since its inception in the early 1990s. Stegman (2007) estimated that payday loan volume expanded fivefold to almost $50 billion from the late 1990s to the mid-2000s, and today 12 million American households borrow on payday loans each year (Pew 2012).[12]

A payday loan is typically a one-to-two week loan of no more than $1,000 that costs $10–$20 per $100 borrowed. Payday loans are usually provided by specialized finance companies that may also provide check cashing services and pawn loans. To borrow on a payday loan, an applicant generally provides her most recent pay stub, which is used to verify employment and determine loan size caps. Most states cap the loan amount at half of take-home pay. An applicant must also show her most recent checking account statement, a valid government-issued ID and a utility or phone bill to verify her address. Information from these documents is sent electronically to the payday loan credit bureau, Teletrack, which computes a score that determines whether the loan is approved. (We provide additional details on this credit scoring process in Section IV). If approved, the borrower writes a post-dated check for the principal plus interest, which the lender cashes on or shortly after the loan's due date, which is typically the borrower's next payday. States generally regulate how long a borrower can have a payday loan debt outstanding. Most states require the loan to be at least 7 or 14 days and no more than 30–45 days long.[13] However, borrowers can "roll over" or "renew" their loans

[12] Avery and Samolyk (2011), using a Current Population Survey supplement, find that about five percent of households in states that allow payday lending used payday loans at least one time in 2008.

[13] Carter et al. (2012) provide additional details on the structure of loan lengths in this industry and study the impact of different loan lengths on payday borrower behavior.

by paying just the fees on that subsequent payday; this grants the borrower an additional pay period to repay the loan and additional interest. The majority of states that allow payday loans have now banned this practice, but these prohibitions can be difficult to enforce.[14]

The application process does not involve a traditional credit check, and payday borrowing activity is not reported to the national credit bureaus Equifax, Experian or TransUnion. This means that payday borrowing is not a factor that directly affects one's traditional credit score. Instead, access to payday loans can only affect one's score indirectly, insofar as such loans affect consumers' ability to meet their financial obligations in general.

If a payday borrower's collateralizing post-dated check bounces, the borrower is in default. A defaulting borrower may then face insufficient funds charges from her bank, as well as bounced check fees from the payday lender on top of the outstanding debt and interest charges, but otherwise payday loans are uncollateralized. Lenders often have internal collections departments that will attempt to collect the outstanding amount owed before selling the debt to collection agencies.

II. Data

We use two sources of administrative panel data. The first is payday loan data from an anonymous provider of financial services. The second consists of anonymous credit records maintained by Equifax. We discuss each of these data sources in greater detail below, and then describe our individual-level merging process.

II.A. Payday Loan Data

We obtained data on nearly 250,000 unique payday loan applicants from a provider of financial services that offers payday loans, with applications occurring

[14] Carter (2012) provides detail regarding rollover bans, interest rate caps, and other state-level regulations.

between January 2001 and August 2004. Along with information on approved and denied applications themselves (principal amount, interest rate, outcome, start date, maturation date, etc.), many details about the individual applicants are available. These include an applicant's net take-home pay, her checking account balance and some demographic data (age, gender and race). Consistent with independent survey evidence on payday borrowers (e.g. Elliehausen and Lawrence 2001), women are slightly more prevalent than men in our sample, and minorities are substantially overrepresented. Median annualized individual income is about $20,000, and the median balance documented on applicants' most recent checking account statement is just $66 (in January 2002 dollars). The Teletrack score is also observed in the data for each applicant. Skiba and Tobacman (2011) provide additional details and summary statistics for these data.[15]

II.B. Federal Reserve Bank of New York Consumer Credit Panel

The Federal Reserve Bank of New York's Consumer Credit Panel (CCP) is a nationally representative, ongoing longitudinal dataset with detailed information on consumer debt and loan performance taken at a quarterly frequency beginning in 1999. The CCP "primary sample" consists of a five-percent subsample of all individual credit records maintained by Equifax and uses a methodology to ensure that the same individuals can be tracked over time. Each quarter, a random sample of people (typically younger people) is added to the sample so that it is representative of the universe of credit records each quarter.[16,17]

The "full sample" CCP includes quarterly snapshots of the credit records of all individuals living at the same address as the primary sample members. In most cases, the same address implies the same housing unit, but in a nontrivial number

[15] Skiba and Tobacman (2011) restrict to applicants from Texas in order to match with records from Texas bankruptcy courts.
[16] For more information on the CCP, see Lee and van der Klaauw (2010).
[17] It is important to note that all individuals in the data are anonymous: names, street addresses and Social Security numbers have been suppressed. Individuals are distinguished and can be linked over time through a unique, anonymous consumer identification number assigned by Equifax. As we discuss later, Equifax assisted with matching payday borrowers to the CCP so that the CCP data remain anonymous. The authors did not conduct the match themselves.

of cases, the same address may be associated with hundreds of individuals because, for example, the address is for a large apartment complex and apartment numbers distinguishing housing units are not available. Thus, the full sample is far bigger than the primary sample, numbering almost 40 million people each quarter compared to around 12 million individuals per quarter in the primary sample.

In addition to detailed credit account information provided by banks and financial institutions, the CCP also contains information reported by collection agencies on actions associated with credit accounts as well as non-credit-related bills (for example, phone or hospital bills) and information on inquiries made by consumers for new credit. Records also contain a limited number of individual characteristics, including the consumer's year of birth and the geographic code (down to the Census block) of the consumer's mailing address.

Finally, an Equifax credit risk score (similar to the FICO score) is available for most individuals each quarter. In any given quarter, some individuals are not scoreable due to their limited credit histories.[18] This score summarizes the information in one's credit report and is based on a model that predicts the likelihood of becoming delinquent by 90 days or more over the next 24 months on a new account.[19] The same model is applied to the data over time and thus scores are directly comparable during the entire period of observation. The credit score ranges from 280 to 850, with a higher score corresponding to lower relative risk.

As noted before, payday lenders do not report on borrowers' activity to the traditional credit bureaus such as Equifax, which means that the use and repayment of payday loans does not directly affect one's traditional credit score in the way a closed-end consumer loan from a bank would. Rather, payday loans can

[18] Multiple traditional credit scores exist; they differ because of variation in credit scoring models (e.g., VantageScore versus FICO) and in the sets of credit record data used by the three different national credit bureaus. These various credit scores are typically very highly correlated. See https://help.equifax.com/app/answers/detail/a_id/244/related/1 for more on the Equifax score.

[19] Credit scoring models take into account numerous factors such as the number of delinquent accounts, the degree of delinquency, the amount of credit being used on credit card lines, the age of accounts on file and recent applications for credit (see https://help.equifax.com/app/answers/detail/a_id/136/noIntercept/1). Factors that are *not* included in the credit file or considered in credit score computations include income, assets and employment history.

have an indirect effect on one's credit score depending on how they affect consumers' ability to meet their other financial obligations.

II.C. Matching Payday Loan Applicants to Credit Record Data

The CCP has anonymous identification numbers (CCP-IDs) that allow individuals in the data to be linked over time. In order to merge the payday loan applicant data with the CCP data, Equifax transformed the personal identifying information available in the payday loan applicant data into CCP-IDs and then provided the payday loan applicant data, including these CCP-IDs and stripping all personal identifying information, to the Federal Reserve. These data could then be merged to the CCP using the CCP-IDs common to both datasets.[20]

Table 1 provides summary information about the quality of the matching process. As shown in the top row, the payday loan applicant data consists of 248,523 unique payday loan applicants. Since the primary CCP sample is a five-percent random sample, and since nearly the entire adult population has a credit record (though not all have a credit score), we expected to match roughly 12,400 applicants to the CCP.[21] We were able to match 12,151 individuals to the primary sample CCP data at some point in time and follow them for an average of 46 quarters (48 quarters maximum). 11,622 appear in the primary sample in the quarter just before the quarter of their first payday loan application, and 11,296 of those have an Equifax score (last row). Overall, the matching appears to have been

[20] Only select Federal Reserve research staff had access to the merged dataset. At the same time, the original payday loan applicant dataset with personal identifying information has not been made available to Federal Reserve staff; they are held solely by Professor Skiba (Equifax did not retain a copy). Thus, we have been able to credibly preserve the anonymity of the CCP data.

[21] Payday borrowers should be captured in the general credit record data, as household survey research suggests that payday borrowers also apply for and use traditional forms of credit (credit cards, car loans, etc.) (Elliehausen and Lawrence 2001). In fact, even those without active credit accounts, but who have some type of public record such as a tax lien or a collection account, or have simply applied for mainstream credit, will be in the database. Finally, the fact that payday borrowers must have a source of income and a checking account to qualify for a payday loan suggests that there is a good chance that they would have participated in the mainstream credit market at some point and therefore should have a credit record.

successful and these match results imply that nearly all of the payday loan applicants had a credit record at the time they applied for their first payday loan.

We also matched payday loan applicants to the full sample CCP. Almost 60 percent of applicants were found in the full sample CCP data at some point during the 48 quarters, but most cannot be tracked over the entire timeframe. The large number of matches to the full sample seems to be related to the fact that payday borrowers predominantly rent rather than own their home, with many applicants living at addresses such as apartment complexes that have large numbers of residents.[22] Nearly 42,000 applicants were matched to the CCP in the quarter just prior to their first payday application, and these applicants can be tracked for 26 quarters on average (Table 1, Column 2).

One sign that the match worked well is that borrower age at the time of first application, which is one of the only variables available in both datasets, is very highly correlated across the two datasets. The correlation coefficient between age in the two datasets among payday loan applicants matched to the full sample is 0.92, and the 10th, 50th and 90th percentiles are nearly identical. The 10th and 50th percentiles of borrower age are 23 and 35, respectively, in both datasets, and the 90th percentile is 53 in the CPP compared to 52 in the payday loan application data.

III. When Do People Apply for Payday Loans?

In this section we study the credit records of payday loan applicants at a point just before their initial payday loan application and the longer-term dynamics of their credit record information to gain insight into factors that may precipitate payday loan use.

III.A. Debt Burden, Credit Card Utilization and Search Activity Prior to Initial Payday Loan Applications

[22] Skiba and Tobacman (2011) report that only about one-third of sample payday loan applicants own their home.

Table 2 reports various credit record statistics for the matched sample. Columns 1 through 4 describe the matched sample in the quarter prior to the initial payday loan application (the median quarter is 2002:Q4). Columns 5 through 8 display national statistics for a random sample of the population with a credit record, and Columns 9 through 12 show statistics for a random sample of the population conditional on having scores below 600.

At the time of their first application, prospective payday borrowers appear to be having major financial difficulties. Their average and median credit scores are below 520, whereas the average score in the general population is 680. Payday loan applicants tend to have nearly four open credit accounts compared to five for the general population, but, on average, applicants with at least one account are reported delinquent by at least 30 days on half of their accounts.

Applicants have an average of less than $20,000 in outstanding debt compared to nearly $50,000 for the general population. This difference is partially attributable to the low likelihood of payday applicants having a mortgage. The median level of debt for the payday applicants is close to $6,000, while the median income reported on payday applications is over $18,000 (income data are not shown in table). For the broader population, median debt is about $9,000. Credit bureau data do not contain information on income, but Census estimates indicate that median personal income in 2002 for adults (18 years old and over) was about $23,000.[23] Although it is difficult to draw definitive conclusions based on these numbers alone, debt-to-income ratios for the payday applicants at this one lender are broadly in line with those of the general population.

Only 59 percent of the payday applicants have a general-purpose credit card. Among those that have at least one card, the average (cumulative) credit limit is only about $3,000, while the average balance is about $2,900, implying little available credit remains. In total, over 78 percent of payday applicants (including those without a card) have zero credit available on credit cards and another 4 percent have less than $50 available. Ninety percent have no more than $300—the

[23] See http://www.census.gov/hhes/www/income/data/historical/people/2010/P15AR_2010.xls.

typical size of a payday loan—available on credit cards. Thus, while some payday applicants could be making a costly mistake by using payday loans, our data indicate very few could simply borrow on credit cards instead.

Are payday applicants trying to get additional credit on credit cards or other traditional sources that generally are much cheaper than payday loans? The answer to this question can help us further understand whether consumers are cognizant of alternatives and successfully search for the cheapest option. The CCP yields some insight on this question because it provides information on the number of credit inquiries over the past 12 months. Credit inquiries are instances where a lender requests an individual's credit report because that individual is applying for a new credit account.[24] As Table 2 shows (third row from the bottom), payday applicants had an average of over five credit inquiries during the 12 months leading up to their initial payday loan application—a level three times higher than that of the general population and even considerably higher than that of the general "subprime" population. Moreover, payday applicants were generally unsuccessful in getting credit, obtaining only 1.4 new accounts on average (penultimate row of Table 2). In other words, first-time payday applicants appear to be searching intensively, but unsuccessfully, for traditional (and presumably cheaper) credit.

III.B. Dynamic Credit Record Information

The previous subsection indicates heightened credit demand immediately preceding initial payday loan applications. We now use the panel aspect of the CCP to see whether credit demand surged in the quarters leading up to this point, perhaps due to a financial shock, precipitating payday loan applications.

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[24] The specific type of credit sought is not available in the CCP. Multiple applications for the same type of credit within a 30-day period count as only one inquiry. Inquiries do not include instances when lenders pull credit reports without an individual's consent for marketing campaigns or portfolio risk management. Inquiries also do not include instances when a consumer requests his or her own credit report for monitoring purposes.

Figure 1 shows several CCP variables for payday loan applicants plotted over a 40-quarter window centered around the quarter of initial payday loan applications.[25] Overall, the figures indeed suggest increased credit demand and financial distress at the time people apply for payday loans relative to previous quarters, but at the same time indicate persistent, long-term financial problems among payday loan applicants.

The top left panel of Figure 1 shows that median total debt begins to climb steeply about two years before the initial application from about $4,000 to about $7,000 two quarters after application. Although not shown in Figure 1, this debt growth largely reflects increased use of auto loans. The top right graph indicates that credit card liquidity becomes exhausted, on average, just around the time of first payday loan applications. However, even five years earlier the average amount available was just $300.

The middle left panel shows the path of credit inquiries. The darker line shows the average number of inquiries for all payday loan applicants, while the lighter line shows inquiries for the subset of applicants who have only one or zero traditional credit accounts in the period just before applying. The darker line indicates an upward trend in inquiries and then an acceleration right around the time of application. About one-third of payday applicants have no more than one account at t-1 and this group (the lighter line) shows a sharp increase in inquires at the time of applying for payday loans, consistent with a sudden surge in credit demand (note that because the inquiry variable is backward-looking, the actual peak in inquiries likely occurred in the same quarter as the payday loan

[25] Since the payday data span from January 2001 to August 2004, with a median initial application date in December 2002, and the CCP data begin in January 1999, the typical person in the dataset has four years of leads. Appendix Figure 1 reports the numbers of observations versus event time. All the patterns we report in the paper are nearly identical if we restrict to people with minimum observed history lengths. (See the discussion of Appendix Figure 2 below.)

applications). At the same time, inquiries were relatively elevated even five years earlier, indicating a persistently intense search for credit.[26]

The bottom left figure shows a rising likelihood of account delinquency leading up to payday loan applications, and then a jump in the quarters immediately following payday loan applications. Financial distress, as measured by this variable, peaks about five quarters after initial payday loan applications. A reasonable interpretation of this figure (combined with the others) is that payday loans were sought to help alleviate an intensification of adverse shocks. The delinquency jump just after application could be a consequence of, or may have been mitigated by, getting a payday loan; these possibilities will be assessed in the next section.

Finally, the bottom right panel of Figure 1 shows the average credit score of payday applicants over time. Credit scores conveniently summarize consumers' entire credit record and allow us to observe more easily how payday applicants compare over time relative to the rest of the population. Although the average score exhibits something of a *v*-shape around the time of application, overall the figure indicates that the average score is consistently below 550, which is well within the bottom quartile of the national score distribution.[27] In other words, payday applicants have persistently very low scores.[28] Notwithstanding noticeable changes around the time of payday loan application, persistently low scores reflect factors such as persistently high inquiry levels and delinquency rates.

To get a better sense of the persistence of low scores in Figure 2, we plot the path of scores for payday loan applicants who first applied in 2002:Q2 alongside

[26] The median calendar date 20 quarters prior to first application is 1999:Q2; the average number of inquiries for the general population in 1999:Q2 was 1.6 and for the population with scores under 600 was nearly 3, numbers that are nearly identical to the averages shown in Table 2 for 2002:Q4.

[27] The credit score distribution has been extremely stable, and an Equifax risk score of just over 600 has marked the 25th percentile since 1999 (see FRBNY 2011).

[28] Appendix Figure 3 shows how the distribution of Equifax risk scores evolves before and after the initial payday application. The 10th, 25th, 50th, 75th and 90th percentiles of the distribution follow paths that are almost exactly parallel, and the rates of decline in these quantiles prior to the application are almost exactly constant. Perhaps most importantly, 20 quarters before their initial payday application, more than 80 percent of applicants have Equifax risk scores below 600: the weakness in payday applicants' credit records exhibits remarkable persistence.

the path of scores for a nationally representative sample from the CCP, where each individual is weighted such that their weighted score distribution in 2002:Q2 matches the score distribution for applicants. This graph suggests that the average person with a score of about 500 in 2002Q—the same as the average score among payday applicants that quarter—dropped more sharply in prior quarters and recovered more robustly in subsequent quarters. After about four years, the average person's score approaches 580, about 50 points above payday applicants' scores. Although 580 still constitutes a subprime score, it would at least meet current eligibility requirements for a mortgage insured by the Federal Housing Administration (FHA).[29]

The time path of scores for payday applicants therefore appears to be unusually stable at a low level. As noted in the introduction, this persistence could reflect difficulties sticking to a household budget, perhaps due to time inconsistent preferences. This conclusion would be consistent with findings from Skiba and Tobacman (2008), who study repayment and default behavior among this population of payday borrowers and find that the patterns are consistent with naïve hyperbolic discounting. Along the same lines, recent survey evidence finds that a majority of borrowers say they use payday loans to help pay for everyday, recurring expenses, as opposed to unexpected emergencies (Pew 2012).

IV. The Effect of Access to Payday Loans on Financial Well-Being

Previous research has found that access to payday loans can impact financial well-being and welfare. However, in some cases the findings have been positive and in others negative. We add evidence on this unsettled, policy-relevant question using our matched dataset and a regression discontinuity (RD) design that allows us to exploit individual variation in payday loan access.

IV.A. Empirical Strategy

[29] FHA mortgage loans, especially in recent years, are very common among those seeking to purchase homes (Avery et al. 2011).

This section briefly describes the regression discontinuity design employed in this paper to identify the effect of getting a payday loan on subsequent creditworthiness.[30] When an applicant enters a payday loan outlet, a credit score is calculated by a third-party firm, Teletrack, and scores above a fixed threshold almost always result in loan approval. The top panel of Figure 3 plots the approval rates against the normalized Teletrack score, with the score threshold rescaled to zero. The top panel (our first stage) shows a strong discontinuity, with the approval rate jumping from under 10 percent for those with scores just below the threshold to an approval rate of over 90 percent for those with Teletrack scores just above the threshold.[31]

In this paper, we exploit the discontinuity in approval rates to test whether payday loans might be financially helpful or harmful. Informally, since applicants just above and just below the approval threshold should be very similar otherwise, approval can be thought of as being randomly assigned in the neighborhood of the threshold, conditional on observed characteristics.

We will test for discontinuities in various credit record outcomes at the threshold where payday loan approval jumps. One key outcome is a traditional credit score (analogous to the FICO score), which summarizes a person's traditional credit record information, such as payment performance on credit cards, mortgages and auto loans. The bottom panel of Figure 3 illustrates the basic idea, plotting credit scores along the same x-axis as in the top panel of that figure. This figure indicates that roughly one year after applying, applicants just above the threshold (those likely to have been barely approved) have slightly lower scores than those just below the threshold (those likely to have been barely rejected).

One potential shortcoming of RD designs is that the selection variable (in our case the Teletrack score) may be subject to manipulation. In this setting, a few details of the process for evaluating loans increase our confidence in the validity of

[30] We follow Skiba and Tobacman (2011) closely. They discuss this econometric approach in more detail.
[31] Skiba and Tobacman (2011) show detailed regression results for the first stage and plot the first stage for numerous subpopulations as well. See their Appendix.

the RD design. Specifically, during the application process, the lender's employee electronically submits information about the applicant to Teletrack, and within minutes a yes/no notification indicating whether the application was approved or declined is returned to the employee. Neither applicants nor the employees are informed of applicants' scores or what the passing credit score threshold is, and thus gaming is unlikely.[32]

Using the Teletrack score discontinuity, we estimate the effect of payday loan approval on traditional credit scores and other credit record outcomes over various time horizons (τ) after the first payday loan application. In addition to graphical evidence, we also present results from two-stage least squares (2SLS) regressions. The second stage equation is:

$$y_i^{\tau} = \beta_0 + \beta_1 Approved_i + f(TeletrackScore_i) + \mathbf{x}'_i \boldsymbol{\beta} + \varepsilon_i \qquad (1)$$

and we instrument for *Approved*—a dummy variable indicating whether first-time payday loan applicants were approved—with a dummy variable (*AboveThr*) indicating whether a borrower's Teletrack score (*TeletrackScore*) was above the underwriting threshold. Thus the first-stage equation is:

$$Approved_i = \delta_0 + \delta_1 AboveThr_i + f(TeletrackScore_i) + \mathbf{x}'_i \boldsymbol{\beta} + \eta_i \qquad (2)$$

The function $f(TeletrackScore)$ is a function of the payday underwriting score and $\mathbf{x}$ is a vector of demographic and background characteristics. In RD parlance, the Teletrack score is the "running" or selection variable, and our identification assumption is that dummy variable *AboveThr* is exogenous conditional on our controls for the running variable and other covariates. Equivalently, unobservable factors must not change discontinuously at the threshold.

[32] Indeed, a histogram of applicant density (not shown) fails to provide evidence of a jump in density just above the Teletrack score approval threshold.

Analyses identified off discontinuities generally introduce a tradeoff as more data are included around the discontinuity (i.e., as the "bandwidth" increases). The additional data reduce sampling noise, but they potentially add bias as weight is placed on observations where unobservables may be correlated with the outcome. To mitigate these potential problems, we show that our results are robust to the choice of bandwidth. We are also able to control for pre-application values of credit scores to help ensure identification and improve precision.

IV.B. Main Results

Figure 4 shows long-term trends in the average credit score for payday loan applicants whose first application was likely to have been accepted (dark circles), versus those whose first application was likely to have been rejected (light diamonds). Using all applicants, regardless of the distance from their Teletrack score to the threshold (top left), the two trends move in a mostly parallel manner. Comparing applicants within narrower bandwidths around the threshold in the other panels of Figure 4, especially the bottom two panels, the two lines lie virtually on top of each other, indicating little difference prior to applying (supporting our identification assumption), and no effect in short or long-term credit scores as a result of getting a payday loan.

Table 3 provides 2SLS RD estimates of the effect of getting a payday loan on credit scores at various times after application, following the methodology presented in the previous section. We implement the RD using a linear function of the selection variable (the Teletrack score) that allows for differential slope on either side of the threshold, and we restrict the sample to applicants with Teletrack scores no more than 0.5 standard deviations from the threshold.[33]

Columns 1 and 2 show estimates of the effect on credit scores one quarter after application. There is some indication in Panel A that credit scores decline slightly as a result of obtaining a payday loan. However, when we control for

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[33] A linear specification seems appropriate given the pattern of the data shown in the bottom panel of Figure 3.

individuals' credit score in the quarter just prior to application in Panel B, the point estimates are much closer to zero and the standard errors also shrink somewhat.

The remainder of Table 3 shows there is little evidence of an effect on credit scores from obtaining a payday loan at various horizons after application and regardless of the sample or specification. In Panel B, the point estimates and 95-percent confidence intervals rule out substantive effects of payday loans on credit scores. The largest estimate, in Column 4, implies just a 4-point increase on average after 4 quarters and rules out effects larger than about 16 points. To help put these numbers in perspective, recall that Figure 2 indicates that after 4 quarters payday applicants' scores are already about 30 points lower than those of the average person with a score of 500 in 2002:Q2. Also recall Table 2, which shows that the score gap between payday loan applicants and the general population around the time of application was nearly 170 points and that the standard deviation of scores among payday applicants is 77 points.

The sample sizes in Panel B are smaller than those in Panel A because not all applicants observed in the CCP in a given quarter after application, $t+q$, are also observed at $t-1$, particularly those applicants not found in the primary sample CCP. Sample sizes in Panel B shrink relative to Panel A as q gets large. Panel C presents identical regressions to those in Panel B, but using only applicants that match to the primary sample CCP, who are much more like to be observed in both $t+q$ and $t-1$ since these are the individuals actively followed in the CCP. Indeed, sample sizes at $t+12$ are nearly the same as the sample sizes at $t+1$ for the primary sample. Although less precise due to smaller sample sizes relative to the full sample CCP, the point estimates and confidence intervals continue to be quite small in Panel C.

These quantitative results are compatible with the Skiba and Tobacman (2011) finding that payday loan access doubles Chapter 13 personal bankruptcy filings. That paper's huge relative effect is a small absolute effect, in the sense that the bankruptcy rate is increased from about two percentage points to about four percentage points. Adverse effects of bankruptcy filings on credit scores are heterogeneous and difficult to quantify. In practice, when individuals file for bankruptcy, their credit scores will already have deteriorated substantially due to multiple severely delinquent accounts, and the bankruptcy filing itself may not push scores down much more.[34] Even if filings were to lower credit scores by 200 points on average, the Skiba and Tobacman bankruptcy effects could account for a reduction in average Equifax scores of (0.04-0.02)*200 = 4 points, which is close to this paper's benchmark point estimates and well within all our confidence intervals.

Despite this similarity, in our view the current paper's finding of a precise zero effect on credit scores is surprising. Bankruptcy is a rare and extreme outcome, while credit scores are highly sensitive summary measures of the entire liability side of the household balance sheet. Even if the population of payday applicants had little space to fall further in creditworthiness, payday loans might have differentially affected recovery of their credit scores.

In principle interesting effects might also be present on particular types of credit, and we are also able to examine effects on the full spectrum of factors that affect credit scores shown in Figure 1. For these other measures, as shown in Appendix Figure 5 and Appendix Table 1, we also generally find precise null effects of payday loans.

When we examine subpopulations, the sample shrinks and the precision of the null effect weakens. Nonetheless, the results reinforce the message that payday loans have little impact on credit scores. We present and discuss these additional tests for potential heterogeneous effects of payday loans in Section IV.D.

IV.C. Adjusting for Access to Competing Payday Lenders

[34] Brevoort and Cooper (2010) study credit score dynamics around another type of public filing, that of foreclosure. They show that scores decline sharply in the one-two years *prior* to the foreclosure period. We suspect similar dynamics surround bankruptcy filings.

One drawback of our data is that we observe payday loan applicants at just one lender. Thus, we do not observe whether these applicants got payday loans elsewhere prior to their first application with our payday lender, or if rejected applicants can easily turn around and get a payday loan from another lender. If rejected applicants can easily get loans by applying elsewhere or again at this lender, our identification strategy would produce estimates of the impact of payday loan access that are biased toward zero. We try to address this consideration in a few ways.

First, as shown in Skiba and Tobacman (2011), just-rejected applicants are far less likely than just-accepted applicants to apply for another loan at the observed payday lender. This fact suggests that applying for a payday loan is at least somewhat costly, and that rejection may discourage trying to use payday loans in the future. Moreover, rejection may provide information: rejected applicants may feel that they will not be accepted at other lenders since the same underwriting criteria may be used again.[35]

Second, the ease of re-applying elsewhere should be directly related to the number of payday lenders in close proximity. Thus, bias should be mitigated for those applicants who live in areas with relatively few payday lenders. We test this proposition using Census data on the number of payday lenders within a five-mile radius of an applicant's home ZIP code, and data from *referenceUSA*[36] on the market share of the observed lender by ZIP code.

Figure 5 displays two figures similar to those shown in Figure 4, but restricts the sample to payday loan applicants living in particular ZIP codes (as reported on the payday loan application). The top panel restricts the sample to applicants living in ZIP codes that are below the median (among the ZIP codes that applicants reside in) in terms of the number of payday lender establishments

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[35] Most payday lenders use scores from Teletrack for their underwriting decisions, but can incorporate different data and choose their own thresholds.
[36] http://www.referenceusa.com.

within a five-mile radius.[37] The bottom panel restricts the sample to applicants living in ZIP codes where the lender that provided our data has a market share of at least one-third.[38] Although the data are noisier because of the sample stratification, there continues to be little evidence that getting a payday loan substantively affects creditworthiness. Appendix Table 2 presents regression results where we interact measures of the availability of payday loans with being above the rejection threshold. Those results fail to provide evidence of any effect of payday loans on credit scores. The results using Census data on the number of lenders, in particular, continue to show fairly precise null effects.

Third, rejection on the observed application may be more likely to deter someone from trying to get another payday loan if this was his or her first experience with payday lenders. Although we cannot provide direct evidence on this, recall that Figure 1 indicates that scores tend to bottom out and that credit demand measured by credit inquiries and credit card utilization, peaks right around the time of the first application we observe. These facts suggest that this observed payday loan application is not occurring at a random time, but rather is occurring on average at a time of peak financial stress and for many of the borrowers could well be the first payday loan application at any company.

IV.D. Testing for Heterogeneous Effects

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[37] Data on the number of payday lender establishments are estimated from the 2002 ZIP Code Business Patterns data published annually by the Census Bureau, which provide the number of establishments by ZIP code and six-digit NAICS code. NAICS codes 522291 (nondepositories providing unsecured consumer cash loans) and 522390 (check cashing services) capture payday lenders. See Bhutta (2012) for more details. The distance between two ZIP codes is calculated using the Haversine formula and ZIP code centroid locations from the Census. There are less than three payday establishments, on average, in a five-mile radius of applicant ZIP codes in the bottom half of the distribution compared to 30 for ZIPs in the top half. Nationwide, most ZIP codes do not have a single payday establishment within a five-mile radius. About five percent of matched applicants live in a ZIP code without a nearby payday establishment.

[38] Market share calculations are based on data from *referenceUSA* for Texas ZIP codes. See Skiba and Tobacman (2011) for more details.

Case 1:18-cv-00295-LY Document 94-1 Filed 02/25/20 Page 30 of 124

The results above suggest that, on average, payday loans have little effect on creditworthiness. In this section we stratify the sample in various ways to test whether there is an effect for various subgroups of interest.

We first examine whether the effect of access to payday loans varies across the distribution of pre-application Equifax credit scores. Figure 6 shows the path of credit scores for those just above and just below the acceptance threshold conditional on being in the bottom quartile (first graph) or top quartile (second graph) of the distribution at *t-1*.[39] Bottom quartile applicants exhibit a large drop in their credit scores of nearly 100 points in the two years before application, and then their credit scores recover to about 500 after roughly 12 quarters, regardless of whether the applicants are approved for the payday loan.

The second graph shows almost exactly the opposite pattern. Top quartile applicants exhibit a rise in scores of about 60 points in the three years prior to application, and then scores drop by a similar amount after the payday loan application. Approved applicants in the top quartile have slightly larger drops than rejected applicants, but the difference is statistically insignificant (regressions not reported).

Overall, the two panels of Figure 6 reinforce the view that payday applicants have longstanding, persistent weakness in their credit files. Whatever the (unobserved) shocks that lead to substantial improvement into the top quartile or worsening into the bottom quartile of Equifax scores in the few years before a payday loan application, these one-standard-deviation changes are undone in the subsequent few years.[40] The medium-term mean reversion in Equifax scores, consistent with Figure 4 and Appendix Figure 3, is remarkably strong across the score distribution.

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[39] Because we are stratifying on a *t-1* variable and looking at patterns up to 20 quarters beyond the application date, we use only payday applicants matched to the primary sample. Applicants outside of the primary sample who are observed both at *t-1* and well after the application quarter are relatively few.

[40] Curiously, top-quartile applicants have an asymmetric experience between their rate of improvement in scores before the payday application and the much faster rate of post-application decline.

Figure 7 shows the effect of payday loan access stratified separately by three different variables measured at the time of application: borrower age, credit inquiries and total debt. Borrower age may proxy for credit market experience, and those with less experience may be more prone to mistakes; inquiries may reflect a willingness to search or awareness about alternatives; and total debt may also serve as a proxy for credit market experience or awareness of alternatives. We split the sample at the median value of each of these variables and then compare the path of credit scores for barely approved versus barely rejected applicants within each subgroup.[41]

Overall, once again there is little evidence that payday loans make a difference for the path of scores after application. There is perhaps a minor divergence in scores among those with less than the median number of inquiries, but this divergence first appears prior to the payday loan application.

V. Conclusion

Since the financial crisis, there has been a renewed focus on consumer financial protection. One controversial product is the payday loan, and the 2010 Dodd-Frank Act, which created the CFPB, gives federal regulators new supervisory powers over payday lenders and new authority to regulate such products to the extent they are deemed "unfair, deceptive or abusive."

In this paper, we use a novel dataset of payday loan applicants matched with ten years of their credit history to study the circumstances under which people use payday loans and the financial consequences of using these loans. One finding is that payday loans appear to be used as a last resort: payday loan applications occur when credit card lines are generally exhausted and when the search for credit becomes much more intense but is largely unsuccessful.

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[41] In Appendix Figure 6, we show that the distribution of credit scores seems unaffected by payday loans. Specifically, the path of the 25th and 75th percentiles of the applicant score distribution is the same for barely rejected and barely accepted applicants.

While liquidity needs immediately preceding application for payday loans appear extreme, our long-term panel data indicate that applicants actually face persistent shortfalls, with delinquency rates and credit application volumes far exceeding national averages over the entire ten-year observation period. Compared to the average person with the same credit score as our average payday applicant at the time of application, payday loan applicants' credit scores stagnate at very low levels. The reason for this persistence is difficult to know for sure, but one possibility is that applicants may have time inconsistent preferences and trouble sticking to a budget.

Finally, and most importantly, we use a regression discontinuity design to study the consequences of getting a payday loan. We find that the path of traditional credit scores following first-time payday loan applications does not differ between those just barely approved and those just barely rejected. The 95-percent confidence intervals for our point estimates exclude effects on credit scores larger than one-tenth of the average gap between payday loan applicants and the rest of the population. These results are unchanged when we address the most important source of possible bias, by focusing on loan applicants with limited access to other payday lenders.

We also find no evidence that payday loans affect other credit record outcomes, such as delinquencies, or that payday loans have an effect within various subgroups such as younger applicants. Together these findings suggest that regulatory changes in access to payday loans would have limited average effects (positive or negative) on financial well-being.

There are a variety of possible reasons for the null effects we find. High-cost alternatives to payday loans may be sought by rejected payday applicants and have similar net effects. To the extent that is true, regulators would be advised to treat the alternative financial services sector as a whole. Another possible explanation is simply that payday loans are small and uncollateralized, limiting their potential benefits and risks. However, most payday borrowers take out sequences of loans, incurring nontrivial cumulative finance charges. Third, effects might appear on other indicators of well-being, or the null effects on average might reflect offsetting effects for different subpopulations. We do not find differentially impacted groups, however, and under either of these hypotheses one would expect to find average effects on at least some measures in the credit file. Finally, it might be the case—supported by the longstanding woes evident in their credit histories—that payday applicants are so financially constrained at the time they apply that large interventions would be necessary to appreciably affect their creditworthiness. Other outcome measures, like financial fragility and subjective well-being, might be more diagnostic for this population and should be pursued in future work.

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Appendix to "Payday Loan Choices and Consequences" for Online Publication

In this appendix, we include additional evidence on the robustness of our findings and the variation in Equifax score dynamics for various subsets of the payday loan applicant pool.

I. Equifax Risk Score Results

Appendix Figure 1 plots the average Equifax risk score for the primary sample and the full sample, for 20 quarters before and after the first payday loan application. Time zero corresponds to the quarter of a consumer's first observed payday loan application. The numbers next to the data points are sample sizes for the full versus the primary sample. Because the primary sample is a true random draw and the full sample is not, we make a point to show these sample sizes to confirm that both samples give similar results. The similarity in results is likely due to the fact that the selection mechanism into the full sample is orthogonal to selection into the payday sample.

In general this paper's figures display 20 quarters of history prior to the first payday application. Because the CCP data begin in 1999:Q1 and the payday data begin in January 2001, pre-application trends reflect (i) dynamics leading up to the application and (ii) compositional changes, as earlier first-time applicants are included at shorter leads. An alternative approach would have been to condition on those payday applicants who had some minimum amount of history available in the CCP. Appendix Figure 2 suggests that any potential compositional changes of our samples are unimportant. This figure compares the entire primary sample to the 6,248 members of the primary sample who appeared in the CCP at least 15 quarters before their first payday loan applications. The figure displays nearly identical average Equifax score dynamics for the entire sample and for the restricted sample with 15+ quarter histories.

Appendix Figure 3 plots Equifax risk scores for the 20 quarters before and after the first payday loan application. Here we plot the 10^{th}, 25^{th}, 50^{th}, 75^{th} and 90^{th} percentiles of the Equifax risk score for the full sample. Across all quantiles, Equifax scores decrease leading up to the first payday loan application. Scores rise somewhat over the following 20 quarters. Three features of this figure stand out. First, the trends at the various percentiles are nearly parallel. Second, deterioration before the payday loan and recovery after it are nearly linear at every percentile. Third, the dispersion in the score distribution is far larger than the average decline prior to the application. These attributes of the data are important: they imply that neither the Equifax score level or derivative cause the payday application.

Appendix Figure 4 shows the distribution of long-term average scores for payday applicants versus the general population. The full distribution reveals the striking difference in credit scores of payday loan applicants compared to the general population. Once again, as we show repeatedly here and in the main text, applicants' scores are persistently low over the long term.

Appendix Figure 5 reports five outcomes: 1) total debt, 2) available credit on credit cards, 3) number of credit inquiries in the last year, 4) number of new accounts opened in the last year and 5) the percent of accounts not current. Each figure plots these outcomes separately for those above (dark circles) and below (light squares) the Teletrack threshold. Again, we show the outcomes for 20 quarters before and after the first payday loan application. The one outcome that appears different for applicants above the Teletrack threshold is the mean available credit on credit cards. Note that all applicants had very little or negative such liquidity on average. But those who were approved to borrow on payday loans (i.e., they were above the threshold) had about \$100 more liquidity after the payday loan application. The average amount of available credit is strictly negative, implying borrowers were in fact beyond their credit card limits.

Appendix Figure 6 shows the regression discontinuity effect at the 25th and 75th percentile. Again we plot average Equifax risk scores and restrict to those within 0.25 standard deviations above and below the threshold. There do not appear to be significant differences in Equifax risk scores for the 20 quarters before and after applying for a payday loan for those above and below the Teletrack score threshold at either the 25th or 75th percentile of Equifax scores. Note that in Appendix Figures 5 and 6, the percentiles are recalculated at each point in event time. This contrasts with Figure 6 in the main text, which conditions on the quartile in the period just before the first payday application.

Appendix Table 1 shows regression estimates of the outcomes shown in Appendix Figure 5. We report instrumental variables regression estimates, as in Table 3 of the main text. The results correspond to estimating equations (1) and (2), also found in the main text. Because these outcomes exhibit greater variance relative to credit scores, we pool observations over the time span of five to eight quarters after an applicant's first payday loan application to improve precision. Pooling increases not just the number of observations per applicant, but also increases the number of applicants observed since different applicants are observed each quarter in the CCP due to the household sampling technique discussed in Section II of the main text. Standard errors are clustered at the applicant level.

As in our main regressions, controls include distance from threshold interacted with a dummy variable indicating whether the Teletrack score was above the passing threshold, log monthly pay, checking account balance, job tenure, age, months in current home, non-sufficient funds events, pay frequency, garnished wages, direct deposit, homeownership, sex and year and quarter dummy variables. The bandwidth used is specified in terms of standard deviations in the Teletrack score from the approval threshold.

The only coefficient that is significant at the five-percent level is the number of new accounts in the past twelve months at a bandwidth of 0.25 standard deviations around the threshold. With the exception of estimates for the effect on total debt, the standard errors—particularly those in Panel C where we control for pre-application values of the outcome variables—are fairly precise. Note that for the first four outcomes we exclude the largest values (above the 95th or 99th percentile) to help improve precision.

Appendix Table 2 interacts measures of the density of nearby payday lenders with dummy for the applicant having a Teletrack score above the passing threshold, i.e., *AboveThr*). The ease of re-applying elsewhere should be related to the number of payday lenders in close proximity. Thus, bias toward zero should be mitigated for those applicants who live in areas with relatively few payday lenders. Panel A uses the number of payday lenders in the five-mile radius of the applicant's ZIP code using Census ZIP Business Patterns Data (see Bhutta 2012 for more details on this measure of payday lender storefronts). Panel B estimates the same regressions but using data from *referenceUSA* to calculate the market share of the payday lender providing our data. The coefficients on *AboveThr* provide estimates of the effect of approval when there are no payday lenders nearby (panel A) or our lender has 100 percent market share (panel B). The results in panel A in particular are small and reasonably precise.

Table 1. Payday Loan - Consumer Credit Panel (CCP) Data Match Diagnostics

	N	Number of quarters in the panel (max is 48)
Payday applicants	248,523	-
Payday applicants who appear at least once in the full sample CCP	146,761	12.6
Payday applicants who appear in the full sample CCP during the quarter prior to the quarter of their first payday loan application	41,948	26.1
… and have a credit score	38,220	18.5
Payday applicants who appear at least once in the 5% primary sample CCP	12,151	45.6
Payday applicants who appear in the 5% primary sample during the quarter prior to the quarter of their first payday loan application	11,622	46.9
… and have a credit score	11,296	47.0

Notes: The administrative payday loan data were provided by a financial services firm and span 2001-2004. The CCP is the Federal Reserve Bank of New York's Consumer Credit Panel, a nationally representative, ongoing panel dataset with detailed quarterly information beginning in 1999. The primary sample consists of a five percent random subsample of all individual credit records maintained by Equifax. The full sample includes quarterly snapshots of the credit records of all individuals living at the same address as the primary sample members.

Table 2. Credit Record Summary Statistics from the CCP

Matched Payday Loan Applicants and the General Population

	Payday applicants matched to full CCP, variables measured as of the end of the quarter prior to the first payday loan application				National random sample of people with a credit record, as of end of 2002:Q4				National random sample of people with a credit record and score < 600, as of end of 2002:Q4			
	(1)	(2)	(3)	(4)	(5)	(6)	(7)	(8)	(9)	(10)	(11)	(12)
	mean	median	SD	N	mean	median	SD	N	mean	median	SD	N
Credit score[1]	513	517	77	38,220	680	702	108	103,766	523	538	60	24,907
Number of open accounts	3.8	3	3.8	38,220	5.0	4	4.3	103,766	4.0	3	4.1	24,907
Share of accounts not current[2]	0.53	0.5	0.39	33,084	0.13	0	0.29	93,912	0.50	0.5	0.39	21,236
Total debt ($)	19,656	5,977	63,578	38,220	49,605	9,120	98,176	103,766	26,482	5,852	53,046	24,907
Has one or more credit cards[3]	0.59	1	0.49	38,220	0.75	1	0.43	103,766	0.64	1	0.48	24,907
Total limit for cardholders ($)	3,050	1,154	6,002	22,556	18,914	11,000	43,487	78,146	5,883	2,029	11,636	15,964
Total balance for cardholders ($)	2,921	1,340	5,086	22,556	5,128	1,586	11,309	78,146	5,274	2,097	9,767	15,964
Has delinquent card account[4]	0.69	1	0.46	22,556	0.16	0	0.37	78,146	0.66	1	0.47	15,964
Has car loan	0.39	0	0.49	38,220	0.28	0	0.45	103,766	0.30	0	0.46	24,907
Has delinquent car loan[4]	0.35	0	0.48	15,002	0.09	0	0.28	28,813	0.31	0	0.46	7,434
Has mortgage[5]	0.14	0	0.35	38,220	0.33	0	0.47	103,766	0.19	0	0.39	24,907
Has mortgage delinquency[4]	0.37	0	0.48	5,460	0.05	0	0.22	34,309	0.33	0	0.47	4,790
Number inquiries past 12 months	5.2	4	4.6	38,220	1.7	1	2.4	103,766	3.0	2	3.3	24,907
Num new acnts past 12 months	1.4	1	2.1	38,123	1.1	1	1.5	103,606	1.0	0	1.5	24,755
Age (years)[6]	37.4	36	11.7	37,573	46.9	45	16.8	93,129	38.9	37	13.2	23,032

Notes: (1) Equifax Risk Score 3.0, ranging from 280-850; (2) "not current" means at least 30 days behind; (3) does not include retail store cards; (4) delinquency rate calculated among those with at least one account of specified type; (5) includes both closed end and home equity lines of credit; (6) age calculated as calendar minus year of birth reported in CCP.

Table 3. Regression Discontinuity Estimates

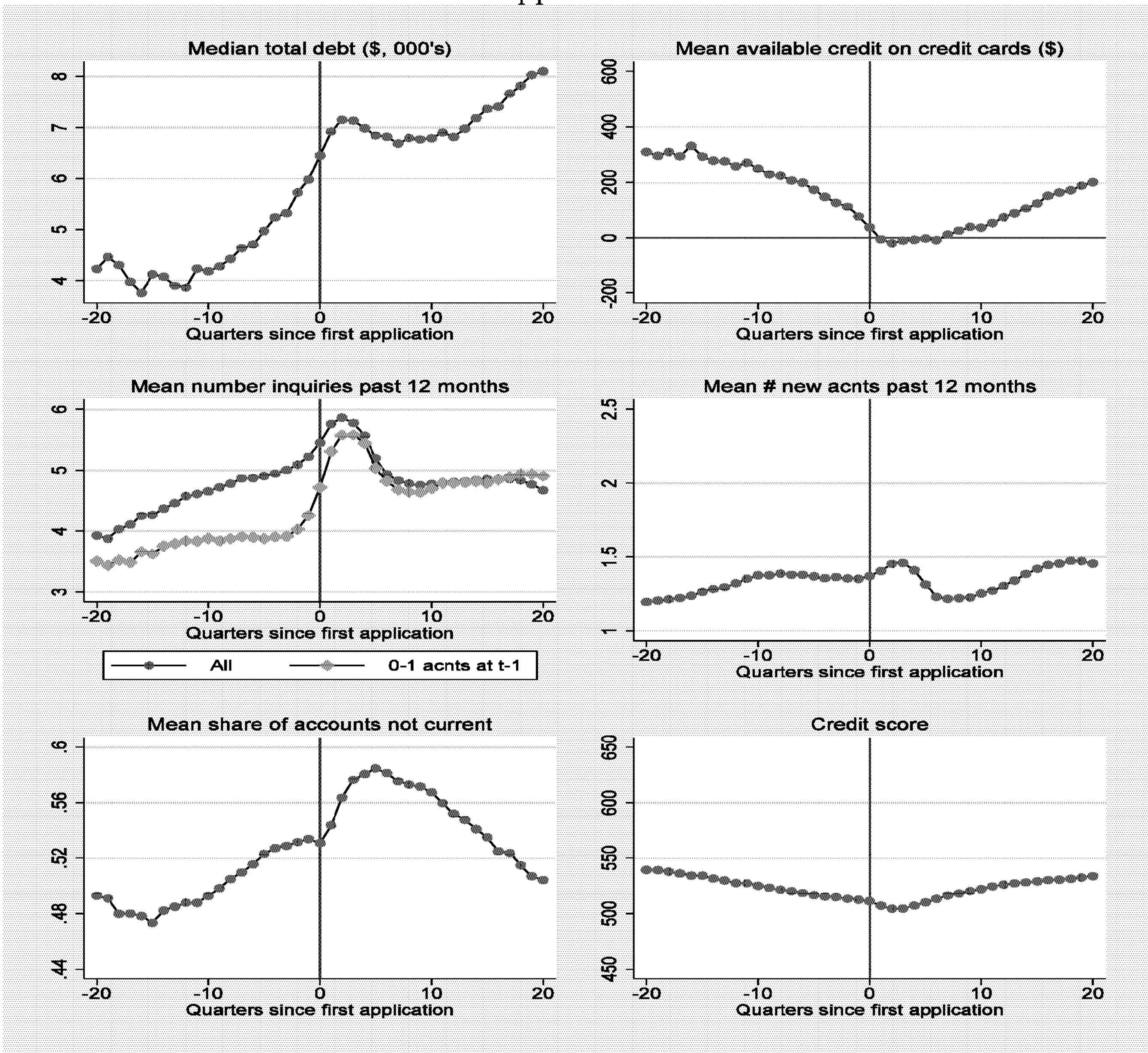
The Effect of Payday Loan Access on Credit Scores

	(1)	(2)	(3)	(4)	(5)	(6)	(7)	(8)
	1 quarter out		4 quarters out		8 quarters out		12 quarters out	
Bandwidth[1]	0.5sd	0.25sd	0.5sd	0.25sd	0.5sd	0.25sd	0.5sd	0.25sd
	A. Applicants observed in full sample CCP, within specified bandwidth							
First Payday Loan Application Approved	-9.48**	-13.19**	-2.76	1.77	-4.59	-3.48	-4.10	-3.88
	(3.55)	(5.11)	(3.58)	(5.27)	(3.32)	(4.74)	(3.33)	(4.81)
N	10714	4029	10573	4002	10419	3937	10079	3780
	B. Applicants observed in full sample CCP; controls for pre-application score							
First Payday Loan Application Approved	-2.29	-2.07	-0.36	4.01	0.63	0.47	0.77	1.90
	(2.81)	(4.13)	(3.83)	(5.72)	(4.01)	(5.87)	(4.36)	(6.36)
N	8547	3223	7065	2702	5918	2298	5216	2001
	C. Applicants observed in primary sample CCP; controls for pre-application score							
First Payday Loan Application Approved	-2.06	0.31	-3.07	6.11	0.05	8.46	2.21	6.11
	(4.73)	(7.03)	(5.83)	(8.73)	(5.60)	(8.35)	(5.48)	(8.02)
N	2994	1156	2979	1151	2970	1147	2958	1139

Notes: * $p < 0.05$; ** $p < 0.01$. Instrumental variables regressions shown. Estimating equations are (1) and (2) in text. Robust standard errors in parentheses. Outcome variable in all regressions is the Equifax credit risk score. Controls include distance from threshold interacted with above threshold, log monthly pay, checking balance, job tenure, age, months in current home, NSF count, pay frequency, garnished wages, direct deposit, home owner, sex, year and quarter dummy variables.

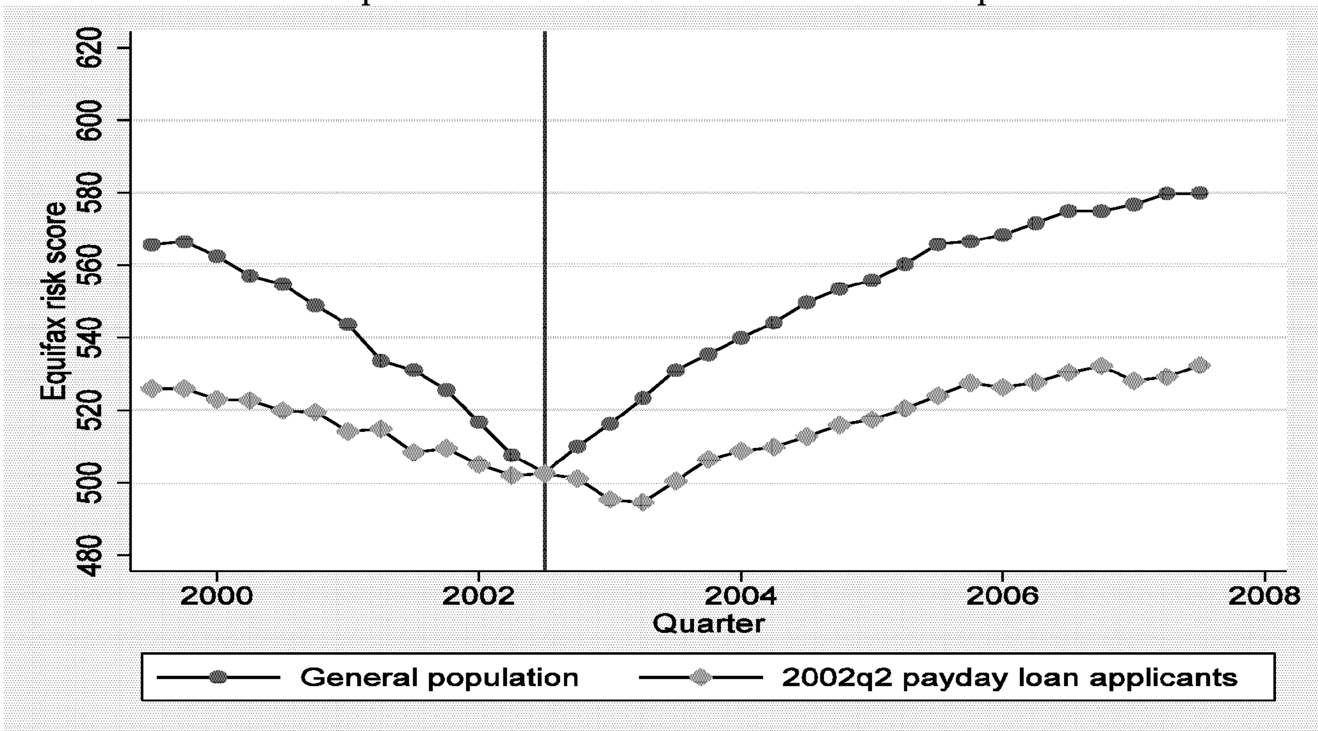
1. Bandwidth specified in terms of standard deviations of the Teletrack score from the approval threshold.

Figure 1. Credit Record Attributes Before and After First Payday Loan Application



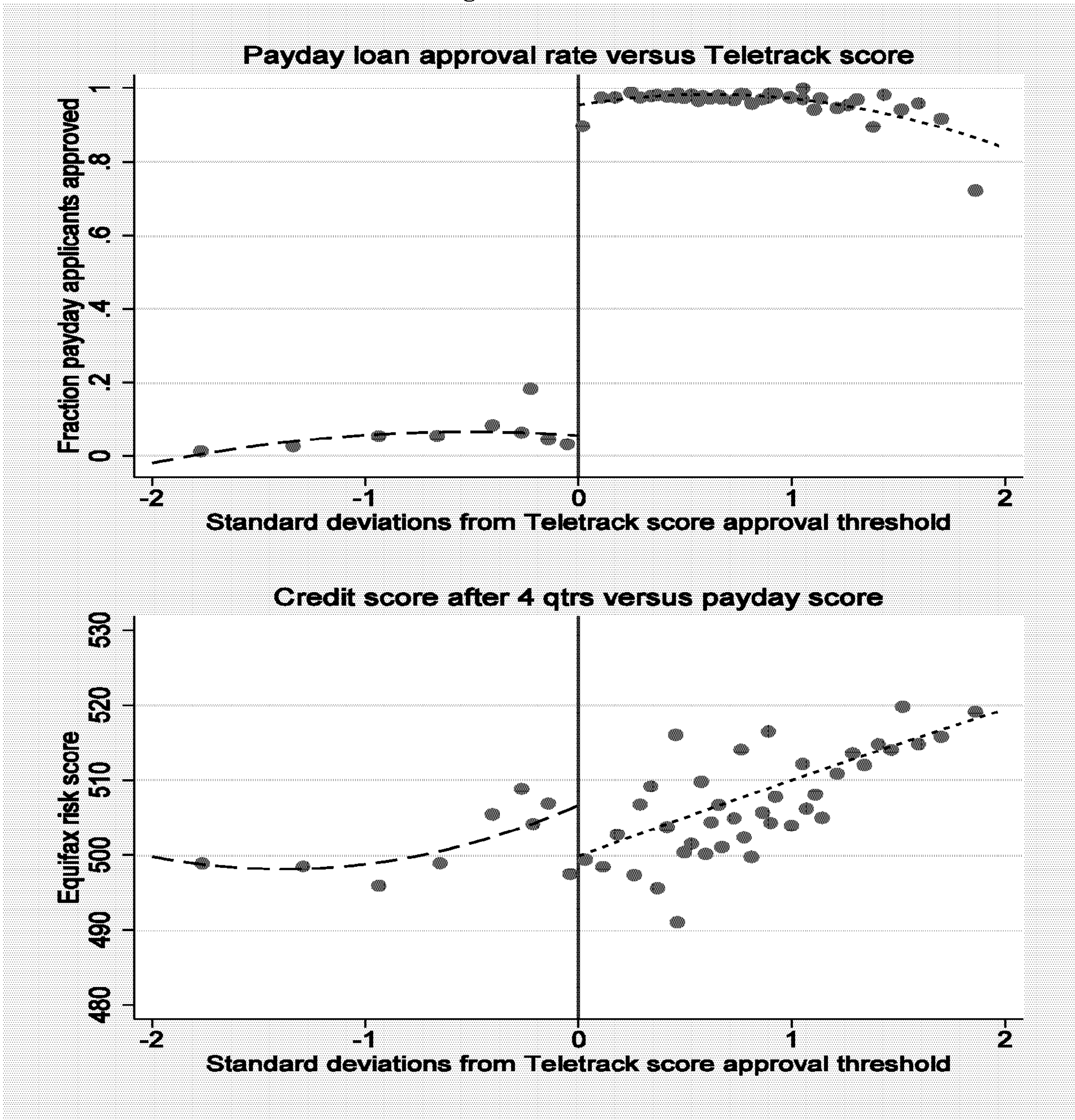
Notes: Figures based on data from the payday applicant data matched to full sample CCP. For the matched applicants, five quarterly CCP data series are plotted: mean total debt, mean credit card liquidity, mean number of credit inquiries in the previous year, mean number of new accounts in the previous year, and the mean share of delinquent accounts.

Figure 2. Credit Score Path of 2002q2 Payday Loan Applicants versus General Population with Identical Scores in 2002q2



Notes: "General population" refers to a 1 percent random sample of consumers drawn from the primary sample CCP, with each individual weighted such that the credit score distribution in 2002q2 is identical to that of payday applicants in 2002q2 (who were merged to the full sample CCP). Each data point represents the average Equifax 3.0 credit score in each quarter.

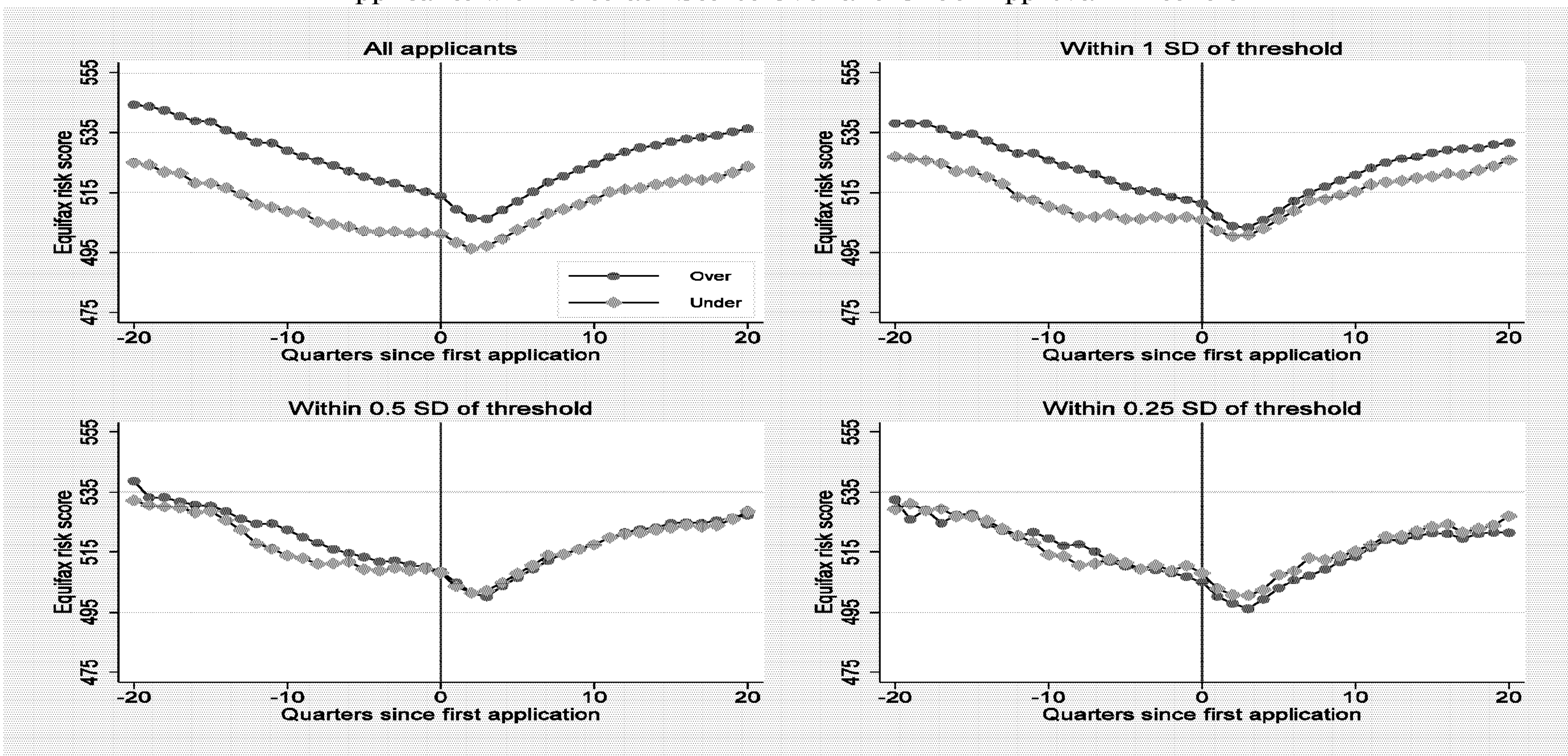
Figure 3. Regression Discontinuity Design
First Stage and Reduced Form



Notes: Each point represents one of 50 quantiles. Points shown are at the median of their quantiles on the x-axis and at the means of their quantiles on the y-axis. Both graphs include quartic fits of the underlying data on either side of the threshold.

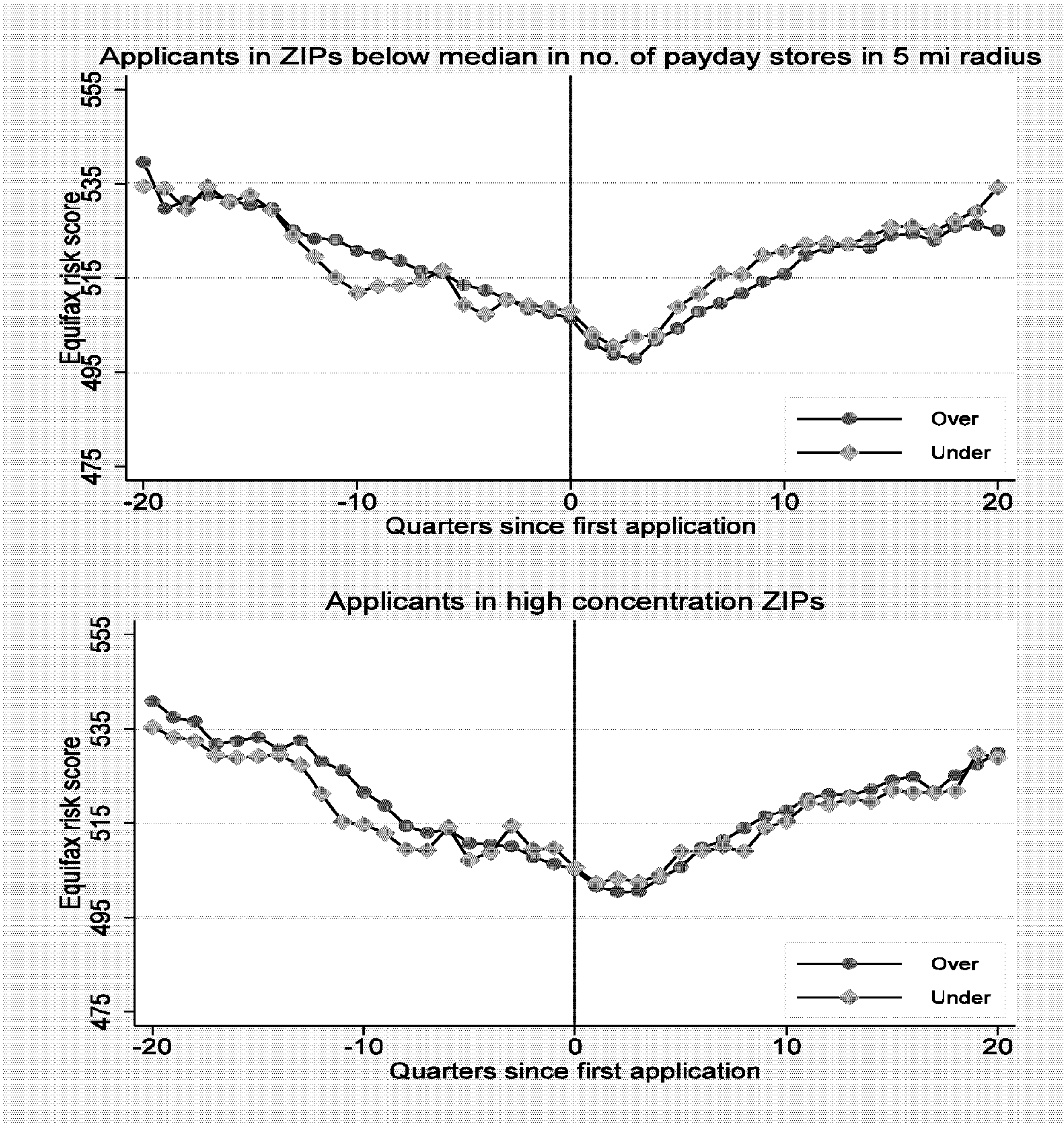
Figure 4. Credit Score Dynamics Before and After First Payday Loan Application

Applicants with Teletrack Scores Over and Under Approval Threshold



Notes: Figure is based on data from the payday loan applictions matched to full sample CCP. Each data point represents the average Equifax 3.0 credit risk score at the end of a quarter relative to the quarter of first payday loan application.

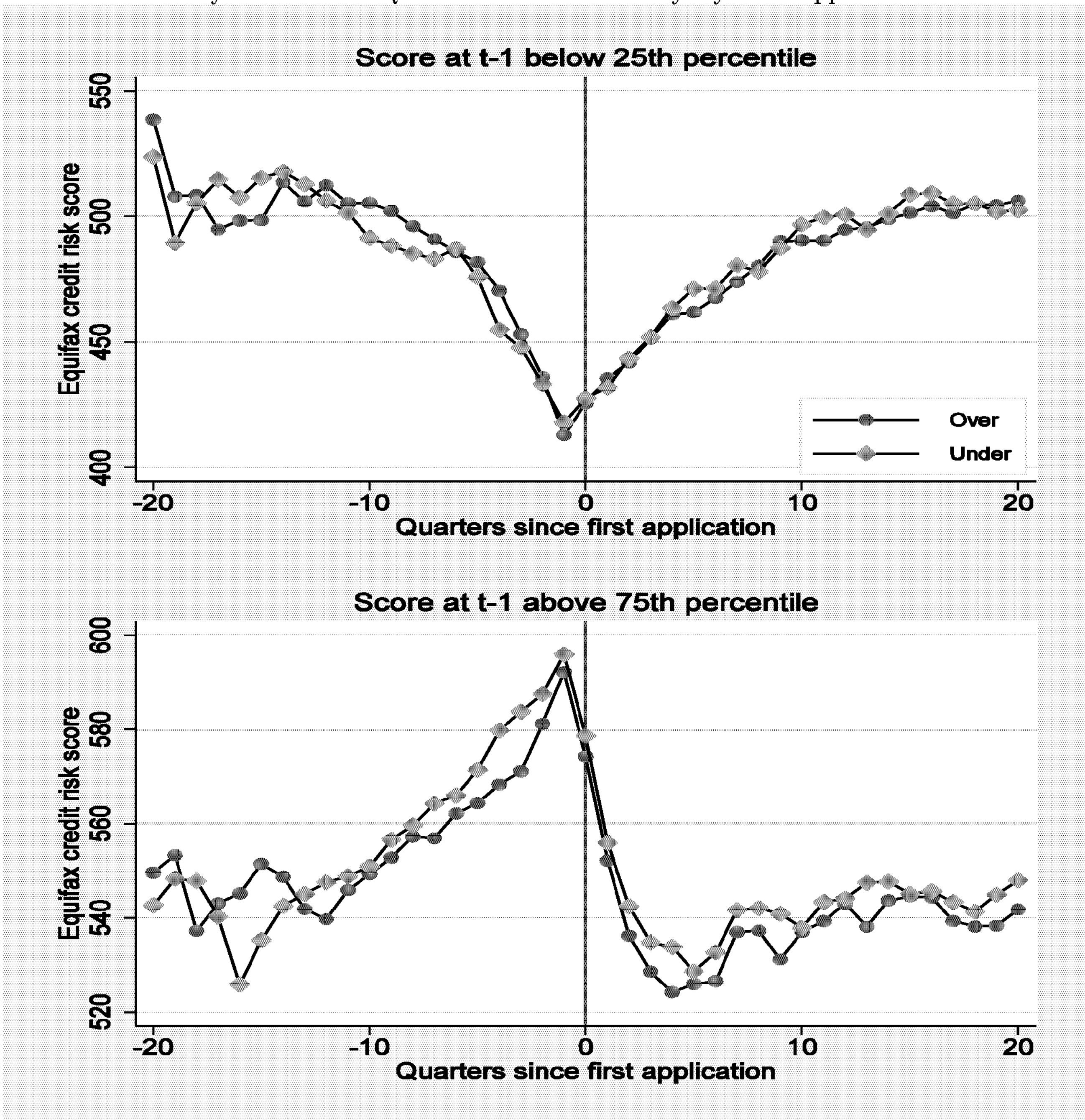
Figure 5. The Effect of Access to Payday Loans on Credit scores, by Market Structure



Notes: Figures based on data from the payday loan applications matched to full sample CCP, and includes only those applicants with Teletrack scores within 0.5 standard deviations of the approval threshold. The top figure restricts to first time payday loan applicants who live in ZIP codes with less than 3 payday lending outlets, on average, within a 5 mile radius in 2002 according to Census data (see text for more details). The bottom panel restricts to first time payday loan applicants who live in ZIP codes where the payday lender that provided the data has market share of at least one-third. Both restrictions mitigate bias toward zero that could occur if rejected applicants at this company borrow successfully on payday loans elsewhere. Both graphs restrict to applicants within 0.5 standard deviations of the Teletrack score cutoff.

Figure 6. The Effect of Access to Payday Loans on Credit Score Dynamics

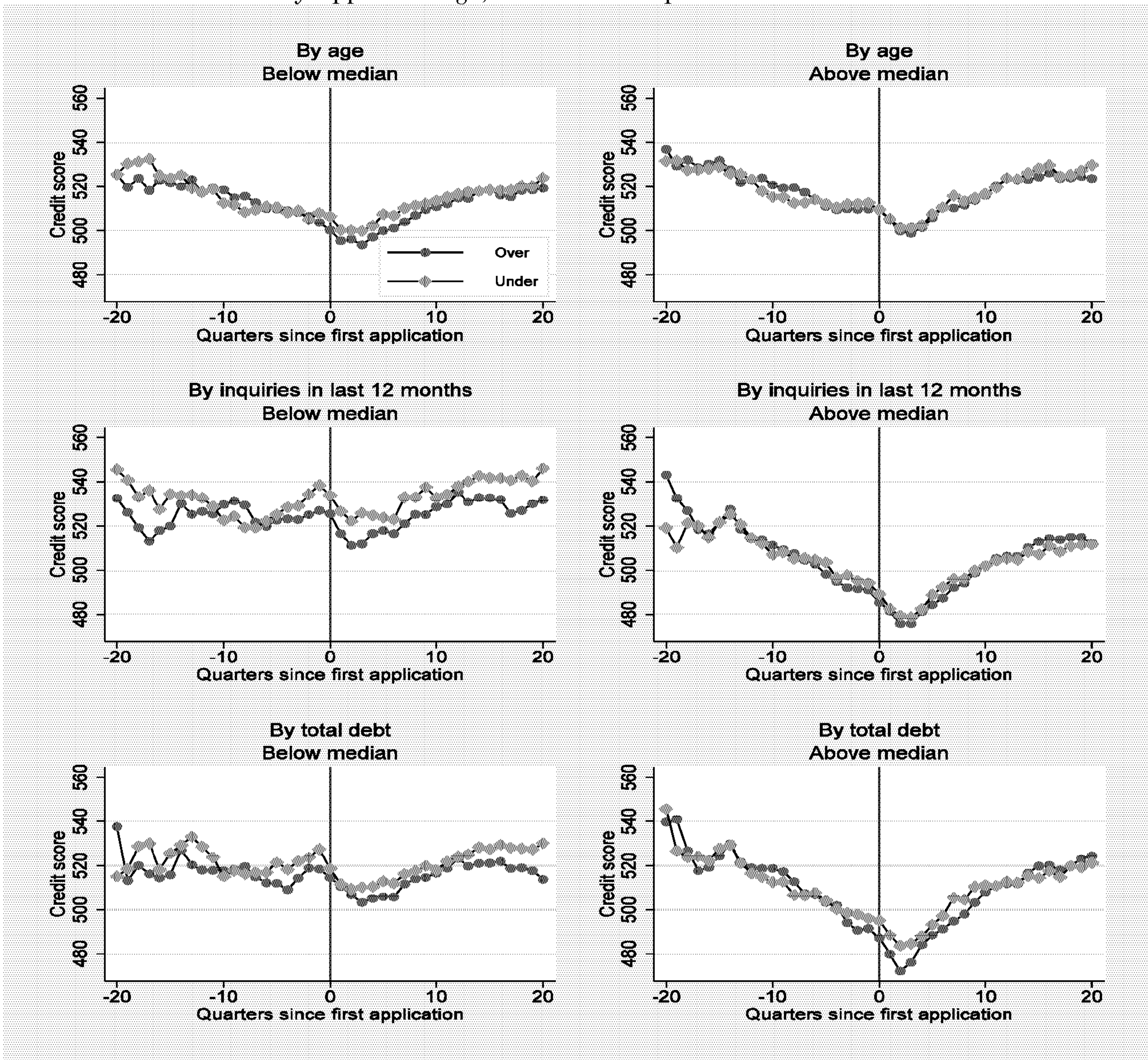
By Credit Score Quartile Prior to First Payday Loan Application



Notes: Figures based on data from the payday loan applicants matched to the primary sample CCP. Each data point represents the average Equifax 3.0 credit risk score at the end of a quarter. The top (bottom) panel shows credit score dynamics for applicants with a credit score in the quarter just before payday loan application in the bottom (top) quartile of the t-1 score distribution. The sample for both graphs is restricted to those with a Teletrack score within 0.25 standard deviations of the approval threshold.

Figure 7. The Effect of Access to Payday Loans on Credit Scores

By Applicant Age, Number of Inquiries and Total Debt



Notes: Top two figures based on full sample CCP data matched to payday loan applicant records, with age of payday applicants coming from payday applicant records measured at the time of first application. Remaining figures based on primary sample CCP data matched to payday applicant records; median number of inquiries and median total debt are measured in the quarter prior to first payday loan application. Each data point represents the average Equifax 3.0 credit risk score at the end of a quarter. Sample for all graphs restricted to those with Teletrack score within 0.25 standard deviations of the approval threshold.

Appendix Table 1. Effect of Payday Loan Access on Credit Record Attributes

	Total debt ($)[2]		Availability on credit cards ($)[3]		Credit inquiries in past 12 months[4]		New accounts in past 12 months[4]		Share of accounts not current	
Bandwidth[1]	0.5sd	0.25sd	0.5sd	0.25sd	0.5sd	0.25sd	0.5sd	0.25sd	0.5sd	0.25sd
					A. Applicants matched to full sample CCP					
First Payday Loan Application Approved	356.77	81.01	-2.53	-6.33	0.27	0.06	-0.03	-0.06	0.03	0.01
	(558.95)	(822.60)	(21.69)	(30.80)	(0.17)	(0.26)	(0.07)	(0.10)	(0.02)	(0.02)
N	39876	14885	41133	15474	41647	15654	41375	15570	35114	13278
					B. Applicants matched to full sample CCP and all outcomes not missing					
First Payday Loan Application Approved	467.35	339.20	-1.26	-16.83	0.24	-0.05	-0.05	-0.11	0.02	0.02
	(637.23)	(931.00)	(25.71)	(35.70)	(0.20)	(0.29)	(0.08)	(0.11)	(0.02)	(0.02)
N	31663	11842	31663	11842	31663	11842	31663	11842	31663	11842
					C. Applicants matched to full sample CCP; controls for outcome at *t-1*					
First Payday Loan Application Approved	-350.29	-367.76	6.85	12.52	-0.04	-0.23	-0.05	-0.15*	-0.01	-0.02
	(618.93)	(964.20)	(12.81)	(18.56)	(0.11)	(0.15)	(0.04)	(0.06)	(0.01)	(0.02)
N	23341	8893	24537	9454	25012	9642	24816	9581	20327	7922

Notes: * $p < 0.05$; ** $p < 0.01$. Instrumental variables regression estimates shown. Estimating equations analogous to (1) and (2) in text. Observations 5-8 quarters after application are pooled, and standard errors clustered at the individual level in parentheses. Controls include distance from threshold interacted with above threshold, log monthly pay, checking balance, job tenure, age, months in current home, NSF count, pay frequency, garnished wages, direct deposit, homeowner, sex, year and quarter dummy variables.

1. Bandwidth specified in terms of standard deviations in the Teletrack score from the approval threshold; 2. trimmed at 95th percentile; 3. trimmed at 1st and 99th percentiles; 4. trimmed at 99th percentile.

Appendix Table 2. Effect of Payday Loan Access on Credit Scores

A. Interaction with # PDL Establishments in 5 mile Radius

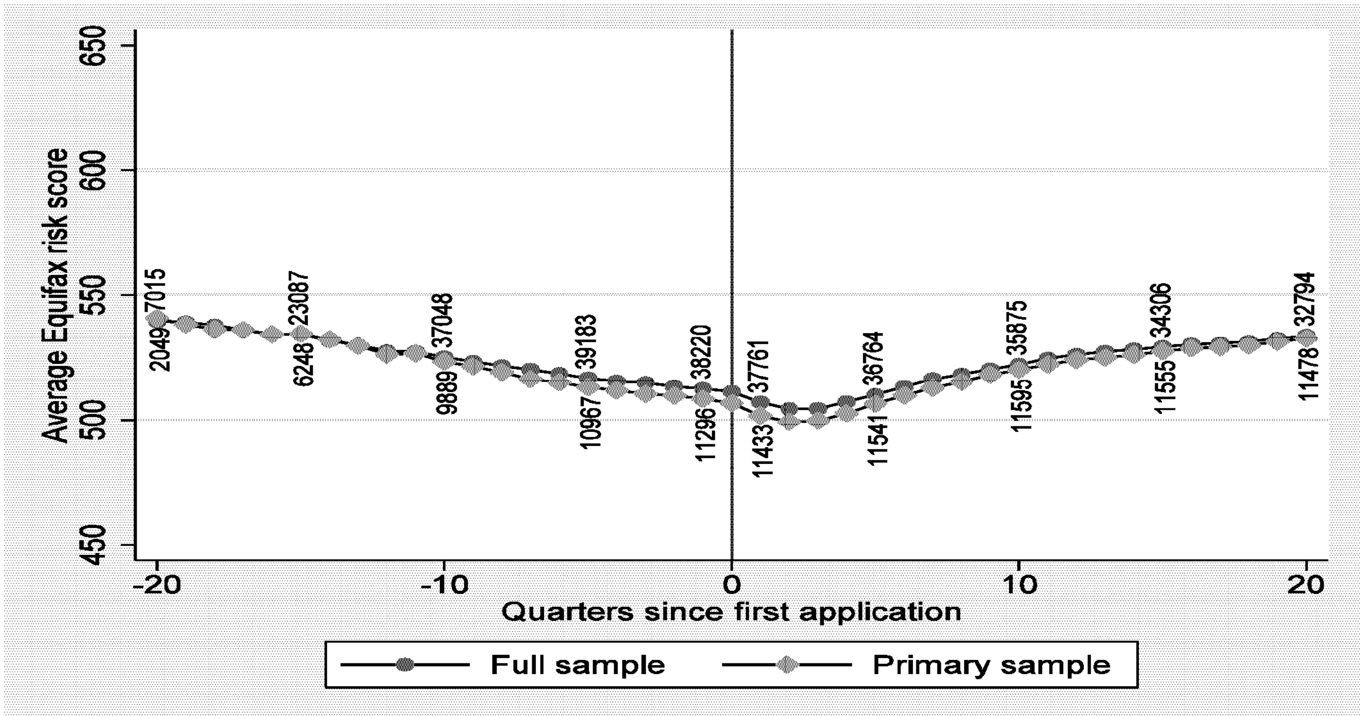
	(1)	(2)	(3)	(4)	(5)	(6)	(7)	(8)
	1 quarter out		4 quarters out		8 quarters out		12 quarters out	
	0.5 SD	0.25 SD	0.5 SD	0.25 SD	0.5 SD	0.25 SD	0.5 SD	0.25 SD
			Applicants matched to full sample CCP					
AboveThr	-1.33	-0.26	1.55	8.26	-1.10	-0.56	-2.50	-0.62
	(3.10)	(4.41)	(4.15)	(6.09)	(4.30)	(6.14)	(4.68)	(6.36)
AboveThr x (# payday lender stores in 5 mi radius)	-0.04	-0.08	-0.08	-0.20	0.08	0.06	0.11	0.09
	(0.07)	(0.09)	(0.09)	(0.14)	(0.09)	(0.13)	(0.10)	(0.13)
(# payday lender stores in 5 mi radius)	0.06	0.11	0.11	0.18	-0.00	0.06	-0.04	0.13
	(0.06)	(0.07)	(0.07)	(0.10)	(0.08)	(0.11)	(0.09)	(0.11)
N	8433	3183	6973	2668	5840	2268	5150	1975
			Applicants matched to primary sample CCP					
AboveThr	-3.22	1.55	-4.78	3.60	-7.63	-3.87	-4.17	-1.60
	(5.25)	(7.38)	(6.37)	(9.53)	(6.06)	(8.77)	(6.06)	(8.34)
AboveThr x (# payday lender stores in 5 mi radius)	0.03	-0.08	0.05	0.05	0.34**	0.52**	0.26	0.39*
	(0.12)	(0.16)	(0.14)	(0.23)	(0.13)	(0.17)	(0.13)	(0.17)
(# payday lender stores in 5 mi radius)	0.02	0.15	0.02	-0.00	-0.25*	-0.30*	-0.21	-0.08
	(0.10)	(0.13)	(0.11)	(0.16)	(0.11)	(0.15)	(0.11)	(0.14)
N	2950	1137	2936	1132	2927	1128	2916	1121

B. Interaction with Data Provider's Market Share

	(1)	(2)	(3)	(4)	(5)	(6)	(7)	(8)
	1 quarter out		4 quarters out		8 quarters out		12 quarters out	
	0.5 SD	0.25 SD	0.5 SD	0.25 SD	0.5 SD	0.25 SD	0.5 SD	0.25 SD
			Applicants matched to full sample CCP					
AboveThr	-10.44	4.50	11.29	18.70	1.94	8.40	-0.49	3.63
	(7.05)	(11.15)	(10.76)	(17.45)	(10.90)	(17.95)	(12.36)	(20.12)
AboveThr x (1- zip code market share)	10.71	-5.67	-10.03	-19.99	-4.20	-13.46	-0.81	-6.15
	(7.26)	(11.95)	(11.15)	(18.88)	(11.31)	(19.11)	(12.87)	(21.80)
(1-zip code market share)	-10.80	-2.27	6.30	9.33	3.17	14.15	3.62	25.82
	(5.67)	(9.10)	(9.62)	(15.56)	(9.45)	(15.91)	(11.05)	(17.56)
N	4675	1703	3832	1433	3173	1200	2782	1027
			Applicants matched to primary sample CCP					
AboveThr	-3.79	14.63	23.98	34.95	1.74	7.07	-8.25	-3.32
	(13.26)	(20.72)	(18.96)	(30.51)	(14.13)	(23.35)	(15.25)	(27.60)
AboveThr x (1- zip code market share)	7.17	-11.82	-28.10	-38.26	-7.42	-6.20	3.85	1.05
	(13.95)	(22.76)	(19.67)	(33.07)	(14.67)	(24.61)	(15.71)	(29.65)
(1-zip code market share)	-6.55	-4.25	19.80	23.10	1.78	-2.46	-1.36	7.88
	(10.86)	(17.56)	(17.14)	(28.16)	(10.89)	(19.42)	(12.32)	(22.81)
N	1537	563	1532	562	1530	557	1525	554

Notes: Robust standard errors in parentheses. * $p < 0.05$; ** $p < 0.01$. *AboveThr* is a dummy variable equal to 1 if the payday loan applicant's Teletrack score exceeded the passing threshold. Zip Code Business Patterns 2002 data from the Census used to estimate the number of payday lender stores in a five mile radius around the applicant's residential zip. Zip code market share estimates in panel B based on data from *referenceUSA*. All regressions control for credit score in the quarter just before application. Other controls include distance from threshold interacted with *AboveThr*, log monthly pay, checking balance, job tenure, age, months in current home, NSF count, pay frequency, garnished wages, direct deposit, homeowner, sex, year and quarter dummy variables.

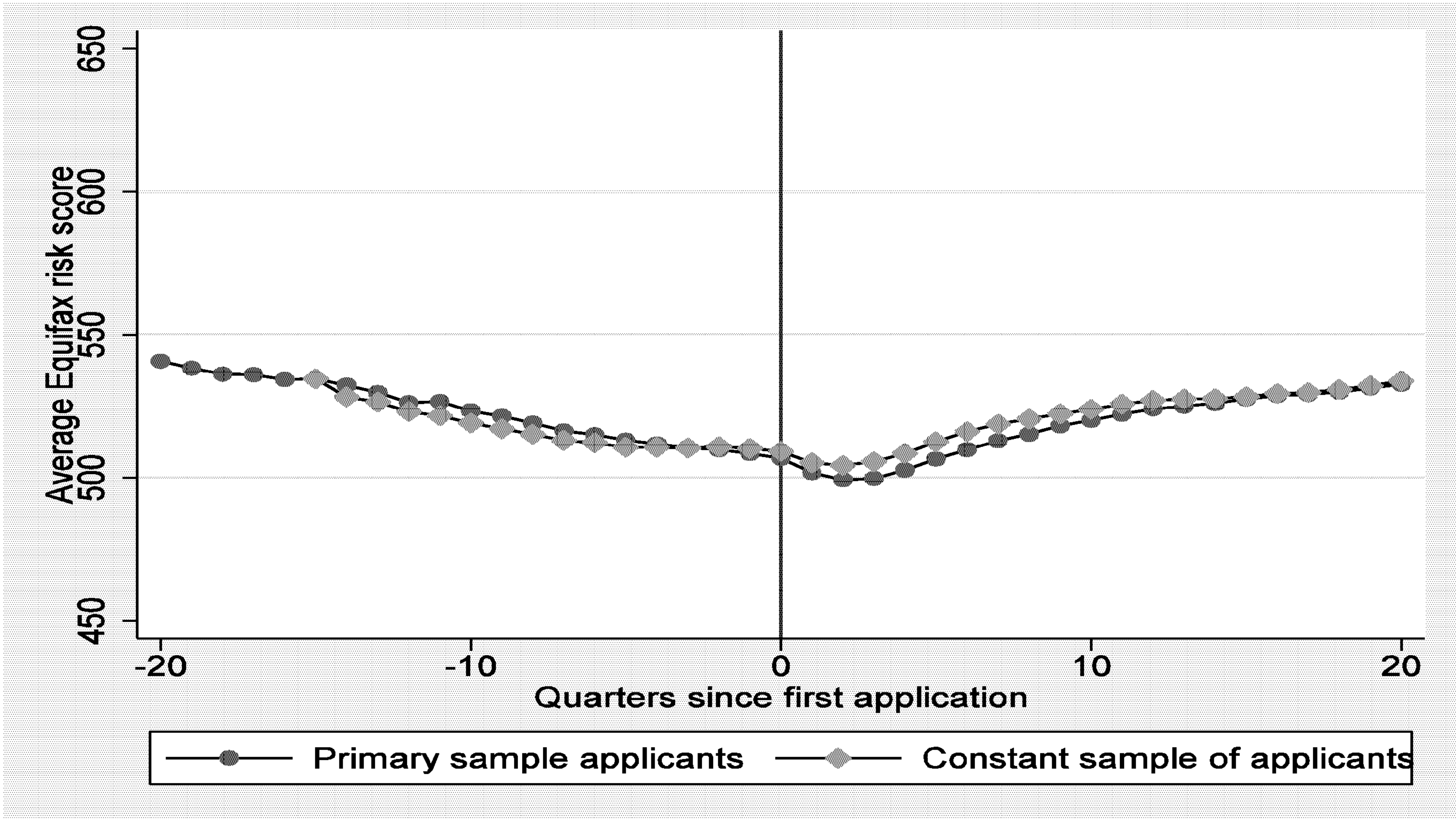
Appendix Figure 1. Credit Score Data Details



Notes: Figure plots credit scores of payday loan applicants separately for applicants matched to the primary sample CCP and applicants matched to the full sample CCP. Those matched to the primary sample are a subset of the group matched to the full sample (see main text for details). Each data point represents the average Equifax 3.0 credit score for applicants (accepted and rejected applicants) at the end of each quarter. Numbers alongside data points refer to the number of applicants the average credit score is based on.

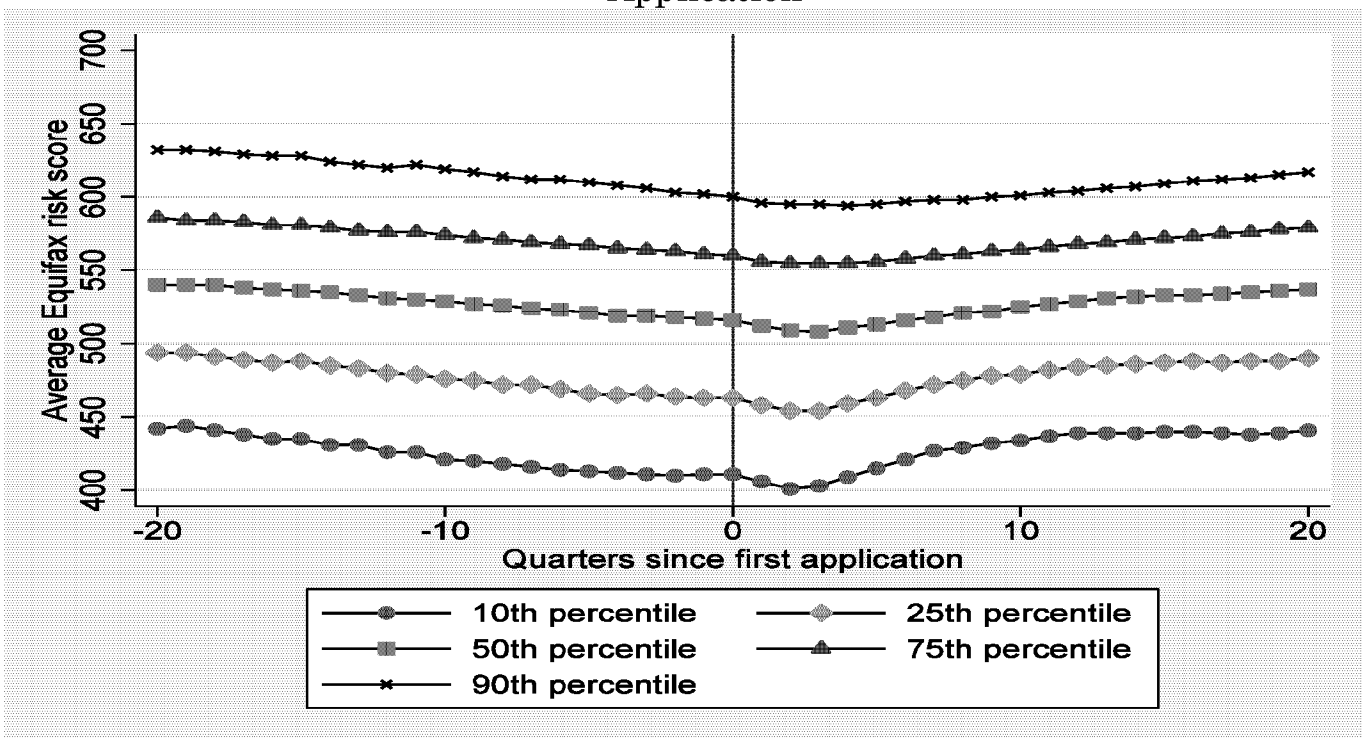
Case 1:18-cv-00295-LY Document 48-1 Filed 02/25/20 Page 54 of 124

Appendix Figure 2. Selection into the Sample is Minimal



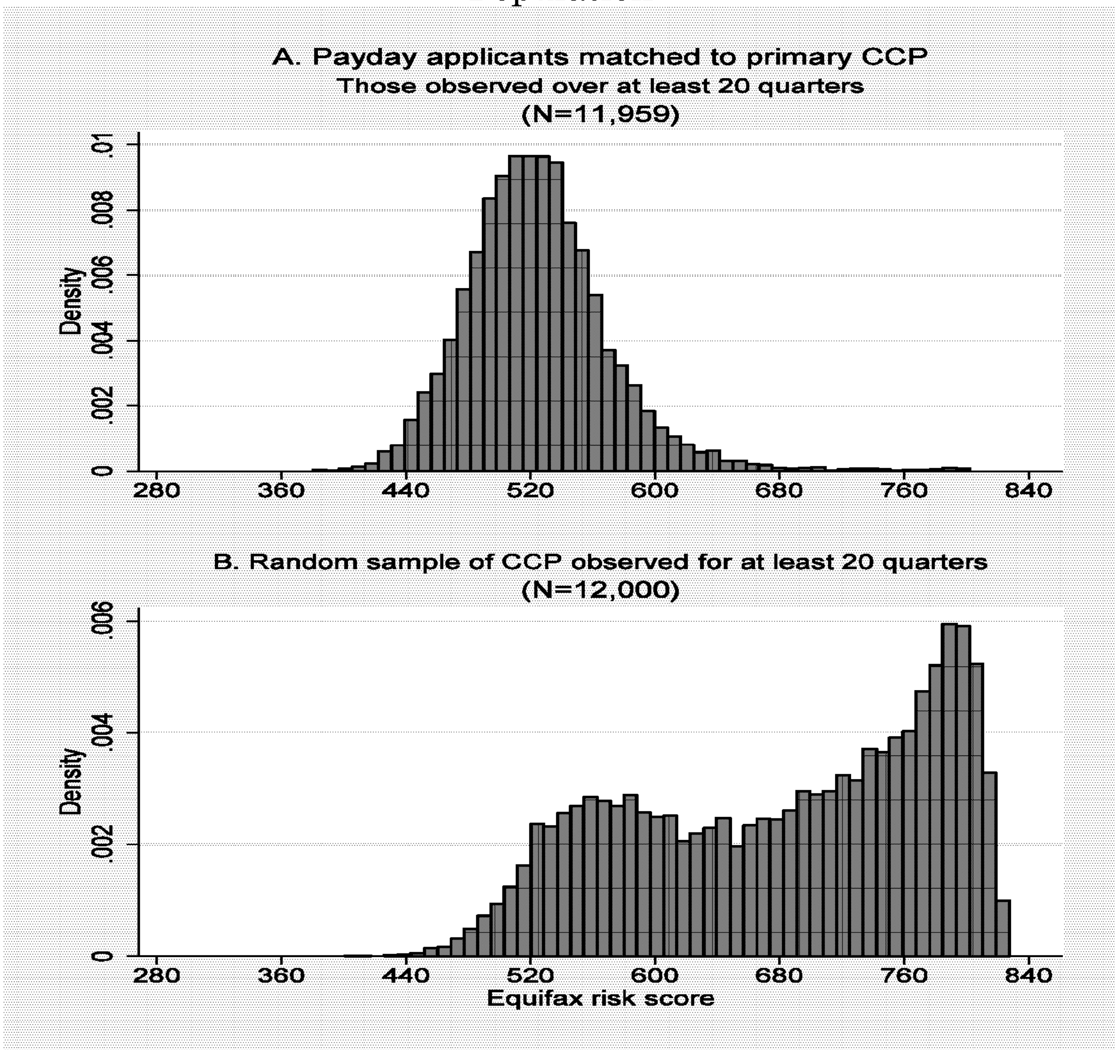
Notes: Figure is based on data from the payday loan applications matched to the primary sample CCP. The horizontal axis is event time in quarters before and after the first payday loan application. Circular data points are for event time between [-20,+20] and include all observed credit scores in the primary matched sample, corresponding to the lighter circles in Appendix Figure 1. Diamond data points are for event time between [-15,+20] and restrict at all times to the 6248 payday loan applicants observed in the primary sample CCP no later than t-15. These people applied for their first payday loans no earlier than October 1, 2002. The path of scores for two samples are nearly identical, further easing concerns about sample selection issues due to growth of the matched sample over time.

Appendix Figure 3. Credit Score Distribution Before and After First Payday Loan Application



Notes: Calculations based on the payday loan applicants matched to full sample CCP. This figure plots quantiles of the Equifax risk score distribution. Time 0 corresponds to the quarter of a consumer's first observed payday loan application.

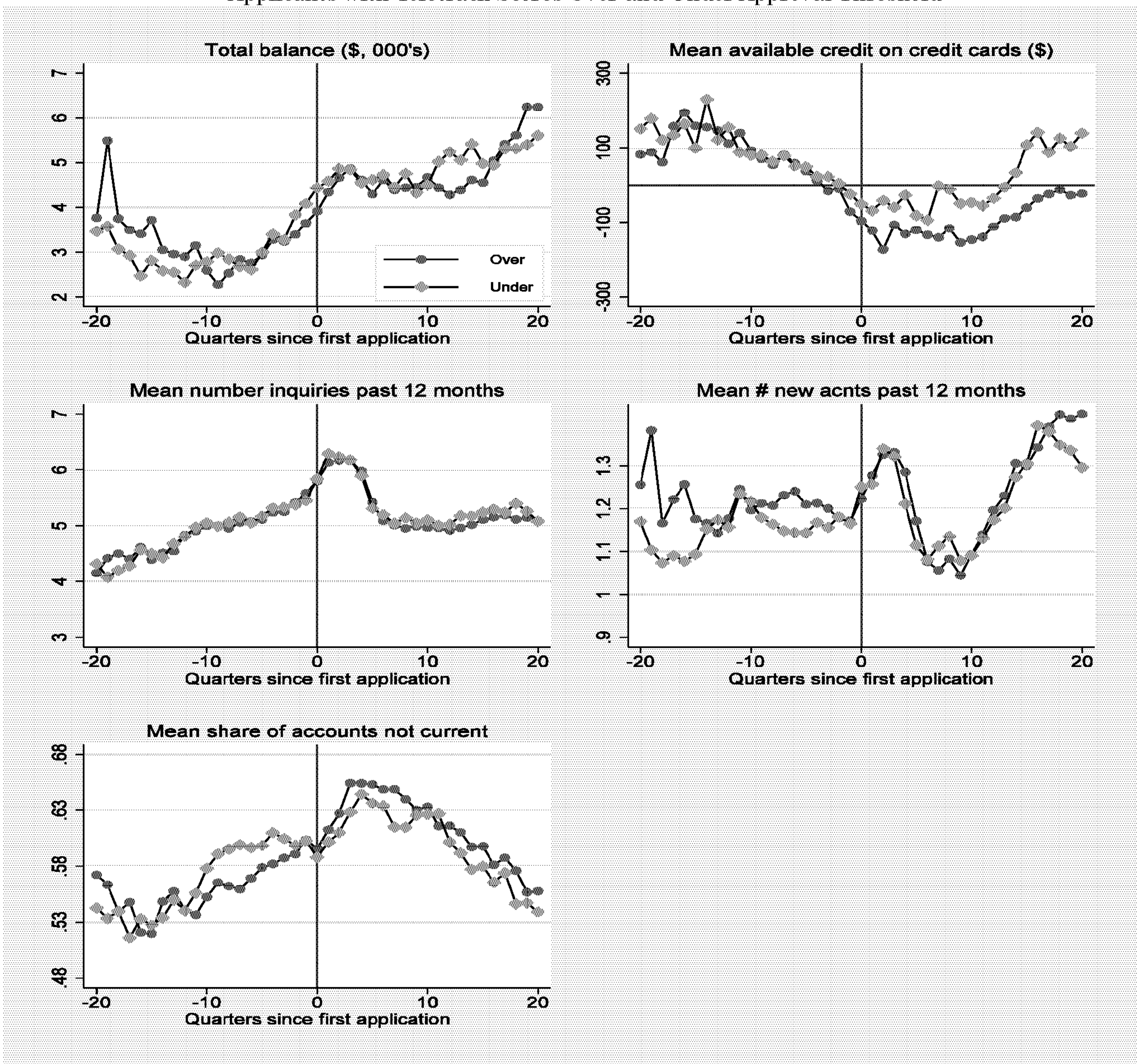
Appendix Figure 4. Payday Applicants versus General Population



Notes: Panel A shows the distribution of Equifax 3.0 credit scores for payday applicants matched to the primary sample FRBNY/Equifax consumer credit panel. The sample is limited to those observed for at least 20 quarters between 1999q1 and 2010q4, and individuals' scores are time-averaged. Panel B displays the distribution of analogous scores for a random subsample of the primary sample FRBNY/Equifax consumer credit panel, observed for at least 20 quarters between 1999q1 and 2010q4, and time-averaged at the individual level.

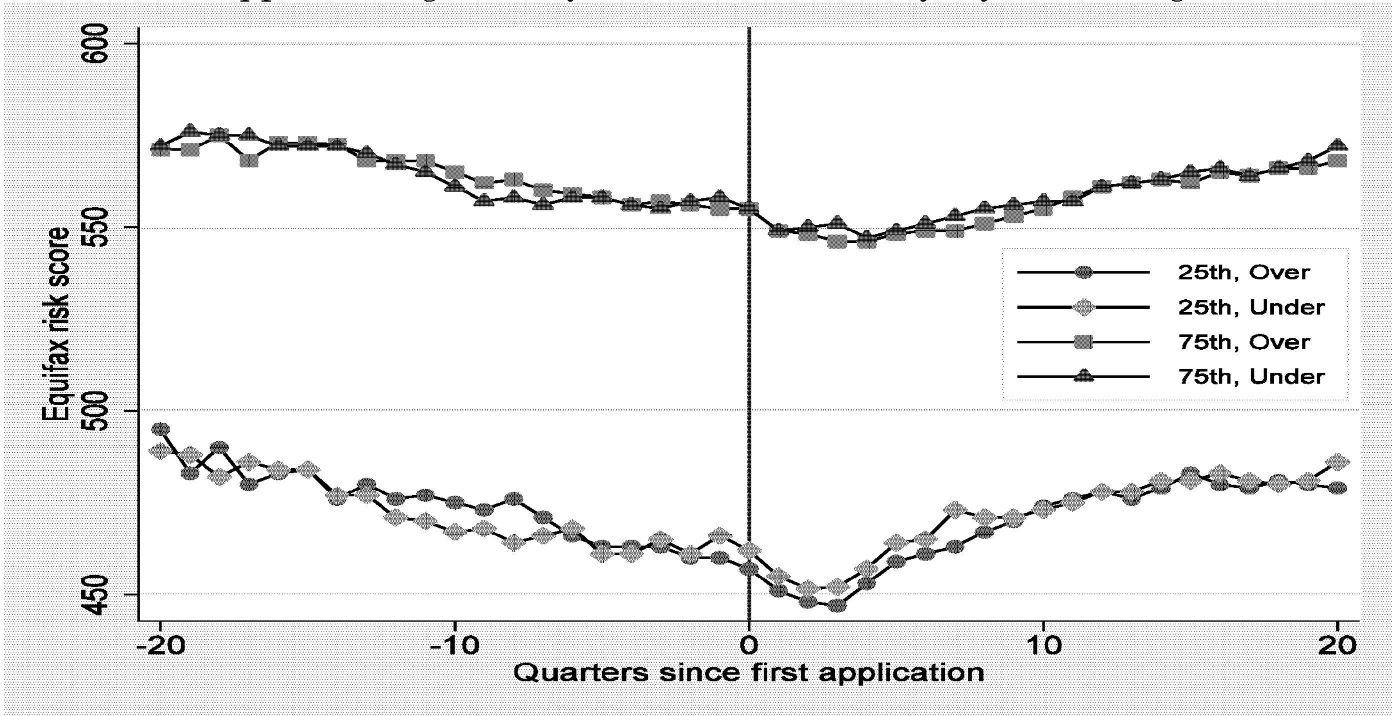
Appendix Figure 5. Credit Record Attributes Before and After First Payday Loan Application

Applicants with Teletrack Scores Over and Under Approval Threshold



Notes: Figures based on data from the payday loan applications matched to the full sample CCP. All graphs use a subsample of applicants within a bandwidth of 0.25 standard deviations from the Teletrack score approval threshold.

Appendix Figure 6. Quantile Effects of Payday Borrowing



Notes: Figure is based on data from the payday loan applications matched to full sample CCP, including only applicants within 0.25 standard deviations from the Teletrack score approval threshold. Data points in the upper (lower) portion of the graph show the 75th (25th) percentile of Equifax 3.0 credit scores relative to the quarter of first application for a payday loan.

TAB 19

Neil Bhutta et al., Consumer Borrowing after Payday Loan Bans (Jan. 14, 2015) (unpublished manuscript), ECF No. 80-1 (Sept. 25, 2020)

Consumer Borrowing After Payday Loan Bans

Neil Bhutta, Jacob Goldin, Tatiana Homonoff*

January 14, 2015

Abstract

High-interest "payday" loans have proliferated in recent years; so too have efforts to regulate them. Yet how borrowers respond to such regulations remains largely unknown. Drawing on both administrative and survey data, we exploit variation in payday lending laws to study the effect of payday loan restrictions on consumer borrowing. We find that although such policies are effective at reducing payday lending, consumers respond by shifting to other forms of high-interest credit (e.g., pawn shops) rather than traditional credit instruments (e.g., credit cards). This suggests efforts to address payday lending in isolation may not reduce consumer reliance on high-interest credit.

Introduction

The payday lending industry has received widespread attention and intense scrutiny in recent years. Payday loans – so-called because the loan is generally due on the date of the borrower's next paycheck – are typically quite expensive. The APR associated with such loans commonly reaches triple digits. Despite their costs, payday loans have skyrocketed in popularity since the 1990s, with the number of payday loan stores more than doubling between 2000 and 2004. As of 2010, there were more payday loan stores in the United States than there were Starbucks and McDonald's combined (Skiba and Tobacman, 2009).

Because of their high interest rates, many criticize payday loans as predatory lending. Payday lenders, critics allege, target low-income borrowers who are so desperate for funds

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that they are willing to pay exorbitant interest rates. Critics also argue that the structure of the loans exploits consumer by masking the true cost of borrowing. Those on the other side of the debate defend the high interest rates by pointing out the cost of lending to high-risk borrowers and by emphasizing the value to low-income households of having of access to (even expensive) credit. Advocates of payday lending also claim that restricting access to payday loans would simply shift consumer borrowing to other even more expensive forms of credit, such as bounced checks and late fees on bills.

Concerns about payday loans have recently led policymakers at both the state and Federal level to put in place significant payday lending restrictions. As of 2006, 11 states prohibited or severely restricted payday lending and by 2012 another six states and the District of Columbia did so as well. At the Federal level, in 2007 Congress and the Department of Defense banned payday lending to members of the military based on the view that such lending traps service members in a cycle of debt and threatens military readiness. Currently, the Consumer Protection Financial Bureau, which was created under the 2010 Dodd-Frank Wall Street Reform and Consumer Protection Act to oversee consumer finance markets, is considering regulations that might make it more difficult to obtain payday loans nationwide (Zibel, 2015). Given the scope for additional payday loan restrictions, research on how such restrictions impact consumer behavior and well-being is critically important.

Despite the attention paid to payday lending in recent years, the policy discussion has been hampered by a lack of empirical research on many of the most basic questions about demand for payday loans. Few datasets measure payday loan use and those that do are typically too small in sample size or too limited in question scope to answer many of the important questions for policy. Moreover, it is difficult to find plausibly exogenous variation in payday loan usage – those who use payday loans are likely to be different in unobservable ways from those who do not. Consequently, important basic questions about payday lending remain unanswered.

In this paper, we attempt to shed light on one of the most basic but unknown questions concerning payday loan usage and regulation: how does consumer borrowing behavior change when consumers lose access to payday loans? Understanding the effect of payday loan bans on borrowing behavior is important for several (related) reasons. On a practical level, knowing the answer to this question is crucial for policymakers considering whether and how to regulate payday lending. If payday lending bans simply shift borrowing to other expensive forms of credit, attempts to deal with payday loans in isolation may be ineffective or even counterproductive. Second, understanding how borrowing behavior changes after payday loan bans sheds light on the nature of demand for payday loans in areas where such loans are available. For example, if payday loans are substitutes for other expensive credit sources, it suggests that the underlying cause of payday borrowing is a general desire (whether rational or not) for short-term credit, rather than some feature unique to the design or marketing of payday loans. Finally, understanding the effects of payday loan bans on a proximate outcome (i.e. borrowing behavior) sheds light on the large body of research linking payday loan access to other outcomes (e.g. credit scores, bankruptcies). Along the same lines, simply measuring the extent to which payday lending restrictions affect the amount of payday lending that occurs is currently an important unknown. Consumers in states that prohibit payday lending may borrow from stores in other states, may borrow online, or may find lenders willing to skirt the law. Understanding the change in payday lending associated with such bans is crucial for assessing and interpreting much of the existing payday lending literature that link payday loan laws to other financial outcomes.

In this paper, we take advantage of two recent developments to study this question. The first is the availability of a new data set: the Federal Deposit Insurance Corporation's National Survey of Unbanked and Underbanked Households, a supplement of the Current Population Survey (CPS). The survey is large, nationally-representative, and contains detailed information about consumer borrowing behavior. We supplement this survey with data on traditional credit product usage from the Federal Reserve Board of New York. The second development we take advantage of is the fact that a number of states have prohibited the use of payday loans in recent years. Through a simple difference-in-difference design, we exploit this policy variation to study the effect of changes in consumer access to payday loans between states over time.

We find that payday loan bans do not reduce the number of individuals who take out alternative financial services (AFS) loans. Although payday loan use declines following the bans, that reduction is offset by an increase in the amount of borrowing from pawn shops. We also document that payday loan bans are associated with an increase in involuntary closures of consumers' checking accounts, a pattern that suggests consumers may substitute from payday loans to other forms of high interest credit such as bank overdrafts and bounced checks. In contrast, payday loan bans have no effect on the use of traditional forms of credit, such as credit card and consumer finance loan use. Finally, our results suggest that those who turn to pawnshop loans following payday loan bans do so because they lack access to small loans from traditional banks.

The paper is structured as follows. Section I provides background on various forms of alternative financial services. Section II reviews state regulations of these credit products. Section III reviews the literature on the relationship between payday loan access, financial well-being and the use of alternative financial services. Section IV describes the data sources used in the empirical analysis and Section V presents the results. Section VI concludes.

I. Background on Alternative Financial Service Credit Products

A. Alternative Financial Service Credit Products

Alternative financial service (AFS) is a term used to describe credit products and other financial services operating outside the traditional banking systems. Many AFS credit products are high-interest loans that are taken out for short time periods. AFS credit products include payday loans, pawnshops loans, rent-to-own loans, and overdraft services.[1] The following section briefly describes these products.[2]

1. Payday Loans

Payday loans are unsecured small-dollar short-term consumer loans. To obtain a loan, customers provide lenders a post-dated check (or authorize a delayed debit) for the loan's principal plus a fee that depends on the amount borrowed. The date of the loan maturity is pre-determined with a standard loan length of two or four weeks, often corresponding with the customer's next "payday." The majority of loans range from $100 to $500 with an average loan amount of $375 (Stephens, 2011). Typical loans carry a financing charge of $15 for each $100 borrowed over a two-week period, which translates to an APR of just under 400 percent. If a customer is unable to pay back the loan at the agreed-upon date, she may rollover the loan for an additional fee, take out a new loan to cover the previous loan, or default on the loan. While payday loans are marketed as short-term credit, the average customer holds a payday loan for five months (Pew, 2012).

To obtain a loan, customers must provide the lender with income verification and verification of a current checking account. However, payday lenders typically do not take customers' credit scores into account when making lending decisions. Instead, lenders typically consider potential borrowers' Teletrack scores, which measure whether the potential customer has a history of writing bad checks Skiba and Tobacman (2009). As a result, payday loans may be an attractive credit product for individuals whose credit history disqualifies them from other credit sources.[3]

[1] The term also encompasses other loan types, such as auto title loans and income tax refund anticipation loans.

[2] More detailed descriptions of the industry are available in Caskey (1994) and Drysdale and Keest (2000).

[3] Interestingly, despite being unsecured, Dobbie and Skiba (2013) find that payday loan borrowers are *less* likely to default on larger loans.

2. Pawnshop Loans

Pawnshops have been a source of credit for centuries, but have seen a steady increase in recent decades. The number of pawnshops in the United States increased from around 5,000 in 1985 to 9,000 in 1992 (Caskey, 1994) and is currently estimated at just over 12,000 storefronts (Carter, 2012).

Pawn loans are also small-dollar short-term loans, but unlike payday loans, pawn loans are secured by physical collateral. Customers provide the lender with tangible personal property, such as electronics or jewelry, and, in return, receive a cash loan based on the value of the collateral. The size of the pawn loan is typically only a fraction of the assessed value of the collateral, ensuring that the loan is more than fully secured.[4] Because pawnshop borrowers are not required to demonstrate a bank account or a regular source of income, they are accessible to a wider population than payday loans.

The average pawn loan is around $100, much smaller than the average loan received from a payday lender. Pawn loans usually have a term of one month and an average fee of $20 for each $100 borrowed, which translates to an APR of about 250 percent (Avery and Samolyk, 2011; Drysdale and Keest, 2000).[5] If a pawnshop customer is not able to repay his loan, he forfeits the pawned item to the lender who can resell it.

3. Rent-to-Own Loans

Unlike payday or pawn loans, rent-to-own stores do not provide cash loans; instead, they allow customers to purchase items on credit. The customer receives the item – typically durable goods such as electronics, furniture, or appliances – for immediate use from one of the 8,000 stores around the country (Czerwonko, 2013). The cost of purchasing the item on credit is substantially greater than the cost of similar items purchased directly. The implied APR varies by good and by store, but have been estimated to be as low as 57 percent (Czerwonko, 2013) and as high as 230 percent (Zikmund-Fisher and Parker, 1999). Like pawn loans, rent-to-own loans are secured: if a customer misses a payment, the lender has the right to repossess the purchased item.

4. Overdraft Protections

In addition to turning to one of the AFS lenders described above, many traditional banks offer overdraft services to their checking account customers. When an account-holder writes

[4] Prager (2009) reports that the loan amount offered ranges between 25 and 65 percent of the estimated resale value of the collateral provided by the customer.

[5] However, the interest rates on pawnshop loans can be much lower depending on state regulations (Prager (2009)).

a check or authorizes a debit for an amount that exceeds her account balance, the bank may allow an overdraft to occur. In that case, the bank allows the payment to proceed (as if the customer had sufficient funds), but charges an overdraft fee in addition to requiring repayment of the overdrafted amount. Overdraft protection is quite expensive, even when compared to other AFS credit products. The implied interest rates and fees associated with overdraft loans typically exceed the interest charged by payday lenders for small loans.

5. Other Forms of Non-Traditional Credit

In addition to the formal types of credit products described above, individuals may borrow against the future by delaying payments that come due. For example, consumers may delay paying utility bills or write checks that they expect to bounce. Of course, borrowing in such forms is far from costless: paying utility bills behind schedule typically triggers expensive late fees, may adversely affect the borrowers' credit score if the debt is sold to a collection agency, and banks may fine consumers who write checks that bounce. Additionally, banks will generally close the accounts of borrowers who engage in too many overdrafts or non-sufficient funds activity (Campbell, Martinez-Jerez and Tufano, 2012).

B. Traditional Credit Products

We define traditional credit as products such as credit cards and small personal loans issued by mainstream banks, finance companies and retailers that participate in national credit reporting systems. Bank-issued general-purpose credit cards are the most common form of such credit, and allow individuals with existing credit lines to quickly borrow small amounts. According to data from the Federal Reserve, the average annual interest rate on card accounts assessed interest has been in the range of 13 to 14 percent in recent years, but for riskier individuals, posted rates are often as high as 20 to 30 percent. In addition, for certain transactions such as cash advances there may be additional fees (e.g., three percent of the amount advanced). Individuals with very low credit scores (e.g. a FICO score in the low 500s or lower) due to a recent default may have trouble obtaining new card accounts, but still would be able to access existing revolving accounts that were opened when their financial standing was better.

C. Substitution Among Credit Products

Because of the differences in their designs, various credit products may or may not be substitutes for one another for non-regulatory reasons. First, some borrowers may be willing to pay the interest required to take out certain types of loans, but not others. For example, pawn shops require borrowers to risk losing ownership of a valuable possession – some borrowers may be unwilling to do so. Second, some borrowers may not be eligible for all types of loans. Traditional bank loans and credit cards have credit score eligibility cut-offs, which some borrowers cannot meet. Likewise, using overdraft protection services requires a bank account and taking out a payday loan requires both a bank account and a relatively steady income source. Finally, even for borrowers who enjoy access to more than one type of loan, the net effects of restricting that access on consumer demand may be ambiguous. For example, as discussed below, borrowers who are denied payday loans may turn to pawn shop loans as an alternative source of short-term credit. On the other hand, borrowers who do use payday loans may end up taking out pawn shop loans to help meet their payday loan payments.

II. The Regulation of Payday Loans and Other High-Interest Credit Products

State regulation of payday lenders has evolved dramatically in recent years. Although most states have strict usury laws that limit the allowable APR of cash loans to well below the amount typically charged for payday loans, many of those states have special carve-outs for payday loans. In addition, until 2005, payday lenders were able to exploit a loophole in national banking law that allowed them to operate in even those states that did prohibit payday loans.[6] Today, state regulations of payday lenders take on a variety of forms. While some states explicitly ban payday loans through usury laws or racketeering violations, other states have adopted regulations that effectively ban payday loans by limiting interest below the rate at which payday lenders are willing to operate (Skiba, 2012).[7] As of January 2006, the start of the period covered by our data, 11 states and the District of Columbia prohibited the use of payday loans (either directly, through bans, or indirectly, through regulation).[8]

[6]Specifically, payday lenders could take advantage of the Supreme Court's 1978 Marquette decision, which held that banks were governed by the usury law of the state in which they were chartered, rather than the laws of the states in which they operated (Schiltz, 2003). Payday lender partnered with banks chartered in states with permissive usury laws to serve as the "loan originator" in states in which payday lending would otherwise be prohibited. This loophole was closed by the Office of the Comptroller of the Currency, which regulates federally-chartered banks, in 2001, and the Federal Deposit Insurance Corporation, which regulates state-chartered banks, followed suit in 2005. See Mann and Hawkins (2007) and Hynes (2012).

[7]For example, after Oregon passed a law limiting the fees associated with loans under $50,000 to $10 per $100, less than a quarter of the payday lending outlets in the state remained a year later (Zinman (2010)).

[8]These states include Connecticut, Georgia, Massachusetts, Maryland, Maine, North Carolina, New Jersey, New York, Pennsylvania, Vermont, and West Virginia.

Between 2006 and 2012, five jurisdictions changed their policies regarding the regulation of payday loans. In January 2008, the District of Columbia effectively banned payday loans by prohibiting lenders from charging interest rates in excess of 24 percent APR . In November 2008, the Arkansas Supreme Court ruled that the Check Cashers Act of 1999, which originally allowed payday lenders to charge high fees for loans in place of interest, violated the state constitution's interest rate cap of 17 percent. In March 2009, New Hampshire passed a law limiting rates on payday loans to 36 percent APR. Arizona originally exempted payday lending from the state's 36 percent APR interest rate cap; however, this law was allowed to sunset, making payday loans illegal as of July 2010. Finally, in November 2010, voters in Montana approved a ballot initiative that capped interest rates on payday loans at 36 percent APR.[9][10] Figure 1 provides a map of payday lending laws by state.

Other AFS credit products are subject to state regulation. In particular, states may regulate both the loan length and the interest that can be charged on a pawn loan. Many states have no fee limits, while other states have limits as low as $2 per $100 for a two-week loan; however, unlike payday lenders, pawn shops continue to operate in states with even the most restrictive policies. In contrast, rent-to-own stores are often able to avoid state regulations on APR disclosure requirements or interest rate caps on the grounds that the contracts signed by customers are terminable-at-will. Several states have passed legislation regulating disclosure on rent-to-own merchandise including the cash price and the total cost to own (Czerwonko (2013)). There were no major changes in pawn or rent-to-own loan regulations at the state level during our sample period.

III. Prior Literature

This section briefly reviews the rapidly growing literature on payday lending. Although data availability has limited the types of questions that can be investigated, prior research has yielded a number of important insights into payday loan usage.

[9]States that allow payday lenders differ in the extent to which payday loans are regulated. In particular, 25 states limit the number of times that borrowers may "roll-over" their loans (Carter (2012)). The Federal Truth in Lending Act imposes additional disclosure requirements, such as requiring payday lenders to disclose the interest rate as an APR.

[10]In addition to the policy changes that we classify as payday lending bans (listed in this paragraph), several other states changed their rules regarding payday lending during our sample period. Both Oregon and Colorado tightened their restrictions on payday lenders – Oregon in 2008 and Colorado in 2010 – but continued to allow payday lenders to operate and to charge relatively high interest rates. In 2008 Ohio passed legislation prohibiting payday loans but various reports suggest that the ban was not actually enforced (Pew (2012)). To isolate the effects of payday loan bans, we drop these three states from the analysis. Our classification of state policies matches the states identified by Pew (2012) as moving from "permissive" to "restrictive" in their treatment of payday lending during our sample period.

A. The Effect of Payday Loan Regulations on Payday Loan Use

While data on the use of payday loans is limited, a small number of papers estimate the effect of payday loan restrictions on usage rates. Chanani (2011) and Pew (2012) investigate cross-state variation in interest rate caps and finds that these restrictions reduce payday loan usage. Carter (2012) documents a similar pattern with respect to laws limiting payday loan rollovers. Zinman (2010) uses a difference-in-differences design to investigate changes in borrowing behavior in Oregon following that state's prohibition of payday lending.[11] Using a neighboring state as a control, Zinman finds that Oregon residents were approximately 30 percent less likely to use a payday loan in the immediate aftermath of the prohibition.

B. The Effect of Payday Loan Regulations on Financial Well-being

From a theoretical perspective, the effect of payday loan access on economic well-being is ambiguous. Neoclassical models suggest that consumers use payday loans when they are preferable to the available alternatives. Such models imply that restricting access would make consumers worse off. On the other hand, behavioral models of payday loan use imply that present-bias, over-optimism, or other cognitive biases induce consumers to take out payday loans when doing so is sub-optimal, as judged by their own preferences. If such models accurately describe behavior, restricting access to payday loans could actually make consumers better off.

The empirical literature on the link between payday loan access and financial well-being comes to mixed conclusions. A number of papers find evidence that payday loan access improves financial outcomes. For example, Morgan, Strain and Seblani (2012) find that payday loan access is associated with lower rates of bankruptcy. Similarly, Morse (2011) suggests that individuals are less likely to foreclose on their homes if they have access to payday loans.

In contrast, several papers find that access to payday loans exacerbates borrowers' financial difficulties. Skiba and Tobacman (2009) exploit a discontinuity in payday loan eligibility and find that payday loan access increases the likelihood of declaring bankruptcy. Carrell and Zinman (2014) find that a law that restricted access to payday loans among military personnel led to an increase in job performance among Air Force members. Melzer (2011) and Melzer (2013) identify the effect of payday loan access by comparing individuals living in states that prohibit payday loans but differ in their proximity to a neighboring jurisdiction where payday lending is legal. These papers find that access to payday loans is associated

[11] The law considered in Zinman (2010) is the interest rate cap in Oregon mentioned in Section II. Classifying the Oregon policy change as a ban generates nearly identical estimates to those presented in this paper.

with worse outcomes along a variety of measures of economic hardship, such as difficulty paying bills, food security, and postponing medical care due to costs. Hynes (2012) investigates the relationship between payday loan legality and bankruptcy and reports mixed evidence, with the results varying by identification strategy. Lars Lefgren and Frank McIntyre (2009) find that state variation in payday loan legality does not explain much of the state-by-state variation in bankruptcy filing rates. Finally, two recent papers, Bhutta (2013) and Bhutta, Skiba and Tobacman (2014) find that access to payday loans (at either the individual or state level) appears to have little to no long-term effect on consumers' credit scores.

C. The Effect of Payday Loan Regulations on Usage of Other Credit Products

1. Alternative Financial Services

A number of papers have studied the interaction between payday loan access and the usage of other high interest products. Skiba and Tobacman (2007) presents mixed evidence concerning the substitutability between payday and pawnshop loans. They find that individuals who are barely denied payday loans due to low credit scores are more likely to take out a pawn loan within the next two days. However, such individuals do not appear any more likely to use pawn loans in the future. Turning to borrowers who do use payday loans, Carter (2012) finds that such borrowers are more likely to also use pawnshops when their state does not limit payday loan roll-overs. She interprets this pattern as evidence that payday borrowers use pawn loans to pay off the interest on their payday loans in order to roll the loan over, rather than default. Carter and Skiba (2011) provide further support for this theory by presenting evidence that payday loan customers who take out a pawn loan within one day of their payday loan due date are more likely to rollover their payday loan. Although these studies help explain patterns of use in states where both payday and pawn loans are legal, they do not address the question of how pawnshop borrowing responds when access to payday loans is restricted statewide.

Evidence on the relationship between payday loan and overdraft use is similarly mixed. Zinman (2010) finds that residents of states that restricted payday loans were more likely to bounce checks after the ban. Morgan, Strain and Seblani (2012) and Melzer and Morgan (2009) find similar results for overdraft fee income at banks. However, Campbell, Martinez-Jerez and Tufano (2012) finds that a payday loan ban in Georgia led to a reduction in involuntary checking account closures, an outcome that is closely associated with bouncing too many checks. Galperin and Weaver (2014) find a similar result with regards to the use of refund anticipation loans (RALs) – bans on payday loans lead to a decrease in the use of

RALs, suggesting that the two products are complements.

Thus the current literature yields a somewhat conflicting view of the relationship between payday loans and other AFS credit products. Particularly for pawn loans, evidence exists that consumers turn to pawn loans as complements to payday loans (at least in states that allow rollovers). On the other hand, some studies suggest that consumers turn to other forms of high interest credit (e.g. overdrafts and bounced checks) when they lose access to payday loans, while other research suggests the opposite.

Our paper builds on this literature by drawing on a nationally-representative dataset that includes information about multiple forms of borrowing behavior that may plausibly be important substitutes for payday loans. In particular, our data captures AFS credit usage at the individual level, even when the loans are taken out from multiple lenders. Additionally, as described in the next section, a useful feature of the CPS data is that it contains information on consumers' motivations for using AFS credit products, which will help provide a more nuanced view of the ways in which payday loan regulations shape consumer borrowing behavior.

2. Traditional Credit

Traditional credit products have considerably lower interest rates than payday loans and other AFS products, however, they often have stricter requirements and loan size limits. Therefore, standard economic models would predict that consumers would only use payday loans if they had exhausted the limits of or were never eligible for these cheaper traditional loans. However, survey data indicate that some payday loans users might switch to bank loans or credit cards if payday loans did not exist (Pew, 2012). A preference for payday loans over traditional credit sources could reflect some perceived non-price advantage of payday loans. For example, payday lenders may be more convenient or comfortable for certain populations. Additionally, payday loan use is not reported on credit reports, which could appeal to some customers. Alternatively, choosing a payday loan over a credit card could reflect confusion or a lack of awareness about relative prices. For example, payday loan prices are typically quoted as a two-week rate (e.g., 15 percent) whereas credit card interest rates are quoted as an annual rate that is numerically similar, and thus consumers may believe that the prices for these products are comparable (Agarwal et al., 2006; Pew, 2012).

In spite of the survey evidence suggesting that payday loans may, in fact, be substitutes for traditional credit products rather than a strictly inferior alternative, few studies have analyzed whether payday loan customers shift toward the use of credit cards or other traditional credit products when access to payday loans is limited. Agarwal, Skiba and Tobacman (2009) find that payday loan users have significant liquidity remaining in their credit card accounts on the day of the loan, suggesting that payday loan users have option of switching to traditional credit sources if payday loan access was suddenly limited. However, Bhutta, Skiba and Tobacman (2014) find, using different data, that most customers exhaust their credit supply at the time of their first payday loan application. Our paper adds to this literature by measuring whether the use of three traditional credit products – credit card debt, retail card debt, and consumer finance loans – increases after a state bans payday loans.

IV. Data

Our primary data source for this paper comes from the FDIC's National Survey of Unbanked and Underbanked Households.[12] This survey was conducted by the U.S. Census Bureau as a supplement to the Current Population Survey (CPS). To date, three rounds of the survey have been collected, one in January 2009, one in June 2011, and one in June 2013.[13] Since no payday loan regulations have been passed since the second wave of the survey, our analysis uses only the first two waves of data.[14] The supplement contains a nationally-representative sample of 46,547 households in the 2009 survey and 45,171 households in the 2011 survey.

The supplement questionnaire contains questions regarding a household's connection to traditional banking systems, use of alternative financial services, and reasons for being unbanked or underbanked. Survey participants were asked whether anyone in the household had used a payday loan, sold items at a pawn shop, or leased merchandise from a rent-to-own store in the past year.[15] For the 2009 supplement, we categorize a household as having used a payday loan in the past year if they responded to the question "How many times in the last 12 months did you or anyone in your household use payday loan or payday advance services?" with a non-zero answer. Similarly, we categorize a household as having used a pawnshop or rent-to-own in the past year if the response to the question "How often do you or anyone in your household sell items at pawn shops/[do business at a rent-to-own store]?" was "At least a few times a year" or "Once or twice a year". In the 2011 supplement, a household is recorded as having used one of these alternative financial services products if

[12] Unbanked households are defined as households without a checking or savings account. Underbanked households are those with a traditional bank account that also use alternative financial services.

[13] The CPS interviews each sample household for four consecutive months, waits eight months then interviews the household for a final four months. Because of this structure, no individual household appears in both supplements.

[14] Additionally, the 2013 wave drops or recodes several of the key variables used in our analysis. Results presented in later sections of the paper remain largely unchanged when using the third wave of the survey for included variables.

[15] Additionally, participants were asked about their use of refund anticipation loans; however the time period referenced in the survey question was not consistent across years, so cannot be used in our main analysis.

they responded affirmatively to the question "In the past 12 months, did (you/or anyone in your household) have a payday loan/[pawn an item because cash was needed]/[have a rent-to-own agreement]?"

Unlike many other data sets that have been used to report patterns of borrowing behavior, the CPS supplement asks participants not only about use of high-interest credit, but also about their reasons for using these alternative financial services. Participants who reported using payday loans in the past year were asked why they chose to use these loans rather than a traditional bank loan; a similar question was asked of pawnshop users. In addition, customers who reported using any alternative financial service credit product in the past year were asked about the purpose of the loan.

To investigate the impact of payday loan bans on traditional forms of credit, we use data from the Federal Reserve Bank of New York's Consumer Credit Panel/Equifax (CCP). The CCP is a nationally-representative longitudinal database with detailed information on consumer debt at a quarterly frequency derived from consumer credit records maintained by Equifax, one of the nation's three major credit bureaus. The data used in this paper is a two percent sample of the CCP data, implying a 0.1 percent sample of the population. Quarterly data on individual credit card, retail card, and consumer finance loan balances are available from 2006-2012, yielding a sample of six million person-quarters. The sampling approach is designed to generate the same entry and exit behavior as present in the population, such that each snapshot continues to be nationally representative while, at the same time, changes in debt use for a given individual over time can be tracked.[16]

Both the CPS and CCP data includes information on the demographic characteristics of the sample individuals. The demographic data in the CPS data pertains to the household's interview reference person and includes the individual's gender, race, education, marital status, income, and employment. These demographic variables are used as controls in the regression analysis. While the CCP only contains information on the participant's age, we are able to control for individual level fixed effects. These data sets also contain information on the location of each individual's place of residence which can be used to link to data on local economic conditions. Data on real state income per capita comes from the Bureau of Economic Analysis and data on unemployment rates comes from the Bureau of Labor Statistics.

[16]For more information on the CCP, see Lee and Van der Klaauw (2010). It is important to note that all individuals in the data are anonymous: names, street addresses and social security numbers have been suppressed. Individuals are distinguished and can be linked over time through a unique, anonymous consumer identification number assigned by Equifax. For information about Equifax, one of the three national consumer credit reporting agencies, see www.equifax.com/home/en_us.

V. Empirical Analysis

The following section examines the effect of the recent payday loan regulations described in Section III. Using data collected before and after the policy changes, we compare borrowing behavior in states that changed their payday loan regulations with borrowing behavior in states that did not. Because our analysis includes state fixed effects, our estimated coefficients are identified from changes in borrowing behavior between the two groups of states.

A. Summary Statistics

1. Use of Alternative Financial Services

Table 1 reports descriptive statistics on the use of alternative financial services from the CPS supplement data. Column 1 reports lifetime usage rates: 4.1 percent used a payday loan, 6.8 percent used a pawnshop, and 4.3 percent purchased merchandise at a rent-to-own store. Overall, 11.7 percent used at least one of these three AFS products. Column 2 reports statistics on the use of the same credit products during the past 12 months. The table shows that an estimated 2.5 percent of the population used a payday loan in the past year. Comparing this quantity to Column 1 suggests that over half of the individuals who had ever used a payday loan in their lives used a payday loan at some point during the past year. A similar proportion of participants used either pawnshops or rent-to-own in the past year – 2.5 and 1.7 percent, respectively. Overall, 5.7 percent of participants used one of the AFS products in the past year.

Table 2 compares the characteristics of individuals who used AFS credit products during the previous year to other survey participants. Relative to the general population, users of AFS credit are more likely to be female, single, black, and young. These demographic patterns appear broadly similar across users of different types of AFS products. AFS users are also more likely to be socioeconomically disadvantaged in terms of income, education, and employment status; however, these characteristics do vary across the type of product used. Payday loan users, while still economically disadvantaged when compared to individuals who do not use AFS products, have more education than pawnshop or rent-to-own users and are less likely to be unemployed. This is likely due to the fact that payday loan customers are required to show proof of employment to obtain a loan.[17] Additionally, while the highest income individuals are less likely to use payday loans, payday loan usage is not concentrated among the lowest income individuals as with pawnshop and rent-to-own usage. Again, this is likely due to the differences in income requirements across the different products.

[17]Note however that since the survey asks about payday loan use in the previous year, we may observe some currently unemployed participants reporting use of payday loans.

2. Use of Traditional Credit Sources

Table 3 provides summary statistics for three types of consumer debt: general purpose bank-issued credit card debt, retail store credit card debt, and consumer finance loans. Across all consumers and quarters, the average credit card balance is nearly \$3,691, with about 57 percent of observations having a positive credit card balance.[18] Because payday loan borrowers are most likely to be in the bottom end of the credit risk score distribution (see Bhutta, Skiba and Tobacman (2014)), we also restrict our analysis to the subset of consumers with an initial credit risk score below 600 since payday loan bans most directly affect this subgroup.[19] The average balance in this low score sample is \$1,667, and only 44 percent have a positive balance.

Retail card balances are much smaller, on average, than credit card balances, and far fewer individuals appear to use such cards. Interestingly, unlike with general purpose bank-issued credit cards, the usage statistics for the low-score sample are fairly similar to those for the broader sample of consumers – about a quarter of both groups use these cards with an average balance of about \$300 among those who do use them. Finally, consumer loans are relatively infrequent – 15 percent of customers in the full sample and 21 percent of customers in the low score sample use this type of loan – though the average balance among consumer loan users is significantly larger than with retail cards. Overall, two-thirds of the sample used at least one of the three types of traditional credit for an average balance of \$4,573. The fraction of individuals in the low-credit sample using at least one form of credit was almost as high as in the full sample (58 percent), though the average balance was only about half the size.

3. Motivations for AFS Credit Product Use

i. Expenditures Financed with AFS Loans Alternative financial service credit products are often marketed to be used as short-term solutions for emergency cash needs among liquidity-constrained individuals. Table 4 presents the reasons why AFS users report using these credit products. The most common reason cited for using an AFS loan was not to meet an emergency need: almost half of AFS users (44 percent) reported using the loan to cover basic living expenses. An additional 5 percent reported using the loan to purchase luxury goods. Nineteen percent of customers used the loans to make up for lost income, 13

[18] Reported balances include both transaction or convenience-use balances and revolving balances.

[19] Credit risk scores for each individual are based on the Equifax 3.0 model, which is similar conceptually and numerically to the FICO score. The Equifax score ranges from 280 to 850, with higher scores associated with a lower expected likelihood of default. Initial score is defined as an individual's credit score as of the first quarter of 2006 or their first observed score.

percent of customers used the loan for auto or home repairs, and 2 percent used the loan to pay for medical expenses.[20]

ii. Motivation for Choosing AFS Loan Instead of Traditional Bank Loan Traditional banks offer much lower interest rates on consumer loans than either payday lenders or pawnshops. However, payday lenders and pawnshops typically serve a low-income, high-risk population that may not be eligible for traditional bank loans and are, therefore, forced to use these high-interest loans due to lack of alternative forms of credit. Alternatively, these customers may have access to cheaper forms of credit, but find using payday lenders or pawnshops more appealing due to other factors such as convenience or ease of use. Column 1 of Table 5 presents the main reasons that payday loan customers report using a payday loan instead of a traditional bank loan.[21] Over half of customers report using a payday loan because the loan was easier or faster to obtain or because the storefronts had more convenient hours or location than traditional banks. Only 16 percent of customers reported that they did not qualify for a bank loan and 21 percent of customers used a payday loan because banks do not give small dollar loans. Column 2 shows that pawnshop customers report similar reasons for using a pawn loan rather than a traditional bank loan.

B. Econometric Analysis

This section investigates the effect of recent changes in the regulation of payday loans on the use of payday loans and on the use of other forms of AFS credit. Our approach employs a difference-in-difference framework: we compare changes in states that change the legality of payday loans with changes in borrowing behavior in states that do not. Relative to much of the prior literature, this approach has the advantage of identifying the effect of payday loan regulation without relying exclusively on state variation in regulation at a single point in time, which may conflate differences in state by state borrowing behavior with differences in payday loan legality. The treatment effect we identify comes from comparing the four states who changed their payday loan regulations during our sample period; as discussed above, these states are quite demographically and geographically diverse. Like

[20] These estimates are very similar to those found in the Pew Charitable Trust Small Dollar Loans data. That study found that 16 percent of payday loan customers used their first loan to cover unexpected expenses (such as car repair or medical expenses), while 69 percent used the loan to cover recurring expenses, including rent, groceries, utilities, car payments, and credit card debt (Pew, 2012).

[21] This table includes data from 2011 only, since the available categories for reasons a customer used a payday loan rather than a traditional bank changed across waves. The categories were consistent across waves for a similar question regarding reasons for using pawnshops; including data from 2009 yields qualitatively similar results.

other difference-in-difference analyses, our identifying assumption is that absent the regulatory change, borrowing behavior would have evolved similarly in states that changed their law and in states that did not. By considering changes from multiple states, we are able to control for characteristics other than payday loan laws that could plausibly affect borrowing behavior and that vary across states over time, such as local economic conditions.

Our empirical specification takes the following form:

$$y_{ist} = \beta\, Ban_{st} + \phi\, Post_t + \delta_s + \gamma X_{ist} + \pi Z_{st} + \varepsilon_{ist}$$

The unit of observation is an individual i in state s in time period t. The dependent variable, y, is an indicator variable for having used a certain type of credit product in the last year, Ban is an indicator variable which takes a value of one if the individual lives in a state where payday loans were effectively illegal in the period at the time of the survey, $Post$ is an indicator variable for being interviewed in the second wave of the survey, δ is a set of state fixed effects, X is a set of individual-level covariates, and Z is a set of state-level controls.

1. Trends in Treatment and Controls States

Before presenting our main results, we assess the comparability of the treatment and control states. The treatment states are geographically diverse; apart from the fact that they all changed their payday loan policy during the sample period, there are not other obvious similarities that would suggest they are on a separate trend from the control states. One way to investigate this issue is by looking at pre-period trends in the two group. Although we can't directly assess the parallel trends assumption upon which our difference-in-differences design relies, observing important differences in the pre-treatment trends might suggest the trends differed in the treatment period as well.

Ideally, we would undertake this analysis with each of the outcome variables in our analysis. This is possible with the traditional credit product use variables, as the CCP data begins in 2006, two years before the first state policy changes. Unfortunately, only one wave of the FDIC data was collected prior to the state policy changes we consider here; hence we cannot use it to identify pre-period trends in the AFS credit product variables from that source. We supplement the analysis by comparing macroeconomic trends among the two groups of states.

The results are presented in Figures 2 and 3. The treatment group contains consumers residing in one of the four states that changed banned payday loans during our window, while control states are those classified as "always permissive" or "always restrictive" in Figure 1. Dashed lines indicate the time range in which these state policies were implemented. Figure

2a plots the fraction of consumers holding any credit card debt, the most common type of traditional credit debt in our data, and Figure 2b plots the fraction holding any one of the three types of traditional credit debt in our data (credit card, retail card, or consumer finance loan). While consumers in controls states are slightly more likely to hold traditional credit debt than those in treatment states, the trends in credit use are quite similar. We see similar movements across treatment and control states in unemployment rates (Figure 3a) and state income per capita (Figure 3b).

2. The Effect of Payday Loan Bans on Payday Loan Use

As a first step in our analysis, we measure how stricter payday loan regulations affect payday loan use in the states where they are enacted. Although one would expect the effect to be negative, media reports and other authors have noted that compliance with the rules may be imperfect and that consumers may still be able to borrow online. Additionally, understanding the magnitude of the change in payday loan use is important for assessing and interpreting other results (both those reported here and elsewhere) concerning the effect of payday loan access on other outcome measures.

Table 6 presents the results of the analysis investigating the effect of the regulations on payday loan use.[22] Column 1 presents a bare-bones specification with controls for state, time-period, and whether the individual's state prohibits the use of payday loans. Using these limited controls, the model shows that payday loan usage is 2.4 percentage points lower in states that ban payday loans, a 74 percent reduction from the usage levels in states where the loans are legal. Column 2 adds individual-level demographic characteristics to the model, specifically: gender, race, marital status, education, age, income, and employment status. After controlling for these demographics, the size of the ban coefficient decreases slightly to 2.3 percentage points. Finally, because payday loan use may be correlated with the business cycle, it is important to control for local economic conditions. Column 3 (our preferred specification) adds controls for state unemployment and personal income per capita, as well as state population; with these additional controls the estimated effect of the ban is a 2.1 percentage point reduction in payday loan use. Across specifications, our model confirm the presence of a large reduction in payday loan usage following the adoption of restrictive state laws.

[22] We estimate demand for payday loans using a linear probability model; however, a probit model yields qualitatively similar results. For all specifications, we report standard errors clustered by state.

3. The Effect of Payday Loan Bans on Other AFS Credit Products

The following section investigates how payday loan restrictions affect the use of other types of AFS credit products. If these other forms of high-interest credit are substitutes for payday loans, we would expect that individuals who previously used payday loans would switch to using one of the other AFS products after payday loans were banned. However, if these other forms of credit are complements to payday loans, for example, if payday loan customers take out a pawn loan to avoid defaulting on the original loan as suggested in Carter (2012), then we would expect to see a reduction in the use of pawn shops and rent-to-own. Additionally, differences between the credit products (e.g., that payday loans require a checking account or that pawn shop loans require collateral) may limit substitution between otherwise-similar types of loans.

Table 7 presents the results of these analyses. Column 1 presents estimates of the effect of payday loan regulations on usage of any AFS credit product (defined here as a payday loan, pawn shop loan, or a rent-to-own loan). The estimated point estimate is close to zero and statistically insignificant. Because we find that payday loan regulations are associated with a reduction in one type of AFS product (i.e. payday loans), this result suggests that usage of a different AFS product must have increased in an offsetting way. Indeed, as Columns 3 reveals, payday loan restrictions are associated with a positive and statistically significant effect on pawn shop loan usage – the estimated effect is 1.4 percentage points, a 51 percent increase from the mean usage rate in states where payday loans are legal. This finding suggests that consumers turn to pawn shop loans as a substitute form of borrowing when payday loans are no longer available. In contrast, Column 4 shows that there is no such evidence of a shift to rent-to-own loans following the payday loan bans. The difference in substitutability between payday loans and these two alternative forms of credit may not be surprising since payday lenders and pawnshops both offer customers cash loans while rent-to-own outlets only offer credit for the purchase of very specific items. If payday customers use their loan for reasons other than the purchase of electronics, appliances, or furniture, then a rent-to-own agreement will be an unlikely substitute.

Although the CPS survey contains relatively direct data on the types of AFS products listed above, it also contains some information that can be used to study whether consumers substitute from payday loans to another form of high-interest credit: bank overdrafts. In particular, the survey asks respondents whether a bank has decided to close their checking account (involuntarily) during the prior 12 months. Because such closures are almost always triggered by the excessive use of bounced checks and overdrafts (Campbell, Martinez-Jerez and Tufano, 2012), we can investigate whether the payday loan bans are associated with increases in such activities. Table 8 documents that this is indeed the case. Involuntary checking account closures increase by 0.2 percentage points following payday loan bans. While small in terms of population size, this coefficient is quite large economically considering that just over 0.4 percent of our sample report ever experiencing an involuntary bank closure. Although banks may close consumers' checking accounts for reasons other than failure to pay overdrafts or too many bounced checks, the positive coefficient is consistent with consumers substituting to these high-interest credit devices when payday loans are no longer available.

4. The Effect of Payday Loan Bans on the Reasons for Using AFS Credit

The results in the previous section suggested that although payday loan regulations reduced the usage of payday loans, many consumers turned to other forms of high interest credit. Despite the fact that the bans did not significantly reduce the overall proportion of individuals using AFS credit, those who shifted from payday loans to other AFS products may use the new loans to cover different types of expenses. For example, if customers are hesitant to risk losing personal items to a pawnshop, they may only use pawn loans to finance emergency expenses, rather than day-to-day consumption. Additionally, the average pawnshop loan is much smaller (only a quarter of the size) of the average payday loan, so it may only be useful for covering small expenses.

Table 9 looks at consumers who use AFS credit products; it investigates whether payday loan bans change the types of expenditures such consumers finance with the AFS loan. The dependent variable in each regression is a binary indicator for whether an individual reports taking out an AFS loan to finance a particular type of expense. Each column shows the effect for a distinct category of expense. For most columns, the estimated effect of the ban is close to zero and statistically insignificant. However, the estimated treatment effect in Column 4 (probability of taking out an AFS loan for medical expenses) is positive and statistically significant. This result suggests that although payday loan bans may not affect the total number of individuals taking out AFS loans, those who continue to use AFS loans after a ban are more likely to use them for emergency expenses, such as medical bills.

Finally, we can gain some insights into the type of borrowers who substitute to pawn shops after payday loans are no longer available. Table 10 reports the effects of the payday loan ban on the number of pawn shop borrowers, broken down by the reason they report for using a pawn shop loan (as opposed to a traditional bank loan). The results show that the increase in pawnshop loan usage is driven by consumers who report turning to AFS credit because they do not qualify for traditional bank loans. In conjunction with our previous results, this suggests that some of the increase in pawnshop usage was driven by those who had turned to the AFS sector because they did not qualify for traditional bank loans, but all else equal would have preferred using payday loans to pawn loans.

5. The Effect of Payday Loan Bans on Traditional Credit Use

In this section, we test whether payday lending bans result in greater usage of credit cards and consumer loans using data from the FRBNY Consumer Credit Panel/Equifax (CCP). The econometric model is similar to the difference-in-differences model discussed above with a few key changes. First, the CCP data includes a very limited set of demographic characteristics. However, the panel structure of the CCP data allows us to follow the same individual over time; therefore, our model now includes individual fixed effects which capture all time-invariant individual characteristics (η_i). Our new econometric model is given by:

$$y_{ist} = \beta\, Ban_{st} + \lambda_t + \eta_i + \delta_s + \gamma X_{ist} + \pi Z_{st} + \varepsilon_{ist}$$

The unit of observation is an individual i in state s in time period t, where t is now quarter instead of survey wave. The dependent variable, y, is either an indicator variable for having a positive credit balance in a given quarter or the log of the balance amount. As before, Ban indicates living in a state where payday loans were effectively illegal in the quarter considered, δ is a set of state fixed effects, X includes the limited set of time-varying individual-level covariates (age and age-squared), and Z is a set of state-level macroeconomic controls. In place of the variable $Post$, we now include time fixed effects at the quarter level, λ.

Additionally, while the CPS data used in the previous section provides annual credit use data at two points in time (2008 and 2011), the CCP data includes quarterly snapshots of credit use from 2006-2012 during which time four states and the District of Columbia banned payday lending.[23] All regressions include quarter fixed effects. Lastly, we consider two outcome variables for each of the three credit types considered: an indicator variable for having a non-zero debt balance (extensive margin) and the log debt balance among users (intensive margin).

Table 11 provides estimates of the effect of payday loan bans on the use of credit card, retail card, and consumer loan debt. For each debt category, the outcome in the first column is credit use on the extensive margin while the second column refers to credit use on the intensive margin. For each of the three types of debt, on both margins, the point estimates are close to zero and insignificant. Similarly, when we look at the intensive margin in the bottom panel, the estimates are insignificant and close to zero, although we cannot rule out somewhat substantive intensive margin effects on retail card and consumer loan debt. Table 12 is analogous to Table 11, but uses the low-score sample, a population that more likely represents the typical payday loan user. As noted above, to the extent that payday loan

[23] The CPS data spans four of these policy changes: Arizona, Arkansas, New Hampshire, and Montana, but not the District of Columbia.

demand is much higher within this population, substitution into credit cards and consumer loans as a result of payday loan bans may show up more clearly in these regressions. However, as in Table 11, the estimates both on the extensive and intensive margins are close to zero and insignificant.[24]

Overall, there is no evidence in these data that payday loan bans result in substitution into more traditional (and generally cheaper) forms of credit. We cannot determine if this is due to a lack of access to these traditional credit products among payday loan users or a distaste for credit card or consumer finance debt compared to payday loan use. However, the findings from Table 10 showed that a large fraction of the increase in pawnshop use was driven by individuals who did not have access to traditional bank loans, suggesting that payday loan customers may have exhausted or never had access to these traditional forms of credit.

VI. Conclusion

This paper analyzes the effect of state-level payday loan restrictions on the use of payday loans and on borrowing behavior more generally. Our results suggest that these restrictions are effective at curbing the use of payday loans; on average, approximately three percent of residents used payday loans before the restriction, compared with less than one percent after the policy change. However, we also found that this reduction in payday loan use was accompanied by an offsetting increase in the use of pawnshop loans with no effect on the use of credit card debt or consumer finance loans. Additionally, we document an increase in involuntary checking account closures following payday loan bans, which suggests that some consumers become more likely to bounce checks and overdraft their bank accounts when payday loans become unavailable. Overall, we find that the adoption of payday loan restrictions do not appear to meaningfully reduce the fraction of the population that utilizes alternative financial services; borrowers who previously used payday loans substitute to other forms of AFS credit.

Although payday loan bans do not appear to affect the overall proportion of individuals using AFS loans, we do find that such bans shape the way that individuals use such loans. In particular, we find that consumers become more likely to take out AFS loans to finance one-time emergency expenses (as opposed to basic living expenses) following such bans. Similarly, we show that the individuals who increase their usage of pawn loans following payday loan bans tend to be the type of AFS borrowers who turn to AFS loans because they did not qualify for traditional banks loans.]This finding, in conjunction with result that

[24] Results are very similar if we limit the time period to 2008-2011, as in the analysis of the CPS data.

payday loan bans do not increase traditional credit use, suggests that payday loan users have limited access to low-cost credit options.

It is important to note several limitations of our study before concluding. First, our analysis examines the effect of policy changes in only four states. While these states are quite diverse, both demographically and geographically, regulations in other states may have a different impact on borrowing behavior. Second, like other difference-in-difference designs, our results are only valid to the extent that the treatment and control states are not characterized by preexisting trends. In particular, we cannot rule out the possibility that the states that chose to ban payday lending during our sample period would have experienced unrelated increases in pawn lending and involuntary bank accounts, even were they to have allowed payday lending to remain legal. Finally, our analysis is limited by the types of borrowing that are covered in our data set. These customers may increase their use of other forms of credit, such as borrowing from family members or loan sharks. Our results should be interpreted with these caveats in mind.

Despite these caveats, our results provide new evidence on important questions of payday loan policy. Most importantly, they suggest that the issue of payday loans cannot be addressed in isolation, without considering the availability and desirability of other forms of high-interest credit. Whether payday loans are good or bad, our analysis shows that it is important to determine whether they are better or worse than the available alternatives. If policymakers conclude that payday loans are better than the available alternatives, restricting access to them (while not regulating other potential substitutes) may end up being counter-productive.

Apart from helping to predict the likely effects of payday loan bans, our results shed light on the nature of consumer demand for payday loans. In particular, the fact that consumers switch to other forms of high interest credit once payday loans become unavailable suggests that demand for such loans is fueled by a general desire for short-term credit (rather than a decision-making bias that is unique to the design of payday loans).

Finally, our results shed light on the mechanisms by which access to payday loans may affect consumers' financial well-being. That is, they suggest that the ultimate effects of payday loan bans on financial outcomes are not being mediated through changes in the overall amount of high-interest borrowing undertaken by consumers. Along these lines, two recent papers[25] find that payday loan access has little if any long-term effect (positive or negative) on borrowers' credit scores. This lack of an effect on borrower's financial health can be readily explained by our finding that payday loan bans do not stop borrowers from taking out high-interest loans, but merely shift the type of credit to which they turn.

[25] Bhutta (2013) and Bhutta, Skiba and Tobacman (2014)

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Table 1: Use of Alternative Financial Services Credit Products

	Ever Used (%)	Used in Past Year (%)
Payday Loan	4.07	2.46
Pawn Shop Loan	6.81	2.49
Rent-to-Own Loan	4.28	1.67
Any AFS Loan	11.73	5.68
N	82,489	82,320

Table 2: Demographic Characteristics by Use of Alternative Financial Services

	Full Sample	Any AFS	Payday	Pawnshop	Rent-to-Own
Male	50.4	44.9	45.7	45.8	41.9
Married	50.8	37.2	39.3	35.0	37.8
White	80.8	68.1	66.6	68.6	66.0
Age	50.0	41.0	41.7	41.1	39.5
Income	50,087	33,119	38,831	28,476	30,980
Less than HS	12.4	19.7	13.7	22.7	29.0
Unemployed	5.5	14.1	10.9	18.5	12.8
N	82,320	4,425	1,920	1,947	1,324

Individuals are classified as using a credit product if they report use in prior 12 months

Table 3: Use of Traditional Credit Services

	Full Sample			Low Credit Sample		
	Ever Used	Balance	Balance for Users	Ever Used	Balance	Balance for
Credit Card	57.3	3,691	6,439	43.7	1,667	3,816
Retail Card	25.1	300	1,198	23.2	289	1,232
Consumer Finance Loan	15.1	582	3,869	20.8	793	3,818
Any Traditional Credit	65.2	4,573	7,009	57.6	2,746	4,766
N	5,996,548			3,912,701		

The low credit sample includes only individuals with credit scores below 600.
"Ever Used" is percent ever using loan type, "Balance" is average balance for each loan type,
"Balance For Users" is average balance among users for each loan type.

Case 1:18-cv-00295-LY Document 84-1 Filed 09/25/20 Page 86 of 124

Table 4: Reported Reason for Use of AFS Credit

	All AFS Loans	Payday	Pawn	Rent-to-Own
Make Up for Lost Income	19.0	19.0	22.9	15.1
Basic Living Expenses	44.0	46.5	51.8	29.5
House/Car Repairs or Buy Appliance	12.9	12.3	6.2	25.0
Medical Expenses	2.4	3.0	2.4	1.1
School or Childcare Expenses	1.7	1.8	1.7	1.0
Special Gifts or Luxuries	4.9	3.7	3.2	8.3
Other Expenses	14.2	12.6	10.8	18.9
N	4,371	1,891	1,925	1,319

Outcome: percent of loan users reporting use as primary reason for loan.
"Any AFS Loan" is defined as payday, pawn shop, or rent-to-own.

Table 5: Reason for Using Payday Lender or Pawnshop versus Traditional Bank

	Payday	Pawnshop
Banks Don't Give Small Dollar Loans	20.8	15.9
More Convenient Hours or Location	12.3	9.6
Easier or Faster to Qualify	42.5	40.2
Feels More Comfortable	1.7	2.8
Doesn't Qualify for a Bank Loan	15.8	21.7
Other	7.0	9.8
N	679	1,165

Outcome: reported reason for primary use by type of loan
Includes data from 2011 FDIC survey only.

Table 6: The Effect of Payday Loan Bans on Payday Loan Use

	Payday Loans (1)	Payday Loans (2)	Payday Loans (3)
Payday Ban	-0.0238*	-0.0234*	-0.0208*
	(0.0129)	(0.0126)	(0.0112)
Post-Ban	-0.0139***	-0.0146***	-0.0188*
	(0.0019)	(0.0020)	(0.0097)
Male		-0.0029***	-0.0029***
		(0.0010)	(0.0010)
Married		-0.0061***	-0.0061***
		(0.0015)	(0.0015)
White		-0.0198***	-0.0198***
		(0.0030)	(0.0030)
HS Only		0.0013	0.0013
		(0.0026)	(0.0026)
College		-0.0157***	-0.0157***
		(0.0029)	(0.0029)
Age		0.0002	0.0002
		(0.0002)	(0.0002)
Age^2		-0.0000***	-0.0000***
		(0.0000)	(0.0000)
Unemployed		0.0144***	0.0144***
		(0.0040)	(0.0040)
Income 15-50k		0.0119***	0.0119***
		(0.0018)	(0.0018)
Income 50-75k		0.0028	0.0028
		(0.0025)	(0.0025)
Income gt75k		-0.0032	-0.0032
		(0.0022)	(0.0022)
Log Income PC			0.1167
			(0.1123)
Log Unemp Rate			0.0124
			(0.0216)
Dep Var Mean	0.032	0.032	0.032
N	82,806	82,806	82,806

Outcome: indicator for payday loan usage within last 12 months
Standard errors clustered at the state level in parentheses.
All specifications include state fixed effects and year fixed effects.
* $p < .10$, ** $p < .05$, *** $p < .01$

Table 7: The Effect of Payday Loan Bans on Other AFS Credit Use

	Any AFS Loan	Payday Loans	Pawn Shop	Rent-to-Own
	(1)	(2)	(3)	(4)
Payday Ban	0.0001	-0.0208*	0.0139**	0.0028
	(0.0051)	(0.0112)	(0.0064)	(0.0036)
Post-Ban	-0.0118	-0.0188*	0.0076	0.0009
	(0.0130)	(0.0097)	(0.0066)	(0.0045)
Dep Var Mean	0.065	0.032	0.027	0.017
N	82,320	82,806	82,824	82,900

Outcome: indicator variable for type of loan usage within prior year by credit product.
Standard errors clustered at the state level in parentheses.
All specifications include individual demographic characteristics, state and year fixed effects, and state-level economic conditions.
"Any AFS Loan" is defined as payday, pawn shop, or rent-to-own.
* $p < .10$, ** $p < .05$, *** $p < .01$

Table 8: The Effect of Payday Loan Bans on Involuntary Bank Closures

	Bank Closure
Payday Ban	0.0018**
	(0.0008)
Post-Ban	-0.0033**
	(0.0016)
Dep Var Mean	0.0014
N	85,079

Outcome: indicator for involuntary bank closure within prior year.
Standard errors clustered at the state level in parentheses.
All specifications include individual demographic characteristics, state and year fixed effects, and state-level economic conditions.
* $p < .10$, ** $p < .05$, *** $p < .01$

Table 9: The Effect of Payday Loan Bans on Reported Use of Alternative Financial Services Credit

	Lost Income (1)	Basic (2)	Repairs (3)	Medical (4)	Child Care (5)	Luxury (6)	Other (7)
Payday Ban	0.0061	-0.0049	0.0018	0.0010**	-0.0003	-0.0004	-0.0011
	(0.0071)	(0.0042)	(0.0012)	(0.0005)	(0.0023)	(0.0015)	(0.0041)
Post-Ban	-0.0074**	-0.0007	-0.0015	0.0005	0.0012	-0.0019	-0.0060*
	(0.0029)	(0.0070)	(0.0035)	(0.0014)	(0.0007)	(0.0013)	(0.0031)
Dep Var Mean	0.012	0.028	0.008	0.001	0.001	0.003	0.009
N	85,224	85,224	85,224	85,224	85,224	85,224	85,224

Outcome: indicator for using AFS credit for specified purpose.
Standard errors clustered at the state level in parentheses.
All specifications include individual demographic characteristics, state and year fixed effects, and state-level economic conditions.
* p < .10 , ** p < .05, *** p < .01

Table 10: The Effect of Payday Loan Bans on the Reason for Choosing Pawn Shops Over Banks

	No Small Loan (1)	Convenient (2)	Faster (3)	Comfort (4)	Don't Qualify (5)	Other (6
Payday Ban	0.0067	-0.0006	0.0035	-0.0013**	0.0052***	0.000
	(0.0041)	(0.0009)	(0.0095)	(0.0006)	(0.0019)	(0.0014
Post-Ban	0.0042**	-0.0038**	0.0009	0.0004	0.0047**	0.001
	(0.0020)	(0.0015)	(0.0039)	(0.0010)	(0.0019)	(0.0029
Dep Var Mean	0.003	0.004	0.010	0.001	0.005	0.00
N	85,326	85,326	85,326	85,326	85,326	85,32

Outcome: indicator for using a pawn shop loan, and choosing to use a pawn loan rather than a bank for the specified reas
Standard errors clustered at the state level in parentheses.
All specifications include individual demographic characteristics, state and year fixed effects, and state-level economic conditions.
* p < .10 , ** p < .05, *** p < .01

Table 11: The Effect of Payday Loan Bans on Traditional Credit Use

	Any Credit		Credit Card		Retail Card		Consumer Financ	
	Ever Use	Balance	Ever Use	Balance	Ever Use	Balance	Ever Use	Balan
	(1)	(2)	(3)	(4)	(5)	(6)	(7)	(
Payday Ban	-0.0095	-0.0040	-0.0061	0.0032	-0.0005	0.0081	-0.0029	-0.028
	(0.0070)	(0.0164)	(0.0069)	(0.0210)	(0.0052)	(0.0242)	(0.0035)	(0.040
Dep Var Mean	0.65	8.85	0.57	8.77	0.25	7.09	0.15	8.:
N	5,996,548	3,912,701	5,996,548	3,436,941	5,996,548	1,503,780	5,996,548	902,1

Outcome: "Ever Use" indicates using the specified credit type in the relevant quarter;
"Balance" is log credit balance among users.
"Any Credit" refers to credit cards, retail cards, and other consumer finance.
Standard errors clustered at the state level in parentheses.
All specifications include quarter and individual fixed effects, age, age squared, and state-level economic conditions.
* p < .10 , ** p < .05, *** p < .01

Table 12: The Effect of Payday Loan Bans on Traditional Credit Use, Low Credit Sample

	Any Credit		Credit Card		Retail Card		Consumer Finance	
	Ever Use	Balance	Ever Use	Balance	Ever Use	Balance	Ever Use	Balance
	(1)	(2)	(3)	(4)	(5)	(6)	(7)	(8)
Payday Ban	-0.0059	-0.0256	-0.0009	-0.0248	0.0054	-0.0017	0.0016	-0.0341
	(0.0116)	(0.0254)	(0.0107)	(0.0251)	(0.0077)	(0.0352)	(0.0064)	(0.0426)
Dep Var Mean	0.58	8.45	0.43	8.23	0.23	7.12	0.22	8.22
N	1,264,591	728,577	1,264,591	552,367	1,264,591	293,714	1,264,591	262,681

Outcome: "Ever Use" indicates using the specified credit type in the relevant quarter;
"Balance" is log credit balance among users.
"Any Credit" refers to credit cards, retail cards, and other consumer finance.
Sample includes individuals with credit scores below 600.
Standard errors clustered at the state level in parentheses.
All specifications include quarter and individual fixed effects, age, age squared, and state-level economic conditions.
* p < .10 , ** p < .05, *** p < .01

Case 1:18-cv-00295-LY Document 40-1 Filed 09/25/20 Page 91 of 124

Figure 1: Payday Loan Regulations by State, 2006-2012

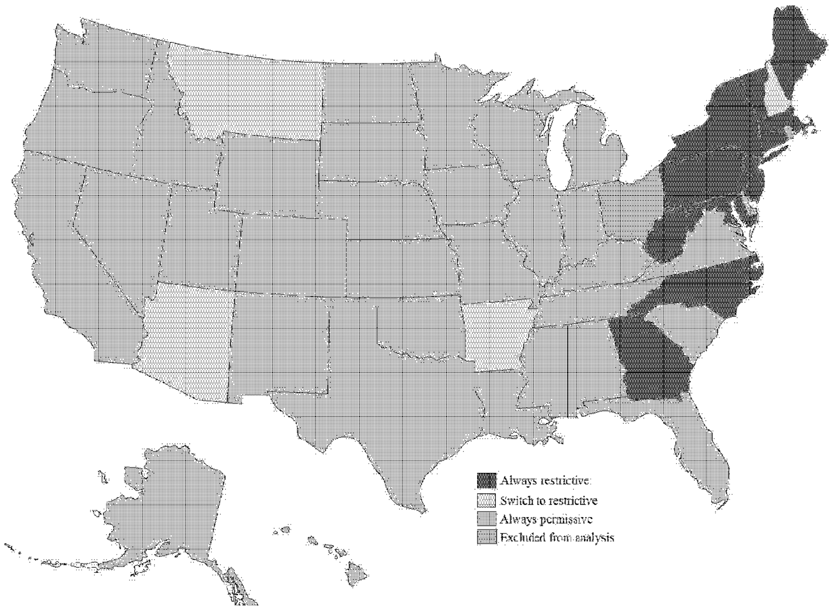
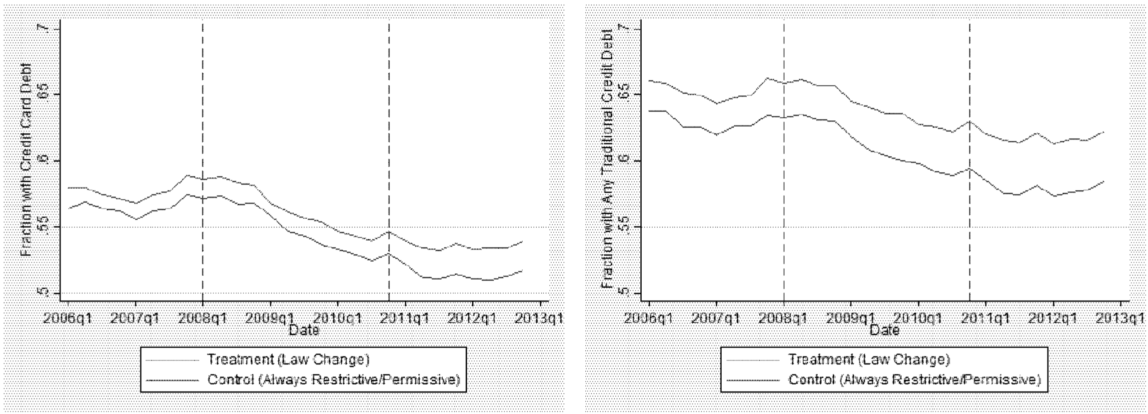


Figure 2: Trends in Traditional Credit Use by State Policy, 2006-2012

(a) Fraction with Credit Card Debt (b) Fraction with Any Traditional Credit Debt

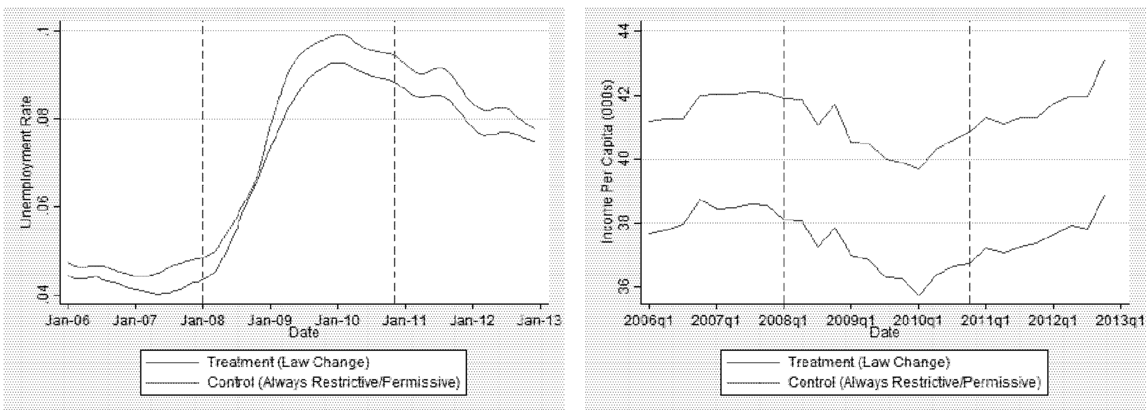


Treatment and control means weighted by population.

Dashed lines indicate the first and last payday policy changes considered in this paper.

Figure 3: Trends in Macroeconomic Conditions by State Policy, 2006-2012

(a) Unemployment Rate (b) Income Per Capita



Treatment and control means weighted by population.

Dashed lines indicate the first and last payday policy changes considered in this paper.

TAB 20

Dennis Shaul Oct. 7, 2016 Comment Letter (Excerpts), Community Financial Services Association of America, ECF No. 80-2 (Sept. 25, 2020)

CFSA[SM]
COMMUNITY FINANCIAL SERVICES ASSOCIATION OF AMERICA
A COMMUNITY OF RESPONSIBLE LENDERS

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October 7, 2016

Monica Jackson
Office of the Executive Secretary
Consumer Financial Protection Bureau
1700 G Street, N.W.
Washington, DC 20552

Re: Notice of Proposed Rulemaking on Payday, Vehicle Title, and Certain High-Cost Installment Loans

Docket No. CFPB-2016-0025; RIN 3170–AA40

Dear Ms. Jackson:

Community Financial Services Association of America, Ltd. ("CFSA") is a national organization dedicated to advancing financial empowerment for consumers through small-dollar, short-term payday loans and similar consumer financial products. CFSA was established in 1999 to promote laws and regulations that protect consumers while preserving their access to credit options, and to support and encourage responsible industry practices. Information about CFSA, including the industry Best Practices that our members are required to follow, is attached as Exhibit A and available at cfsaa.com. CFSA members have extensive experience, knowledge, and insight to bring to bear in developing balanced, workable payday-lending regulations that preserve consumer choice among a variety of responsible and valuable credit products. CFSA accordingly offers this comment on the rule concerning payday, vehicle title, and certain high-cost installment loans proposed by the Consumer Financial Protection Bureau on June 2, 2016.

Payday loans provide a financial lifeline for millions of consumers who are unable to access more traditional forms of credit. Currently, approximately twelve million Americans per year rely on payday loans to help with their financial needs. Without payday loans, these consumers would be forced into inferior and more costly alternatives, such as defaults on other debts, bounced checks, overdraft fees, and the use of unregulated and illegal underground sources of credit. Consumers understand this, which is why they consistently and overwhelmingly praise the product and value the flexibility it provides.

Yet, rather than strengthen and protect access to this critical form of credit, the proposed rule would virtually eliminate it. The centerpiece of the proposed rule is an ability-to-repay requirement that is fundamentally inconsistent with how consumers use payday loans and payday loan sequences. It rests on misperceptions about consumer behavior and unfounded presumptions of harm. And, ultimately, by eliminating a critical form of credit, it would severely injure the very consumers that the Bureau is charged with protecting.

In particular, the proposed rule suffers from the following critical flaws, which are discussed in greater detail in this comment letter:

- The proposed rule effectively ignores the significant benefits that payday borrowing and reborrowing confer on consumers.
    - Millions of consumers who lack access to other forms of credit use payday loans, including payday loan sequences that result from reborrowing, to manage debts and to cope with unexpected expenses and income shortfalls and with income and expense volatility.
    - If payday loans were unavailable to them, these consumers would be forced to use inferior and more costly alternatives, such as bounced checks, overdraft fees, default on other debt, and unlicensed and unregulated sources of credit.
    - Unsurprisingly, then, the social-science literature demonstrates that consumer welfare is improved when payday loans and loan sequences are available.
- The proposed rule would effectively eliminate payday lending. It prohibits the vast majority of payday loans currently made, and makes payday lending so unprofitable that few if any companies will be able to remain in the business, even to offer loans that the Bureau concedes are beneficial to consumers. Indeed, the Bureau admits that the proposed rule would eliminate at least 70% of payday-lending storefronts, and other studies show even more dramatic impacts.
- The proposed rule prohibits the specific uses of payday loans that are most beneficial to consumers. Restricting payday loans to only those borrowers who have sufficient net income to satisfy all other financial obligations and also repay the loan within its initial two-week (or thirty-day) term is fundamentally inconsistent with how consumers actually use payday loans to manage debts and in response to income and expense shocks and income and expense volatility.
    - The Bureau ignores entirely that consumers beneficially use payday loans for income smoothing in the face of income and expense volatility.
    - The Bureau concedes that consumers beneficially use payday loans in response to income and expense shocks, but the proposed rule fails to address or accommodate this use.
- The Bureau's claim that consumers who do not satisfy the proposed rule's ability-to-repay requirement are substantially harmed by payday loans rests on the unfounded presumption that reborrowing a payday loan at the end of its term is necessarily harmful. In fact, this presumption defies common sense and basic economic analysis. There is no evidence to support it and ample evidence to contradict it.

- The Bureau's contentions that consumers lack understanding of the material risks and costs of payday loans, cannot reasonably avoid being injured by them, and are unable to protect their own interests are premised on unreasonable interpretations of what it means to lack understanding, reasonably avoid injury, and protect one's own interests. These contentions also lack evidentiary support. Indeed, ample evidence demonstrates that consumers fully understand the costs and risks of these products, and choose to use payday loans anyway because their benefits outweigh their costs.

- The Bureau's heavy-handed proposal is all the more perplexing because numerous States employ alternative, less burdensome regulatory approaches, ignored by the Bureau, that would adequately address the Bureau's concerns while preserving access to payday credit.

- The proposed rule is also fundamentally at odds with Congress's careful delineation of the Bureau's statutory authority.

    - Congress set a clear boundary on the Bureau's powers by unequivocally declaring that the Bureau lacks the authority to establish a usury limit. The proposed rule flagrantly runs afoul of this statutory restriction by improperly targeting high-interest loans because of their alleged "high cost" and "unaffordability," and by determining the legal status of covered longer-term loans based solely on their interest rate.

    - Congress likewise clearly intended to deprive the Bureau of the authority to impose an ability-to-repay requirement for the covered loans.

    - The proposed rule is premised primarily on the Bureau's policy choices about the desirability of high-interest, small-dollar loans, in contravention of the congressional command that public-policy determinations "may not serve as a primary basis for" an unfairness determination and may not be considered at all in determining whether an act or practice is abusive.

    - The Bureau's efforts to stamp out a lawful, highly regulated financial product exceeds its statutory mandate.

- The proposed rule would also be unconstitutional because it constitutes the exercise of improperly delegated legislative authority by an agency that is improperly insulated from presidential and congressional oversight. This novel structure is unprecedented.

For these and other reasons, all discussed in greater detail below, CFSA strongly opposes the proposed rule as outside the Bureau's constitutional and statutory authority, as well as unnecessary, arbitrary, overreaching, and substantially harmful to lenders and borrowers alike.

Table of Contents

Executive Summary

In this comment letter, CFSA addresses the Bureau's fundamentally flawed proposed rule on payday, vehicle title, and certain high-cost installment loans. In Part I, we discuss how payday loans and payday loan sequences resulting from reborrowing are an essential form of credit for millions of Americans. We explain that consumers, with full understanding of the costs and risks of payday loans, rationally choose these products over inferior alternative solutions to their financial difficulties; that consumers overwhelmingly praise the utility of payday loan products; and that the empirical evidence shows that payday loans and reborrowing improve consumer welfare. In Part II, we explain how the proposed rule would devastate the payday-lending market and virtually eliminate this essential form of consumer credit.

In Parts III and IV, we show that the Bureau lacks justification for the determination that it is an unfair and abusive practice to make a payday loan without satisfying the Bureau's proposed ability-to-repay test. We explain that the Bureau's proposed findings, including those relating to substantial consumer injury and lack of consumer understanding, improperly rest on presumptions of consumer harms that do not exist and unwarranted assumptions about consumer behavior, and also unreasonably ignore or discount the substantial benefits that consumers obtain from payday loans as currently marketed without the Bureau's ability-to-repay test.

We demonstrate in Part V that the Bureau's statutorily required cost-benefit analysis is defective. We next show that the Bureau's findings with respect to longer-term installment loans (Part VI) and vehicle-title loans (Part VII) are likewise unsupportable. In Part VIII we explain that the Bureau's proposed "residual income" test for consumers' ability to repay covered loans is unsound and unreasonably burdensome, and in Part IX we explain that the Bureau has failed to consider important aspects of the problem, including the views of the consumers and the less restrictive alternative regulations employed by the States that permit payday lending. We then address the shortcomings of the proposed rule's provisions on payment practices (Part X), information furnishing (Part XI), and evasion (Part XII). Finally, we explain that the rule exceeds the Bureau's statutory authority (Part XIII), is unconstitutional (Part XIV), and is the product of a flawed regulatory process (Part XV).

I. Payday Loans Are an Essential Form of Credit for Millions of Consumers

Payday loans provide critical access to needed funds for millions of consumers who are unable to obtain more traditional forms of credit. These consumers, who fully understand the costs and risks involved, rationally use payday loans, including payday loan sequences that result from reborrowing, to manage debt and to cope with unexpected expenses and income shortfalls (income and expense shocks) and fluctuating income and expenses (income and expense volatility). These consumers would be forced into inferior alternatives—bounced checks, default on other debt, use of underground sources of credit, and the like—if payday loans were unavailable to them. It is therefore unsurprising that consumers overwhelmingly praise the utility of payday loans, and that the social-science literature demonstrates that consumer welfare is improved when payday loans and loan sequences are available.

A. The Market for Payday Loans

Short-term consumer lending based on employment income, the essence of payday lending, is not new. Over one hundred years ago, lenders offered to purchase employee paychecks at a discount. Aaron Huckstep, *Payday Lending: Do Outrageous Prices Necessarily Mean Outrageous Profits?*, 12 Fordham J. of Corp. & Fin. Law 203, 204 (2007).[1] Known as "wage assignment," "salary buying," or "salary lending," these transactions arose as increasing numbers of people concentrated in urban areas with highly competitive labor markets and little access to traditional forms of bank or social-based credit. *Id.* Before long, States subjected these transactions to usury laws specifying interest-rate limits, thereby largely eliminating this consumer-driven source of credit. In the years that followed, as banks departed the market for short-term loans and general-purpose credit cards supplanted installment financing of consumer goods, many consumers, including those who could not qualify for credit cards, had nowhere to turn for short-term, small-dollar credit. *Id.*

At the end of the twentieth century, short-term consumer lending based on employment income re-emerged. This time, however, state laws eliminating interest-rate caps for this type of credit allowed "mom and pop" shops, particularly businesses that cashed checks, to try to serve this market through what became payday loans. Ronald J. Mann & Jim Hawkins, *Just Until Payday*, 54 UCLA L. Rev. 855, 862 (2007). The core business of check cashers was (and is) to cash checks for a fee. But some consumers began asking companies to cash post-dated checks and defer presentment of those checks to the consumers' banks for several days. The check-cashing businesses would charge consumers a small fee for taking the risk that the post-dated checks would bounce. When those post-dated checks became tied to payroll cycles, modern payday lending was born. *Id.*

The modern payday-lending transaction is straightforward. A borrower presents a lender evidence of a bank account and employment income. The borrower writes a check for a set amount or authorizes an equivalent electronic withdrawal and receives cash of some value less than the face value of the check or electronic-withdrawal authorization. The payday lender promises not to cash the check or make the withdrawal for a short period of time. After that time, the borrower may pay off the loan in cash or the lender may cash the check or make the withdrawal. The difference between the face value of the check or authorized withdrawal and the cash received by the consumer represents the service charge. The typical transaction involves a two-week loan for a few hundred dollars with a service charge of $15 per $100 borrowed. This charge reflects the cost and risks of extending this form of credit.

Payday lenders offering these transactions provide a valued service to underserved consumers. Due to low profitability, mainstream financial institutions have largely vacated the small, short-term credit market, except for credit cards. Mark Flannery & Katherine Samolyk, *Payday Lending: Do the Costs Justify the Price?*, at 4 (FDIC Center for Financial Research Working Paper No. 2005-09). Yet credit cards are unavailable to a significant subset of the

[1] All references cited herein are included in the appendix accompanying this letter.

consumer credit is restricted, many consumers will turn to illegal lending markets. Zywicki, *supra*, at 17. Under the strict credit regulation in Germany, for example, "60 percent of low-income Germans have had credit applications refused, and almost 10 percent have resorted to illegal lenders." *Id.* at 17–18. And when Japan tightened its consumer credit regulations in 2006, the result was "dramatic growth in illegal loan sharking," "primarily run by organized crime." *Id.* at 18. Not surprisingly, borrowing from illegal lenders comes at a much higher cost than a payday loan, and "collections by illegal lenders rest on threats, intimidation, violence, and forms of exploitation," including demands for "sexual favors when unable to pay." *Id.* at 19.

D. Consumers Rationally Choose Payday Loans and Loan Sequences Over Other Available Alternatives

Against this backdrop, it is unsurprising that standard economic analysis confirms that payday loans offer a superior alternative for many rational consumers.

Consider, for example, a consumer who uses his car to drive to work. *See* Gregory Elliehausen & Edward C. Lawrence, *Payday Advance Credit in America: An Analysis of Customer Demand*, at 13–14 (McDonough School of Business, Georgetown University, 2001). The car breaks, requiring a $200 repair. The consumer does not have the cash for the repair and is thus faced with a choice: delay the repair and take public transportation until the next payday (in two weeks) or obtain a two-week payday loan. The math favors obtaining the payday loan. *See id.* Assuming a commute near the headquarters of the Bureau in Washington, D.C., the net cost of taking public transportation is about $4.56 per day (which includes bus and subway fares of $3.50 each way, minus a savings of $3.72 in costs for fuel, maintenance, and vehicle depreciation as per federal government estimates, plus $2.50 in forgone wages for a longer commute), for a total cost of $45.60. To be conservative, that net cost does not include any weekend or nightly car activities. For a $200 payday loan, by contrast, the finance charge would be $30 ($15 per $100 in loan amount), for a savings over the public-transportation option of slightly less than $15 (when all costs are discounted to present value). This means that the consumer should take the payday loan notwithstanding its APR of 390 percent. *See id.*

Consider, similarly, a consumer who faces a $50 utility bill and a $50 credit card bill due before his next paycheck. *See id.* at 12–13. Assume he cannot cut $100 of expenses before his next paycheck. Late payments on both bills will incur costs of, for example, $5 for the utility company and $30 for the credit-card company. With a $100 payday loan, the consumer will avoid these $35 in costs but incur a $15 finance charge. The consumer saves $20 (or $17.39 if discounted to present value) for choosing a payday loan instead of paying late fees. *See id.* And the financial and non-pecuniary costs of the non-payment of bills would be substantially higher (and the payday option substantially more valuable by comparison) if, for instance, late payment of the utility bill would result in service disruption and a reconnection fee.

This beneficial and economically rational use of payday loans extends to payday loan sequences that result from reborrowing. Consider if, in the above examples, the funds to pay for the expense (car repair or outstanding bills) would be available not at the consumer's next paycheck, but three months after that, when the consumer's financial situation improves (because, for instance, the consumer has a seasonal increase in income or retires another debt). Over fourteen weeks, with a sequence of seven payday loans, the first hypothetical consumer would pay $210 in payday-loan fees, versus approximately $319 in commuting expenses, for a savings of approximately $109 by choosing a payday loan over public transportation. The second hypothetical consumer would pay $105 in payday loan fees, versus approximately $140 in late fees, for a savings of approximately $35 by choosing a payday loan over monthly fees. (These savings are slightly lower when discounted to present value.) Where, as in these examples, the monthly costs of the consumer's alternative solution exceed the monthly costs of a payday loan, it will be in the consumer's best interest to borrow—and reborrow—a payday loan.

Obviously, costs and benefits will vary from circumstance to circumstance, and there will likewise be scenarios where the net costs of a payday loan are higher than the alternatives. The point, however, is that there are innumerable situations where a particular cash-strapped consumer with limited credit options benefits financially from a payday loan, vis-à-vis the consumer's other available options, despite the payday loan's supposed high cost. And it therefore simply cannot be presumed that reborrowing is necessarily irrational or harmful. All told then, payday loans and payday reborrowing provide a critically important and valued service to millions of American consumers.

E. Consumers Overwhelmingly Praise the Utility of Payday Loans, Including Via the Bureau's Own "Tell Your Story" Portal

It is unsurprising, therefore, that payday-loan borrowers praise the product and the companies who offer it in overwhelming numbers.

The Bureau's own "Tell Your Story" and consumer-complaint portals demonstrate the overwhelmingly positive reaction of borrowers. The Bureau established the "Tell Your Story" portal, and invited consumers to submit their "experiences …, good and bad," CFPB, *Your financial stories*, http://www.consumerfinance.gov/your-story (last visited Aug. 22, 2016), in order to "gain insight … into … consumer financial products and services [consumers] depend on," CFPB, *Consumer Stories Archive*, http://www.consumerfinance.gov/everyone-has-a-story (last visited Aug. 22, 2016). Nearly all of the stories submitted on payday lending and similar products are positive. Since its inception, the portal has collected 12,546 comments on payday lending. *See* CFPB Response to FOIA Request (Mar. 29, 2016) (attached hereto as Exhibit B). Of those comments, only 238 were negative. *Id.* The rest—12,308 comments—were positive. *Id.* In other words, 98.8% of the "good and bad" consumer experiences regarding payday lending solicited by the Bureau's own consumer portal were positive.

These positive comments praised payday lending for helping consumers to negotiate liquidity crises, *e.g.*, *id.* at ID 141106-001506 (Nov. 6, 2014) ("Was short on money to meet my bills due to car repairs so check into cash helped me to pay my bills."), with "fast and friendly service," *id.* at ID 140509-000891 (May 9, 2014) ("I had car trouble and needed extra cash to help. The fast and friendly service was there to help."), when there were few other options, *id.* at

ID 140821-000856 (Aug. 21, 2014) ("I'm on commission sales and my income varies from week to week and the cash advance helps me not to bounce checks in between and steadies my income so my bills get paid on time. I don't have any family that can help me so this is really my only option at this point."). Of the 238 negative comments, about one third were actually complaints against banks, insurance, or school companies; another third concerned payday-lending scams and unregulated lenders, an important consumer-protection issue that the proposed rule does not address. *Id.* That leaves only approximately eighty negative comments about payday lending—less than one-tenth of one percent.

The Bureau also maintains a database of consumer complaints about financial services, including payday loans. Unlike the "Tell Your Story" portal, the complaint portal solicits only complaints, not positive experiences. This complaint database, the Bureau's director proclaimed, is "part of our DNA," and plays an important role guiding the agency's supervision of companies, enforcement actions, rule-making and consumer protection. Yuka Hayaski, *Consumers With Complaints Flock to CFPB*, Wall St. J. (July 25, 2016). In particular, the Bureau predicted that the complaint database would show the need for payday-loan regulation, giving the people a "greater voice" with respect to "trouble with payday lending products." CFPB Press Release, CFPB Begins Accepting Payday Loan Complaints (Nov. 6, 2013). But in fact the results undermine any supposed need for the proposed rule.

According to the Bureau's latest monthly complaint report, the Bureau has received a total of 982,397 complaints since it began receiving complaints in July 2011. But just 15,356 complaints, or less than two percent, were about payday lending. CFPB, *Monthly Complaint Report* 5, 21 (Sept. 2016). And only a fraction of those complaints are related to regulated, storefront lenders. *See* CFPB, *Consumer Response Annual Report* 33 (Mar. 2016). Put differently, there has been an average of 5,268 payday-lending complaints per year, *see id.* at 5, out of approximately twelve million individual payday borrowers per year, which is a per capita complaint rate of less than five hundredths of one percent—a number that compares favorably to other products and services monitored by the Bureau. In addition, unlike complaints for most other products, monthly payday-loan complaints have significantly declined over the past year, with the latest three-month average down eighteen percent from the prior year, the greatest percentage decrease, by a significant margin, of any product. CFPB, *Monthly Complaint Report* 3–5 (Sept. 2016); *see also* Ex. C.[2]

[2] As summarized in Exhibit C, attached hereto, data from the Federal Trade Commission and the several States likewise show an exceedingly low level of consumer complaints about payday lending. *See, e.g.*, FTC, Consumer Sentinel Network, Data Book for January – December 2015, at 80 (Feb. 2016) (payday loans account for less than three-tenths of one percent of (unverified) consumer complaints received in 2015), *available at* http://goo.gl/jrL0jc; CFSA, Customer Complaints Against the Payday Advance Industry in 2009 (state-level data showing low numbers of payday complaints), *available at* http://goo.gl/wRwOAY; Tenn. Dep't of Fin. Insts., 2015 Annual Report 11, 42 (thirty-three payday complaints out of over four million transactions), *available at* http://goo.gl/WpxHGH; Mo. Div. of Fin., Report on Payday Lending (Feb. 9, 2015) (thirty-two payday complaints out of more than 1.87 million loans), *available at* http://goo.gl/N5p892.

fact, this evidence overwhelmingly establishes that payday loans and loan sequences (as currently marketed without the Bureau's ability-to-repay requirement) are beneficial to consumers. *See supra* Part I.F. Regardless, "admittedly (and at best) 'mixed' empirical evidence" cannot support the proposed rule. *Business Roundtable*, 647 F.3d at 1151.

Moreover, the Bureau's "reasonable synthesis" of this allegedly "mixed" evidence—that "payday loans benefit consumers in certain circumstances, such as when they are hit by a transitory shock to income or expenses, but that in more general circumstances access to these loans makes consumer [sic] worse off," *id.* at 48,132—is fundamentally flawed. The Bureau has no evidence for its distinction between consumers "facing a truly short-term need for credit" and other consumers "in more general circumstances." 81 Fed. Reg. at 48,132. It points to no studies dividing consumers into groups based on those suffering a "transitory shock to income" and those operating under "more general circumstances" (*id.*)—those categories are fabricated as a convenient way to justify the Bureau's policy preference. Additionally, this distinction is meaningless without any effort by the Bureau to define the characteristics and, in particular, the duration of transitory shocks in order to determine whether the proposed rule adequately protects consumers who suffer from such shock. *See supra* Part III.A.1.d.iii.

Third, the Bureau entirely fails to consider that the proposed rule deprives consumers of their freedom to make independent financial decisions. Payday borrowers overwhelmingly agree that "[i]t should be your choice … to use payday lending, not the government's choice," and that "[y]ou should have the ability to make your own financial decisions without government interference." Harris Interactive, *supra*, at 13. A strong majority oppose government restrictions on the number of loans consumers can take out in a year or the number of times a borrower can renew or extend a loan. *Id.* at 15. And a strong majority believe that consumers "should have the freedom to make informed financial decisions by being able to choose among multiple options in a competitive marketplace." Tarrance Group, *supra*, at 24. Yet the Bureau does not even mention that the proposed rule will impose drastic limits on free choice. Instead, the Bureau infuses its analysis with disdain for the ability of consumers to make rational decisions, accusing them of having cognitive deficiencies—including optimism bias and tunneling (a euphemism for narrow mindedness)—that prevents them from making the allegedly smart financial choice. And while the Bureau counts eliminating "psychological distress" from collection of payday loans as a benefit of the proposed rule, *see* 81 Fed. Reg. at 47,930, it ignores the serious cost of restricting individual choice.

Fourth, the Bureau also fails to consider the proposed rule's cost to consumer privacy. The proposed rule will require payday borrowers to submit personal financial information for loan approval. Consumers must furnish an array of data to show their "basic living expenses," including all the "goods and services necessary to maintain [their] health, welfare, and ability to produce income," and the goods and services necessary to support each dependant. *Id.* at 47,943. They must also furnish information about their "major financial obligations," including the cost of housing, payments on other debt, delinquencies on other debt, and child support payments. *Id.* These requirements intrude on consumer privacy in an industry in which consumers typically do not wish to disclose financial information and appreciate the ability to receive credit without revealing their personal information. Yet the Bureau makes no attempt to assess the cost of exposing consumers' personal financial information to payday lenders. *See id.* at 48,129.

Fifth, the Bureau ducks serious evaluation of the proposed rule's impacts on consumers in rural areas. It first acknowledges that the proposed rule will "likely lead to a substantial contraction in the markets for storefront payday loans." *Id.* at 48,150. But to assess the impact on consumers in rural areas throughout the United States, the Bureau uses data from only three States, Colorado, Virginia, and Washington. It makes no attempt to examine rural areas throughout the fifty States in which its nationwide rule would apply. The Bureau then concludes that, even if rural consumers would lack access to a storefront lender, they will have access to online lenders. But the Bureau conducts no assessment of the number of rural consumers who lack access to the Internet, nor does it assess how these rural consumers will fare in States—like Virginia, South Carolina, Nebraska, Iowa, Kentucky, and Utah—that prohibit online loans.

VI. There Is No Substantial Evidence That the Targeted Practices Related To Longer-Term Loans Are Unfair or Abusive

The Bureau also lacks substantial evidence or a reasonable basis for extending the proposed rule to cover certain "high priced" longer-term installment loans with what the Bureau calls a "leveraged payment" mechanism. 81 Fed. Reg. at 47,985–86. Again the Bureau invokes its authority to address and prevent "unfair" or "abusive" acts or practices, and it concludes that current practices for issuing these loans without an assessment of the consumer's ability to repay the loan without reborrowing are both unfair and abusive. *Id.* But the Bureau's conclusions as to both unfairness and abusiveness suffer from the same legal and evidentiary shortcomings as its conclusions as to payday loans. Accordingly, we incorporate herein the arguments made above for payday loans, and address as well certain specific problems with the proposed rule as applied to longer-term installment loans.

Before discussing the Bureau's evidentiary insufficiencies in greater detail, a few overarching points bear mention. *First*, the Bureau apparently developed its proposal to extend the rule to longer-term loans as an afterthought, outside the main objective of the payday-lending rule. Indeed, it appears that the Bureau proposes this extension primarily to prevent payday lenders from shifting their business to longer-term loans, rather than due to any legitimate concerns about the longer-term loans themselves. *Id.* The problem for the Bureau is that the core theoretical underpinning for its desire to ban payday loans—the alleged debt trap caused by unanticipated reborrowing—is inapplicable to long-term loans. The Bureau has thus attempted to manufacture a justification for extending the rule to these loans, but the supporting evidence is nonexistent. *Second*, the Bureau has not been supervising installment lending. Without supervisory data and an understanding of the market, it is entirely premature to be proposing a rule impacting that market. *Third*, the Bureau's effort to expand the rule to cover installment loans—which do not display the core alleged harms caused by payday loans—is further evidence that the Bureau's true concern is (prohibited) interest-rate regulation. *See infra* Part XIII.A. *Fourth*, the Bureau arbitrarily extends the rule to installment loans while not extending it to deposit advance products and bank overdrafts. The Bureau admits that these latter products "pose similar risks to consumers" as payday loans, but determines not to subject them to the proposed rule. *See* 81 Fed. Reg. at 47,919 n.428. In contrast, installment loans do not pose similar alleged risks as payday loans, but the Bureau nevertheless subjects them to the proposed rule. These inconsistencies and shortcomings, along with the complete lack of evidence to support extending the rule to installment loans, lead inexorably to the conclusion that the proposed rule is arbitrary.

A. The Bureau Lacks Evidence That Leveraged-Payment Loans Are Unfair

Certain States have chosen to expand consumer options by allowing longer-term installment loans secured by access to borrower bank accounts. As with their shorter-term counterparts, consumers benefit substantially from the availability of these longer-term loans. Determined to stamp out any loans made above the Bureau-approved interest rate, however, the Bureau declares these loans unfair as well, based on the same unproven, non-existent harms and unsupported misperceptions about consumer behavior used to justify the short-term-loan requirements.

The Bureau claims that issuing leveraged-payment loans without determining the ability to repay is unfair because (1) they are too expensive, leading to high levels of loan default, costly collection efforts, and refinancing, 81 Fed. Reg. at 47,997; (2) these alleged injuries are not reasonably avoidable because consumers cannot understand the risks of taking out these loans and are too stressed with an immediate need for cash to rationally consider the available alternatives, *id.* at 47,998–99; and (3) the injuries are not outweighed by any benefits that leveraged-payment loans provide, *id.* at 47,999–48,002. Each of these three conclusions lacks substantial evidence.

1. According to the Bureau, longer-term installment loans cause three substantial injuries: default, collection costs, and refinancing. *Id.* at 47,997–98. For three key reasons, the Bureau's analysis lacks substantial evidence.

First, the Bureau's overarching theory assumes that the "high cost" or unaffordability of these loans is harmful to consumers, yet it ignores that the alternatives are less affordable. As with payday loans, consumers turn to covered longer-term loans when other forms of credit are unavailable. *Id.* at 47,987. The available alternatives can be significantly more costly and less affordable than the costs of a leveraged-payment loan, even accounting for the costs of defaulting or refinancing. These alternatives include resorting to more expensive forms of credit, such as bank overdraft protection, or simply defaulting on other obligations, which itself can result in late fees, termination of crucial services, loss of bank accounts, and repossession of personal property. *See supra* Parts I & III.A.

Consider, for example, a consumer who cannot make a payment on a pre-existing auto loan due to an unexpected expense. Taking out a leveraged-payment loan can allow the consumer to make the payment and eliminate the possibility of repossession. Even if there is authorizations." 81 Fed. Reg. at 47,894. The Bureau's evidence thus does not support the full scope of its proposed payment-practices provisions: those provisions should apply, at most, only to online lenders.

The Bureau attempts to justify its overbroad rule on the ground that "[o]ther publicly available data indicate that returned payments likewise occur with great frequency in the storefront payday market." 81 Fed. Reg. at 48,049. But it never identifies that data so that the public may comment on it. The Bureau at one point cites data about *overall* payment failure rates from one institution that offers storefront *and online lending* and other data about *initial* payment failure rates from two storefront lenders (which the Bureau admits attempt to withdraw payment less than 10% of the time, 81 Fed. Reg. at 47,894). *See* 81 Fed. Reg. at 48,051. Neither set of data suggests anything about *repeated* payment withdrawal attempts from *storefront* lenders. Because the Bureau's evidence does not support the scope of its proposed rule, the Bureau's proposal should at a minimum be limited to online lenders. For the same reason, without data concerning repeated withdrawal attempts involving storefront lending, substantial evidence simply does not support the Bureau's unfairness and abusiveness determinations.

2. The Bureau also misinterprets and misapplies its authority over unfair practices in several ways. The Bureau may not declare a business practice unfair unless it causes or is likely to cause a substantial injury to consumers that is not reasonably avoidable and not outweighed by countervailing benefits. *See supra* Part III. With respect to the Bureau's payment practices proposal, there is no injury, the Bureau's professed injury is not caused by the regulated practice, and consumers may reasonably avoid the Bureau's professed injury.

The Bureau posits that the substantial injury associated with a third attempted payment withdrawal consists of "substantial additional fees" and a "greater risk" of account closure. 81 Fed. Reg. at 48,056–57. As an initial matter, the determination that the fee associated with a third payment withdrawal attempt creates "substantial injury" is entirely arbitrary: the Bureau offers no reason why it is not, for example, the fifth fee that makes the purported injury substantial. More fundamentally, the Bureau has committed the same error with respect to the purported injury of a third payment withdrawal attempt as it committed with respect to the purported injury of reborrowing. *See supra* Part III.A. That is, the Bureau has confused cost with injury: although failed payment withdrawal attempt fees increase the cost of credit (through the fees themselves and possible account-related effects), they are not necessarily injuries. That determination requires an assessment of costs and benefits to consumers that the Bureau has forsaken. *See supra* Part III.A. Indeed, the Bureau tacitly admits that failed payment withdrawal fees are not *per se* injurious by allowing consumers to consent to new payment withdrawal attempts that may result in such fees.

The Bureau further errs in concluding that payday lenders are the cause of this purported injury. *See* 81 Fed. Reg. at 48,056 n.824; *supra* Part III.A.3 (discussing causation of collateral consequences). The Bureau's statutory authority must be interpreted in light of traditional principles of causation. *See FTC v. Wyndham Worldwide Corp.*, 799 F.3d 236, 246 (3d Cir. 2015) (discussing Restatement (Second) of Torts). Under those principles, payday lenders do not cause failed payment withdrawal fees or account closures; rather, consumers' banks do. Payday lenders are not responsible for imposing or collecting the fees and do not coordinate in any way with consumers' banks in this regard. In addition, payday lenders do not intend to subject their borrowers to these fees and of course do not know any of the details of fees related to accounts they do not own. Attempting to avoid these facts, the Bureau asserts that payday lenders know that consumers "generally" may incur fees. 81 Fed. Reg. at 48,056 n.24. But the Bureau cites no evidence of such "general" knowledge, let alone evidence that lenders know that banks may charge repeated fees. And to the extent the Bureau's assumption is true, it is likely even more true that consumers "generally" know of such fees and thus that the Bureau errs in concluding consumers lack understanding of such fees and may not reasonably avoid them. As for a purported greater risk of account closures, the Bureau makes no attempt to distinguish causation from correlation: its evidence shows only that failed payment withdrawal attempts are correlated with closures without providing any explanation why this may be so. In sum, for the Bureau to state that payday lenders cause failed payment withdrawal fees is to stretch the concept of causation beyond its statutory limit.

The Bureau's statement that consumers cannot reasonably avoid failed payment withdrawal fees is similarly pockmarked with error. 81 Fed. Reg. at 48,057–58. Consumers have agreed to the transaction in which lenders attempt to withdraw payment. They can avoid any purported injury by not entering into the transaction. Indeed, the Bureau admits that consumers may avoid any purported injury when it gives them the chance to reauthorize, or not reauthorize, payment withdrawal attempts. Moreover, even after consumers have entered into a payday lending agreement, they have at least four methods of avoiding fees: (1) they can place sufficient funds in their account to pay off their loans, (2) they can roll over or renew their loans, (3) they can discuss repayment options with their lender, or (4) they can invoke their rights under federal law to issue stop-payment orders or rescind authorized account access. The Bureau has failed to consider these options either at all or in anything but a superficial way.

The Bureau considers only one aspect of the first option. It states that consumers could place enough funds to cover the third failed payment withdrawal fee. 81 Fed. Reg. at 48,057. But then the Bureau rejects that way of avoiding the purported injury as requiring consumers to know when and in what amount lenders will withdraw funds, and observes that any such funds would pay the first two fees. But the consumer agreed to the lenders' withdrawal practices, including timing and amount issues, and could avoid any purported injury by not so agreeing. In addition, the Bureau simply does not consider that a consumer can avoid any purported injury by placing the *entire* indebted amount in the account, so that there is no failed payment withdrawal attempt and thus no fees to pay at all. The Bureau suggests that financial distress prevents such behavior. 81 Fed. Reg. at 48,057. But that suggestion shows at a minimum that the Bureau's proposal is wholly unnecessary if it promulgates regulations implementing its ability-to-repay proposal. It also shows that the Bureau is misunderstanding consumer behavior: consumers are using payday loans strategically, *e.g.*, to address income and expense shock and volatility, such that incurring a fee is not the same as suffering an injury.

The Bureau does not even purport to consider the second and third ways of avoiding failed payment withdrawal attempts and the purported injury they supposedly cause. Yet many consumers successfully use renewals and rollovers to manage financial shocks and volatility. In addition, many States and localities require lenders to offer extended repayment plans, *see supra* Parts I.A & IX.C.2, and all CFSA members do so voluntarily (as a condition of membership) in compliance with CFSA's industry Best Practices (*see* Ex. A).

As for the fourth potential way of avoiding the purported injury, the Bureau asserts that stop payment orders or revocations of authorization are "not a reasonable means of avoiding the injuries." 81 Fed. Reg. at 48,057. But it overestimates the difficulty of such methods, which are available in-person, telephonically, and online for most banks, and are common enough for the Comptroller of the Currency and lending institutions to devote webpages to them. *See, e.g.*, OCC, Stop Payment Orders (*available at* https://www.helpwithmybank.gov/get-answers/bank-accounts/stop-payment-orders/bank-accounts-stop-payment-quesindx.html); New York Credit Union Association, Stop Payments (*available at* https://www.nycua.org/inner-page/49-compliance/regulatory-analysis/180-stop-payment) ("Stop payments are a very common request").

3. Third, the Bureau misinterprets and misapplies its authority over abusive practices. The Bureau may declare a practice abusive if it takes unreasonable advantage of a lack of understanding on the part of the consumer or the inability of the consumer to protect his interests. *See supra* Part IV. Here, the Bureau asserts that consumers lack understanding of the statistical likelihood of particular possibilities and cannot protect their interests through stop-payment orders or revocations of account access. As discussed above, however, the Bureau misinterprets "lack of understanding": consumers need not be up-to-date on financial statistics to possess sufficient understanding, and a willingness to tolerate certain risks and costs is not the same as a lack of understanding of them. *See supra* Part IV.1. In addition, also as discussed above, the Bureau has conducted no studies showing consumers' inability to obtain stop-payment orders or rescind account access, or establishing that consumers do not in fact take steps to protect their interests by prioritizing expenditures to navigate income and expense shocks and volatility. *See supra* Part IV.2.

4. Finally, the Bureau has failed to consider important aspects of the purported problem and to support its determinations with substantial evidence. The Bureau posits that payment withdrawal attempts may fail in two situations: (1) consumers inaccurately predict the amount and timing of lenders' attempts, (2) consumers are in financial distress. 81 Fed. Reg. at 48,057. But the Bureau has provided insufficient evidence that the first circumstance is actually realized, *i.e.*, that a consumer could pay the loan on Monday but not on Tuesday but then again on Wednesday. The second circumstance, moreover, is supposed to be resolved by the Bureau's ability-to-repay approach. That means that the Bureau's proposal on payment practices is either not supported by substantial evidence or is unnecessary. In addition, the Bureau has failed to consider a potential third circumstance regarding when a payment withdrawal attempt may fail: a consumer prioritizes other more important expenditures. For the same reason that a consumer

Finally, the SBA's Office of Advocacy recently convened a series of roundtables to discuss the proposed rule. Attendee notes of these roundtables, attached as Exhibit I to this letter, further show that the Bureau has ignored the concerns of small businesses and neglected to consider feasible alternatives that would achieve the regulatory objectives in a less costly way.

Following these roundtables, the Office of Advocacy submitted a comment opposing the proposed rule. According to the Office of Advocacy, the Bureau has significantly underestimated the potential economic impact of the rulemaking on small entities. As a result, the Office of Advocacy urged the Bureau, among other things, to eliminate some of the ability-to-repay requirements; shorten or eliminate the cooling-off period; provide an exception for consumers facing financial emergencies; exempt small businesses that operate in States that regulate payday lending; consider the detrimental effects that the proposed rule will have on small rural communities; perform a full analysis addressing the impact the rule would have on the cost of credit for small businesses; extend the proposed rule's effective date; and perform additional research to determine the impact of the proposed rule on small entities and consumers.

Echoing the concerns set forth in this letter, the Office of Advocacy also emphasized that the proposed rule "will not alleviate a consumer's financial situation. The consumer will still need to pay his/her bills and other expenses"—but will have been deprived of the means to do so. The Office of Advocacy therefore urged the Bureau to reconsider its proposal entirely, and instead develop requirements that protect consumers without jeopardizing their access to credit.

* * * *

Given the fundamental flaws described herein, it is clear that the proposed rule, if adopted, would be set aside by the courts for violating the substantive and procedural requirements of the Dodd-Frank Act, the Administrative Procedure Act, and the Constitution. Rather than proceeding with this misguided proposal, the Bureau should withdraw the proposed rule and work with stakeholders to develop regulations that establish responsible lending practices while also safeguarding the rights of consumers to access necessary credit.

Thank you for your consideration of these comments. We would be happy to discuss these issues further at any time.

Sincerely,

Dennis Shaul
Chief Executive Officer

Attachments