**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 KRANINGER, in her official capacity as Director, Consumer Financial Protection Bureau, *Defendants.*	Civil Action No. 1:18-cv-295

DEFENDANTS' COMBINED CROSS-MOTION FOR SUMMARY JUDGMENT AND OPPOSITION TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

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INTRODUCTION

Plaintiffs brought this suit in 2018 to challenge the "Payday, Vehicle Title, and Certain High-Cost Installment Loans" Rule ("2017 Rule") that Defendant the Consumer Financial Protection Bureau issued in 2017. As initially promulgated, the 2017 Rule contained two primary components. First, the Rule contained "Underwriting Provisions" that generally required lenders to confirm a borrower's ability to repay before making a payday or other covered loan. Second, the 2017 Rule also imposed more modest requirements relating to lenders' withdrawal of payments for covered loans from consumers' accounts. These "Payment Provisions" (1) require lenders to provide consumers advance notice about certain upcoming withdrawals from their accounts that they may not expect, and (2) prohibit lenders from continuing to attempt to withdraw payment directly from a consumer's account in certain circumstances where the attempt would likely result in substantial fees for the (likely already financially distressed) consumer, without much chance of resulting in payment for the lender. The Underwriting Provisions, but not the Payment Provisions, were expected to have dramatic impacts on the market for covered loans.

The Bureau revoked the Underwriting Provisions in July 2020, and all that remains of this case are Plaintiffs' challenges to the Payment Provisions.

Those challenges fail. Plaintiffs principally contend that the Payment Provisions must be set aside because they were initially promulgated by a Bureau whose Director was unconstitutionally insulated from removal by the President. But that problem has been fixed. The Supreme Court recently invalidated the statutory restriction on the President's ability to remove the Bureau's Director, and following that decision, the Bureau's Director—now undeniably subject to the President's plenary supervision—ratified the Payment Provisions. As

case after case confirms, this sort of ratification cures a separation-of-powers problem that affected an agency's earlier action. Plaintiffs' contrary view that ratification cannot remedy the constitutional problem here finds no support in case law or in any separation-of-powers principle. While Plaintiffs may want a more drastic remedy—wholesale invalidation of a rule they do not like—they can no longer complain that the Payment Provisions were adopted without adequate presidential oversight. That defeats their constitutional claim.

Plaintiffs' challenges to the merits of the Payment Provisions fare no better. Plaintiffs claim that the Payment Provisions are "inconsistent" with the Bureau's 2020 decision to revoke the Underwriting Provisions, but that claim badly distorts the record—there is no inconsistency. And while Plaintiffs also take issue with various judgments the Bureau made in adopting the Payment Provisions, its challenges are at bottom policy disagreements, not viable Administrative Procedure Act (APA) claims.

The Court should accordingly grant summary judgment in favor of the Bureau.

BACKGROUND

A. The Consumer Financial Protection Act

In response to the 2008 financial crisis, Congress enacted the Consumer Financial Protection Act of 2010 (CFPA or Act) as part of the Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376. The CFPA created the Consumer Financial Protection Bureau (Bureau) and charged the new agency with implementing and enforcing the federal consumer financial laws. *See* 12 U.S.C. §§ 5491, 5511.

The CFPA provides for the Bureau to be led by a single Director appointed by the President and confirmed by the Senate. 12 U.S.C. § 5491(b)-(c). Although the Act states that the President may remove the Director only for "inefficiency, neglect of duty, or malfeasance in

office," that provision was recently invalidated by the Supreme Court. 12 U.S.C. § 5491(c)(3); *Seila Law LLC v. CFPB*, 140 S. Ct. 2183, 2197 (2020).

Congress chose to fund the Bureau primarily outside the annual appropriations process, just as it has done with other financial regulators. *Compare* 12 U.S.C. § 5497 (Bureau), *with id.* § 243 (Federal Reserve Board); §§ 1815(d), 1820(e) (Federal Deposit Insurance Corporation); § 16 (Office of the Comptroller of the Currency). In particular, the CFPA authorizes the Bureau to obtain funds from the earnings of the Federal Reserve System as needed "to carry out the authorities of the Bureau," up to a specified annual cap. *Id.* § 5497(a)(1)-(2).

The CFPA grants the Bureau a host of rulemaking, enforcement, and other authorities. As most relevant here, the CFPA empowers the Bureau to write rules implementing federal consumer financial law, including rules to "identify[]" and "prevent[]" "unfair, deceptive, or abusive" acts and practices in connection with consumer loans or other consumer financial products and services. 12 U.S.C. §§ 5512(b), 5531(b); *see also id.* §§ 5481(5), (15)(A)(i), 5536(a)(1)(B). The CFPA further specifies what can qualify as "unfair" or "abusive" under the Act. In particular, an act or practice is "unfair" only if the Bureau has a reasonable basis to conclude (1) that it "causes or is likely to cause substantial injury to consumers," and that this injury is (2) "not reasonably avoidable by consumers," and (3) "not outweighed by countervailing benefits to consumers or to competition." *Id.* § 5531(c)(1). Similarly, an act or practice is "abusive" only if it meets one of four specified standards, including (as relevant here) "tak[ing] unreasonable advantage" of either (1) "a lack of understanding on the part of the consumer of the material risks, costs, or conditions of the product or service" or (2) "the inability of the consumer to protect the interests of the consumer in selecting or using a consumer financial product or service." *Id.* § 5531(d).

The Act also separately authorizes the Bureau to issue disclosure rules. 12 U.S.C. § 5532(a).

B. The 2017 Payday Rule

Pursuant to its authorities under the CFPA, the Bureau published a rule entitled "Payday, Vehicle Title, and Certain High-Cost Installment Loans" in the Federal Register on November 17, 2017. 82 Fed. Reg. 54472. As initially promulgated, the 2017 Rule imposed two main sets of requirements on lenders making covered loans. First, subpart B (the "Underwriting Provisions") identified it as an "unfair" and "abusive" practice for lenders to make a covered loan without first reasonably determining that the consumer would be able to repay it according to its terms. *Id.* at 54874. The Underwriting Provisions accordingly prohibited that practice and prescribed specific steps lenders had to take to assess consumers' ability to repay (unless they made the loan in accordance with an exemption). *Id.* at 54874-77.

The Rule's second set of requirements, the "Payment Provisions" in subpart C, regulate covered lenders' payment-withdrawal practices in two ways. First, those Provisions prohibit lenders from attempting to withdraw payment for a covered loan from a borrower's account after two consecutive attempts have failed due to lack of sufficient funds, unless the borrower specifically provides new authorization to do so. 12 C.F.R. § 1041.8(b)(1). This prohibition is based on the Bureau's finding that it is "unfair" and "abusive" to make such repeated withdrawal attempts without the consumer's renewed authorization. *See id.* § 1041.7; 82 Fed. Reg. at 54731.

In reaching that finding, the Bureau determined that while the (common) practice of obtaining upfront authorization to withdraw payments from a consumer's account can benefit lenders and consumers alike, lenders making covered loans were using these authorizations in ways that caused significant harm. 82 Fed. Reg. at 54720. In particular, unlike lenders in other

markets, lenders of loans covered by the Payment Provisions often repeatedly try to withdraw payment even after initial attempts fail. *Id.* at 54720-21. Each failed attempt causes consumers to incur significant fees—including nonsufficient funds fees, overdraft fees, and lender-imposed return fees—and makes it more likely that the bank will involuntarily close the consumer's account. *Id.* at 54725-26.

The Bureau further determined that it was very difficult for consumers to guard against these significant (and continually mounting) fees and other harms by blocking lenders' account access. *Id.* at 54737. That difficulty stems from a host of factors. Revoking a lender's authorization can be challenging because lenders may require written notice days in advance, purport to prohibit revocation, require authorization for a different type of account access before one authorization may be revoked, or even automatically debit payments through another method if a consumer revokes authorization for a certain kind of payment. *Id.* at 54726-27. In some cases, consumers can face difficulty even contacting the lender at all. *Id.* at 54726. It is no less challenging for consumers to direct their bank to stop payment, including because effectively blocking a withdrawal attempt can involve navigating complex procedures, generally costs upwards of $30, and often requires the consumer to provide information (like a merchant code or other lender-identifying information, none of which is standardized and which lenders sometimes vary to evade detection) that can be anywhere from difficult to nearly impossible to find. *Id.* at 54727-28. In addition, lenders may make multiple withdrawal attempts in quick succession, making it that much harder for consumers to block access before fees pile up. *Id.* at 54501.

At the same time, continuing to make withdrawal attempts after initial attempts fail is unlikely to result in payment for the lender. *Id.* at 54500. After two failed attempts, a third succeeds only about a quarter of the time, and further attempts' success rates are even lower. *Id.*

In addition to prohibiting the repeated withdrawal attempts that the Bureau determined were unfair and abusive, the Payment Provisions also contain a second set of requirements for lenders to give consumers advance notice before attempting to withdraw a payment for the first time and before making an "unusual" withdrawal attempt that deviates from what the consumer might expect in certain specified ways. 12 C.F.R. § 1041.9(b). Unlike the limit on payment-withdrawal attempts, these notification requirements are based on the Bureau's authority to prescribe disclosure rules, 12 U.S.C. § 5532, not its authority to identify and prevent unfair and abusive practices, *id.* § 5531. 82 Fed. Reg. at 54760.

The 2017 Rule established August 19, 2019, as the compliance date for both the Underwriting Provisions and the Payment Provisions. *Id.* at 54472.

C. Subsequent Developments

1. This Litigation and the Stay of the 2017 Rule's Compliance Date

Plaintiffs filed this suit challenging the 2017 Rule in April 2018. ECF No. 1. The next month, the parties jointly moved the Court to stay the litigation and the compliance date in light of the Bureau's plans to undertake a rulemaking process to reconsider the Rule. ECF No. 16. The Court initially stayed the litigation but declined to stay the compliance date. ECF No. 29. Plaintiffs sought reconsideration. ECF No. 30.

In a brief supporting reconsideration, the Bureau explained that staying the 2017 Rule's compliance date was warranted because the Bureau planned to reconsider the Rule, and because the Rule's Underwriting Provisions (which were expected to reduce loan volumes by around 90 percent and thus force many businesses out of the market) were likely to cause Plaintiffs' members irreparable harm in the meantime. ECF No. 34 at 6-7, 16. The Bureau further explained that Plaintiffs had established a substantial case on the merits of their challenge to the

Underwriting Provisions because the evidence may not have supported certain factual findings on which those particular provisions were based. *Id.* at 13-15.

That reasoning did not justify staying the Payment Provisions, but the Bureau acknowledged that Plaintiffs may have established a substantial case with respect to those Provisions as well because Plaintiffs claimed that the entire Rule was promulgated by an agency whose Director was insulated from presidential removal in violation of the separation of powers. *See id.* at 11 n.4. That was the sole reason either party ever gave for why it was appropriate to stay the compliance date for the Payment Provisions.

The Court ultimately stayed the compliance date for the entire 2017 Rule on November 6, 2018. ECF No. 53.

2. 2020 Rule Revoking the Underwriting Provisions

The Bureau issued a notice of proposed rulemaking in February 2019 that proposed to rescind the Underwriting Provisions of the 2017 Rule. 84 Fed. Reg. 4252 (Feb. 14, 2019). Consistent with an earlier, October 2018 announcement that the planned rulemaking would address only the Underwriting Provisions, and not the Payment Provisions,[1] the notice made clear that the Payment Provisions were outside the scope of the rulemaking. After considering the comments, the Bureau finalized a rule revoking the Underwriting Provisions on July 7, 2020. 85 Fed. Reg. 44382 (July 22, 2020) ("2020 Rule" or "2020 Revocation Rule"). Consistent with the proposal, the final rule did not alter the Payment Provisions. *See id.* at 44388.

After this rulemaking concluded, the Court lifted the stay of this litigation. ECF No. 74.

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[1] CFPB, *Public Statement Regarding Payday Rule Reconsideration and Delay of Compliance Date* (Oct. 26, 2018), *available at* https://go.usa.gov/xGeC6.

3. *Advance Financial's Petition for Rulemaking*

While the process to reconsider the Underwriting Provisions was underway, Advance Financial, a member of Plaintiff Community Financial Services Association (CFSA), filed a petition for rulemaking urging the Bureau to exempt debit- and prepaid-card transactions from the Payment Provisions on the ground that failed attempts to withdraw payment from those cards rarely result in non-sufficient funds fees. Appx.1-35 (PAYD-R-18073-107).

The Bureau denied that petition on July 7, 2020. Appx.36-43 (PAYD-R-18108-15). In its letter denying the petition, the Bureau reiterated the reasons it had already given in the 2017 Rule for declining to exempt debit- and prepaid-card payments, including that failed debit- and prepaid-card transactions still result in *other* harms to consumers (such as overdraft fees and return fees) even if they did not result in non-sufficient funds fees. Appx.39-40 (PAYD-R-18111-12). In addition, the Bureau explained that it had a busy rulemaking agenda and chose to use its limited resources on other, more urgent matters, particularly given that Advance Financial had not presented any new evidence or changed circumstances that might warrant reconsidering the conclusions the Bureau had just reached in 2017. Appx.41-42 (PAYD-R-18113-14).

4. **Seila Law** *and Ratification of the Payment Provisions*

While the proposal to revisit the Underwriting Provisions was still under consideration, the Supreme Court decided *Seila Law LLC v. CFPB*, which held that the Bureau's "leadership by a single individual removable only for inefficiency, neglect, or malfeasance violates the separation of powers" by improperly impeding the President's executive authority under Article II of the Constitution. 140 S. Ct. 2183, 2197 (2020). It further held that the CFPA provision purporting to insulate the Bureau's Director from removal was severable from the remainder of

the statute, and accordingly invalidated that provision, while making clear that "[t]he agency may … continue to operate" with a Director "removable by the President at will." *Id.* at 2192.

Following the decision in *Seila Law*, the Bureau's Director—now subject to the President's plenary supervision—ratified the Payment Provisions on behalf of the Bureau. 85 Fed. Reg. 41905 (July 13, 2020). The notice of the ratification specified that the Bureau was also ratifying the "procedural steps" that led to the Payment Provisions' issuance, including the "the decision to propose [them] for public comment." *Id.* at 41905 n.10.

ARGUMENT

I. Plaintiffs' Separation-of-Powers Challenge Provides No Basis To Set Aside the Payment Provisions Because a Director Fully Accountable to the President Has Ratified Them.

The separation of powers provides no basis to set aside the Payment Provisions. Plaintiffs complain that the Payment Provisions were initially adopted by a Bureau Director unconstitutionally insulated from presidential control in violation of Article II of the Constitution. Pls.' Mot. for Summ. J. ("Mot.") at 12-14 (ECF No. 80). But any such Article II problem with the initial adoption of the Payment Provisions was cured when a Director fully accountable to the President ratified them. As case after case confirms, such a ratification by an official unaffected by a separation-of-powers violation remedies an earlier constitutional problem—and Plaintiffs cite no authority suggesting otherwise. Although Plaintiffs offer a hodgepodge of arguments why the ratification here is not valid, those arguments find no support in precedent or in any separation-of-powers principle.

A. The ratification by a Director fully accountable to the President cured any Article II defect in the initial adoption of the Payment Provisions.

Plaintiffs principally contend (at 12-14) that the Payment Provisions are invalid because they were initially promulgated by a Bureau Director unconstitutionally insulated from the

President's removal power. This objection, however, ignores that any such problem has since been fixed. In *Seila Law*, the Supreme Court held that the statutory restriction on the President's authority to remove the Bureau's Director improperly impeded the President's executive authority under Article II of the Constitution. 140 S. Ct. at 2197. But the Court invalidated the unconstitutional removal restriction, while leaving the rest of the CFPA intact, and leaving the Bureau free to "continue to operate" with a Director "removable by the President at will." *Id.* at 2192, 2209. Following that decision, the Bureau's Director—now fully accountable to the President—ratified the Payment Provisions of the Rule. 85 Fed. Reg. at 41905-06.

With that ratification by a Director removable at the President's will, any cause to complain that the President lacked sufficient oversight over the Payment Provisions' adoption disappeared. Courts have held time and again that ratification by an official unaffected by any constitutional problem can "cure[] any Article II deficiencies" with an agency action initially taken by an official who exercised executive authority in violation of Article II. *See CFPB v. Gordon*, 819 F.3d 1179, 1190-91 (9th Cir. 2016) (refusing to dismiss enforcement action initially approved by official appointed in violation of Article II because properly appointed official ratified the action); *see also, e.g.*, *Wilkes-Barre Hosp. Co. v. NLRB*, 857 F.3d 364, 372 (D.C. Cir. 2017) (holding that ratification "remedie[s] the defect in [the] original issuance of the complaint" by officials appointed in violation of Article II); *Advanced Disposal Servs. E., Inc. v. NLRB*, 820 F.3d 592, 602 (3d Cir. 2016) (holding that ratification by properly appointed official "adequately addressed" the constitutional problem with action initially approved by official appointed in violation of Article II); *Alfa Int'l Seafood v. Ross*, 264 F. Supp. 3d 23, 43 (D.D.C. 2017) (concluding that official's "ratification of the Rule cures any potential Appointments Clause defects in its promulgation"); *State Nat'l Bank of Big Spring v. Lew*, 197 F. Supp. 3d 177, 182

(D.D.C. 2016) (holding that "ratification [by properly appointed official] saves the regulations from [the] challenge" that they were adopted by official appointed in violation of Article II).

The same holds true here. The Payment Provisions were initially adopted by a Bureau Director whom a statute purported to protect from removal by the President in violation of Article II, but a Director undoubtedly subject to the President's plenary oversight has since ratified the Provisions. This ratification "cures any initial Article II deficiencies" with the Provisions' adoption. *Gordon*, 819 F.3d at 1190-91. Indeed, to invalidate the Provisions now—after the President's fully accountable subordinate has approved them—would undermine, not respect, the executive authority granted by Article II. *Cf. Collins v. Mnuchin*, 938 F.3d 553, 594 (5th Cir. 2019) (en banc), *cert. granted*, Nos. 19-422, 19-563 (holding that it would not "make sense" to invalidate agency action taken by an official unconstitutionally insulated from removal where the President still "had full oversight" over the action through other means).

Because the Payment Provisions have been approved by a Director fully accountable to the President, Plaintiffs miss the point in arguing (at 12-14) that "the acts of an unconstitutionally insulated Director," including the 2017 Rule, are invalid.[2] Regardless of whether the Payment Provisions were initially approved by an "unconstitutionally insulated Director," they have now

[2] By the same token, Plaintiffs err (at 14) in relying on cases in which the Supreme Court invalidated actions taken by agencies affected by a separation-of-powers violation. Those cases involved agency actions that had *not* been ratified by an official unaffected by the constitutional problem. *See generally NLRB v. Noel Canning*, 573 U.S. 513 (2014); *Bowsher v. Synar*, 478 U.S. 714 (1986). Indeed, following the decision in *Noel Canning*, which held that members of the National Labor Relations Board had been improperly appointed under Article II, a properly appointed Board adopted the order against Noel Canning as well as many other prior decisions—and courts have routinely upheld those ratified actions. *Noel Canning v. NLRB*, 823 F.3d 76, 78, 81 (D.C. Cir. 2016) (enforcing "new decision and order essentially adopting" the earlier decision made by improperly appointed officials); *see also, e.g.*, *McKinney v. Ozburn-Hessey Logistics*, LLC, 875 F.3d 333, 338 (6th Cir. 2017); *Wilkes-Barre Hosp*, 857 F.3d at 371-72; *Advanced Disposal*, 820 F.3d at 604-06.

also been approved by a Director who is subject to the President's plenary supervision. So, whether or not the Payment Provisions would have been invalid absent the ratification is irrelevant here,[3] for the need to protect the President's Article II powers provides no basis to set aside a Rule that the President's fully accountable subordinate has approved.

B. The ratification of the Payment Provisions is valid.

In an attempt to avoid the overwhelming authority holding that ratification can cure an Article II problem, Plaintiffs make various (meritless) arguments (at 14-23) that *this* ratification was ineffective. In particular, Plaintiffs contend (at 17-18) that ratification cannot cure the particular type of Article II problem here and (at 11, 14-17) that rules affected by a separation-of-powers problem can never be ratified and instead must be re-adopted through a new notice-and-comment process. In other words, Plaintiffs maintain that, no matter what the President or a Director fully accountable to him may want, the Bureau simply cannot ratify any rule or other action it has taken over the past decade. Nothing in the Constitution, the Administrative Procedure Act (APA), or any other statute supports such a draconian result.[4] Nor is there any

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[3] That the Payment Provisions would be invalid absent the ratification is far from settled. As the D.C. Circuit has observed, "the Supreme Court and [other courts] have often accorded validity to past acts of unconstitutionally structured governmental agencies." *John Doe Co. v. CFPB*, 849 F.3d 1129, 1133-34 (D.C. Cir. 2017) (citing cases not involving ratification). The Court, however, need not decide here whether the Payment Provisions would be valid even without the ratification, because the ratification clearly resolves any constitutional problem.

[4] The implications of Plaintiffs' position could be profound. If accepted, Plaintiffs arguments could be used to raise doubts about the validity of countless other actions that the Bureau has taken since its creation in 2010 and that a fully accountable Director has now also ratified. Those actions include, for example, regulations governing the nation's multi-trillion-dollar mortgage market. *See* 85 Fed. Reg. 41330 (July 10, 2020). It would be difficult to overstate the potential disruption that a decision calling these actions into question could produce. *See, e.g.*, Amicus Br. of Mortg. Bankers Ass'n at 10-11, *Seila Law*, No. 19-7, 2019 WL 6910300 (Dec. 16, 2019) (explaining that "a ruling calling into question the ongoing legitimacy of the [Bureau's] past actions … could be catastrophic," potentially causing "the mortgage markets … [to] all but grind to a halt" and leaving "consumers … largely unable to buy or sell their homes").

merit to Plaintiffs' contention (at 18-23) that this ratification was arbitrary and capricious for failing to account for supposed "inconsistencies" that do not actually exist.

1. The nature of the prior constitutional problem does not preclude ratification.

Plaintiffs err in contending (at 17-18) that "black-letter agency law" makes ratification "impossible" here because the Bureau itself "lacked authority" to promulgate the Rule in the first place. This contention badly misunderstands both the Supreme Court's decision in *Seila Law* and basic ratification principles.

a. As an initial matter, under *Seila Law*, the unconstitutional removal restriction did not strip *the Bureau* of authority to act: The Court in *Seila Law* expressly rejected the argument that the unconstitutional removal restriction meant that "the entire agency is unconstitutional and powerless to act." *Seila Law*, 140 S. Ct. at 2208. While the unconstitutional removal restriction may have affected the authority of an unconstitutionally insulated Director, it did not affect the "remainder of th[e] Act," including the provisions vesting the Bureau with authority to promulgate rules. *Id.* at 2209; *cf. also Gordon*, 819 F.3d at 1192 (holding that, by statute, the Bureau "had the authority" to bring enforcement action even though its improperly appointed Director lacked authority). Indeed, the presence of the removal restriction would not have precluded the Bureau from taking action through a different director—such as an acting or holdover director to whom the CFPA's removal restriction would not have applied. *See Designating an Acting Director of the Bureau of Consumer Financial Protection*, 41 Op. O.L.C. ---, 2017 WL 6419154, at *7 (Nov. 25, 2017) ("[T]he removal protections for the Director would not insulate an *Acting* Director from displacement" (emphasis in original)); *Swan v. Clinton*, 100 F.3d 973, 988 (D.C. Cir. 1996) (holding that statutory removal protection for members of National Credit Union Administration would "not extend to holdover members"). The Bureau

has at all relevant times had authority to promulgate rules like the Payment Provisions. *See* 12 U.S.C. §§ 5512, 5531(b), 5532(a).

b. In any event, whether the Bureau had authority to take the action initially (it did) is irrelevant, because the ratification cured any prior problem regardless. Plaintiffs' arguments to the contrary misunderstand how agency law applies here in three respects. First, while it is true that ratification involves a principal that sanctions a prior action of an agent who lacked authority, Plaintiffs are wrong to contend (at 17) that there is no principal and agent here, and instead "just one entity," the Bureau. The Bureau is the principal, and the Director is the agent who acts on the Bureau's behalf. *See Gordon*, 819 F.3d at 1191 (identifying Bureau as the principal). Although the Payment Provisions were initially adopted by an agent of the Bureau whose authority was in doubt (the Director insulated from presidential removal), the Bureau, as the principal, validly ratified the Provisions when its valid agent (a Director indisputably removable at will) approved them.

Second, Plaintiffs err in contending (at 17) that a ratification is valid under agency law principles only if the principal "had authority to act" initially. While some older cases imposed such a requirement, "[c]ontemporary cases do not support restricting ratification on [that] basis." Restatement (Third) of Agency § 4.04 cmt. b (2006). So, even if the constitutional problem with the Bureau Director's insulation from removal somehow left the Bureau itself without authority to act (it did not), the ratification of the Payment Provisions would still be valid under common-law ratification principles.[5]

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[5] To support their claim that ratification cannot cure the constitutional problem with the "authority of the [Bureau]" here, Plaintiffs cite (at 17) *CFPB v. RD Legal Funding, LLC*, 332 F. Supp. 3d 729, 785 (S.D.N.Y. 2018). But the court in *RD Legal* held that ratification could not cure the constitutional problem because the removal provision was not severable and instead

Third, any limitations to be found in common-law principles would not necessarily apply to the kind of government ratification at issue here—indeed, courts regularly give effect to government-agency ratifications without even referring to common-law rules. *See, e.g.*, *Advanced Disposal*, 820 F.3d at 602 (upholding ratifications after assessing whether they "adequately addressed the prejudice" stemming from constitutional violation, without referring to common-law agency principles); *Doolin Sec. Sav. Bank, FSB v. OTS*, 139 F.3d 203, 213 (D.C. Cir. 1998) (upholding ratification without "go[ing] down th[e] path" of assessing whether ratification followed agency-law rules); *FEC v. Legi-Tech, Inc.*, 75 F.3d 704, 708-09 (D.C. Cir. 1996) (holding that ratification was "an adequate remedy" for earlier constitutional problem with agency's composition, without considering common-law ratification requirements). This is because, in the government-agency context, ratification is essentially an "equitable remedy" that should be "applied flexibly."[6] *Advanced Disposal*, 820 F.3d at 603. There can be no real dispute that the "equitable" result here is to uphold Provisions that are designed to protect consumers from harmful practices and that a Director fully accountable to the President has approved.

2. The Bureau was not required to redo the notice-and-comment process.

Plaintiffs also miss the mark in contending (at 14-17) that the Bureau could not ratify the Payment Provisions without starting notice-and-comment over from scratch. This is really an argument that rules cannot ever be ratified—and there is no support for that sweeping claim.

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rendered the entire CFPA, and the Bureau itself, invalid. *Id.* at 784. That conclusion, of course, has since been rejected by *Seila Law*, 140 S. Ct. at 2192.

[6] In applying this approach, it has not mattered whether the agency had authority initially (just as it would not matter under common-law rules). In *FEC v. Legi-Tech, Inc.*, for example, the D.C. Circuit upheld a government agency's ratification even though a separation-of-powers problem meant that the agency initially "had no authority" to take the ratified action. 75 F.3d at 706, 709 (upholding ratification of enforcement action initially filed by agency whose membership unconstitutionally included two ex officio agents of Congress).

On the contrary, courts that have considered ratifications of rules have uniformly upheld them without requiring the agency to redo the notice-and-comment process. *See Moose Jooce v. FDA*, No. 18-cv-203, 2020 WL 680143, at *5 (D.D.C. Feb. 11, 2011), *appeals pending*, Nos. 20-5048, 5049, 5050 ("[A]ll the district courts in this District that have confronted the issue … have not required agencies to undergo the entire APA notice-and-comment processes anew before upholding otherwise effective ratifications [of rulemakings]."); *State Nat'l Bank*, 197 F. Supp. 3d at 184 (rejecting argument that ratification was "ineffective because it did not involve repromulgation of the regulations pursuant to the APA's notice and comment rulemaking procedures" (quotations omitted)); *Alfa Int'l Seafood*, 264 F. Supp. 3d at 43 (concluding, in case where agency did not repeat notice-and-comment process, that Secretary's "ratification of [challenged] Rule cures any potential Appointments Clause defects in its promulgation"); *Huntco Pawn Holdings, LLC v. Dep't of Def.*, 240 F. Supp. 3d 206, 232 (D.D.C. 2016) (accepting ratification issued without notice and comment); *see also Guedes v. Bureau of Alcohol, Tobacco, Firearms, and Explosives*, 920 F.3d 1, 12 (D.C. Cir. 2019) (accepting challengers' concession that properly appointed Attorney General validly ratified, without notice and comment, a rule initially promulgated by allegedly improperly appointed official). Plaintiffs do not cite a single case holding otherwise.

Outside the rulemaking context as well, courts have not required procedural redos for ratifications, even where a statute required the agency to follow certain procedures before taking the action initially. In *Doolin*, for example, the D.C. Circuit held that a properly appointed official did not need to "sign a new notice" of charges or otherwise "redo[] the administrative proceedings" initiated by an official who may not have been properly appointed. 139 F.3d at 213-14. Instead, a ratification by a properly appointed official was enough. *Id.* Similarly, the

Federal Election Commission must, by statute, "engage in a lengthy, elaborate series of administrative steps involving investigation and deliberation before it votes to bring an enforcement action in court." *Id.* at 213 n.9. Nonetheless, the court in *Legi-Tech* did not require the FEC to repeat this "entire administrative process" before ratifying an enforcement action initially approved by an unconstitutionally composed commission. 75 F.3d at 708. No matter the "type of administrative action involved," courts "have consistently declined to impose formalistic procedural requirements before a ratification is deemed to be effective." *State Nat'l Bank*, 197 F. Supp. 3d at 184.

Nor is there any basis to impose such requirements here, for neither the APA nor the Constitution requires the notice-and-comment redo that Plaintiffs seek. The APA generally requires notice and an opportunity to comment before an agency issues a rule, 5 U.S.C. § 553(b)-(c), but the Bureau satisfied that requirement when it adopted the Payment Provisions initially. *See* 81 Fed. Reg. 47864 (July 22, 2016). Nothing in the APA requires an agency to conduct notice-and-comment a second time simply to affirm a previously-promulgated rule. And because it is well established that "reviewing courts are … not free to impose" additional "procedural requirements" beyond those that the APA establishes, *Perez v. Mortg. Bankers Ass'n*, 575 U.S. 92, 102 (2015) (quotations omitted), Plaintiffs cannot ask this Court to require a second notice-and-comment process either.

The Constitution likewise provides no grounds to require the new notice-and-comment rulemaking that Plaintiffs seek. The constitutional problem here was that a statutory removal restriction impeded the President's power to oversee the decisions the Bureau's Director made. That problem was cured when the Supreme Court invalidated the removal restriction and a Director subject to the President's plenary supervision ratified both the decision to propose the

Payment Provisions for public comment and the ultimate decision to adopt them. *See* 85 Fed. Reg. at 41905 & n.10. The President had sufficient oversight over that ratification, and the Constitution demands nothing more.

Contrary to Plaintiffs' contention (at 15-16), the Supreme Court's decision in *Lucia v. SEC*, 138 S. Ct. 2044 (2018), does not suggest otherwise. In *Lucia*, the Supreme Court held that the administrative law judge (ALJ) who presided over an administrative enforcement proceeding against Lucia had not been constitutionally appointed. *Id.* at 2055. The Court further held that, under its prior decision in *Ryder v. United States*, the remedy for this Article II violation was "a new 'hearing before a properly appointed' official." *Id.* (quoting *Ryder v. United States*, 515 U.S. 177, 183 (1995)).

That holding in no way supports Plaintiffs' contention (at 15-16) that a separation-of-powers problem can be remedied only by an entirely "new proceeding" (here, a new notice-and-comment rulemaking), not a ratification. For one, the Court in *Lucia* did not consider ratification, let alone reject it as an adequate remedy.[7] Moreover, Plaintiffs are wrong to assume that the "new hearing" required by *Lucia* must entail a complete do-over of the entire administrative process. The D.C. Circuit has made clear it does not. As that court has explained, the "new hearing" required by *Ryder* (the case that *Lucia* applied) did not need to be a "completely new proceeding," but could instead entail a "de novo review" of the existing record by officials unaffected by the separation-of-powers violation. *Intercollegiate Broad. Sys., Inc. v.*

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[7] Lucia asked the Court to reject the agency's later ratification of the appointments of its ALJs, but the Court saw "no reason to address that issue." *Lucia*, 138 S. Ct. at 2055 n.6. Lucia had also urged the Court to hold that a properly appointed ALJ could not ratify the prior ALJ's decisions on remand. *See* Br. for Pet'rs at 49-57, *Lucia v. SEC*, 2018 WL 1027816 (filed Feb. 21, 2018). The Court did not address the validity of such a hypothetical future ratification either. *See generally Lucia*, 138 S. Ct. at 2055.

Copyright Royalty Bd., 796 F.3d 111, 120 (D.C. Cir. 2015). That is what Plaintiffs received here: A fully accountable Director conducted a de novo review of the basis for the Payment Provisions and concluded they should be ratified. That is all that the Constitution, or the Supreme Court's decisions in *Lucia* and *Ryder*, requires.

Plaintiffs complain (at 15) that this denies them a "meaningful remedy," but Plaintiffs can offer no reason why they will suffer constitutional harm unless a properly accountable Director repeats the notice-and-comment process. Plaintiffs already had, and took advantage of, the chance to comment, and they cannot credibly claim that the Director's prior insulation from removal somehow impaired their ability to raise issues they wanted the agency to consider. Although Plaintiffs might wish to raise new issues now, "[t]here is no [separation-of-powers] problem in limiting [a party] to the [comments] that it decided, on its own volition, to submit" before. *Intercollegiate*, 796 F.3d at 122.[8] Plaintiffs do not suffer constitutional harm simply from being subject to a regulation they do not like.

Nor is there any merit to Plaintiffs' contention (at 15) that recognizing the ratification's validity disregards *Lucia*'s admonition that remedies for separation-of-powers violations should "create incentives" to raise separation-of-powers challenges. *Lucia*, 138 S. Ct. at 2055 n.5 (alterations omitted). Creating incentives does not mean giving challengers whatever relief they

[8] Nor can Plaintiffs claim any entitlement to a new round of notice-and-comment so that they can make new comments based on events that occurred after the Rule's initial adoption—the repeal of the Underwriting Provisions and this Court's stay of the compliance date. Plaintiffs were unable to make those comments before because the relevant events had not happened yet, not because the constitutional problem stood in their way. Circumstances change all the time, and nothing requires agencies to reopen rules for comment when they do. Besides, for the reasons explained in section I.B.3 below, those subsequent events are irrelevant to the Bureau's decision to ratify the Payment Provisions, so there is no "reason to believe that the outcome would change if [Plaintiffs] were permitted to comment" again. *State Nat'l Bank*, 197 F. Supp. 3d at 185.

prefer. In *Lucia*, the remedy that provided an adequate "incentive" was a new decision by a different official (if one was available), not throwing the action out entirely (Lucia's preferred course). *See id.* at 2055 & n.5. Likewise, here, the prospect of a new decision properly supervised by the President on whether a rule should remain in place provides parties an adequate incentive to raise separation-of-powers challenges like that here—and there is no basis to throw a rule out entirely and require the agency to start over from scratch. After all, "[c]onstitutional litigation is not a game of gotcha" allowing litigants to "ride a discrete constitutional flaw … to take down [a] whole, otherwise constitutional" action. *Cf. Barr v. Am. Ass'n of Pol. Consultants, Inc.*, 140 S. Ct. 2335, 2351 (2020) (discussing why unconstitutional statutory provisions are presumptively severable). Just as Lucia was entitled only to a new decision by a properly appointed ALJ, here Plaintiffs are entitled to (at most) a decision by an official fully accountable to the President on whether the Payment Provisions should remain in place. The ratification gave them exactly that.

3. The ratification is not arbitrary and capricious.

Finally, Plaintiffs err in contending (at 18-23) that the ratification is arbitrary and capricious for failing to explain various (supposed) "inconsisten[cies]."

a. As an initial matter, Plaintiffs do not point to a single case requiring an agency to provide an explanation for a *ratification* separate and apart from the explanation that the agency already provided for the ratified rule. *Cf. Moose Jooce*, 2020 WL 680143, at *6 (rejecting argument that agency had to address "intervening studies" that had come out between the issuance of a rule and its ratification because that argument erroneously "conflate[d] ratification doctrine with APA requirements prior to agency action"). Ratification is simply the retroactive "affirmance of a prior act"—here, the adoption of the Payment Provisions. Restatement (Third)

of Agency §§ 4.01(1), 4.02(1). And the preamble to the 2017 Rule already provided a thorough explanation for those Provisions, which the ratification simply affirms.

Plaintiffs object (at 18-19) that, in ratifying the Payment Provisions, the Bureau was obligated to explain various (supposed) "inconsistenc[ies]" between those Provisions and the 2020 Rule repealing the Underwriting Provisions. But the administrative law principle on which Plaintiffs rely requires an agency to explain "inconsisten[cies] *with its past practice*"—i.e., policy changes. *Nat'l Cable & Telecommunications Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 981 (2005) (emphasis added); *see also Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2125 (2016) (explaining that agency must "provide a reasoned explanation for [a] change" in "existing policies"). That requirement has no application to the ratification because the ratification effects no "change" in "past practice"; it affirms what the Bureau already did in 2017. And while the 2020 Rule did effect a change in policy, the preamble to that rule explains those changes at length. 85 Fed. Reg. 44382 (July 22, 2020). Nothing required the Bureau to explain those changes in the ratification as well.

b. In any event, the three "inconsistencies" that Plaintiffs point out are not inconsistencies at all. First, the ratification does not change the amount of time companies have to come into compliance with the Payment Provisions. *Contra* Mot. at 21-22. The 2017 Rule gave companies 21 months—until August 19, 2019—to prepare for compliance. 82 Fed. Reg. at 54472, 54813-14. The ratification of the Payment Provisions affirms that August 2019 compliance date along with everything else.[9] It is unclear why Plaintiffs believe they are entitled to *another* 21 months *after the ratification* to make whatever remaining adjustments are needed

[9] For this reason, Plaintiffs are wrong to contend (at 22) that the ratification improperly fails to "encompass[] the entirety" of the Payment Provisions.

to comply, especially when they have already had three years to prepare. *Cf. Alfa Int'l Seafoods*, 264 F. Supp. 3d at 46 (noting that it was "unclear" how a "recent ratification" of a rule allegedly adopted by improperly appointed official "impairs [the plaintiffs'] interests" where they had "known since December 9, 2016, that the Rule's … requirements would take effect on January 1, 2018, and thus were on notice of the need" to come into compliance by that time). Indeed, Plaintiffs cite no authority for their apparent view that, in ratifying a rule, an agency must restart the clock for compliance.

True, because of the stay entered in this case, companies did not actually have to comply by the Rule's original compliance date (and do not have to comply yet)—but that leaves companies with more time to come into compliance, not less. If some lenders put preparations on hold in hopes that the Payment Provisions would be invalidated before the Court ever lifted the stay, that was a gamble they took. That gamble does not make it arbitrary and capricious for the Bureau to keep the same compliance date in place.[10]

Second, the 2020 repeal of the Underwriting Provisions did not give rise to an "inconsistency" in the 2017 Rule's discussion of the Payment Provisions' benefits and costs. To be sure, a couple of sentences in the 2017 Rule observed that the Underwriting Provisions would lessen certain impacts of the Payment Provisions. 82 Fed. Reg. at 54846. But the preamble's detailed discussion of the Provisions' benefits and costs did not rely on that observation in any way. *Id.* at 54846-50. On the contrary, the Bureau considered the Payment Provisions' benefits and costs against a baseline of the "regulatory regime" that existed before the 2017 Rule—when, like now, the Underwriting Provisions were not in place. *Id.* at 54815. Plaintiffs are therefore

[10] Of course, compliance will not actually become mandatory until this Court lifts the compliance-date stay—but the timing of that will be determined by the Court, not the Bureau.

wrong to contend (at 23) that the repeal of the Underwriting Provisions undermined an "essential premise" of the Bureau's 2017 consideration of the Payment Provisions' benefits and costs.

Third, there is likewise no inconsistency between the interpretation of the standards for "unfair" and "abusive" practices that the Bureau applied in the 2020 Rule revoking the Underwriting Provisions and the standards that the Bureau applied in adopting the Payment Provisions in 2017. In the 2017 Rule, the Bureau found that the practice of continuing to attempt to withdraw payments from a consumer's account without renewed authorization after two consecutive attempts have failed is "unfair" or "abusive" under three separate prongs of the CFPA's provisions describing such practices. Contrary to Plaintiffs' contention (at 19-21), the way the Bureau applied each of those prongs in adopting the Payment Provisions is wholly consistent with the 2020 Revocation Rule.

For one, there is no conflict between the 2020 Rule and the Payment Provisions' application of the statutory provision specifying that it is "abusive" to "take[] unreasonable advantage" of consumers' "lack of understanding … of the material risks, costs, or conditions" of a covered financial product, 12 U.S.C. § 5531(d)(2)(A). In adopting the Payment Provisions, the Bureau found that the proscribed payment-withdrawals practice satisfied this standard because it took unreasonable advantage of consumers' "lack of understanding" of the risk that a lender would hit the consumer's account again and again if initial withdrawal attempts failed. 82 Fed. Reg. at 54741. In particular, the Bureau found that the statute's "lack of understanding" element was met because most consumers do not realize that lenders covered by the Provisions often keep trying to withdraw payment after initial attempts fail, and thus do not appreciate just how many fees they would face in the event their accounts lacked sufficient funds. *Id.*

Contrary to Plaintiffs' contention (at 19-20), nothing in the 2020 Rule undermines this approach to assessing consumers' "understanding." In the 2017 Rule, the Bureau had concluded that consumers lacked "understanding" for purposes of the abusiveness standard if they *either* (1) did not understand that a risk existed as a general matter or (2) did not understand their individualized risk of suffering a particular harm given their personal circumstances. *See, e.g.*, 82 Fed. Reg. at 54597-98, 54741. In the 2020 Rule, the Bureau rejected the latter, individualized-risk standard with respect to the Underwriting Provisions, but left the former, general-risk standard in place. 85 Fed. Reg. at 44394-95, 44422. The individualized-risk standard that the Bureau rejected was relevant only to the Underwriting Provisions—which were premised in part on a finding that consumers did not understand their own personal risk of ending up in a costly cycle of debt (even if they understood as a general matter that many consumers have difficulty repaying and suffer adverse consequences as a result). 82 Fed. Reg. at 54597-98. The (later-rejected) individualized-risk standard had no bearing on the Payment Provisions. In 2017, the Bureau did not base those Provisions on any finding that consumers lack an understanding of their personal risk of facing repeated payment withdrawal attempts, but on the fact that consumers are not aware that the risk exists even as a general matter. *Id.* at 54741 ("[M]ost consumers do not realize that the identified practice involving multiple failed re-presentments happens."). That conclusion is wholly consistent with the 2020 Rule's interpretation of consumer "understanding."

The 2020 Rule is likewise wholly consistent with the two other (independent) determinations on which the Bureau based the Payment Provisions—that the practice of continuing (without renewed authorization) to attempt to withdraw payment after two failed attempts meets the elements of "unfairness," as well as a separate "abusiveness" prong covering

practices that "take unreasonable advantage of" consumers' "inability … to protect the[ir] interests … in selecting or using a consumer financial product or service," 12 U.S.C. § 5531(d)(2)(B). For a practice to be "unfair," it must cause substantial injury that (among other things) the consumer cannot "reasonably avoid[]." *Id.* § 5531(c). Applying that statutory standard, the Bureau concluded in the 2017 Rule that consumers could not "reasonably avoid" the injuries—costly fees and possible account closure—that the repeated-withdrawals practice was likely to cause. 82 Fed. Reg. at 54737. This is because a host of factors make it very difficult for consumers to revoke a lender's account access or otherwise stop withdrawal attempts. *Id.*; *see also id.* at 54726-28; *supra* at p. 5. The Bureau further explained that consumers could not reasonably avoid injury by simply not taking out the loan. 82 Fed. Reg. at 54737. It is well established that an injury is not "reasonably avoidable" if the consumer has no "reason to anticipate the impending harm" and thus does not appreciate the need to take steps to avoid it. *Orkin Exterminating Co., Inc. v. FTC*, 849 F.2d 1354, 1365-66 (11th Cir. 1988); 82 Fed. Reg. at 54736 (adopting that standard in 2017 Rule); 85 Fed. Reg. at 44395 & n.147 (adopting same standard in 2020 Rule). As explained above, consumers had no reason to anticipate that they could face repeated withdrawal attempts resulting in significant fees—and so would have no reason to decline the loan to avoid that (unknown) risk. *See supra* at p. 24.

For the same reasons, the Bureau concluded (as relevant to the abusiveness standard) that consumers were unable to "protect the[ir] interests" in avoiding the fees and risk of account closure that result from lenders' repeated withdrawal practices. 82 Fed. Reg. at 54742-43.

Nothing in the 2020 Rule undermines these conclusions. Plaintiffs claim (at 20-21) that the 2020 Rule establishes that consumers can avoid the harm of repeated withdrawal attempts and protect their interests by not taking out the loan in the first place—but the 2020 Rule says no

such thing. To be sure, in the 2020 Rule, the Bureau determined that consumers can *sometimes* reasonably avoid injury by declining a product. *See* 85 Fed. Reg. at 44397. And it determined that consumers could reasonably avoid the injuries that result from the distinct practice addressed by the Underwriting Provisions—lenders making loans without first assessing borrowers' ability to repay—by not taking out the loan and instead seeking some other form of credit. *Id.* But, in so concluding, the Bureau made crystal clear that this did not mean that "any harm [would be] reasonably avoidable simply because a consumer can decline a product or service." *Id.* Rather, consumers' ability to decline the loan was "relevant" in the context there because the unfair and abusive underwriting practice involved lenders' "conduct when borrowers are making an initial decision to take out a new loan," at which point consumers are aware of the risk and have the option to decline the loan. *Id.* The unfair and abusive payment practice, by contrast, involves lenders' conduct later—after the consumer has taken out the loan and two consecutive payment attempts have failed. At that point in time, consumers no longer have the option to decline the loan, and therefore cannot reasonably avoid the injury or protect their own interests.

II. The Payment Provisions Are Consistent with the Bureau's Statutory Authority and Are Not Arbitrary and Capricious.

Plaintiffs allege that the Bureau has exceeded its statutory authority, and acted in a manner that is arbitrary and capricious, in promulgating the Payment Provisions. Under the APA, the standard of review for such claims is "highly deferential" to the agency. *Sw. Elec. Power Co. v. EPA*, 920 F.3d 999, 1013 (5th Cir. 2019). Because the CFPA provides "an express delegation of authority" to the Bureau to identify and prevent "unfair" and "abusive" practices, *see* 12 U.S.C. § 5531(b), rules promulgated pursuant to that authority must be "given controlling weight" so long as they are not "arbitrary, capricious, or manifestly contrary to the statute." *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 843-44 (1984). In assessing

whether a rule is "arbitrary [or] capricious," the Court "appl[ies] a presumption of validity" and simply "determine[s] whether the agency examined the pertinent evidence, considered the relevant factors, and articulated a reasonable explanation for how it reached its decision." *Associated Builders & Contractors of Tex., Inc. v. NLRB*, 826 F.3d 215, 219-20 (5th Cir. 2016) (quotations omitted). In so doing, the Court "may not substitute [its] judgment for that of the agency." *Id.* at 220. Plaintiffs cannot prevail under this "highly deferential" standard.

A. The Bureau reasonably determined that the proscribed payment-withdrawals practice is "unfair."

Pursuant to the CFPA, the Bureau may declare a practice unfair where it "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). In the 2017 Rule, the Bureau found that the identified payment practice—attempting to withdraw payment from a consumer's account in connection with certain covered loans after two consecutive withdrawal attempts have already failed, absent the consumer's new and specific authorization—met these elements, and it explained those findings at length. 82 Fed. Reg. at 54720-44. Plaintiffs do not and cannot show that these findings were arbitrary and capricious or otherwise exceeded the Bureau's authority.

Substantial Injury. The Bureau reasonably found that the identified practice caused or was likely to cause "substantial injury" to consumers because it subjected borrowers to substantial and repeated fees (including non-sufficient funds fees, overdraft fees, and returned-item fees) and an increased risk that their accounts would be closed. 82 Fed. Reg. at 54734-36.

Plaintiffs' first objection to this finding of "substantial injury" seems to be that costs like this are "injuries" only if they outweigh "the benefits to consumers and to competition." Mot. at

24. But this conflates the "substantial injury" element with a *different* element of the statutory unfairness test that provides that a practice is unfair only if the relevant "injury to consumers" is not outweighed by "countervailing benefits to consumers or competition." *See* 12 U.S.C. § 5531(c)(1)(B). Plaintiffs do not and cannot point to any authority supporting their bizarre interpretation of "injury."

There is likewise no merit to Plaintiffs' contention (at 24-25) that the Bureau lacked adequate evidence of these injuries because the Bureau's "primary study" pertained only to online lenders, not storefront lenders. Plaintiffs offer no reason why failed withdrawal attempts by online lenders would result in substantial fees (some of which are imposed not by the lender, but by the consumer's bank) and increased risk of account closure, but attempts by storefront lenders would not. In any event, the Bureau relied on data pertaining to storefront lenders in addition to the online lender study. *See* 82 Fed. Reg. at 54722-23, 54725, 54734.

Not Reasonably Avoidable. The Bureau also determined in the 2017 Final Rule that consumers are not reasonably able to avoid the substantial injuries that result from the proscribed repeated-withdrawal-attempts practice. It is well established that an injury is not "reasonably avoidable" if the consumer lacks reasonable "means to avoid it." *In the Matter of Orkin Exterminating Co.*, 108 F.T.C. 263, 366 (1986). A theoretical way of avoiding injury is not enough; rather, the means must "be practicable for individual consumers to pursue." FTC, Policy Statement on Unfairness at n.19 (1980), *available at* https://go.usa.gov/xGSbW. Applying this standard, the Bureau concluded that consumers could not reasonably avoid the fees and other harms that result from lenders' repeated failed withdrawal attempts because a variety of hurdles make it very difficult for consumers to revoke lenders' account access or otherwise to

stop the withdrawal attempts that trigger the substantial fees. 82 Fed. Reg. at 54737; *see also id.* at 54726-28; *supra* at p. 5.

Plaintiffs posit (at 25) various ways that consumers could reasonably avoid injury, but the rulemaking record specifically refutes each of Plaintiffs' suggestions. Borrowers cannot avoid injury by "not authorizing automatic withdrawals" (Mot. at 25) because covered lenders almost always require such authorization before they will extend the loan. 82 Fed. Reg. at 54737. Consumers cannot practicably avoid injury by putting "sufficient funds in their bank accounts" (Mot. at 25) both because (1) they simply do not have the money (indeed, that is generally why the withdrawal attempts have failed) and (2) even if they did, subsequent withdrawal attempts can occur very quickly, often on the same day, making it hard to get funds in the right account before the next withdrawal attempt. 82 Fed. Reg. at 54736-37. Because of this quick succession of repeated withdrawal attempts, "renewing … their loans" or "negotiating repayment options" (Mot. at 25) is not a viable option either. *See* 82 Fed. Reg. at 54737. Nor can consumers reasonably avoid the injuries from the proscribed repeated-withdrawals practice by not taking out a loan in the first place (Mot. at 25). 82 Fed. Reg. at 54737. As explained above, consumers have no reason to anticipate the risk of repeated, costly withdrawal attempts upfront, and by the time the problem is apparent, declining the loan is no longer an option. *See supra* at pp. 25-26.[11]

Countervailing Benefits. The Bureau also determined that the substantial injury that is not reasonably avoidable by consumers was not "outweighed by countervailing benefits to consumers or to competition," including because a third withdrawal attempt after two

[11] As also explained above, this conclusion is wholly consistent with the Bureau's conclusion in the 2020 Revocation Rule that the harm from the distinct practice addressed by the Underwriting Provisions could reasonably be avoided by simply declining to take out the loan in the first place. *See supra* at pp. 25-26.

consecutive attempts have failed is very unlikely to result in payment for the lender. 82 Fed. Reg. at 54737-39. Plaintiffs' sole objection to the Bureau's countervailing benefits determination is that the Bureau "discount[ed]" the "benefits of these products" for consumers. Mot. at 24. This objection is meritless because the unfairness standard looks to the "countervailing benefits" of the "act or practice," not of the products covered. 12 U.S.C. § 5531(c)(1)(B). Covered loans may well provide consumers a host of benefits, but those benefits are not benefits of the relevant practice—making a third withdrawal attempt after two previous attempts have failed—and are therefore irrelevant under the CFPA's "countervailing benefits" analysis.[12] 82 Fed. Reg. at 54738. Indeed, nothing in the Payment Provisions precludes consumers from continuing to enjoy the benefits Plaintiffs claim their loans provide.

Cause of Injury. Plaintiffs likewise err in contending (at 25) that the Bureau improperly "concluded that lenders are the cause" of the injury that repeated withdrawal attempts cause consumers. While it is true that some (but not all) of the fees that repeated failed attempts trigger are charged by the consumer's bank, not the lender, there is no question that lenders' repeated withdrawal attempts are a but-for cause of those harms to consumers. And it is well established that the fact that "a company's conduct was not *the most* proximate cause of an injury generally does not immunize liability from foreseeable harms." *FTC v. Wyndham Worldwide Corp.*, 799 F.3d 236, 246 (3d Cir. 2015) (emphasis in original) (citing Restatement (Second) of Torts § 449 (1965)) (finding conduct unfair under the FTC Act); *FTC v. Neovi, Inc.*, 604 F.3d 1150, 1155 (9th Cir. 2010) (holding, in the context of the FTC Act's prohibition on unfairness, that "the

[12] For similar reasons, the convenience of recurring payment authorizations is not a benefit that should have been weighed. *Contra* Mot. at 26. The Payment Provisions do not prohibit such authorizations, so lenders and consumers can continue to enjoy their benefits. 82 Fed. Reg. at 54738-39.

contribution[s] of independent causal agents … do not magically erase the role" of others in causing a harm). The Bureau made just this point in the rulemaking, 82 Fed. Reg. at 54735, so Plaintiffs cannot credibly claim (at 25) that the Bureau "fail[ed] to consider" this issue.

B. The Bureau reasonably determined that the proscribed payment-withdrawals practice is "abusive."

The Bureau also reasonably determined that the proscribed payment-withdrawals practice is "abusive"—a finding that independently supported prohibiting the practice. As relevant here, pursuant to the CFPA, the Bureau may declare an act or practice abusive where 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 that the practice of attempting to withdraw payment from a consumer's account in connection with a covered loan after two consecutive failed attempts (unless the lender obtains the consumer's new and specific authorization) was abusive for both of these (independent) reasons. 82 Fed. Reg. at 54739-44. Plaintiffs' sole objection to these findings is that they are inconsistent with the way the Bureau applied the "lack of understanding" and "inability to protect interests" standards in the 2020 Rule revoking the Underwriting Provisions. But, as explained above, there is no such inconsistency, so Plaintiffs cannot prevail on this challenge. *See supra* at pp. 23-26.

C. The Bureau reasonably declined to exempt certain types of payment transfers from the Payment Provisions.

Plaintiffs next contend (at 26) that the Bureau "arbitrarily and capriciously failed to heed important differences among the varieties of payment transfers covered" by the Rule. But again, Plaintiffs' argument simply ignores the Bureau's considered treatment of these issues.

Plaintiffs claim (at 26-27) the Bureau ignored the difference between failed debit-card and prepaid-card payments, which generally do not result in non-sufficient funds fees, and check and ACH payment transfers, which do. But the Bureau specifically considered this fact. *See* 82 Fed. Reg. at 54747, 54750. The Bureau explained that it declined to exempt debit cards and prepaid cards from the Payment Provisions because even though failed attempts to withdraw payments from those accounts may not trigger non-sufficient funds fees, they can trigger overdraft fees and fees for returned or declined payments, as well as various lender-imposed fees. 82 Fed. Reg 54723, 54747. In setting forth this analysis, the Bureau more than met its obligation to establish a "rational connection between the facts found and the choice made." *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29, 43 (1983).

This is also true with respect to the Bureau's decision to limit payment transfer attempts across multiple installments of a multi-payment installment loan. Plaintiffs claim (at 27) that the Bureau "failed to acknowledge an important aspect of the problem" by disregarding the fact that installment payments are spaced farther apart and thus leave consumers with more time to replenish their accounts or take other steps to avoid non-sufficient funds fees. This contention again ignores the actual rulemaking record, which specifically explained the Bureau's decision to require new authorization after two failed attempts for different installments of a loan: A third payment attempt in this context would still likely fail "even if two weeks or a month has passed." 82 Fed. Reg. at 54753. Indeed, Plaintiffs do not provide any reason to think consumers in financial distress would be likely to scrape together funds in that time.[13]

[13] Plaintiffs also argue in a footnote (at 27 n.5) that a different part of the Payment Provisions—the requirements to send consumers notice of an upcoming initial or unusual withdrawal a specified number of days in advance—"harms consumers" by forcing them to incur additional interest costs in certain circumstances. The notice requirements do not have this effect. Plaintiffs claim that if a lender (timely) sends notice by email three days before an upcoming

D. The Payment Provisions do not establish a usury limit or improperly rely on "public policy."

Plaintiffs fare no better in claiming that the Payment Provisions violate statutory provisions that bar the Bureau from "establish[ing] a usury limit," 12 U.S.C. § 5517(o), and from relying on "public policy considerations … as a primary basis" for a finding that a practice is "unfair," 12 U.S.C. § 5531(c)(2).

In ordinary usage, a "usury limit" is "a law prohibiting moneylenders from charging illegally high interest rates." Black's Law Dictionary (9th ed. 2009); *see also* 82 Fed. Reg. at 54578. The Payment Provisions—which require certain notices and limit additional withdrawal attempts after two consecutive attempts have failed—in no way restrict the interest rates (or, indeed, any other amounts) that lenders may charge.

Nor does the fact that the Payment Provisions cover installment loans only if they have interest rates above 36 percent mean that the Bureau has improperly established a "usury limit." *Contra* Mot. at 27-28. Nothing in the Payment Provisions prohibits lenders from charging whatever interest rate they wish, and Plaintiffs offer no support for their view that covering certain loans based on their interest rate somehow constitutes a "usury limit." The Bureau covered those higher-interest loans not to prevent or even discourage lenders from making them, but because the evidence showed that lenders engaged in the harmful repeated-withdrawals

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withdrawal, but that email bounces back, they will not be able to make the withdrawal as scheduled, and must instead send a new notice by mail and wait another six days to make the withdrawal—causing the consumer to incur additional interest. But the Rule requires no such thing. If an emailed notice does not go through, the lender may still make the upcoming withdrawal as planned, and must switch to sending notice by alternative means only for the *next* withdrawal. 12 C.F.R. §§ 1041.9(b)(2)(i)(B)(2), (b)(3)(i)(B)(2); *id.* pt. 1041, Supp. I, ¶ 9(b)(2)(i)(B)(2)-1.

practice in connection with those loans, but not in connection with lower-interest products. 82 Fed. Reg. at 54732.

Plaintiffs are likewise unpersuasive in arguing (at 28) that the Bureau improperly based the Payment Provisions on "public-policy considerations about the undesirability of expensive small-dollar loans," in violation of the CFPA's prohibition on allowing "public policy considerations" to "serve as a primary basis" for a finding that a practice is "unfair," 12 U.S.C. § 5531(c)(2). It is hard to see how this argument makes sense even on its own terms, given that the Payment Provisions are not expected to meaningfully reduce usage of covered loans. *See* 82 Fed. Reg. at 54738, 54818, 54847-48. At any rate, even though the statute permits the Bureau to consider "established public policies" as evidence that a practice is unfair (so long as those are not the "primary" basis for the unfairness finding), *id.*, the Bureau did not rely on such public policy considerations at all in adopting the Payment Provisions, let alone "primar[il]y." 82 Fed. Reg. at 54739. Instead, its unfairness finding was based on the extensive evidence showing that the repeated-withdrawals practice caused substantial injury that consumers could not reasonably avoid and that was not outweighed by countervailing benefits. *Id.* at 54720-30, 54733-39.

III. The Bureau Reasonably Considered the Payment Provisions' Benefits and Costs.

The Bureau thoroughly considered the benefits and costs of the Payment Provisions in accordance with the CFPA's requirement that the Bureau "consider … the potential benefits and costs" of its rules "to consumers and covered persons," 12 U.S.C. § 5512(b)(2)(A). 82 Fed. Reg. at 54814-16, 54846-50. Plaintiffs' claim (at 28) that this consideration of benefits and costs contained "serious flaws" cannot withstand scrutiny.

As explained above, Plaintiffs misread the record in contending (at 29) that the 2020 Rule revoking the Underwriting Provisions undermined a "pillar" the 2017 Rule's discussion of the

Payment Provisions' benefits and costs. *See supra* at pp. 22-23. Although the 2017 Rule noted that the Underwriting Provisions would lessen certain impacts of the Payment Provisions, it otherwise discussed the impact that the Provisions would have even if (as is currently the case) the Underwriting Provisions were not in place. *Id.*

Plaintiffs likewise err in contending (at 29) that the Bureau failed to consider two "important" costs that the Payment Provisions would impose on consumers. First, Plaintiffs are simply mistaken that consumers will face "additional accrued interest" as a result of the Rule's timing requirements for payment notices, *see supra* at pp. 32-33 n.13, so that was not a cost that the Bureau could or should have considered. Second, there was likewise no need for the Bureau to consider what Plaintiffs claim (at 29) is "the increased likelihood that a loan would enter into collections sooner." An agency need only consider "*important* aspect[s] of the problem" before it, *State Farm*, 463 U.S. at 43 (emphasis added), and is "not required to consider every single possible cost," *STG LLC v. United States*, 147 Fed. Cl. 790, 809 (2020); *accord Ctr. for Auto Safety v. Peck*, 751 F.2d 1336, 1355 n.15 (D.C. Cir. 1985) (rejecting argument that agency acted arbitrarily by failing "to factor *insignificant* health and safety effects into the agency's cost-benefit analysis" (emphasis in original)). Even if the Payment Provisions' limitations on repeated withdrawal attempts might send some loans into collections sooner, that cost is hardly significant, particularly given that the alternative is repeated withdrawal attempts that cause consumers to incur more and more fees. Indeed, Plaintiffs cannot credibly claim now that the possibility of a loan entering collections sooner is so "important" that the Bureau had to discuss it—Plaintiff CFSA did not even bother to mention it in its nearly-100-page comment letter on the proposed rule (and CFSA's co-plaintiff did not comment at all). *See* Appx.44-139 (Doc. ID CFPB-2016-0025-142779).

IV. The Bureau Appropriately Denied Advance Financial's Petition for Rulemaking.

Plaintiffs' challenge to the Bureau's denial of Advance Financial's Petition for Rulemaking fares no better than Plaintiffs' challenges to the Payment Provisions themselves. The Petition asked the Bureau to revise the Payment Provisions to exclude debit- and prepaid-card payments—an exclusion that the Bureau already considered and rejected in adopting the Provisions in 2017. Just as it was not arbitrary and capricious for the Bureau to decline to exclude such payments in the first place, *see supra* section II.C, it was not arbitrary and capricious for the Bureau to decline to initiate a whole new rulemaking to make that exclusion, particularly given that the rulemaking petition did not cite any new facts or changed circumstances that might call the basis for the Bureau's earlier decision into doubt. *See* Appx.41 (PAYD-R-18113). This is reason enough to reject Plaintiffs' claim.

But even if the merits of the denial were not so clear, Plaintiffs still could not prevail on this claim. As the Supreme Court has made clear, an agency's "[r]efusal[] to promulgate [a] rule[]" is subject only to "extremely limited and highly deferential" review. *Massachusetts v. EPA*, 549 U.S. 497, 527-28 (2007); *Am. Horse Prot. Ass'n, Inc. v. Lyng*, 812 F.2d 1, 5 (D.C. Cir. 1987) (holding that a refusal to initiate a rulemaking "is to be overturned only in the rarest and most compelling of circumstances"). This is in part because "an agency has broad discretion to choose how best to marshal its limited resources and personnel to carry out its delegated responsibilities." *Massachusetts v. EPA*, 549 U.S. at 527; *see also, e.g.*, *Flyers Rts. Educ. Fund, Inc. v. FAA*, 864 F.3d 738, 749 (D.C. Cir. 2017) ("[R]egulatory-effort and resource-allocation judgments … fall squarely within the agency's province.").

Here, in addition to reiterating the substantive reasons for not excluding debit- and prepaid-card payments from the Payment Provisions, the Bureau explained that it already had an

"active and busy" agenda that included work on rules required by law and other time-sensitive activity (like responding to the COVID-19 crisis). Appx.41-42 (PAYD-R-18113-14). The Bureau chose to prioritize these other items over the petition's request—especially given that the petition largely only repeated arguments that the Bureau already considered and rejected just a few years before. *Id.* There is no basis to "second-guess [this] decision" about how "to prioritize regulatory actions." *WildEarth Guardians v. EPA,* 751 F.3d 649, 656 (D.C. Cir. 2014).

In any event, even if Plaintiffs had demonstrated that the denial was arbitrary—which they have not—the remedy would not be to order the agency to commence a rulemaking, let alone to require the agency to adopt the regulatory changes that the petitioners request. *See, e.g., Flyers Rts.*, 864 F.3d at 747 (holding that ordering an agency to "institute rulemaking … is appropriate only in the rarest and most compelling of circumstances" (quotations omitted)); *Am. Horse Prot. Ass'n,* 812 F.2d at 7 (similar). The appropriate judicial remedy would only be to order the agency to reconsider the petition and respond again. *See, e.g.*, *Flyers Rts.*, 864 F.3d at 47 (ordering such relief); *Am. Horse Prot. Ass'n*, 812 F.2d at 7 (same).

V. There Is No Remaining Separation-of-Powers Problem with the Bureau's Organic Statute.

Plaintiffs cannot prevail on their claim (at 31-32) that the Payment Provisions are invalid because "the Bureau continues to violate" the separation of powers in two ways. First, the way Congress chose to fund the Bureau does not violate the Appropriations Clause—as the courts that have considered the issue have unanimously held.[14] The Appropriations Clause—which

[14] *E.g.*, *PHH Corp. v. CFPB*, 881 F.3d 75, 95-96 (D.C. Cir. 2018) (en banc), *abrogated on other grounds, Seila Law*, 140 S. Ct. 2183; *CFPB v. Think Finance LLC*, No, 17-127, 2018 WL 3707911, at *1-2 (D. Mont. Aug. 3, 2018); *CFPB v. Navient Corp.*, No. 3:17-101, 2017 WL 3380530, at *16 (M.D. Pa. Aug. 4, 2017); *CFPB v. ITT Educ. Servs., Inc.*, 219 F. Supp. 3d 878, 896-97 (S.D. Ind. 2015); *CFPB v. Morgan Drexen, Inc.*, 60 F. Supp. 3d 1082, 1089 (C.D. Cal. 2014); *see also Rop v. FHFA*, No. 1:17-CV-497, 2020 WL 5361991, at *26 (W.D. Mich. Sept. 8,

states 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—simply requires that "the payment of money from the Treasury must be authorized by a statute." *OPM v. Richmond*, 496 U.S. 414, 424 (1990); *accord Cincinnati Soap Co. v. United States*, 301 U.S. 308, 321 (1937) (the Clause "means simply that no money can be paid out of the Treasury unless it has been appropriated by an act of Congress"). The Bureau's funding is so authorized: The CFPA authorizes the Bureau to receive funds from the Federal Reserve up to a specified annual cap, 12 U.S.C. § 5497(a), and Congress remains free to change that funding at any time through the ordinary legislative process.

In contending (at 31) that the Bureau unconstitutionally gets funds "without an appropriations act," Plaintiffs mistakenly assume that Congress must fund agencies only through annual appropriations bills, not through other legislation providing funding through other means. Nothing in the Constitution ties Congress's hands in that way. On the contrary, it is well established that "Congress can, consistent with the Appropriations Clause, create governmental institutions reliant on fees, assessments, or investments rather than the ordinary appropriations process." *PHH Corp.*, 881 F.3d 75 at 95; *accord, e.g.*, *Am. Fed'n of Gov't Emps., AFL-CIO, Local 1647 v. FLRA*, 388 F.3d 405, 409 (3d Cir. 2004) ("Congress may … decide not to finance" an agency "through the normal appropriations process").

Second, Plaintiffs' contention (at 31-32) that Congress unconstitutionally delegated legislative power to the Bureau by authorizing it to promulgate rules prohibiting "unfair" and "abusive" financial practices is also meritless. Indeed, every court to have considered such a challenge has rejected it. *CFPB v. All Am. Check Cashing, Inc.*, No. 3:16-CV-356, 2018 WL

2020) (concluding that *Seila Law* "strongly implied that the [Bureau's] source of funding was not a problem by itself").

9812125, at *3 (S.D. Miss. Mar. 21, 2018), *en banc review pending on other grounds*, No. 18-60302 (5th Cir.); *ITT Educ. Servs.*, 219 F. Supp. 3d at 906 n.25; *Morgan Drexen*, 60 F. Supp. 3d at 1090.

The Supreme Court has held "time and again" that Congress may constitutionally delegate power to an executive agency so long as it provides an "intelligible principle" that the agency must follow. *Gundy v. United States*, 139 S. Ct. 2116, 2123 (2019) (quotations omitted). There can be "no doubt here" that, in authorizing the Bureau to identify and prevent "unfair" and "abusive" practices—terms whose meaning Congress spelled out in multi-pronged provisions, 12 U.S.C. §§ 5531(c)-(d)—"Congress has supplied an 'intelligible principle' to the Bureau." *ITT Educ. Servs.*, 219 F. Supp. 3d at 906 n.25. The Supreme Court has approved far-less-detailed principles in the past, including instructions for agencies to fix "fair and equitable" commodities prices, *Yakus v. United States*, 321 U.S. 414, 426-27 (1944); to regulate broadcast licensing as "public interest, convenience, or necessity" requires, *Nat'l Broad. Co. v. United States*, 319 U.S. 190, 225-26 (1943) (quotations omitted); and to take action to "avoid an imminent hazard to the public safety," *Touby v. United States*, 500 U.S. 160, 165-67 (1991).

VI. The Bureau Observed All Required Procedures in Promulgating the Payment Provisions.

Finally, the Bureau is entitled to summary judgment on count eight of Plaintiffs' amended complaint—which Plaintiffs do not even bother to pursue in their motion for summary judgment. Contrary to the allegations in that count, the Bureau did not "violate[] … procedural requirements" in promulgating the 2017 Rule. *See* Am. Compl. ¶¶ 144-150 (ECF No. 76).

At the outset, it is unclear what "procedural requirements" Plaintiffs claim the Bureau violated. The only procedural requirements that the Amended Complaint cites are the Regulatory Flexibility Act's requirements to publish initial and final regulatory flexibility

analyses that discuss a rule's impact on small entities and significant alternatives, 5 U.S.C. §§ 603, 604, and the APA's requirement to accept and consider public comments, 5 U.S.C. § 553(c). Am. Compl. ¶¶ 149-150. Plaintiffs do not explain how the Bureau failed to comply with those requirements, and there can be no serious dispute that it did. 82 Fed. Reg. at 54853-70 (final regulatory flexibility analysis); 81 Fed. Reg. at 48150-66 (initial regulatory flexibility analysis); 81 Fed. Reg. at 47864 (soliciting public comment); *see generally* 82 Fed. Reg. 54472 (considering comments throughout).

Plaintiffs' claim also fails to the extent they allege that the Bureau failed to "adequately" consider "evidence," lender and borrower "concerns," the "impact on small businesses," and "comments" (Am. Compl. ¶¶ 147-150). The Bureau considered "the relevant matter presented" as required by the APA, 5 U.S.C. § 553(c), and Plaintiffs' barebones allegations—which do not even explain what the Bureau allegedly ignored—do not show otherwise.

Finally, the Bureau is also entitled to summary judgment to the extent that Plaintiffs claim that the Rule was "pre-ordained" and that the Bureau accordingly approached the rulemaking with an insufficiently open mind. Am. Compl. ¶ 147; *see also id.* ¶ 149 (calling Rule a "foregone conclusion"). Besides being factually baseless, this claim is foreclosed by Supreme Court precedent rejecting such an "open-mindedness" requirement as having "no basis in the APA." *Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania*, 140 S. Ct. 2367, 2385 (2020) (quotations omitted).

CONCLUSION

For the foregoing reasons, the Court should grant summary judgment to the Bureau on all of Plaintiffs' claims.

Dated: October 23, 2020

Respectfully submitted,

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I hereby certify that on October 23, 2020, 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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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 KRANINGER, in her official capacity as Director, Consumer Financial Protection Bureau,

Defendants.

Civil Action No. 1:18-cv-295

APPENDIX TO DEFENDANTS' COMBINED CROSS-MOTION FOR SUMMARY JUDGMENT AND OPPOSITION TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

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December 13, 2018

VIA HAND DELIVERY

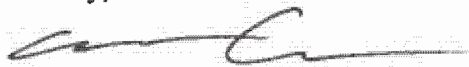
Brian Johnson, Acting Deputy Director
Office of the Director
Bureau of Consumer Financial Protection
1700 G Street N.W.
Washington, DC 20552

Dear Deputy Director Johnson:

Please find enclosed a petition for rulemaking and supplemental comments regarding the Bureau's Final Rule regulating Payday, Vehicle Title, And Certain High–Cost Installment Loans. The petition and comments request that the Bureau, as part of its currently pending reconsideration of that Rule, exempt debit card payments from the Rule's payment provisions. As the petition and comments explain, the decision to include debit card payments was unsupported and irrational, and that error should be addressed and corrected **at the same time that the Bureau reconsiders the Rule's ability-to-pay provisions** so as to ensure that there is a level playing field across these different segments of the consumer-lending industry.

I would be happy to discuss the petition and comments, and I thank you for your consideration.

Sincerely,



Andrew M. Grossman
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Enclosure

Petition for Rulemaking and Supplementary Comment
From Advance Financial,
To the Bureau of Consumer Financial Protection

December 13, 2018

Docket No. CFPB-2016-0025

Filed via email to cfpb_reginquiries@cfpb.gov and
FederalRegisterComments@cfpb.gov and via Hand Delivery to:

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I. Introduction and Summary

Pursuant to the First Amendment to the United States Constitution and 5 U.S.C. § 553(e), Advance Financial hereby petitions and submits these supplemental comments to the Bureau of Consumer Financial Protection to amend its Final Rule regulating Payday, Vehicle Title, And Certain High–Cost Installment Loans, 82 Fed. Reg. 54,472 (Nov. 17, 2017), to exempt debit card transactions from provisions regulating payment transfers.

The Final Rule brushed aside recommendations by the Small Business Review Panel, 18 state attorneys general, and numerous small business representatives, credit unions, community banks, and other industry participants to exclude debit card transactions from the Final Rule's payment provisions. Instead, the Final Rule treated them the same as check and ACH payments, despite recognizing that denied debit card payments do not present the very risk of consumer harm that the Bureau relied upon as the basis for the payment provisions because debit card payments rarely (if ever) result in consumers being charged insufficient funds fees. That decision was completely unsupported and, in fact, conflicts with substantial record evidence demonstrating the benefits to consumers of debit card repayment.

Perversely, by treating debit card payments the same as ACH and check payments, the Final Rule reduces incentives for lenders to allow consumers to use the most popular payment method that typically avoids the precise consumer harm that the Bureau sought to address with the payment provisions: mounting insufficient funds fees.

The Final Rule's error in failing to exclude debit card payments from its payment provisions needs to be corrected now in conjunction with the Bureau's reconsideration of the Final Rule's ability-to-pay provisions. The current state of regulatory uncertainty is causing lenders to evaluate whether longer-term, multi-payment transactions and allowing repayment by debit card make sense. A reconsideration process that provides regulatory relief only on the ability-to-repay issue will actually limit consumers' ability to choose longer-term credit products with more affordable installments that avoid balloon payments and to employ a payment method that avoids mounting insufficient funds fees. By contrast, acting now, in concert with reconsideration of the ability-to-pay provisions, would promote more affordable credit options and the use of debit card payments limiting consumer's exposure to costly fees. In this respect, excluding debit card payments from the Final Rule's payment provisions goes hand-in-hand with the Bureau's reconsideration of the ability-to-pay provisions.

Accordingly, the Petitioner respectfully requests that the Bureau amend the Final Rule to exclude debit card payments and that it do so in conjunction with its reconsideration of the Final Rule's ability-to-pay provisions.

II. Legal Background

The Bureau is responsible for "regulat[ing] the offering and provision of consumer financial products or services under the Federal consumer financial laws." 12 U.S.C. § 5491. As relevant here, Section 1031 of the Dodd-Frank Act authorizes the Bureau to exercise rulemaking authority "to prevent a covered person or service provider from committing or engaging in an unfair, deceptive,

or abusive act or practice under Federal law 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." 12 U.S.C. § 5531(a); *see also* Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 1031(a), 124 Stat. 1376, 2005.

The statute defines an "unfair" or "abusive" act or practice. An "unfair" act or practice is "likely to cause substantial injury to consumers which is not reasonably avoidable by consumers" and "not outweighed by countervailing benefits to consumers or to competition." 12 U.S.C. § 5531(c). An "abusive" act or practice is one that "materially interferes with the ability of a consumer to understand a term or condition of a consumer financial product or service" or "takes unreasonable advantage of" the consumer's ignorance of material terms or conditions, the consumer's inability to protect his own interests, or the consumer's reasonable reliance that the lender is acting in his best interest. *Id.* § 5531(d). If an act or practice is identified as unfair, deceptive, or abusive, then the Bureau has the authority to "prescribe rules" preventing such acts or practices. *Id.* § 5531(b). Thus, to regulate an act or practice, the Bureau must find that it is unfair or abusive. Absent such a finding, the Bureau has no basis or authority to regulate.

In November 2017, the Bureau identified what it deemed three unfair and abusive practices, one of which is relevant to this comment and rulemaking petition. Payday, Vehicle Title, and Certain High-Cost Installment Loans, 82 Fed. Reg. 54,472 (Nov. 17, 2017) (codified at 12 C.F.R. pt. 1041). After

making its findings, the Bureau issued a rule (the "Final Rule") prescribing those practices. The Final Rule includes three main sections, which have been referred to as the "ability-to-pay" provisions, the "payment" provisions, and the "notice" provisions. This petition and comment addresses only one aspect of the Final Rule's payment provisions that is unsupported by the requisite finding of unfairness or abusiveness and, in fact, discourages use of a payment method that can help consumers avoid the very unfair and abusive element of other payment methods the Bureau sought to curtail.

The Bureau claimed authority to promulgate the payment provisions based on the following finding:

> It is an unfair and abusive practice for a lender to make attempts to withdraw payment from consumers' accounts in connection with a covered loan after the lender's second consecutive attempts to withdraw payments from the accounts from which the prior attempts were made have failed due to a lack of sufficient funds, unless the lender obtains the consumers' new and specific authorization to make further withdrawals from the accounts.

12 C.F.R. § 1041.7 (2018). To prevent that practice, the Bureau issued a rule that prohibits lenders from "initiat[ing] a payment transfer from a consumer's account in connection with any covered loan that the consumer has with the lender after the lender has attempted to initiate two consecutive failed payment transfers from that account in connection with any covered loan that the consumer has with the lender." *Id.* § 1041.8 (b)(1).

The regulation defines 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." *Id.* § 1041.8(a)(1). In its official interpretations of the Final Rule, the Bureau clarified that the definition of "payment transfer" means, among other payment methods, "[a]ny electronic fund transfer meeting the general definition in § 1041.8(a)(1)..., including but not limited to an electronic fund transfer initiated by a debit card or a prepaid card." 82 Fed. Reg. at 54,910. As a result, the payment provisions generally apply, on equal terms, transactions involving checks, ACH transfers, and debit or prepaid cards.

In the notice and comment period, industry members expressed their concern that the definition of payment transfer was insupportably overbroad. They argued that, although the Bureau's finding may support regulation of payments through such means as checks or ACH transfers where a denied payment can and likely would result in overdrafts and insufficient fund fees, that rationale does not extend to payments made through debit cards. Unlike a check or ACH transfer, a denied debit card transaction generally does not incur denial fees or result in an overdraft—instead, the payment is simply denied. Accordingly, they argued, subjecting debit card payments to the payment provisions was unsupported, unnecessary, and therefore arbitrary and capricious. As the Bureau explained in the Final Rule's preamble:

> 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.

Id. at 54,750.

The concerns raised by industry leaders were shared by many state law-enforcement officers responsible for policing unfair and abusive financial practices within their states. In particular, the Attorneys General of Arkansas, South Carolina, Alabama, Florida, Georgia, Indiana, Kansas, Louisiana, Nebraska, Nevada, North Dakota, Oklahoma, South Dakota, Tennessee, Texas, Utah, West Virginia, and Wisconsin stated in their joint comments to the Bureau:

> The Proposed Rule should likewise be revised to incorporate industry's suggestions that the prohibition against repeated presentments not apply to debit card transactions. The Proposed Rule purports to justify imposing a two transaction limit on the grounds that repeated presentments result in repeated non-sufficient funds fees. *See* 81 FR 47929/3 ("Bounced checks and failed [automated transaction] payments can be quite costly for borrowers. The median bank NSF fee is $34[.]"); 81 FR 48049/2 (similar); 81 FR 48057/2 (contending restriction is necessary because NSF fees can quickly diminish consumer deposits); *see also* 81 FR 47934/1 (discussing NSF fees and arguing they aggravate risks associated with payday loans). Yet as previous commenters have observed—and the Proposed Rule concedes—those concerns do not apply to the overwhelming majority of debit card transactions because "depository institutions generally do not charge consumers a [non-sufficient funds] fee or declined authorization fees for declined debit card transactions." 81 FR 48066/1. And in declining to create an exemption, the Proposed Rule merely argues

> that "it is not appropriate to propose carving out of the rule payment withdrawal attempts by debit cards... given the narrow circumstances in which the carve-out would apply, administrative challenges, and residual risks to consumers." 81 FR 48066/2; *see also* 81 FR 48066/1. Thus, in other words, the Proposed Rule failed to incorporate a justifiable exemption because it would be narrow- which is often true of exemptions- and would require the CFPB Director to do extra work. Those factors hardly justify failing to create an exemption, and accordingly, the Proposed Rule should be revised.

Comment of Attorneys General of Arkansas, South Carolina, Alabama, Florida, Georgia, Indiana, Kansas, Louisiana, Nebraska, Nevada, North Dakota, Oklahoma, South Dakota, Tennessee, Texas, Utah, West Virginia, and Wisconsin, Docket No. CFPB-2016-0025, Oct. 7, 2016, at 20–21. The Bureau acknowledged the comment, stating that, "[s]everal 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." 82 Fed. Reg. at 54,746.

The Bureau acknowledged that a denied debit card transaction generally does not create "NSF [Not Sufficient Funds], overdraft, return payment fees, or similar fees, and [would] not close accounts because of failed payment attempts," and thus *"the harms underpinning the unfair and abusive practice…would not occur." Id.* (emphasis added). The Bureau even conceded that "the rule does not need to cover those instances." *Id.* Yet despite recognizing that debit card

payments are unlike check or ACH transfers, would not cause the unfair or abusive harms identified as the basis for the payment provisions, and do not need to be covered by the Final Rule, the Bureau arbitrarily and inexplicably applied the new restrictions to debit cards:

> [T]he 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.

Id. at 54,747.

The Final Rule provided that the payment provisions at issue here would go into force on August 19, 2019.[1] *Id.* at 54,472. In November 2018, however, a federal court indefinitely stayed the compliance date pending further order. Order, *Community Financial Services Association of America, Ltd. et al., v. Consumer Financial Protection Bureau et al.*, 2018 WL 3491029 (W.D. Tex.) (Nov. 6, 2018).

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[1] All of the provisions of the Final Rule initially had a compliance date of August 19, 2019, except for three provisions: Section 1041.1 (authority and purpose), Section 1041.11 (registered information systems), and Section 1041.14 (severability).

Shortly before the compliance date was stayed, the Bureau indicated that it was reconsidering the scope of the Final Rule. It issued a statement providing that it was "planning to propose revisiting only the ability-to-repay provisions and not the payments provisions, in significant part because the ability-to-repay provisions have much greater consequences for both consumers and industry than the payment provisions." Public Statement Regarding Payday Rule Reconsideration and Delay of Compliance Date, Consumer Financial Protection Bureau, October 26, 2018. The Bureau has subsequently suggested that it may revisit the Final Rule's payment provisions in a subsequent proposal.

III. The Bureau Should Exclude Debit Cards from the Final Rule

The Bureau should exclude debit cards from the payment provisions in the Final Rule because the decision to include debit cards was arbitrary and capricious, contrary to law, and in excess of the Bureau's authority. *See* 5 U.S.C. § 706(2). The Bureau's rulemaking authority is limited to regulating acts and practices that are unfair or abusive. Unlike other payment types subject to the Final Rule, such as ACH and check transfers, debit card transactions do not pose any risk of likely substantial injury to consumers, as the Bureau itself acknowledged. Even assuming *arguendo* that debit cards could pose a substantial risk of harm, their benefits to consumers outweigh the potential harm. And, as a procedural matter, it would be easy for the Bureau to exclude debit card transactions from the payment provisions: the existing rulemaking record supports that result, and all that is required is a single, one-sentence amendment

modeled on the exemption in Section 1041.8(a)(1)(ii) for certain account-holding institutions.

A. Debit Card Transactions Are Unlike ACH and Check Transfers

The Bureau's regulatory authority under Dodd-Frank is limited to making rules that prescribe acts or practices that are unfair or abusive. *See* 12 U.S.C. § 5531(a). In identifying its basis for exercising regulatory authority, the Bureau found that it is an unfair and abusive practice for a lender to make more than two consecutive attempts to withdraw funds from accounts when the withdrawal attempt was denied for lack of sufficient funds, unless the lender obtains the consumers' new and specific authorization to make further withdrawals from the accounts. 12 C.F.R. § 1041.7 (2018).

The stated rationale for this prohibition was that "each additional attempt by the lender is *likely to trigger substantial additional fees* for the consumer but is unlikely to result in successful collection for the lender. These additional attempts can cause serious injury to consumers who are already in substantial financial distress, including the cumulative fees." Payday, Vehicle Title, and Certain High-Cost Installment Loans, 82 Fed. Reg. at 54,733 (emphasis added). The Bureau studied ACH transfers and found that consumers may incur up to $100 in NSF fees from their account-holding institution after just two failed attempts to withdraw funds, which injures consumers who then incur substantial fees without having completed the original payment. *Id.* Thus, to prevent what it identified as an unfair and abusive lending practice for ACH transfers, the Bureau prohibited lenders from initiating a payment transfer after two

consecutive failed attempts for ACH transfers, checks, and debit card payments. 12 C.F.R. § 1041.8(b). The stated purpose was to prevent consumers from being subjected, without their additional express authorization, to excessive fees from their account-holding institution for denied transactions after successive attempted withdrawals.

The problem with this approach is that it applies too broadly because of how the Bureau defined payment transfer. *Id.* § 1041.8(a)(1). In the definition of a payment transfer, the Bureau included debit or withdrawal payments initiated through check, ACH, *and debit card. Id.* Based on the Bureau's own stated purpose for the payment limitations, that definition arbitrarily includes a payment method that is neither unfair nor abusive—namely, debit card transactions, which are unlike ACH and check payment transfers. Although check and ACH transfers typically cause consumers to incur fees from multiple failed attempts to withdraw funds, debit card payments rarely (if ever) result in such fees from their account-holding institutions. As the Bureau itself has recognized,

> Generally, if you overdraw your checking account by a check or ACH, your bank or credit union's overdraft program will pay for the transaction and charge you a fee. By allowing your account balance to fall below $0, your bank or credit union will also effectively take the repayment right out of your next deposit. At most institutions, the overdraft fee is a fixed amount regardless of the transaction amount, and you can incur several overdraft fees in a single day.... Overdraft fees work a little differently for debit cards. Your bank or credit union cannot charge you fees for overdrafts on

> ATM and most debit card transactions unless you have agreed ("opted in") to these fees.

Gary Stein, *Understanding the Overdraft "Opt-in" Choice*, Consumer Financial Protection Bureau (January 19, 2017)[2]; *see also* Requirements for Overdraft Services, 12 C.F.R. § 1005.17. Because the rationale and statutory justification for the payment provisions was to prevent excessive fees likely to be incurred by consumers from failed payment attempts, the decision to include debit cards was arbitrary—indeed, that decision conflicts with the Bureau's stated rationale. And in arbitrarily including debit cards in the Final Rule, the Bureau exceeded its statutory authority to regulate and the Administrative Procedure Act's requirement for reasoned rulemaking.

The Bureau implicitly acknowledged this to be true when it distinguished ACH transactions from debit card transactions. As the Bureau recognized in its study, "Fees on [ACH] 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." 82 Fed. Reg. at 54,735. The Bureau further reiterated that "account-holding institution[s] may not charge a fee [on] attempts made by debit cards and certain prepaid cards." *Id.* at 54,734.

Simply put, when a lender attempts to deposit a check or initiate an ACH transfer and the consumer's balance is insufficient, the consumer's bank

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[2] *Available at* https://www.consumerfinance.gov/about-us/blog/understanding-overdraft-opt-choice.

typically charges an NSF fee, and the lender may charge an NSF fee, as well. In contrast, when a lender tries to initiate payment through a debit card, the bank will typically either accept or decline the authorization request, without imposing any fee when the request is denied for insufficient funds. Unlike with checks and ACH transfers, overdrafts or overdraft fees are permitted only when account-holders have specifically and voluntarily authorized overdraft protection, *see* 12 C.F.R. § 1005.17, which (as the Bureau found) most have not, *see* 82 Fed. Reg. at 54,750/3. Furthermore, unlike with check and ACH payments, lenders do not charge fees for denied debit card payments. In fact, state laws permitting fees for insufficient funds generally do not even apply to denied debit card payments. So while borrowers may face the risk of mounting NSF fees from both the borrower's account-holding institution and the lender with check or ACH payments, debit card payments do not pose that risk.

In short, the rationale relied upon in the Final Rule to regulate other forms of payment does not extend to debit card payments. The Final Rule failed to identify any basis to conclude otherwise, arbitrarily relying on ACH-transaction data and ignoring that consumers who may be subject to fees because of a denied debit card payment affirmatively consented to them and have the absolute right to revoke such consent. *Id.* at 54,847 (providing the Bureau's analysis of ACH data). The rules and restrictions applicable to debit card payments already place strong protections on any fees associated with overdrafts. Arbitrarily lumping debit card payments in with checks and ACH transfers results in heavier burdens on debit card payments and thereby disincentivizes lenders from using a

payment method that has more protections and is less costly to consumers. That is illogical and contrary to the stated purpose of the payment provisions.

B. The Finding of Substantial Harm to Consumers Is Unsupported

For the Bureau to exercise regulatory authority, it must also show that an act or practice will substantially injure a consumer, materially interfere with a consumer's ability to understand the product or service, or unreasonably take advantage of a consumer. 12 U.S.C. § 5531(c)–(d). Absent such a showing, the Bureau is prohibited from regulating.

The Bureau should exclude debit card transactions from the Final Rule's payment provisions because there has been no finding of harm or even evidence to support such a finding with respect to such transactions and any implied finding of harm would be insufficient to justify the exercise of regulatory authority. As explained above, the Final Rule's rationale for regulating payments was to protect consumers from the harms of excessive fees based on insufficient funds. But unlike checks and ACH debits, debit card transactions do not pose such risks. If the account lacks adequate funds to cover the debit, the transaction is simply denied. Likewise, lenders offering covered loans subject to the Final Rule do not charge NSF fees for debit card transactions. Only when a consumer has expressly chosen to obtain overdraft coverage is a bank fee even possible, and as the Bureau has acknowledged, the vast majority of consumers do not make such an election. For the few who have specifically and voluntarily elected to have overdraft protection, they do so specifically to obtain the protections it provides.

Furthermore, the Bureau inexplicably relied on an examination of ACH transfer data in determining that consumers needed to be protected from mounting NSF fees following a second consecutive failed payment attempt. The Bureau did not examine similar debit card payment data. Reviewing such data would have revealed that consumers are rarely charged overdraft fees by their financial institutions for denied debit card payments, that state laws generally do not authorize lenders to charge NSF fees for denied debit card payments, that debit card rules may prohibit the charging of such fees, and that lenders of "covered loans" rarely, if ever, charge a fee for a denied debit card payment. Including debit card payments in the payment provisions is attempting to solve a problem that does not exist and, in doing so, actually harms consumers.

The State Attorneys General correctly identified the lack of evidentiary support for the decision to include debit card transactions. As their comment described, "the Proposed Rule concedes [that] those concerns do not apply to the overwhelming majority of debit card transactions because 'depository institutions generally do not charge consumers a [NSF] fee or declined authorization fees for declined debit card transactions.'" Comment from State Attorneys General, *supra*, at 21.

Other commenters identified the Bureau's lack of evidentiary support for its decision to include debit card transactions. For example, one industry participant noted that "the CFPB has shown no research indicating consumers incur a disproportionate number of insufficient funds fees from covered loan products…Furthermore, debit card payments and other forms of payment which

do not result in the consumer incurring fees should certainly not be subject to this proposal." Comment on the Proposed Payday Rule from Checkmate at 7 (Oct. 7, 2016). Likewise, another comment by an industry participant observed that the Bureau "does not take into account that other market alternatives to ACH or RCC payments, such as debit card authorizations, do not cause NSF fees" and "fails to account for the fact that overdraft fees will only occur if the consumer has voluntarily elected for overdraft protection at their financial institution." Comment from Check Into Cash, Inc. on the Proposed Payday Rule (Oct. 4, 2016).

In short, the Bureau relied on inapplicable data, arbitrarily failed to consider the material ways in which debit card transactions differ from other payment mechanisms, and failed to identify any evidence supporting a finding that debit card transactions likely impose substantial harm on consumers. In fact, the Bureau acknowledged that debit card payments are *not likely* to impose substantial harm on consumers. Accordingly, the decision to include debit cards in the payment provisions was arbitrary.

C. The Final Rule's Asserted Compliance and Enforcement Challenges Are Illusory

The Bureau stated in the Final Rule that it "decided not to exempt payments made using debit cards from the rule" because it did "not believe an exclusion based on payment type would work to alleviate much compliance burden associated with § 1041.8." 82 Fed. Reg. at 54,747. It concluded that the compliance burden would exist regardless "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." *Id.*

The Bureau's claims that excluding debit card payments would not "alleviate much compliance burden" and could even increase compliance costs were completely unsupported and are contrary to information provided by industry and plain common sense—after all, alternative means of collection, such as litigation, obviously impose far greater costs. And the unsupported assertion that an exclusion would increase compliance burdens by requiring lenders to "juggl[e] multiple, disparate processes and procedures depending on payment type" ignores that different payment types are already subject to different compliance regimes and that lenders, as a result, already are forced to employ "multiple, disparate processes and procedures depending on payment type." Given that reality, an exclusion could only reduce compliance burden. And the magnitude of that reduction would be significant, in light of the Final Rule's burdens. The payment provisions will significantly increase compliance costs on all payment transfer methods—specifically in terms of notifications, communications, and litigation. If debit card payments are excluded from the payment provisions, then lenders will be able to limit the increase in compliance costs associated with check and ACH transfer payments.

Likewise, the Final Rule's bare assertions of unidentified "administrative challenges" and enforcement challenges find no record support and ignore the

pervasive regulation, at the state and federal levels, of debit card networks and transactions. As the State Attorneys General observed,

> in declining to create an exemption, the Proposed Rule merely argues that 'it is not appropriate to propose carving out of the rule payment withdrawal attempts by debit cards…given the narrow circumstances in which the carve-out would apply, administrative challenges, and residual risks to consumers.' Thus, in other words, the Proposed Rule failed to incorporate a justifiable exemption because it would be narrow—which is often true of exemptions—and would require the CFPB Director to do extra work. Those factors hardly justify failing to create an exemption, and accordingly, the Proposed Rule should be revised.

Comment from State Attorneys General, *supra*, at 21 (citations omitted). The Bureau oddly argues that an exemption for debit card payments is not warranted because it would apply only in "narrow circumstances." But the fact that debit card payments rarely (if ever) incur any NSF fees is reason enough to exempt them from the definition of payment transfer in the first place. Further, it defies logic to suggest that debit card payments are not a significant enough issue to create an exemption. That is the entire point of the comment from the State Attorneys General: debit card payments do not cause the harms the rule intends to cure (excessive NSF fees) and so regulating them will increase administrative burdens for lenders and impose risks and higher costs on consumers, without any countervailing benefit.

Industry members agreed:

> Given that FFA members offer their consumers various options to repay their transactions, some of which

> include debits from their bank accounts using debit cards, we encourage the CFPB to…reconsider its approach to debit cards. Debit cards are rejected by the banking system when consumers do not have sufficient funds in their account. So NSF fees do not arise. Use of the debit cards networks is widely understood by regulators, and the CFPB polices that industry well. Thus, *enforcement challenges should not exist.*

Comment on the Payday Rule from the Flexible Finance Association at 26 (Oct. 6, 2016) (emphasis added).

Furthermore, the Bureau's claim that including debit cards is justified because "a single definition is a simpler approach" and "more administrable as a practical matter" is unsupported and illogical. Exempting debit card transactions would create no compliance burden, and there is no record evidence to the contrary. Indeed, such an exemption would be more easily administrable than the exclusion provided in Section 1041.8(a)(1)(ii), which creates a *conditional* exclusion for certain transfers by account-holding institutions. By definition, a *conditional* exclusion is more complicated and burdensome to apply than a straightforward *categorical* exclusion, such as for debit card transactions. Moreover, it is completely arbitrary and illogical to acknowledge debit card transactions are unlike ACH and check transfers but then persist in regulating debit card payments just to have a "single definition" when the regulation (because of the existing exclusion) already abandoned the idea of employing a "single definition."

D. The Final Rule's Regulation of Debit Card Transactions Actually Injures Consumers

The Bureau's authority to regulate is further limited by the statutory requirement that even a substantially harmful act or practice is permitted if the countervailing benefits to consumers or competition outweigh the harm. 12 U.S.C. § 5531(c). Likewise, the Bureau is obligated to 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." 12 U.S.C. § 5512(b)(2)(A)(i). For the reasons stated in Section III (A)–(B), *supra*, debit card repayment does not cause substantial harm to consumers. But even if such harm existed, it is outweighed by the countervailing benefit of access to (1) a form of repayment that is unlikely to subject consumers to the kind of mounting NSF fees the Bureau cites as unfair and abusive and (2) more flexible longer-term loans that employ debit card payment options. The Bureau's consideration of only (purported) costs, while ignoring these benefits, is the height of irrationality.

The chief consequence of including debit card payments in the payment provisions is to disincentivize lenders from promoting or allowing such payments. Processing debit card payments is costlier to lenders than processing ACH transfers and presenting checks. As mentioned above, debit card payments are already subject to numerous restrictions, and arbitrarily placing the payment provision limitations on debit card payments creates an even heavier burden on such payments. To save on costs, lenders are likely to rely more heavily on ACH

transfers and checks, which will in turn cause consumers to incur more NSF fees. Furthermore, lenders will be more apt to charge NSF fees on ACH transfers and checks to cover the costs associated with the Final Rule. The Bureau has always promoted giving consumers as many payment options as possible, but the Final Rule works against that goal. The Final Rule should encourage the use of payment methods like debit cards, which do not result in NSF fees, rather than discourage such payments in favor of other payment methods that do.

In addition to increasing NSF fees, the Final Rule's treatment of debit card payment will also increase borrowing-related expenses for consumers. If lenders are unable to complete debit card payment transactions, the result in many cases will be for the loan to go into default. That, in itself, causes injury to the consumer's credit, increasing the likelihood that the consumer remains in the subprime credit market. Defaulted payments will result in more interest being charged on larger principal balances. Additional defaults and limited repayment options for lenders will result in significantly more collection lawsuits, which will increase the consumer's cost of credit through attorney fees, pre- and post-judgment interest, and other costs. Lenders will be forced to obtain more collection judgments resulting in disruptive wage garnishments. Thus, collection-related expenses will increase for both the lender and borrower. These can be substantial on both sides but are particularly harmful for consumers. *See, e.g.*, Comment on the Payday Rule from the Center for Responsible Lending Consumer Federation of America National Consumer Law Center, et al., at 20 (Oct. 7, 2016).

Debit card repayment is essential to the provision of longer-term and more flexible credit products that provide an alternative to single-payment balloon loans. Debit card repayment authorization facilitates longer-term loans, providing vital security for such lending. This includes installment loans, revolving loans and lines of credit, and a variety of other credit products that provide consumers with flexibility, typically lower annual percentage rates, and generally lower scheduled payments than single-payment balloon loans. Single-payment loans do not typically rely on debit card repayment and would not be impacted by the payment provision because lenders offering such loans are already required to obtain a new payment authorization for each new loan transaction.

Accordingly, one consequence of regulating debit card repayment is to increase the cost and reduce the availability of longer-term credit products and thereby channel more consumers into the very kind of single-payment balloon loans that the Bureau has identified as posing special risk of harm to consumers. Without the security of debit card repayment, longer-term lenders will be less able to extend credit to many consumers or will be forced to do so at higher rates or by charging higher fees in light of the increased risk and costs of such lending. Higher borrowing costs are, of course, detrimental to consumers.

In these respects, the Final Rule's treatment of debit card repayment is nonsensical: it purports to fix a "harm" to consumers for which there is no evidence with a solution for which there is substantial, documented evidence of

potential consumer harm. That is completely contrary to the Final Rule's stated purpose and goals.

E. The Choice of a Few Consumers To Opt in to Overdraft Protection for Debit Card Transactions Does Not Justify the Final Rule's Approach

The Final Rule's treatment of debit card payments implicitly assumes that those relatively few consumers who have affirmatively chosen to add overdraft protection to accounts accessed through debit card transactions have made a harmful decision or are likely at risk to unfair or abusive fees. That assumption is unsupported and contrary to the record. There is no risk of mounting excessive fees but rather only the "narrow circumstance" of limited overdraft fees from the consumer's bank—which the consumer affirmatively elected as a protection.

As described above, overdrafts or overdraft fees on debit card transactions are rare and permitted only when the account-holder has specifically and voluntarily authorized overdraft protection. 12 C.F.R. § 1005.17. Such consent must be affirmative, and it must be informed: regulations require a financial institution, when seeking such consent, to "[p]rovide[] the consumer with a notice in writing, or if the consumer agrees, electronically, segregated from all other information, describing the institution's overdraft service." *Id.* at § 1005.17(b)(1)(i). Moreover, the contents and form of the notice are also prescribed by regulation. *Id.* at § 1005.17(d). When account-holders consent to overdraft protection for debit card transactions, they are fully informed of the

costs and benefits of that service. And they may revoke that consent at any time, effective immediately. *Id.* at § 1005.17(f)–(g).

The evidence shows that consumers choose to opt-in to overdraft protection on debit card payments because it provides them with a safe and reputable method for accessing credit. Indeed, Professor Todd Zywicki found that "[t]here is no evidence that those who use overdraft protection are unaware of the cost or otherwise use overdraft protection foolishly or unknowingly." Todd J. Zywicki, *The Economics and Regulation of Bank Overdraft Protection*, 69 Wash. & Lee L. Rev. 1141, 1141 (2012).

Including debit card payment in the payment provisions would require customers in certain circumstances to essentially "opt-in" a second time to take advantage of a protection they specifically and voluntarily have already chosen. The few consumers who affirmatively elect this service do so because they appreciate its benefits and expect that it will provide them the service of covering payments owed rather than defaulting on them.

In short, the Final Rule's implicit judgment on consumers' decision to opt in to overdraft protection

> runs contrary to [Former] CFPB Director Richard Cordray's own testimony to the U.S. House Financial Services Committee in March 2012 regarding the purpose and intent of the Bureau, where he stated: 'People can make their own decisions, and nobody can or should try to do that for them…[I]t is the American way for responsible businesses to be straightforward and upfront with their customers, giving them all the information they need to make informed decisions.'

Comment from Check Into Cash, Inc., *supra*, at 8.

IV. The Bureau Should Act Now

Given the lack of record support for the Final Rule's decision to include debit card payments, the strong basis to exclude them, and the harm to consumers from the Final Rule's approach, the Bureau would be well justified in reversing that decision. It should do so now, to end the uncertainty facing lenders and thereby prevent serious harm to consumers. The present record is more than adequate to conclude that the Final Rule's approach to debit card payments lacks support and imposes unjustified burdens on both lenders and consumers. That exposes the Bureau to substantial legal risk, given the lack of support for the Final Rule's arbitrary treatment of debit card payments. Thus, the Bureau should promptly modify the definition of payment transfer to exclude debit card payments.

A. The Failure to Exclude Debit Card Payments Is Harming Consumers

The Bureau has suggested that it may reconsider the Final Rule's payment provisions in the future, after it reconsiders the Rule's ability-to-pay provisions. The delay inherent in that plan, however, will cause needless harm to consumers, because the uncertainty stemming from the Final Rule's status threatens consumers now. The small change requested in this petition and comment would suffice to ameliorate much of that harm.

Lenders offering longer-term covered loans (which are disproportionally impacted by the payment provisions) face substantial uncertainty at this time. It

is difficult to evaluate the credit risks and pricing for longer-term loans when the rules to which those loans will be subject in the future are in a state of flux. That uncertainty is especially damaging because it concerns the core matter of repayment, the central source of risk in every loan. The viability of many longer-term loans turns on whether lenders will have recourse to debit card repayment in the future, as protection against default and the high costs of collection, including litigation. To be clear, the availability of debit card repayment free from the kind of regulation imposed by the Final Rule can and does often make the difference between extending credit to a consumer and denying it as too risky.

Yet lenders have no assurance at this time that they will be able to take advantage of debit card repayment for the loans that consumers are requesting today. The Final Rule, which is still on the books, severely limits the use of debit card repayment in ways that materially undermine the security necessary to extend credit. The district court's stay of the Final Rule may have been premised largely on challenges to the Rule's ability-to-pay provisions and so may or may not continue in force during and after the conclusion of the Bureau's reconsideration of those provisions. An additional reconsideration to address the Rule's payment provisions has not yet been formally announced and is uncertain with respect to its timing and focus. In the face of all these uncertainties, a prudent lender has no choice but to manage risk by limiting the availability of credit and increasing the cost of credit.

And that, in turn, causes all of the harms identified above. It denies consumers access to forms of payment that avoid NSF fees. It limits access to longer-term more flexible credit products and, as a result, increases the likelihood that consumers will be forced to resort to obtaining single-payment balloon loans. It increases consumers' borrowing costs. And it may restrict their access to credit altogether. What it does not do is reduce consumers' need for credit—that remains exactly the same, left to be satisfied in ways that involve higher costs and burdens for consumers. In this way, the present uncertainty faced by longer-term lenders exacerbates the ills that the Final Rule sought to address.

The Bureau can easily and timely put an end to this harm to consumers by implementing the change requested in this petition and comment as part of its initial reconsideration of the Final Rule. As described above, the existing rulemaking record already supports that change; the issues and evidence to be considered are manageable, given the Final Rule's lack of support for its approach; and the change goes hand-in-hand with the Bureau's reconsideration of the ability-to-pay provisions, which may reduce regulatory burdens on payday and other short-term lenders at the same time that longer-term lenders are subject to this needless uncertainty. Delaying would distort the market, by continuing disproportionate burdens on longer-term credit products. By contrast, acting now, in concert with reconsideration of the ability-to-pay provisions, would promote a level playing field across these different segments

of the consumer-lending industry at the precise time when that is especially needed.

B. Failure to Exclude Debit Cards Exposes the Bureau to Serious Litigation Risk

The Bureau faces the substantial likelihood of a legal defeat that would undermine the operation of the Final Rule if it does not exclude electronic funds transfers initiated by a debit card or prepaid card from the definition of payment transfer. This outcome would be a self-inflicted wound entirely of the Bureau's making, as the existing record not only supports but demands the exclusion of debit card transfers from the payment transfer definition. Rather than harm the consumers that the Bureau is charged with protecting and the financial services industries on which those consumers depend, and then conducting yet more rulemaking that could extend past 2020, the Bureau should exclude electronic funds transfers initiated by a debit card or prepaid card from the definition of payment transfer at Section 1041.8(a)(1). Doing so would continue to protect consumers from excessive NSF fees from the typical culprits (checks and ACH transfers) while allowing consumers the option to make more payments by debit cards and significantly reduce such fees.

As explained above in Section III, the Bureau's decision to include debit card and prepaid card transfers in the definition of payment transfer was based on portions of the record that considered the effect on consumers of ACH transfers, a different payment method that results in fees that generally do not exist for debit card and prepaid card transfers. Furthermore, that decision flies

in the face of uncontroverted empirical evidence in the record contradicting the Bureau's claim that the inclusion of debit card and prepaid card transfers was necessary for financial service providers to be able to administer the Rule. In this way, the Bureau's action was akin to the SEC that the United States Court of Appeals for the District of Columbia Circuit set aside in *Business Roundtable v. SEC*, 647 F.3d 1144 (D.C. Cir. 2011).

There, as here, the agency acted based "upon insufficient empirical data" that was contradicted by "numerous studies submitted by commenters that reached the opposite result." *Id.* at 1150–51. In this regard, the Final Rule's claims that excluding payments through debit cards and prepaid cards would not "alleviate much compliance burden" and could even increase compliance costs were completely unsupported and are contrary to information provided by industry and plain common sense—alternative means of collection, such as litigation, impose greater costs. Likewise, the Final Rule's bare assertions of unidentified "administrative challenges" and enforcement challenges find no record support and ignore the pervasive regulation, at the state and federal levels, of debit card networks and transactions.

Similarly, the Bureau "duck[ed] a serious evaluation of the costs" of the rule by relying on costs of ACH transfers on consumers in including debit card and prepaid card transfers in the definition. But unlike checks and ACH debits, debit card transactions generally pose no risk of overdraft or NSF fees—if the account lacks adequate funds to cover the debit, the transaction is simply denied. Only when a consumer has expressly chosen to obtain overdraft coverage is a

fee even possible, and fully two-thirds of consumers have not done so. In short, the Bureau ducked a serious evaluation of the costs and burdens of the rule on consumers and financial services provider by arbitrarily relying on other forms of payment that do not extend to debit card payments.

The likely result of the Bureau's potential failure to correct its failure to exclude debit card and prepaid card transfers would be vacatur of the definition of payment transfer at Section 1041.8(a)(1). Not only is vacatur the presumptive remedy for arbitrary and capricious agency action, *see Sierra Club v. Van Antwerp*, 719 F. Supp. 2d 77, 78 (D.D.C. 2010) (collecting cases), but that presumption is reinforced where, as in this case, the agency will be unable to justify maintaining the inclusion of debit card and prepaid cards in the payment transfer definition on remand, *see Fox Television Stations, Inc. v. Fed. Comms. Comm'n*, 280 F.3d 1027, 1052–53 (D.C. Cir. 2002).

Vacatur of the payment transfer definition would lead to substantial uncertainty in administering the Final Rule, even as amended through reconsideration. The term "payment transfer" is one of the backbone definitions of the Final Rule and is used frequently throughout, including in Sections 1041.3, 1041.8, 1041.9, and 1041.12. Each of these mechanisms would be placed in jeopardy with vacatur and could require substantial effort on the part of the Bureau to address on remand. Depending on the timeframe for litigation and the potential necessity of additional notice and comment on remand, such proceedings may not be completed until after 2020. Even if the definition of payment transfer were partially vacated only to the extent it failed to exclude

debit cards and prepaid cards, the possibility of remand proceedings after 2020 exist.

In addition to these legal problems for the Bureau, the interim period between finalization of a reconsideration proceeding that failed to exclude debit cards and prepaid cards would exacerbate the already substantial uncertainty in the marketplace that would exist if the Bureau declines to modify this definition. The mere fact of delay in fixing the failure to exclude prepaid cards and debit cards from the definition of payment transfers could cause those same financial services providers potentially moving towards less consumer- friendly financial products and payment methods, and it is far from certain that they would return to their traditional offerings with a later fix. This uncertainty would harm both consumers and financial service providers for the reasons discussed above.

Finally, this Rule is the Bureau's inaugural exercise of authority under Section 1031, and because it will set precedent for the future, "it is critical that, in any final rule, the Bureau identify unfair or abusive acts only for which it has evidence establishing the unfairness or abusiveness of the act. The Bureau has not met that standard in the proposed rule with respect to small dollar installment loans, single payment loans, and lines of credit offered by banks." American Bankers Association Comment on the Proposed Rule at 6 (Oct. 7, 2016). Given that no additional research or analysis is required to conclude that the Final Rule's approach lacks support and imposes unjustified burdens on both lenders and consumers, as this conclusion can be made on the existing record,

any failure to revisit inclusion of debit cards and prepaid cards from the payment transfer definition would be a problem of the Bureau's own making.

V. Rulemaking Request

The Bureau should modify the definition of payment transfer to clarify that a transfer initiated through a debit card or a prepaid card is not included. To make the change, the Bureau should simply insert the following paragraph in Section 1041.8(a)(1):

> (iii) Exclusion for certain transfers. An electronic funds transfer initiated by a debit card or a prepaid card is not a payment transfer, notwithstanding that the transfer otherwise meets the description in paragraph (a)(1) of this section.

Respectfully submitted,

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RE: Petition for Rulemaking from Advance Financial

Dear Mr. Grossman,

Thank you for the petition for rulemaking that you filed on behalf of Advance Financial regarding the Consumer Financial Protection Bureau's regulation governing Payday, Vehicle Title, and Certain High-Cost Installment Loans ("the rule"). In the petition, you requested "that the Bureau amend the [rule] to exclude debit card payments and that [the Bureau] do so in conjunction with its reconsideration of the [rule's] ability-to-pay provisions."[1] The Bureau is denying your petition, for the reasons set forth below.

Background

The Rule

On October 5, 2017, the Bureau issued the rule regarding certain consumer credit products.[2] The rule was codified at 12 C.F.R. Part 1041 (12 C.F.R. §§ 1041.1-15). The rule had two primary parts. First, certain provisions of the rule (the "Mandatory Underwriting Provisions") identified a lender's making of short-term and longer-term loans with balloon payments without

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[1] Advance Financial, Petition for Rulemaking and Supplementary Comment, at 2 (Dec. 13, 2018) ("Petition").

[2] *See generally* Payday, Vehicle Title, and Certain High-Cost Installment Loans, 82 Fed. Reg. 54472, 54746 (Nov. 17, 2017) ("2017 Final Rule").

reasonably determining that consumers have the ability to repay the loans according to their terms to be an unfair and abusive practice. *See* 12 C.F.R. 1041 Subpart B. Second, for the same set of loans and for longer-term loans with an annual percentage rate greater than 36 percent that are repaid directly from the consumer's account, the Payment Provisions of the rule identified attempting to withdraw payment from a consumer's account after two consecutive payment attempts have failed, without obtaining the consumer's new and specific authorization to make further withdrawals from the account, to be an unfair and abusive practice. *See* 12 C.F.R. §§ 1041.7-8. The Payment Provisions also required lenders to provide certain notices to the consumer before attempting to withdraw payment for such loans from the consumer's account. *See* 12 C.F.R. § 1041.9.

The Payment Provisions of the rule generally apply with respect to "payment transfers." *See generally* 12 C.F.R. Part 1041 Subpart C. "Payment transfer" is defined 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." 12 C.F.R. § 1041.8(a)(1). Further, "[a]ny electronic fund transfer meeting [this definition] is a payment transfer, including but not limited to an electronic fund transfer initiated by a debit card or a prepaid card." 12 C.F.R. § 1041.8(a)(1)(i)(A) cmt. 1.

2019 Proposal

On February 6, 2019, the Bureau proposed to rescind the Mandatory Underwriting Provisions of the rule.[3] Regarding debit cards, the preamble to that proposal stated:

> The Bureau is not proposing to reconsider the Payment Provisions of the 2017 Final Rule, and the Payment Provisions are outside the scope of this [proposal]. However, the Bureau has received a rulemaking petition [from Advance Financial] to exempt debit card payments from the Rule's Payment Provisions. The Bureau has also received informal requests related to various aspects of the Payment Provisions or the Rule as a whole, including requests to exempt certain types of lenders or loan products from the Rule's coverage and to delay the compliance date for the Payment Provisions. The Bureau intends to examine

[3] *See generally* Payday, Vehicle Title, and Certain High-Cost Installment Loans, 84 Fed. Reg. 4252, 4253 (Feb. 14, 2019) ("2019 Payday Reconsideration NPRM").

> these issues and if the Bureau determines that further action is warranted, the Bureau will commence a separate rulemaking initiative (such as by issuing a request for information (RFI) or an advance notice of proposed rulemaking).[4]

On July 7, 2020, the Bureau rescinded the Mandatory Underwriting Provisions of the rule.[5]

Advance Financial Petition

As noted above, the petition "requests that the Bureau amend the [rule] to exclude debit card payments and that it do so in conjunction with its reconsideration of the [rule's] ability-to-pay provisions."[6]

The petition argues that "[u]nlike other payment types subject to the [rule], such as [automated clearing house] and check transfers, debit card transactions do not pose any risk of likely substantial injury to consumers, as the Bureau itself acknowledged."[7] Specifically, the petition argues that "[a]lthough check and [automated clearing house] transfers typically cause consumers to incur fees from multiple failed attempts to withdraw funds, debit card payments rarely (if ever) result in such fees from their account-holding institution."[8] The petition argues that "[b]ecause the rationale and statutory justification for the payment provisions was to prevent excessive fees likely to be incurred by consumers from failed payment attempts, the decision to include debit cards was arbitrary—indeed, that decision conflicts with the Bureau's stated rationale."[9]

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[4] 2019 Payday Reconsideration NPRM, 84 Fed. Reg. at 4253. Although the petition indicates that it is a "supplementary comment" as well as a petition for rulemaking, the Bureau did not have an open comment period regarding the payday rule when the petition was filed.

[5] https://www.consumerfinance.gov/policy-compliance/rulemaking/final-rules/payday-vehicle-title-and-certain-high-cost-installment-loans-revocation-rule/.

[6] Petition at 2; *see also* Cover Letter to the Petition ("The petition and comments request that the Bureau, as part of its currently pending reconsideration of [the 2017 Final] Rule, exempt debit card payments from the Rule's payment provisions.").

[7] Petition at 10.

[8] Petition at 12.

[9] Petition at 13.

Further, the petition argues that "[e]ven assuming *arguendo* that debit cards could pose a substantial risk of harm, their benefits to consumers outweigh the potential harm."[10] Specifically, the petition argues that "even if such harm existed, it is outweighed by the countervailing benefit of access to (1) a form of repayment that is unlikely to subject consumers to the kind of mounting [insufficient funds] fees the Bureau cites as unfair and abusive and (2) more flexible longer-term loans that employ debit card payment options."[11]

Although the petition's argument focuses primarily on debit cards, the petition's "rulemaking request" would also exempt prepaid cards from the Payment Provisions. Specifically, the petition requests that the Bureau "modify the definition of payment transfer to clarify that a transfer initiated through a debit card or a prepaid card is not included."[12]

Discussion

When the Bureau proposed and finalized the rule, we specifically considered and responded to arguments from commenters that are similar to the arguments made in the petition. In particular, as described above, the petition argues that "[u]nlike other payment types subject to the Final Rule, such as ACH and check transfers, debit card transactions do not pose any risk of likely substantial injury to consumers."[13] In the preamble to the rule, the Bureau similarly indicated that "[s]everal commenters, including State Attorneys General, argued that payments made using debit cards should be exempt because they generally do not engender [insufficient funds] fees, and thus, the harm justifying the identified unfair and abusive act or practice is diminished for debit card payments."[14] The Bureau responded:

> The Bureau has decided not to exempt payments made using debit cards from the rule. First, while failed debit card transactions may not trigger [insufficient funds] 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

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[10] Petition at 10.

[11] Petition at 21.

[12] Petition at 33.

[13] Petition at 10.

[14] 2017 Final Rule, 82 Fed. Reg. at 54746.

> each presentment. And third, the Bureau does not believe an exclusion based on payment type would work to alleviate much compliance burden associated with [the Payments Provisions] 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.[15]

Similarly, in the preamble to the rule, the Bureau noted that "[d]uring the [Small Business Regulatory Enforcement Fairness Act] 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" and that "[o]ne 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 [insufficient funds] fee in connection with a second failed payment attempt involving a debit card transaction that is declined.[16] The Bureau responded to these comments as well.[17] That said, while the Bureau rejected arguments that debit card transactions should be excluded from the rule because debit card payments generally do not result in insufficient funds fees, the Bureau did create a conditional exclusion

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[15] 2017 Final Rule, 82 Fed. Reg. at 54748.

[16] 2017 Final Rule, 82 Fed. Reg. at 54750.

[17] *See* 2017 Final Rule, 82 Fed. Reg. at 54748 ("As explained in the proposal, the Bureau understood that depository institutions generally do not charge consumers [insufficient funds] 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 [another section of the preamble,] Market Concerns—Payments, the Bureau's research focusing on online lenders' attempts to collect covered loan payments through the [automated clearing house] 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.").

from the Payment Provisions for a lender that is also the account-holding institution where the lender, among other things, does not charge insufficient funds fees.[18]

Accordingly, we believe that the Bureau has already largely responded to the arguments now made in the petition. We note that the petition does not provide new facts or data or describe circumstances that have changed since the issuance of the rule. Given this, with respect to arguments now made in the petition that the Bureau previously responded to when issuing the rule, we decline to reconsider the Bureau's previous response. To the degree that the petition makes somewhat distinct arguments that were not considered when the Bureau issued the rule – such as that the benefits to consumers from debit card payments in this context outweighs the potential harm – we do not believe that the petition's arguments are sufficiently compelling or different from the arguments that the Bureau previously considered for us to reconsider the previous response, given that the petition does not provide new facts or data or describe circumstances that have changed since the issuance of the rule.

Additionally, we note that the Bureau already has an otherwise active and busy agenda, including significant rulemaking activity, and in particular activity with urgent timing considerations or that is required by law. The Bureau's Fall 2019 and Spring 2020 Agendas[19] – which are part of the Unified Agenda of Federal Regulatory and Deregulatory Actions,[20] as coordinated by the Office of Management and Budget – together describe the regulatory matters that the Bureau reasonably anticipates having under consideration during the period from October 1, 2019 to April 30, 2021. As these agendas suggest, the Bureau already plans to engage

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[18] *See* 12 C.F.R. § 1041.8(a)(1)(ii); 2017 Final Rule, 82 Fed. Reg. at 54746 ("In response to the sound suggestion received from several commenters, the Bureau is adding . . . 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.").

[19] *See* Bureau of Consumer Financial Protection, Preamble to semiannual regulatory agenda (July 26, 2019) ("Preamble to Fall 2019 Unified Agenda"), https://www.reginfo.gov/public/jsp/eAgenda/StaticContent/201910/Preamble_3170_CFPB.pdf; Bureau of Consumer Financial Protection, Preamble to semiannual regulatory agenda (Mar. 5, 2020) ("Preamble to Spring 2020 Unified Agenda"), https://www.reginfo.gov/public/jsp/eAgenda/StaticContent/202004/Preamble_3170_CFPB.pdf.

[20] https://www.reginfo.gov/public/do/eAgendaMain.

in significant rulemaking activity at this time. This includes activity with urgent timing considerations[21] or that is required by law.[22] The Bureau is also actively engaged in responding to the COVID-19 crisis, including providing guidance to regulated entities and providing resources to the public. Given that the Bureau has already largely considered and responded to arguments that are similar to those made in the petition and that the petition does not provide new facts or data or describe circumstances that have changed since the issuance of the rule, we choose at this time to prioritize the other items on the Bureau's agenda over the petition's request. As with all of its rulemaking, the Bureau will monitor and assess the effects of the Payment Provisions, including with regard to debit cards, and the Bureau may determine whether further action is needed in light of what it learns.

[21] *See, e.g.,* Preamble to Fall 2019 Unified Agenda, at 7 ("The Bureau is now focusing its attention on a regulatory provision that extends qualified mortgage status to loans that are eligible to be purchased or guaranteed by either Fannie Mae or Freddie Mac (which are often called the Government Sponsored Enterprises or GSEs) while they operate under Federal conservatorship or receivership. The 'GSE patch' provision is set to expire in January 2021, meaning that loans originated after that date would not be eligible for qualified mortgage status under its criteria."); *id.* ("[T]he Bureau issued in April 2019 a Request for Information to gather information related to the scope of the Remittance Rule's coverage and the expiration of a statutorily-established exception in the Remittance Rule that permits insured banks and insured credit unions to estimate certain required disclosures and other potential remittance transfer issues. In its consideration of appropriate next steps, including potentially rulemaking, the Bureau is considering stakeholder feedback during the assessment process and comments received in response to the Request for Information.").

[22] *See, e.g.,* Preamble to Fall 2019 Unified Agenda, at 3 ("The Bureau is engaged in a number of rulemakings to implement directives mandated in the Economic Growth, Regulatory Relief, and Consumer Protection Act of 2018 (EGRRCPA), Public Law 115-174, 132 Stat. 1297, the Dodd-Frank Act, and other statutes. . . . For example, in March 2019, the Bureau published an Advance Notice of Proposed Rulemaking (ANPRM) to seek public comment relating to implementation of section 307 of the EGRRCPA, which amends the Truth in Lending Act (TILA) to mandate that the Bureau prescribe certain regulations relating to 'Property Assessed Clean Energy' (PACE) financing."); *id.* at 4 ("Section 1071 of the Dodd-Frank Act amended the Equal Credit Opportunity Act to require, subject to rules prescribed by the Bureau, financial institutions to collect, report, and make public certain information concerning credit applications made by women-owned, minority-owned, and small businesses. The Bureau is hosting a symposium on small business data collection in November 2019 in order to facilitate a robust discussion with outside experts on the issues implicated by creating such a data collection and reporting regime. After the symposium, the Bureau anticipates that its next step will be the release of materials in advance of convening a panel under the Small Business Regulatory Enforcement Fairness Act, in conjunction with the Office of Management and Budget and the Small Business Administration's Chief Counsel for Advocacy, to consult with representatives of small businesses that may be affected by the rulemaking.").

Conclusion

Thank you again for submitting the petition for rulemaking on behalf of Advance Financial. Although the Bureau denies the petition, we appreciate the arguments raised and hope to hear from you in the future about the effects of the Payments Provisions of the rule.

Sincerely,

Kathleen L. Kraninger
Director

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October 7, 2016

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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.

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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.

population. *See, e.g.*, Gregory Elliehausen, *An Analysis of Consumers' Use of Payday Loans*, Geo. Wash. U. Sch. of Bus. Financial Services Research Program Monograph No. 41, at 31 (Jan. 2009) (survey showing only 75% of American consumers have credit cards). That is even more true for payday-loan borrowers. *Id*. (only 54% of payday borrowers have credit cards). And those payday borrowers who do have credit cards often 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, title loans (for those who own cars), and incurring fees associated with existing accounts, such as bounced-check fees or late-payment fees. Huckstep, *supra*, at 209. Each of these types of credit has drawbacks and consumers often do not have access to some types. Many consumers, for example, lack savings to tap, do not enjoy social networks populated by people with liquid assets to lend, or do not own cars against which to borrow. *Id.* Payday lending, by contrast, offers access to credit for consumers whose only resource is employment income, and it offers it on clear terms at nearby locations during convenient hours and on a quick timetable. Flannery & Samolyk, *supra*, at 4. Indeed, as discussed below, payday lending is not only an available and attractive option for underserved consumers, it is often the most cost-effective option.

Payday lenders are subject to significant federal and state regulation. On the federal level, the Consumer Financial Protection Act of 2010 (the "CFPA"), enacted as Title X of the Dodd-Frank Act, empowers the Bureau to bring enforcement actions to prevent lenders from committing or engaging in unfair, deceptive, or abusive acts or practices (collectively, "UDAAPs"). CFPA § 1031(a), 12 U.S.C. § 5531(a). Lenders must also comply with, among other statutes, the Truth-in-Lending Act—which has been interpreted to require payday-loan fees to be disclosed as an annual percentage rate ("APR")—the Fair Debt Collection Practices Act, the Electronic Fund Transfer Act, the Gramm-Leach-Bliley Act, and the Equal Credit Opportunity Act.

On the state level, because state law generally prohibits the rates of interest that payday lenders charge, payday lenders operate only in those States that have exempted them from usury laws. Chintal A. Desai & Gregory Elliehausen, *The Effect of State Legislation Restricting Payday Lending on Consumer Credit Delinquencies* (Mar. 31, 2014). The grant of such an exception is accompanied by other types of regulation, which comes in widely varying forms. Alex Kaufman, *Payday Lending Regulation*, at 6–7 (Fed. Reserve Bd., Divs. Of Research & Statistics & Monetary Affairs, Finance & Economics Discussion Series (FEDS) Working Paper No. 2013-62) (collecting state strategies). *See generally* Nat'l Conference of State Legislatures, *Payday Lending State Statutes* (Sept. 6, 2016), http://www.ncsl.org/research/financial-services-and-commerce/payday-lending-state-statutes.aspx (summarizing state statutes regarding payday lending). For example, some States cap the size of payday loans at an absolute amount or as a percentage of a borrower's monthly income. *See, e.g.*, Fla. Stat. § 560.404(5) ($500); Nev. Rev. Stat. § 604A.425.1(a) (25% of gross monthly income); *Payday Lending State Statutes*, *supra* (compiling state-law maximum loan amounts). Others limit the number of loans a person may have outstanding at a particular time, *see, e.g.,* S.C. Code Ann. § 34-39-270(A)(1) (one loan at a

time), prohibit rolling over or renewing a loan without a "cooling-off" period (typically one or two days), *see, e.g.*, Fla. Stat. § 560.404(19) (twenty-four hours), grant consumers a right to rescind a loan transaction within a reasonable period of time, *see, e.g.*, Utah Code Ann. § 7-23-401(3)(b) (by 5 p.m. the next business day), or mandate extended or other alternative repayment options, *see, e.g.*, Fla. Stat. § 560.404(22) (sixty-day grace period coupled with consumer counseling); Utah Code Ann. § 7-23-403 (extended payment plan). *See also Payday Lending State Statutes*, *supra*.

One of the most frequent modes of regulation is the length of the loan period: many States set minimum and/or maximum time periods for term limits. *See id.* (cataloging required loan terms). The minimum term limits are often at odds with the desires of borrowers. Kaufman, *supra*, at 14 (minimum term limits set by law increase average term length). And consumers reborrow in the face of maximum-term loan limits. *Id.* at 14–15. As a result of this regulation, the short, two-week or thirty-day period of a typical loan, among many other features of the loan, is determined not by consumer demand, but by state law. *Id.* at 13–15. As explained in greater detail below, consumers with credit needs understand that they may not be able to retire their payday loans in the period set by state law, and that it may take several cycles of reborrowing to repay them in full. Thus, although a typical payday loan is facially a two-week or thirty-day loan, in fact, consumers understand and intend that payday credit may take several weeks or months to retire. *See infra* Part I.G.

B. Millions of Consumers Rely on Payday Loans

Payday loans are critical to millions of consumers. In any given year, approximately twelve million American adults use payday loans. Neil Bhutta *et al.*, *Payday Loan Choices and Consequences*, at 4 (Vanderbilt L. Sch., Law & Economic Working Paper No. 12-30, 2012). Many of these individuals choose to rely on payday loans because of gaps in access to other, more traditional forms of credit. The average payday borrower is much less likely to have a credit card than the average American consumer. *See* Elliehausen, *supra*, at 31 (Jan. 2009) (survey showing about 75% of American consumers but only 54% of payday borrowers have credit cards). The average payday borrower is also less than half as likely to have a retail credit card. *Id.* In addition, payday borrowers are less likely to own their own homes, thereby eliminating the possibility of home equity loans. *Id.* Credit unions are often unable or unwilling to provide credit to these consumers because of the high cost and high risk of extending credit to typical consumers of payday loans. Victor Stango, *Are Credit Unions Viable Providers of Short Term Credit?* 4 (Feb. 3, 2010). Even those payday-loan borrowers who enjoy access to traditional forms of credit are generally more limited than the average American consumer in the amount of available credit. Payday borrowers, for example, have cumulative credit limits at one-sixth the amount of average consumers. Neil Bhutta, *Payday Loans and Consumer Financial Health*, 47 J. Banking & Fin. 230, 233 (2014).

Payday-loan borrowers are even further constrained at the time they seek a payday loan. At the time of their loans, nearly 80% of payday borrowers have no available credit on their credit cards, and 90% have less than $300 available. Bhutta *et al.*, *Payday Loan Choices*, *supra*,

at 3. Payday borrowers also are disproportionately likely to have already taken out home equity loans, thereby depleting that source of credit. Elliehausen, *supra*, at 31–32. And payday borrowers are disproportionately unable to open new accounts; they are almost three times as likely as average American consumers to have been rejected in their application for additional credit. Elliehausen, *supra*, at 33. That is not to say they are not searching: payday borrowers have on average five times as many credit inquiries, a good proxy for credit applications at traditional lenders, as average American consumers. Bhutta, *Consumer Financial Health*, *supra*, at 233. As several scholars put it, "initial payday loan applications occur precisely when consumers' access to liquidity from mainstream creditors is lowest." Bhutta *et al.*, *Payday Loan Choices*, *supra*, at 3.

Payday-loan borrowers are thus among the "underbanked." *See* Fed. Deposit Ins. Corp., *2011 FDIC National Survey of Unbanked and Underbanked Households*, at 29 (Sept. 2012) (chronicling use of alternative financial products by unbanked and underbanked). Yet despite their lack of access to mainstream credit, payday borrowers, like their more-banked fellow consumers, frequently have significant liquidity needs. And for those needs, they often turn to payday loans as the most cost-efficient form of credit.

Three significant uses of payday loans bear specific mention. First, many consumers use payday loans to cope with income and expense shocks, that is, with unexpected, temporary expenses or shortfalls in income. In one survey, for example, eighty-six percent of payday-loan borrowers strongly or somewhat agreed that their use of a payday loan was to cope with an unexpected expense. Elliehausen, *supra*, at 35. Such income and expense shocks can arise, for instance, from the need for unexpected car repairs or the loss of a job. Second, many consumers use payday loans for income smoothing in the face of income and expense volatility, that is, where the consumer's income or expenses fluctuate over the course of the year, such that credit is needed during times of lower net income to tide the consumer over until times of higher net income. Income volatility may exist for any number of reasons, such as where the consumer works on commission, is scheduled to receive a one-time income supplement (*e.g.*, a holiday bonus), expects to have a seasonal opportunity to earn extra income by working additional hours (*e.g.*, agricultural workers or students), or will satisfy in full some other outstanding debt. Third, some payday borrowers use payday loans to manage accumulated debt, preferring to use the payday loan proceeds to pay down other debt for which nonpayment or default would be more costly.

When used in these ways, it makes little sense to refer to the "affordability" of the loan within the loan period. By design, consumers turn to payday loans as the necessary credit option of choice exactly when their net incomes are unable to satisfy all major financial obligations and basic living expenses. And these consumers often renew or roll over their loans: reborrowing is necessary and desirable where the income or expense shock is not resolved within the duration of a single loan cycle or where the consumer is utilizing an income-smoothing or debt-management strategy over a time horizon longer than the limited term of the initial payday loan.

C. Consumers Would Shift To Worse Alternatives If Payday Loans and Loan Sequences Were Unavailable

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." Bhutta, *Consumer Financial Health*, *supra*, at 233. 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, and the like. Thus, restricting "payday lending as an option for financially-stressed consumers would likely make them worse off and force them to use inferior and less-preferred types of credit, such as pawnshops, or to go without credit." Todd J. Zywicki, *The Case Against New Restrictions on Payday Lending* 9 (Geo. Mason U., Mercatus Ctr., Working Paper No. 09-28, 2009).

Indeed, numerous studies demonstrate that consumers will substitute inferior and more costly alternative forms of credit when they lack access to payday loans. Thus, in States that have banned payday loans, the reduction in payday borrowing leads to increases in pawn loans. Neil Bhutta *et al.*, *Consumer Borrowing After Payday Loan Bans* 3 (2016) (unpublished manuscript). Consumers subject to payday-loan bans also bounce more checks and pay more bank overdraft fees. Donald Morgan *et al.*, *How Payday Credit Access Affects Overdrafts and Other Outcomes*, 44 J. Money, Credit, & Banking 519, 521 (2012). When Georgia banned payday lending, for example, the number of bounced checks skyrocketed. Donald P. Morgan & Michael R. Strain, *Payday Holiday: How Households Fare after Payday Credit Bans* 3 (Fed. Reserve Bank of N.Y., Staff Report No. 309, rev. 2008). "On average, the Federal Reserve check processing center in Atlanta returned 1.2 million more checks per year after the ban," amounting to an "extra $36 million per year in bounced check fees." *Id.* The effect after North Carolina banned payday loans was "very similar." *Id.*; *see also* Jonathan Zinman, *Restricting Consumer Credit Access: Household Survey Evidence on Effects around the Oregon Rate Cap* 3 (Fed. Reserve Bank of Phila., Research Dep't, Working Paper No. 08-32, 2008) (discussing substitution through "checking account overdrafts of various types and/or late bills"); Zywicki, *supra*, at 9–23 (cataloging consumer substitution to various forms of alternative credit).

Crucially, these alternative forms of credit are both more expensive and have equivalent or higher APRs than payday loans—as shown by academic papers and studies that calculate the average costs of these products in terms of dollars and APRs. 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." Bhutta *et al.*, *Consumer Borrowing After Payday Loan Bans*, *supra*, at 5. 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. Zywicki, *supra*, at 15.

Similarly, overdraft fees "can be more expensive than payday credit." Morgan *et al.*, *Overdrafts and Other Outcomes*, *supra*, at 522. A single overdraft charge is typically $50 ($25 to the merchant and $25 to the bank), which is substantially more than $15 for a $100 payday

loan. *Id.* One study estimated that "households served by a given Federal Reserve Regional Check Processing Center … save about $43 million per year in returned check fees" when States permit payday lending. *Id.* at 521. Not only are overdraft fees more expensive than payday credit, but so is the overdraft "protection" offered by most banks. Morgan & Strain, *Payday Holiday*, *supra*, at 4. One survey of eight Chicago banks estimated the APR for their overdraft protection plans at 2,400%. *Id.*; *see also* Zywicki, *supra*, at 12 (documenting APRs of 520% and 1,067%, and noting that "the APR on these overdraft loans can easily exceed the cost of a payday loan"). 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%. *See* Press Release, Consumer Fin. Protection Bureau, CFPB Finds Small Debit Purchases Lead to Expensive Overdraft Charges (July 31, 2014), *available at* http://goo.gl/vNJP8d. 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 "'cheaper product.'" Zywicki, *supra*, at 12 (quoting Shelia Bair, former Chair of the FDIC).

The same is true of revolving credit and credit-card cash advances: consumers "forced to substitute to greater use of revolving credit likely end up paying even higher costs for credit and run into greater financial difficulty." Zywicki, *supra*, at 14. 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, late fees, and other behavior-based fees." *Id.* 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." *Id.* at 15.

Restricting access to payday loans hurts consumers in other ways as well. They are frequently 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. Bhutta *et al.*, *Consumer Borrowing After Payday Loan Bans*, *supra*, at 6; Kelly D. Edmiston, *Could Restrictions on Payday Lending Hurt Consumers?*, Fed. Reserve Bank of K.C., Econ. Rev. 31, 38 (1st Qtr. 2011) (cataloging these consequences). 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. *See* Mann, *Do Defaults on Payday Loans Matter?* 22 (Colum. L. Sch., Ctr. L. & Econ. Studies, Working Paper No. 509, 2014).

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. Zywicki, *supra*, at 17. Research in the United States confirms that where payday credit has been restricted, consumers turn to online and unlicensed lenders. *See* Anna Ellison, Policis, *The outcomes for consumers of differing approaches to the regulation of small dollar lending* (2016). Similarly, research on European markets has shown that when access to

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.

In sum, the Bureau's own "Tell Your Story" and consumer-complaint databases—designed to give the public the chance to air their "troubles" with payday loans—unequivocally demonstrate that payday borrowers overwhelmingly praise payday lending, payday loans, and payday lenders. It is no wonder that the Bureau has ignored its own database in the proposed rule, since its own data fatally undermines the purported justifications for its proposed rule.

Social-science studies, moreover, further confirm the conclusions that must be drawn from the Bureau's own data. In one study of over 1,000 recent payday borrowers, consumers lavished praise on payday loans and payday lenders. The study showed that "nearly all payday loan customers were satisfied. More than half of customers were very satisfied with their most recent payday loan, and about a third of customers were somewhat satisfied." Elliehausen, *supra*, at 41, 50 (Jan. 2009). Another overwhelming majority appreciated the availability of payday loans: 86% of borrowers believe that payday lenders provide a useful service. These satisfied borrowers report that payday lenders employ courteous, friendly, and professional staff that provide timely service with little hassle. And nearly sixty percent of payday-loan borrowers oppose regulation limiting the number of loans they can get in a year. Elliehausen, *supra*, at 50; *see* Elliehausen & Lawrence, *supra*, at 36 (same for limits on renewals and rollovers).

In a more recent study of over 1,000 recent payday-loan borrowers, consumers were even more positive about the utility of payday loans. A full 95% of borrowers reported that they value having the option of taking out a payday loan. Harris Interactive, *Payday Loans and the Borrower Experience*, at 3 (Dec. 2013). The same percentage believes that payday loans provide a safety net. And 98% of these borrowers described payday lenders with positive words: overwhelming numbers of borrowers said that lenders were respectful (80%), helpful (79%), knowledgeable (78%), trustworthy (78%), truthful (77%), thorough (74%), and/or caring (71%).

Even studies run by organizations staunchly opposed to payday lending have found that payday borrowers are positive about their experiences. *See* Rob Levy & Joshua Sledge, *A Complex Portrait – An Examination of Small-Dollar Credit Consumers*, at 21 (Ctr. for Fin. Serv. Innovation, Aug. 2012). One such study found that well over half of borrowers were satisfied with their payday loans (indeed, possibly up to 75% of borrowers were satisfied—the study is ambiguous as to whether another 20% were neutral or satisfied). And a full third of borrowers in this study would use a payday loan again "without hesitation," while another 44% would use it again depending on the circumstances and available options.

F. The Evidence Demonstrates That Payday Loans Improve Consumer Financial Health

An overwhelming 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. These empirical studies, included in the appendix hereto, document the following specific findings:

- Access to payday loans enables consumers to avoid bad financial outcomes. After payday loans were banned in Georgia and North Carolina, households in those States "bounced more checks after the ban, complained more about lenders and debt collectors, and were more likely to file for bankruptcy under Chapter 7." Donald P. Morgan & Michael R. Strain, *Payday Holiday: How Households Fare after Payday Credit Bans* 3 (Fed. Reserve Bank of N.Y., Staff Report No. 309, rev. 2008). Morgan and Strain noted that the increase in Chapter 7 filings was accompanied by a decrease in Chapter 13 bankruptcy filings. *Id.* at 6. But because Chapter 13 is for filers with substantial assets to protect, this pattern suggests "a slipping down in the lives of would-be payday borrowers: fewer bother to reschedule debts under Chapter 13, more file for Chapter 7, and more simply default without filing for bankruptcy." *Id.* at 6.

- Restricting access to payday loans causes consumers to shift to inferior substitutes and worsens their overall financial health. Zinman, *supra*. Consumers responded to Oregon's payday lending restrictions by switching to "incomplete and plausibly inferior substitutes," such as "checking account overdrafts of various types and/or late bills." *Id.* at 4. Further, these consumers "were also significantly more likely to experience an adverse change in financial condition," such as becoming unemployed or having a negative subjective assessment of overall financial condition, which "suggest[s] that restricting access to consumer credit hinders productive investment and/or consumption smoothing at least over the short term." *Id.* at 16–17.

- Access to payday loans mitigates distress in response to a financial shock. Adair Morse, *Payday Lenders: Heroes or Villains?*, 102 J. Fin. Econ. 28 (2011). Using data on natural disasters in California, along with data on the availability of payday loans in various areas, Morse showed that "foreclosures increase dramatically … in the year following a natural disaster," but that approximately 25% of that "increase is mitigated by access to a [payday] lender." *Id.* at 42. "The results indicate that payday lenders offer a positive service to individuals facing financial distress." *Id.* at 29. Without access to payday loans, "small-scale personal emergencies can lead to bounced checks, late fees, utility suspensions, repossessions, and, in some cases, foreclosures, evictions and bankruptcies." *Id.* at 28–29. Given access to payday loans, however, consumers are able to mitigate these harms.

- Restrictions on payday lending can harm borrowers' credit standing. Kelly D. Edmiston, *Could Restrictions on Payday Lending Hurt Consumers?*, Fed. Reserve Bank of K.C., Econ. Rev. 31, 37–38 (1st Qtr. 2011). Using credit-score data from all States, Edmiston found that "consumers in counties under restrictive state payday lending laws were more likely to have low credit scores than consumers in counties where payday lending is legal." *Id.* at 44. This was true even after controlling for

income across counties, meaning that the number of people with low credit scores was "lower in low-income payday loan counties than in low-income counties without legal access to payday lending." *Id.* at 45. The same is true for late bill payments: "consumers living in counties where payday lending is legally accessible were less likely to have late bill payments than consumers in counties under restrictive state payday lending laws." *Id.* Also, restrictions on payday lending do not lead to increases in the use of traditional forms of credit, such as credit cards, which suggests that bans on payday loans compel consumers to use other nontraditional credit sources less favorable than payday lending. *Id.* at 48.

- Access to payday loans does not worsen financial health by causing delinquencies on other accounts. Desai & Elliehausen, *The Effect of State Legislation Restricting Payday Lending on Consumer Credit Delinquencies: An Investigation of the Debt Trap Hypothesis* (Mar. 31, 2014) (unpublished manuscript). Payday loan bans in Georgia, North Carolina, and Oregon, resulted in "small *increases* in delinquencies" for three other types of consumer credit accounts (revolving, retail, and installment) relative to areas in neighboring States where payday loans were available. *Id.* (emphasis added). Yet if access to payday loans worsens financial health, one would predict that payday loan bans would *decrease* delinquencies on other forms of credit. These results refute the theory that access to payday loans worsens consumer financial health.

- Access to payday loans has no negative effect on various measures of consumer financial health. Bhutta, *Consumer Financial Health*, *supra*, at 242. Using nationwide credit reporting data and "geographic and temporal variation in access" to payday loans "arising from differences in state lending laws," Bhutta showed that the availability of payday loans has no significant effect on credit scores, new delinquencies, and the likelihood of exceeding one's credit limit. *Id.* at 231. The availability of payday lending has "little to no effect" on these measures of financial health. *Id.* at 242.

- Access to payday loans did not negatively impact credit scores. Bhutta *et al.*, *Payday Loan* Choices, *supra*, at 3. In a more targeted study on credit scores using "payday loan application histories from a large payday lender," researchers compared long-run credit scores of payday loan applicants who were barely approved for a loan versus applicants who were barely rejected for a loan. Subsequent credit scores "differ[ed] very little between those barely accepted and those barely rejected for payday loans," demonstrating that "payday loan access appears irrelevant" to credit scores—a key indicator of financial health. *Id.* at 5.

- Defaulting on a payday loan does not negatively impact credit scores. Mann, *Do Defaults on Payday Loans Matter?*, *supra*. Mann examined payday borrowing histories along with credit bureau information, and found that (1) credit scores of

borrowers had dropped significantly in the two years *prior* to taking the payday loan, (2) credit scores dropped by an insignificant amount immediately following default, and (3) credit scores significantly increased "in each of the two years *after* the year of default." *Id.* at 20. These results suggest that "the effect of a default on the borrower's overall financial health is trivial at best." *Id.* at 22. A "payday loan is plainly not the *beginning* of serious financial problems," and consumers in fact benefit from a "cognizable rebound" in their financial health in the years following a default. *Id.*

- Overall, access to payday loans improves consumer financial health. Bart J. Wilson *et al.*, *An Experimental Analysis of the Demand for Payday Loans*, 10 B.E. J. Econ. Analysis & Policy, no. 1, art. 93, at 19 (2010). Wilson and others 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. *Id.* at 12. They used a computer simulation with test subjects who were asked to manage a budget, and required to make credit and purchasing choices in response to recurring bills as well as infrequent and unpredictable "large bill shocks." *Id.* at 7. The study assigned "consumption points" based on payment of bills at the appropriate time, and a failure to accrue a certain number of consumption points in any given "month" (approximately 120 seconds in real time) meant lack of financial survival. *Id.* at 5–6. In this experiment, "the existence of payday loans, all else fixed, increase[d] the probability of financial survival by 31%." *Id.* at 15. In other words, consumers are better able to manage their financial circumstances with access to payday loans than without.

- A synthesis of the available evidence shows that (1) "[t]he primary reason why consumers use payday lenders is because they have an urgent need for credit and because no less-expensive option is available," (2) "[e]liminating payday lending as an option for financially-stressed consumers would likely make them worse off and force them to use inferior and less-preferred types of credit, such as pawnshops, or to go without credit," and (3) "[o]n average, access to payday loans appears to make it *easier*, not more difficult, for low-income borrowers to manage their finances." Zywicki, *supra*, at 9, 21.

- Studies that looked specifically at reborrowing confirm that the ability to reborrow or roll over payday loans is beneficial for consumers. One study examined payday borrowers' credit scores—"an extremely useful proxy for overall consumer financial health"—using data from three large payday lenders, and compared scores in States with restrictive regulations on reborrowing with scores in States with less restrictive or no reborrowing limits. Jennifer Lewis Priestley, *Payday Loan Rollovers and Consumer Welfare* 5 (Dec. 5, 2014), *available at* http://ssrn.com/abstract=2534628. Priestley found that "longer-term borrowers have better outcomes (measured by changes in credit scores) than consumers whose borrowing is limited to shorter

durations," and that "payday borrowers in less-restrictive states (i.e., those which permit many or unlimited rollovers) generally have better outcomes than those in more restrictive states, in each case controlling for the borrowers' initial financial condition." *Id.* Indeed, "the total number of payday loan rollovers was found to be strongly positively related to changes in credit score," meaning that "not only did sustained usage *not* contribute to a negative outcome, it contributed to a positive outcome for borrowers." *Id.* at 23. Thus, denying consumers access to payday credit—whether at the time of the original loan or upon reborrowing—has "welfare-reducing consequences." *Id.* The study "add[s] to a growing body of research which has found that restricting access to payday credit, whether generally or at refinancing, has negative consumer-welfare consequences." *Id.* at 6.

- Further supporting these conclusions is the laboratory experiment discussed above, Wilson *et al.*, *supra*, at 15 (2010). Test subjects who took out ten or fewer loans had better financial success (as measured in the experiment) than those who lacked access to payday loans altogether. *Id.* This suggests that access to rollovers lowers the risk of financial failure in the face of unexpected expenditures, at least until a borrower takes out ten or more successive loans in a sequence. *Id.*

In sum, the studies show that consumer access to payday loans under current practices, *i.e.*, with reborrowing permitted and without the Bureau's ability-to-repay test, improves consumer financial health.

G. Payday Borrowers Understand the Nature of the Product, Including Its Costs and Risks, and Reborrow Because They Need Longer Term Credit

The proposed rule nonetheless rests on the assumption that consumers do not understand the substance of a payday loan. This is false. Empirical research 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—much better than the government bureaucrats who are far removed from their daily lives.

- One survey questioned over 1,300 borrowers at the time they took out payday loans, and then compared their repayment expectations with actual repayment data from the lender. Ronald Mann, *Assessing the Optimism of Payday Loan Borrowers*, 21 Sup. Ct. Econ. Rev. 105, 116 (2014). The borrowers' expectations about repayment and rollovers were "surprisingly accurate." *Id.* at 118. In fact, "about 60% of the borrowers predicted the final repayment date" within a fourteen-day window, meaning that "most borrowers could predict to within one pay period when they would be free of debt." *Id.* Further, "most borrowers expected that they would continue borrowing for some time after the initial loan," *id.*, suggesting "that a strong majority of those using the product have a basic understanding of what will happen when they borrow," *id.* at 123. These findings directly contradict the claim that

extended use of payday loans is the product of consumers' misunderstanding of the product or irrational optimism about when the loan will be repaid. *Id.* at 118.

- In another survey of over 1,000 borrowers who had recently repaid a payday loan (without further reborrowing), a research group asked consumers if they had accurately predicted how long it would take them to "completely repay the loan." Harris Interactive, *Payday Loans and the Borrower Experience* (Dec. 2013). Of these borrowers, 94% responded that they were able to repay their payday loan in the amount of time they had expected. *Id.* Also, over 90% responded that they used payday lending responsibly, carefully weighed the risks and benefits of taking out a payday loan, and considered the overall costs they would incur before taking out a payday loan. *Id.* at 4. Finally, these borrowers reported high levels of satisfaction with payday lenders in general and their experience with payday loans in particular. *Id.* at 6, 10–11.

- A similar, more recent survey found the same results. *See* Tarrance Group *et al.*, *Borrower & Voter Views of Payday Loans* (2016). The vast majority of payday borrowers "completely understood how long it would take to pay off the payday loan" and "completely understood the finance charges" they would pay, and the "payday lender clearly explained the terms of the loan." *Id.* at 19. The overwhelming majority of payday borrowers also reported that they "carefully thought about the risks and benefits" before taking out the loan. *Id.* Finally, 96% of borrowers reported that payday loans had been very useful or somewhat useful to them. *Id.* at 17.

- Likewise, in a survey of consumers who had used a payday loan at least once in the preceding year, borrowers reported that they had accurately predicted how long it would take them to pay off their loan, and also reported high levels of satisfaction with the product. Rob Levy & Joshua Sledge, *A Complex Portrait — An Examination of Small-Dollar Credit Consumers* (Ctr. for Fin. Serv. Innovation, Aug. 2012). A large majority of payday borrowers reported the loan costing no more than expected; 68% of borrowers repaid their loans in the same or less time than they had expected; and 77% of loan borrowers said they would use the product again. *Id.* at 21.

- A survey of consumers who had taken out or renewed a payday loan in the preceding three months showed significant consumer deliberation prior to taking out the loan. Elliehausen, *supra*. Of the only 10.8% of borrowers who were dissatisfied with their most recent payday loan, less than 1% thought there was insufficient or unclear information. *Id.* at 41. And only 15.9% felt it was "[t]oo difficult to get out of debt." *Id.* at 42. These borrowers, together with the 1.8% of satisfied borrowers who mentioned this reason, accounted for just 3.2% of all payday-loan borrowers. Thus, very few borrowers "felt that payday loans were a debt trap." *Id.* at 42, 62. Most borrowers also deliberated before obtaining the loan, and about half "said they considered another source of credit before they obtained their most recent new

payday loan." *Id.* at 39, 61. "Nearly all payday loan customers were satisfied with their decisions." *Id.* at 41.

- A field experiment tested whether the high cost—*i.e.*, what the Bureau calls "unaffordability"—of payday loans caused consumers to reborrow, or whether consumers reborrowed simply because they had a need for a longer-term loan. Marc Anthony Fusaro & Patricia J. Cirillo, *Do Payday Loans Trap Consumers in a Cycle of Debt?* (Nov. 16, 2011). Participants in the experiment were consumers who had used a payday loan in the previous sixty days. *Id.* at 10. The researchers offered one group of borrowers an initial payday loan at no cost, with rollovers incurring the usual fee of $15 per $100, while another group took out loans at the usual cost. *Id.* The result was that borrowers with a cost-free initial loan "fully repaid their loans" without reborrowing "no more frequently" than those borrowers who paid the usual fee, suggesting that the cost or unaffordability of payday loans "do[es] not drive a 'cycle of debt.'" *Id.* at 28.

The studies discussed above in Part I.F also undermine the theory that payday loans trap consumers in a cycle of debt that worsens their financial condition. As explained, when access to payday loans is restricted, consumers turn to inferior substitutes. This "suggests that the demand for [payday] loans is fueled by a general desire for short-term credit," not "a decision-making bias that is unique to the design of payday loans." Bhutta, *et al.*, *Consumer Borrowing*, *supra*, at 24–25. Similarly, payday loan bans do not improve the rate of delinquencies on other consumer credit accounts, meaning that access to payday loans does not worsen consumer financial health. Desai & Ellihausen, *supra*, at 5. Finally, payday loan bans result in more bounced checks, more complaints about debt collectors, and more Chapter 7 bankruptcy filings. Morgan & Strain, *Payday Holiday*, *supra*, at 3. Together, all of these "findings contradict the debt trap hypothesis." *Id.*

* * * *

In sum, millions of consumers responsibly rely on payday loans and payday loan sequences as superior alternatives for meeting their credit needs. Consumers overwhelmingly praise the product and have full understanding and appreciation of its costs and risks. And academic studies confirm that the availability of payday loans has a net positive effect on consumer welfare. The proposed rule would eliminate these beneficial uses of this highly valued product, thus hurting the very consumers that the Bureau is charged with protecting.

II. The Proposed Rule Would Devastate the Payday Loan Industry and Deny Consumers Access to This Essential Form of Credit

The proposed rule is draconian. It would ban virtually all of the payday loans that are currently made. Indeed, it would make payday lending so unprofitable that it would virtually eliminate the entire payday-lending industry, with devastating effects for consumers, small businesses, and local economies.

A. The Proposed Rule

The principal element of the proposed rule is the imposition of an ability-to-pay requirement applicable to consumer loans with a contractual duration of forty-five days or less. Pursuant to this requirement, lenders of such short-term loans would be required to make a reasonable determination that the consumer's "residual income" during the term of the loan—that is, the consumer's net income minus the amounts payable for major financial obligations (housing expense, debt obligations, and child-support obligations)—is sufficient to make *all* payments under the loan (*i.e.*, principal, interest and fees) and to 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. 81 Fed. Reg. 47,864, 48,169 (July 22, 2016) (proposed 12 C.F.R. § 1041.5(b)).

Moreover, because the Bureau views reborrowing as an indication that the consumer lacked the ability to repay the loan, *see id.* at 47,957, there would be a presumption that a consumer is incapable of repaying subsequent loans made within a thirty-day period of the initial loan. *See id.* at 48,170 (proposed § 1041.6(b)).[3] For the second and third loans in a sequence, this presumption would be rebuttable and could be overcome only if the lender reasonably determines that the consumer's financial capacity has sufficiently improved, such that the consumer will have the ability to repay the new loan despite the unaffordability of the prior loan (*e.g.*, by a projected increase in net income or decrease in major financial obligations). *Id.* (proposed § 1041.6(e)). After the third loan in a sequence, there would be a conclusive presumption that the consumer lacks the ability to repay the loan. *Id.* Loans would be capped at three in a row followed by a mandatory thirty-day cooling off period, during which time no additional loans could be made. *Id.* (proposed § 1041.6(f)).

The proposed rule would permit lenders 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 would be required to verify income and borrowing history, and, through the use of a registered information system, confirm that the consumer does not have, and over the preceding thirty days has not had, any outstanding covered loans, and that the loan would 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. *Id.* at 48,170–71 (proposed § 1041.7). If a consumer meets these requirements, a lender would be 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.* (proposed § 1041.7(b)). Lenders must make specified written disclosures in connection with these loans, including, at time of first loan, notice of the

[3] This presumption does not apply if the new loan has a principal balance of 50% less than the first loan, or, in the case of a rollover, the consumer would not owe more on the new loan than the consumer paid on the loan that is being rolled over—in other words, limited reborrowing is permitted without an ability-to-repay determination if the loan is amortized over the period of the reborrowing. *See id.*

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.* at 48,171 (proposed § 1041.7(e)).

Similar ability-to-repay requirements apply to longer-term installment loans (*i.e.*, those with a duration of greater than forty-five days) with a total cost of credit in excess of 36% per year, where the lender holds either account access (a "leveraged payment method") or a non-purchase-money security interest in the borrower's vehicle. *Id.* at 48,172–74 (proposed §§ 1041.8–.11). Pursuant to two "conditional exemptions," a lender would have two options to make longer-term installment loans without complying with the ability-to-repay requirements. First, it would be permitted to make a loan between $200 and $1,000 with a term of up to six months if the loan is repayable in two or more substantially equal payments at substantially equal intervals of at least monthly; completely amortizes during the term of the loan; carries a total cost of credit not more than permitted under the National Credit Union Administration's ("NCUA") payday alternative loan ("PAL") program loan (currently 28%); and does not result in the consumer's having more than three loans from the lender or its affiliates within a 180-day period. *Id.* at 48,173–74 (proposed § 1041.11). Second, it would be permitted to make a loan with a term of no more than twenty-four months if the loan completely amortizes over at least two substantially equal payments at substantially equal intervals, carries a modified total cost of credit of no more than 36% (plus a reasonable origination fee), and does not result in the consumer having more than two loans from the lender or its affiliates within a 180-day period. *Id.* at 48,174–75 (proposed § 1041.12). Under the second option, a lender would be required to maintain annual default rates of no greater than 5%, and, if it misses that target, to refund to each consumer a portion of his origination fee. *Id.* (proposed § 1041.12(d)).

The proposed rule also prohibits lenders from making more than two attempts to withdraw payment from a consumer's account without obtaining a new, specific authorization from the consumer, *id.* at 48,175–76 (proposed §§ 1041.13–.14); requires disclosures to consumers of payment-transfer attempts, *id.* at 48,176–79 (proposed § 1041.15); mandates the use of new credit reporting systems, *id.* at 48,179–81 (proposed §§ 1041.16–.17); imposes new compliance and record-keeping requirements, *id.* at 48,181–82 (proposed § 1041.18); and prohibits actions taken with the intent to evade any requirements of the rule, *id.* at 48,182 (proposed § 1041.19).

B. The Proposed Rule Would Dramatically Reduce the Supply of Credit and Would Devastate the Payday Loan Industry

If adopted, the proposed rule would greatly increase the costs to payday lenders of doing business.[4] But its larger impact would be to reduce dramatically the supply of credit by

[4] The proposed rule would impose 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 proposed rule's onerous record-retention obligations.

prohibiting the vast majority of payday loans that are currently made. This in turn would make payday lending so unprofitable that it would eliminate virtually 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.

The proposed rule's draconian requirements, by their terms, would 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 would 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 would 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 would be forced to eschew the ability-to-repay approach altogether and "make loans primarily using the Alternative approach." 81 Fed. Reg. at 48,121. But the Bureau estimates that under the alternative approach, loan volumes will decrease by between 55% and 62%. *Id.* at 48,122.

These simulations underestimate the full effect on loan volumes that would follow implementation of the proposed rule. Among other things, they improperly assume that consumers will not alter their behavior in response to the proposed rule, including that consumers will continue to borrow in the maximum amounts and durations permitted by the proposed rule (and, in particular, by the alternative approach), 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.

Other studies confirm that the Bureau's already dramatic assessment of the proposed rule's devastating impact is too low. One study conducted after the Bureau issued the proposed rule found that the proposed rule's ability-to-repay requirement would lead to a 90.5% to 92.7% decline in loan volumes, while the proposed rule's alternative requirement would reduce loan volumes by 81.7%. *See* Rich Hackett, *Evaluating CFPB Simulations of the Impact of Proposed Rules on Storefront Payday Lending* 3, 7 (nonPrime101 white paper). A second study concluded that the proposed rule would result in a reduction in the supply of credit of 82.5%. *See* Arthur Baines *et al.*, Charles River Assocs., *Economic Impact on Larger Storefront Lenders of the Payday Lending Rules Proposed by the CFPB* (Oct. 7, 2016) (attached hereto as Exhibit D).

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 proposed rule by its terms does not prohibit. The Bureau concedes that the reborrowing

restrictions of the ability-to-repay requirements will result in revenue losses equal to volume losses, *i.e.*, between 60% and 81%, in addition to the loss of revenues resulting from the application of the ability-to-repay requirement to the first loan in a sequence, and that under the alternative approach, lender revenues will decrease by between 71% and 76%. *See* 81 Fed. Reg. at 48,122. One of the studies referenced above found that the proposed rule's alternative approach would reduce revenues by 81.7%. Hackett, *supra*, at 3, 7. The other study similarly found that the proposed rule would result in average revenue decrease of 83% (with some variation among States) for larger storefront lenders. Baines, *Economic Impact on Larger Storefront Lenders*, *supra*, at 9. A study of the impact of the Bureau's substantially similar March 2015 outline of proposals estimated that the Bureau's requirements would cause payday-lending revenues to decrease (depending on region) by between 70% and 92%, with an average revenue decrease of 82%. *See* Arthur Baines *et al.*, Charles River Assocs., *Economic Impact on Small Lenders of the Payday Lending Rules under Consideration by the CFPB*, at 8 (May 12, 2015).

Declines in revenue of this magnitude will be "fatal for most businesses." Hackett, *supra*, at 16; *see also* Baines, *Economic Impact on Larger Storefront Lenders*, *supra*, at 11 (estimating that at least 70% of the approximately 4,100 stores studied would experience net losses); Baines, *Economic Impact on Small Lenders*, *supra*, at 10 (estimating that 84% of the 200 stores studied would experience net losses). Most of these unprofitable stores would need to close, or incur the costs of shifting to selling other products. Indeed, the Bureau euphemistically admits that, if lenders do not offer alternative products, "the ultimate net reduction in revenue would likely lead to contractions of storefronts of a similar magnitude." *Id.* at 48,126. Such store closures will result in an even further contraction of the supply of payday credit—not to mention significant job losses and other economic damage to those regions. *See* Baines, *Economic Impact on Larger Storefront Lenders*, *supra*, at 12–13 (estimating billions of dollars in economic consequences); Marsha Courchane & Steli Stoianovici, Charles River Assocs., *Economic Impact of the Payday Lending Industry* (June 11, 2015) (attached hereto as Exhibit E).

III. The Targeted Payday Lending Practices Are Not Unfair

The Bureau contends that an ability-to-repay requirement is needed to eliminate unfair lending practices. But in order to find unfairness, the Bureau misconstrues the statute, presumes consumer harm that does not exist, makes unwarranted assumptions about consumer behavior, and unreasonably discounts or ignores the substantial benefits that consumers obtain from payday loans as currently marketed.

The proposed rule would prohibit as unfair and abusive the practice of "mak[ing] a covered short-term loan without reasonably determining that the consumer will have the ability to repay the loan" according to its terms—*i.e.*, without reborrowing or extending the term of the loan. 81 Fed. Reg. at 48,168–69 (proposed 12 C.F.R. §§ 1041.4(a), 1041.5(b)); *see also id.* at 47,936, 47,946. But the Bureau may not declare a business practice unfair unless it has a "reasonable basis to conclude" that (1) the targeted practice causes or is likely to cause "substantial injury to consumers," (2) such injury "is not reasonably avoidable by consumers,"

and (3) such injury is "not outweighed by countervailing benefits to consumers or to competition." CFPA § 1031(c)(1), 12 U.S.C. § 5531(c)(1). There is no reasonable basis or evidentiary support for these conclusions here. Indeed, the available evidence demonstrates to the contrary.

A. Payday Loans and Loan Sequences Are Beneficial, Not Harmful, to Consumers

As detailed above in Part I, consumers benefit substantially from the availability of payday loans and payday loan sequences. Indeed, based on the available evidence, it is simply impossible to conclude that these loans, even when made without a determination that the borrower will be able to repay the loan within its term, cause or are likely to cause substantial injury. And because the evidence does not establish harm, the Bureau is forced to presume its existence.

The Bureau asserts that payday loans, as currently marketed without an ability-to-repay determination, cause or are likely to cause three types of substantial injuries to consumers: "extended sequences of reborrowing, delinquency and defaults, and certain collateral harms from making unaffordable payments." 81 Fed. Reg. at 47,919; *see also id.* at 47,936–37. 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.

First, in equating reborrowing with substantial injury, the Bureau improperly assumes without evidence that the extended use of payday loans is harmful to consumers; in fact, the available evidence shows that payday loans and loan sequences provide net benefits, allowing cash-strapped and credit-starved consumers to satisfy necessary expenses without resort to more costly and less affordable alternatives. *Second*, the Bureau mischaracterizes the consequences of payday-loan defaults, and unreasonably seeks to restrict the availability of payday loans in response to harms allegedly caused by repayment and collection efforts. *Third*, the Bureau lacks any evidence that the "collateral consequences" it identifies are caused—rather than mitigated—by payday loans. Accordingly, there is virtually no evidentiary basis for a rule that, if adopted, would decimate an entire, lawful industry.

1. The Bureau improperly and illogically presumes that reborrowing is harmful to consumers, when the evidence shows otherwise

The Bureau contends that the "primary" harm caused by making payday loans without an assessment of the consumer's ability to repay the loan at the end of its term is that "many consumers end up reborrowing over and over again," leading to expensive "long-term cycle[s] of debt." *Id.* at 47,932; *see also id.* at 47,936. This is problematic, according to the Bureau, because it results in "very high total costs of borrowing." *Id.* at 47,925; *see also id.* (relying on the "dramatic" "cost of reborrowing"); *id.* at 47,929 (relying on "costs that come from being delinquent or defaulting"); *id.* at 47,931 (relying on "collateral harms" stemming from the high cost of making payday loan payments); *id.* at 47,936 (relying on "substantial fees"); *id.* (relying

on "substantial costs"). Thus, consumers who reborrow many times "pay substantial fees," and even consumers who reborrow only once or twice "will still incur substantial costs related to reborrowing or rolling over the loans." *Id*. at 47,936.

As explained later, the Act's usury restriction prohibits the Bureau from seeking to regulate this alleged harm. *See infra* Part XIII.A. Regardless, there is nothing inherently harmful about either reborrowing or paying a high rate of interest. That is precisely why the Act prohibits the Bureau from imposing a usury limit. *See* CFPA § 1027(o),12 U.S.C. §5517(o). Instead, to determine whether these practices constitute substantial injury, one would need to compare the benefits of payday loans to the less affordable, more costly alternatives available to these consumers and assess whether, overall, consumers are harmed by this product. The Bureau here utterly failed to undertake this analysis.[5]

a. To begin with, the Bureau provides no evidence that payday loans are in fact highly expensive in the abstract. The Bureau criticizes the purported high cost of payday loans when expressed in the form of an annual percentage rate ("APR"). *See, e.g.*, 81 Fed. Reg. at 47,869 (noting APR of 391%). But APR is a highly misleading measure of the cost of a payday loan. The Bureau's own findings establish that virtually no borrowers, even those with frequent renewal and rollover activity, pay interest for an entire year. Thus, "for short-term, small-dollar loans, the finance charge seems to be the most useful measure of credit price under common circumstances." Thomas A. Durkin & Gregory Elliehausen, *Assessing the Price of Short-Term Credit* (Nov. 6, 2013) (unpublished manuscript). And when the costs of alternative forms of short-term credit (such as credit-card late fees, bank overdraft protection, bounced-check fees, and the like) are similarly annualized, many have comparable or even higher APRs than payday loans—as high as 17,000% by the Bureau's own estimates in one scenario. *See supra* Part I.C. Nor are payday-loan prices "high" when measured by objective economic indicia, such as whether payday lenders earn excess profits. *See, e.g.*, Huckstep, *supra*, at 203 (survey finding high fees justified by high store expenses and high loan losses); Mark Flannery & Kathryn Samolyk, *Payday Lending: Do the Costs Justify the Price?* (FDIC Ctr. For Fin. Research, Working Paper No. 2005-09, 2005) (study finding that fixed operating costs and loan-loss rates justify a large part of the high APRs charged on payday loans).

b. In any event, the supposedly high cost of payday loans and payday loan sequences, without more, tells us nothing about whether consumers are harmed. The fact that a consumer incurs expense—even substantial expense—when purchasing a product or service does not, in and of itself, establish substantial injury. To determine whether a consumer is injured, it is necessary to consider, among other things, the value of the benefits received by that consumer, including the avoidance of more costly and less affordable alternatives.

As discussed above, payday loans benefit consumers primarily by providing access to needed funds that they could not otherwise obtain, either at all or without incurring even higher

[5] To the extent the Bureau reads its UDAAP authority to permit the Bureau to forgo such an assessment of consumer injury, its interpretation is inconsistent with, and/or an unreasonable interpretation of, the statute.

costs, because these consumers lack access to traditional forms of credit. *See supra* Part I. 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." Bhutta, *Consumer Financial Health*, *supra*, at 233; *see also supra* Part I. Payday lending allows consumers to avoid alternative forms of lending that they do not prefer or that may be unavailable. *See supra* Part I. And through expanding financial choices, payday loans enable consumers to avoid more costly alternatives, such as overdraft fees for bounced checks, late fees for the missed payment of bills, and the collateral consequences of the non-payment of debts, including termination of crucial services (such as utilities), loss of bank accounts, loss of a vehicle, and damage to a consumer's credit score. *See supra* Part I.

c. This is true not only for payday loans that are paid in full at the end of their terms, but also for payday loan sequences, including those where it is expected at the time of the initial loan that the consumer will need to reborrow one or more times—that is, where the consumer cannot satisfy the Bureau's proposed ability-to-repay requirement. Consumers who enter into thirty-year mortgages take on very long-term debt, but no reasonable person suggests that this fact alone demonstrates that thirty-year mortgages cause substantial harm to consumers. With respect to payday loan sequences, the length of consumer indebtedness shows only that some consumers are engaging in reborrowing or rollover activity. This tautology is insufficient to sustain the rule. So is the fact that payday loan sequences sometimes result in substantial fees—as just explained, high cost alone is not evidence of harm. The question the Bureau must—but fails to—confront is whether such reborrowing or rollovers, on balance, have net positive value to the consumer. Here again it is crucial to take into account the benefits received by consumers engaged in reborrowing or rollover activity, including the avoidance of more costly alternatives.

The Bureau's assumption that reborrowing a payday loan is necessarily harmful is easily refuted. Take, for example, a consumer with a monthly net income of $3,000, outstanding loan payments of $1,000 per month, rent of $1,500 per month, and basic living expenses totaling $500 per month. Because his net income equals the sum of his major financial expenses and basic living expenses, this consumer by the Bureau's definition lacks the ability to repay a payday loan at the end of its term. The proposed rule would thus make it an unfair practice to extend to this consumer a payday loan of $600 to pay for necessary car repairs. That would be so even if, for example, the consumer correctly anticipates being able to repay the loan in full after four reborrowings because he by that point will have repaid his other outstanding debt in full, or will have received a holiday bonus from his employer or a seasonal opportunity to earn extra income by working additional hours. And it would be so no matter how rational the consumer's decision, and no matter how costly it would be to the consumer to forgo the payday loan in favor of some other solution to his financial shortfall, like non-payment of bills or costly default on his other debt obligations.

The Bureau fails to engage in this sort of consumer-focused analysis. After observing that "a meaningful share of borrowers" have very long sequences of loans, the Bureau simply

asserts that this is a "negative outcome[]" (81 Fed. Reg. at 47,925)—thus improperly taking as "an article of faith" that "sustained use is harmful to consumers," Priestley, *supra*, at 3. The Bureau makes no effort to determine what value payday borrowers receive from loan sequence or whether payday borrowers (either individually or in the aggregate) are better off with payday loan sequences than without them. And it conducts no analysis at all of consumer satisfaction with the product. Instead, the Bureau reflexively dismisses the benefit of payday loan reborrowing as "what amounts to a temporary 'reprieve' from their current situation." 81 Fed. Reg. at 47,939. In one telling example, the Bureau proclaims that, "[a]fter just three reborrowings, the borrower [who took out a payday loan of $350 with a typical fee of $15 per $100] will have paid $140 simply to defer payment of the original principal amount by an additional six weeks to three months." *Id.* at 47,925. But the Bureau never acknowledges that deferring payment of the principal can mean a great deal to a consumer who has to choose this month between paying the phone bill, fixing the car, or paying back the loan. Nor does the Bureau acknowledge that the available alternatives can come at a much higher cost, which is why consumers prefer payday loans over their other options. And the Bureau fails to consider that—due to irregular income, temporary or seasonal employment, the satisfaction of outstanding debts, and other circumstances—the income and expenses of many consumers fluctuate over periods of time longer than the two-week or thirty-day durational term of a typical payday loan, such that a consumer who lacks the ability to repay a payday loan at the end of its term does not necessarily lack the ability to responsibly manage the loan and his other expenses until a later time when he can repay the loan. *See supra* Part I.B (discussing this sort of strategic borrower behavior). Without such analysis, the Bureau lacks any basis at all to conclude that reborrowing causes or is likely to cause harm.

Relatedly, the Bureau admittedly makes no attempt to engage in any "quantitative analysis of benefits and costs" of access to payday loans and payday loan sequences. 81 Fed. Reg. at 47,938. 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. *See id.* at 47,920–32 . It uses no scientifically reliable studies of consumers of payday loans or studies that compare consumer-welfare outcome between those States allowing rollover activity and those States that sharply limit it. *Id.* at 47,936–40. 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. *Id.* And it fails to assess how many payday borrowers are injured and in what magnitude, thus making it impossible to support its characterization of the injury as "substantial."

The Bureau also offers no evidentiary support or reasoned analysis in support of the draconian inability-to-repay presumptions reflected in the proposed rule, which categorically cut off consumer access to payday loans after three loans in a sequence and, as a practical matter, effectively prevent even a second loan except in unusual circumstances. *See supra* Part II.A. The Bureau expresses particular concern about longer loan sequences, noting that "the median borrowing level" for payday loan consumers is "10 loans over the course of a year," and

emphasizing one study showing that the average borrower will have at least one loan sequence of nine loans, that 25% of borrowers will have a loan sequences of eleven loans, and that 10% of borrowers will have at least one loan sequence of twenty-two loans. *Id.* at 47,926–27. But the Bureau does not even show why this is harmful, much less why an arbitrary cap of three loans makes sense. And it fails to explain why, instead of targeting these longer sequences, the proposed rule effectively bans all rollovers (and categorically bans four or more loans in a sequence).

d. The lack of evidence of consumer harm and the unreasonableness of the Bureau's presumptions of harm are sufficient to render the proposed rule an improper exercise of the Bureau's authority to regulate unfair practices. Moreover, contrary to the Bureau's assumptions, numerous scientifically rigorous studies confirm that payday lending affirmatively benefits consumer financial health or, at a minimum, does not harm consumers. *See supra* Part I.F. Other studies have shown that consumers choose payday loans because they are the best available option, and that consumers are highly satisfied with the payday loan product. *See supra* Part I.D, E & G. This evidence thoroughly undermines the Bureau's conclusions, showing that (i) access to payday loans and payday loan sequences improves or does no harm to various measures of consumer financial health, and (ii) consumers themselves report that they choose payday loans because they are the most affordable option available, and also report high levels of satisfaction with their borrowing experience. At a minimum, this evidence demonstrates that the Bureau has failed to carry *its* burden of showing consumer injury.

i. The relevant evidence shows that consumers benefit from access to payday loans, and that, conversely, restricting access does not improve financial health. *See supra* Part I.F. As shown in various studies, access to payday loans (1) allows consumers to avoid worse alternatives, (2) reduces mortgage foreclosures in response to a financial shock, (3) improves or does not worsen credit scores, (4) does not lead to default on other obligations, and (5) reduces (or at a minimum does not lead to) bankruptcy. Consider each point in turn.

First, a common alternative to payday credit is to write a check with insufficient funds. *See* Morgan *et al.*, *Overdrafts and Other Outcomes*, *supra* at 520. Thus, when States have banned payday loans, consumers unsurprisingly bounce more checks and pay more overdraft fees. *Id.* at 521. When Georgia and North Carolina banned payday lending, for example, the number of bounced checks in those States ballooned. Morgan & Strain, *Payday Holiday*, *supra*, at 3. But to the detriment of consumers, overdraft fees are "more expensive than payday credit," not less, both in absolute terms and when measured as an APR. Morgan *et al.*, *Overdrafts and Other Outcomes*, *supra*, at 522; *see also supra* Part I.C. So is the overdraft "protection" offered by most banks. Morgan & Strain, *Payday Holiday*, *supra*, at 4. And, as previously discussed, payday loans empower consumers to avoid other worse outcomes as well, such as taking out pawn loans, defaulting on other obligations, or turning to illegal lenders. *See supra* Part I.C.

Second, consumers are also less likely to suffer mortgage foreclosure in response to financial shock if payday loans are available. Morse, *Heroes or Villains?*, *supra*, at 29. On average, mortgage foreclosure rates increase dramatically in the year following a natural disaster,

which represents an important financial shock. *Id.* at 42. But the available evidence shows that access to payday lenders substantially mitigates this harm by approximately 25%. *Id.* Thus, payday loans tend to mitigate financial shocks, and "payday lenders offer a positive service to individuals facing financial distress." *Id.* at 29.

Third, payday loans do not negatively impact consumer credit scores, either directly or indirectly. Bhutta, *Consumer Financial Health*, *supra*, at 242. Payday borrowing does not directly affect credit scores because payday lenders do not report borrowing activity to the national credit bureaus. *Id.* at 233. Neither do payday loans indirectly affect credit scores by affecting consumers' "ability to meet their financial obligations in general." *Id.* Credit scores are an important measure of consumers' overall financial health, and they reflect consumers' ability to manage their financial obligations. If payday loans were financially harmful to consumers, as the Bureau insists, one would predict that credit scores would decline in locations where consumers have access to payday loans. Yet that is not true. *Id.* at 242. Instead, access to payday loans has "little to no effect" on consumer "credit scores and other credit record outcomes." *Id.*; *see also* Bhutta *et al.*, *Payday Loan Choices and Consequences*, *supra*, at 6 ("[W]e are able to credibly reject economically substantive effect of payday loans on creditworthiness.").

Fourth, access to payday loans does not increase delinquency on other consumer credit accounts, such as revolving and retail credit accounts and auto loans. Again, if payday loans were harmful to consumers in the way the Bureau suggests, one would predict that payday loans would lead to default on other obligations. Yet as economic research has shown, there is "no evidence that payday loans affect … delinquencies" on other credit accounts. Bhutta *et al.*, *Payday Loan Choices and Consequences*, *supra*, at 27. For example, when States have banned payday loans, as in North Carolina, Georgia, and Oregon, the effect on delinquencies is "small" and "not statistically significant." Desai & Elliehausen, *An Investigation of the Debt Trap Hypothesis* at 18. In other words, payday loans are not causing consumers to default on other obligations.

Fifth, payday loans do not push consumers into bankruptcy. In fact, one important study showed that payday loans helped stave off bankruptcy in Georgia and North Carolina. Morgan & Strain, *Payday Holiday*, *supra*, at 6. After those States banned payday loans in 2004 and 2005, households in both States filed for Chapter 7 bankruptcy at a higher rate. *Id.* At the same time, Chapter 13 bankruptcy filings decreased after the payday ban. *Id.* But because Chapter 13 is for filers with substantial assets to protect from liquidation, the decrease in Chapter 13 filings is not a good thing for consumers, but rather suggests "a slipping down in the lives of payday borrowers: fewer bother to reschedule debts under Chapter 13, more file for Chapter 7, and more simply default without filing for bankruptcy." *Id.* at 6; *see also* Lars Lefgren & Frank McIntyre, *Explaining the Puzzle of Cross-State Differences in Bankruptcy Rates*, 52 J. L. & Econ. 367, at *26 (2008) (legality of payday lending does not increase bankruptcy rates). On whole, when access to payday loans has been denied, "former borrowers bounce[d] more checks, aggravating their already marginal circumstances." Morgan & Strain, *Payday Holiday*, *supra*, at 21. "To

stave off bankruptcy, distressed borrowers pawned or sold assets," or defaulted on other obligations, and many ultimately filed for bankruptcy. *Id.*

Notably, recent studies that have looked specifically at the effects of reborrowing activity on consumer welfare contradict the Bureau's view that sustained use is harmful. In fact, there is a "growing body of research which has found that restricting access to payday credit, whether generally or at refinancing, has negative consumer-welfare consequences." Priestley, *supra*, at 7. For example, research analyzing credit scores of payday borrowers has established that "longer-term borrowers have better outcomes," defined in terms of credit scores, "than consumers whose borrowing is limited to shorter durations." Priestley, *supra*, at 5. In particular, "sustained use of payday loans has a net positive impact on consumer credit scores," and "restrictions on the duration of payday-loan borrowing have a net negative impact." *Id.* Another group of researchers conducted a computer simulation with test subjects who were asked to make credit and purchasing choices to test whether their access to payday loans would increase or decrease their "financial survival" or financial health. Wilson *et al.*, *An Experimental Analysis of the Demand for Payday Loans*, *supra*, at 4–8. Their study showed that "the existence of payday loans, all else fixed, increases the probability of financial survival by 31%." *Id.* at 15. As for reborrowing, test subjects taking out ten or fewer payday loans were financially better off than those for which payday loans were unavailable. *Id.* In short, the Bureau's theory that reborrowing amounts to a consumer harm is "not evidence-based." Priestley, *supra*, at 7.

The upshot of this evidence is that "access to payday loans appears to make it *easier*, not more difficult, for low-income borrowers to manage their finances." Zywicki, *supra*, at 9. "Eliminating payday lending as an option for financially-stressed consumers would likely make them worse off and force them to use inferior and less-preferred types of credit, such as pawnshops, or to go without credit," which would worsen their overall financial health. *Id.* In short, "household credit problems go opposite the supply of payday credit: higher supply, lower problems." Morgan & Strain, *Payday Holiday*, *supra*, at 24.

ii. Confirming that consumers benefit from the availability of payday loans and payday loan sequences as currently marketed without an ability-to-repay determination, research shows that borrowers choose payday loans because they are the most affordable available option and improve their lives. *See supra* Part I; Elliehausen & Lawrence, *Payday Advance Credit in America*, *supra*, at 13–14 (illustrating how a consumer faced with an emergency car repair would save money by taking out a payday loan versus riding the bus until payday). Indeed, the overwhelming majority of payday borrowers in one survey reported weighing their options and choosing payday loans because they were the best option available. Harris Interactive, *supra*, at 3–4; *Elliehausen*, *supra*, at 39. The available alternatives were generally more costly: bank overdraft protection, costs incurred for paying late bills, bounced checks, and pawn loans. Bhutta *et al.*, *Consumer Borrowing*, *supra*, at 5–6 (cataloguing unattractive features of alternatives to payday loans); Zywicki, *supra*, at 9–28 (same). Pawn shops are especially unappealing to these consumers because their cost is comparable to payday loans but they require a borrower to part with valuable personal property. Zywicki, *supra*, at 15.

And not all consumers possess valuable personal property for a pawn loan, nor do all consumers have friends or family who will loan money. Notably, even consumers with a variety of available options still choose payday loans. *See id.* at 15–16, 20.

Consumers also generally report high levels of satisfaction with payday loans, further rebutting the Bureau's view that payday loans harm consumers. Consumer submissions relating to payday loans made through the Bureau's own "Tell Your Story" portal are almost entirely positive, and payday loan complaints—unlike most other products within the Bureau's regulatory purview—constitute a small and decreasing proportion of overall consumer complaints at the both the state and federal levels. *See supra* Part I.E. And consumer surveys have shown that borrowers overwhelmingly appreciate the availability of payday loans and are satisfied or very satisfied with their most recent payday loan, Elliehausen, *supra*, at 41,50; that 95% of borrowers value having the option of taking out a payday loan and believe that payday loans provide a beneficial safety net, Harris Interactive, at 3; and that well over half of borrowers are satisfied with their payday loans and nearly half would use one again depending on circumstances, Levy & Sledge, *supra*, at 21. *See also supra* Part I.E. The unprecedented level of consumer response during this comment period likewise demonstrates that most consumers value payday loans and oppose the proposed rule.

iii. The Bureau disputes that payday loans are generally beneficial for consumers, but concedes that the evidence establishes that, at a minimum, "payday loans benefit consumers in certain circumstances, such as when they are hit by a transitory shock to income or expenses." 81 Fed. Reg. at 42,132. The Bureau claims that, because the proposed rule does not ban payday loans entirely, "consumers facing a truly short-term need for credit" will still have access to such credit. *Id.* This reasoning is fundamentally flawed on a number of levels.

To begin, as discussed above, the proposed rule does effectively ban payday loans, both by prohibiting the vast majority of payday loans that are currently made, and by making it unprofitable for lenders to remain in the market. *See supra* Part II.B. Indeed, the Bureau *concedes* that the proposed rule would eliminate more than 70% of the market. *See* 81 Fed. Reg. at 48,122. Moreover, the Bureau's dichotomy is flawed. It is true that consumers do benefit when using payday loans in response to income and expense shocks, but they *also* benefit when using payday loans in response to other circumstances, like income or expense volatility or managing debts. *See supra* Part I.B. The Bureau cannot justify a rule that preserves one beneficial use of payday loans while ignoring all others.

Regardless, the proposed rule does not even rationally account for the supposed distinction between consumers using payday loans for transitory income and expense shocks and those using them for other purposes. The proposed ability-to-repay requirement is not based on the consumer's reason for taking out the loan or on the distinction between transitory shocks and "more general circumstances." For example, the proposed rule does not require lenders to ask consumers if they need the loan for a transitory shock, and the residual income test does not permit lenders to forecast whether consumers' circumstances will change in the near future once a transitory shock has passed. Instead, the proposed test requires a static financial snapshot taken

at the moment a consumer applies for a loan. Relatedly, the Bureau has no evidence or rationale to support a particular definition of "transitory shock"—and in particular how long a transitory shock might last—which makes it impossible to assess whether the proposed rule adequately preserves access to credit for those faced with such shocks. (Since the proposed rule categorically prohibits reborrowing after three loans in a sequence and as a practical matter prohibits all reborrowing except under unusual circumstance, the Bureau must be presuming that the effects of transitory shock will wear off quite quickly indeed. But there is no reason or evidence to support this view.)

Moreover, when hit by a transitory income or expense shock, consumers are unlikely to be able to satisfy a requirement that they demonstrate an ability to repay a payday loan within the short term of that loan. Such consumers are already living paycheck to paycheck, with monthly net incomes roughly equivalent to major financial expenses plus basic living expenses, and lack the funds to address the shock or to repay a loan used to address the shock, which is why they need the loan in the first place. The Bureau implicitly concedes that this is so, noting that such consumers will be able to obtain a loan "[i]f payday lenders make loans using the Alternative approach." 81 Fed. Reg. at 42,131. But there is no reason to believe, and the Bureau offers no evidence or analysis to suggest, that the short-term loans allowable under the alternative approach—*i.e.*, loans for $500 or less that fully amortize over a sequence of no more than three—would be sufficient to satisfy the financial needs of consumers faced with an income or expense shock. Here again the Bureau fails to perform the necessary analysis.

2. The Bureau lacks substantial evidence that consumers are harmed by payday loan delinquencies and defaults

There is also no merit to, and no evidence to support, the Bureau's claim that borrowers who cannot satisfy the proposed rule's ability-to-repay requirements are further injured "in the form of the costs that come from being delinquent or defaulting on the loans." 81 Fed. Reg. at 47,929. According to the Bureau, delinquent borrowers may face costly fees for bounced checks and failed ACH payments. *Id.* And, the Bureau contends, defaults are harmful because consumers in default may incur fees for repeated bank draft attempts and be subject to the "psychological distress" of "harassing" or "illegal" debt-collection efforts. *Id.* at 47,929–30. These purported harms are insufficient to justify the proposed rule for several reasons.

First, the Bureau's analysis is flawed because here too it fails to account for the benefit these consumers receive from payday loans and loan sequences and for the array of worse or less affordable alternatives consumers would face if payday loans were unavailable. The relevant question in determining whether substantial injury will likely result from payday loans made to consumers unable to satisfy the Bureau's ability-to-repay test is whether those consumers are better off or worse off with such loans, taking into account all of the loans' benefits and costs (including the costs of delinquencies and defaults) and all of the costs and benefits of the alternatives. With respect to delinquencies and defaults in particular, by taking out payday loans, consumers are able to avoid delinquencies and defaults on other debts, many of which would result in similar or worse fees, "harassing" collection efforts, reports to credit bureaus,

repossession of vehicles, or discontinuance of vital services. The Bureau has failed to engage in this necessary comparative analysis.

Second, the Bureau mischaracterizes the consequences of payday-loan delinquencies and defaults. Contrary to the Bureau's purported concerns, consumers can avoid the costs of unsuccessful bank-draft attempts by invoking their rights under federal law to revoke their authorizations for bank-account access. *See, e.g.*, 12 C.F.R. § 1005.10(c). To the extent the Bureau is concerned that consumers lack awareness of this right, the appropriate remedy is to require additional disclosures, not to restrict access to loans.

Moreover, as discussed above, access to payday loans and payday loan sequences—even assuming high levels of default—has, on balance, a positive impact on consumer welfare. More specifically, payday-loan defaults typically are not reported to credit agencies (and thus do not appear on credit reports) and, because the amounts owed are so low, many lenders do not pursue legal actions for unpaid debts. Mann, *Do Defaults on Payday Loans Matter?*, *supra*, at 22. Unsurprisingly, therefore, payday defaults do not negatively impact consumers' financial health. *Id.*; Bhutta, *Payday Loans and Consumer Financial Health*, *supra*, at 242. Indeed, the available empirical evidence demonstrates that "default on a payday loan plays at most a small part in the overall timeline of the borrower's financial distress," and "it is plain that the effect of a default on the borrower's overall financial health is trivial at best." Mann, *Do Defaults on Payday Loans Matter?*, *supra*, at 21–22. In the longer term, payday loan defaulters benefit from a "disproportionately large rise in their credit scores for at least two years following the year of default, evidence suggesting some cognizable rebound in the financial health of the post-default borrowers." *Id.* at 24. After all, "the principal long-term consequence" of default for a borrower who withstands collection efforts "is that the borrower gets to keep the funds without repaying the loan." *Id.* at 22.

Third, the Bureau has failed to demonstrate the existence, or measure the prevalence and severity, of the hypothesized "psychological distress" of debt-collection efforts allegedly caused by payday-loan defaults. The Bureau also cites no evidence that improper or burdensome debt-collection practices occur more frequently in the context of payday loans than in other contexts giving rise to consumer debt. The Bureau simply notes that more than 10% of complaints it has received about debt-collection practices stem from payday loans, 81 Fed. Reg. at 47,930, without explaining how this frequency compares to other products or analyzing whether these complaints involved "harassing" or "illegal" practices. And the Bureau completely ignores the ample evidence of consumer satisfaction with payday products. *See supra* Part I.E. In any event, consumers can avoid this harm too, by invoking their right to have third-party debt collectors cease further communication, *see* Fair Debt Collection Practices Act § 805(c), 15 U.S.C. § 1962c(c). Again, if the Bureau is concerned that payday borrowers are insufficiently aware of this right, the appropriate solution is to require disclosures, not to restrict access to loans.

Fourth, and even more fundamentally, it is entirely unreasonable to restrict the *availability* of payday loans because of perceived abuses by third parties involved in *repayment* or *collection* efforts. If debt-collection efforts are "harassing" or "illegal," the answer is not to

arbitrarily restrict payday loans or other products that may result in consumer debt, but rather to regulate the conduct of, or enforce existing laws against, debt collectors. Similarly, if the fees charged by depository institutions to consumers for bounced checks and failed ACH payments are too costly, then the Bureau should regulate those fees. Put in statutory terms, these acts of third parties are not harms "cause[d]" by the targeted lending practices. CFPA § 1031(c)(1)(A), 12 U.S.C. § 5531(c)(1)(A). At most, the Bureau might—with an appropriate evidentiary basis—reasonably regulate the use of ACH payments by payday lenders. Indeed, the payment-practice provisions of the Bureau's proposed rule attempt to do just that, *see infra* Part X, and it is unreasonable to count as an injury supportive of the ability-to-repay provisions of the proposed rule a putative harm that would be eliminated by other provisions of the proposed rule.[6]

3. The Bureau lacks substantial evidence that collateral consequences of payday borrowing harm consumers

The Bureau also counts as injury to consumers certain "collateral consequences" that the Bureau "infer[s]" (81 Fed. Reg. at 47,931) may result "as [consumers] struggle to make payments that are beyond their ability to repay," such as inability to meet other major financial obligations or having to forgo basic living expenses. *Id.* at 47,937; *see also id.* at 47,920 (asserting that consumers "may find themselves struggling to pay other bills or meet their basic living expenses" if they repay their payday loan). The Bureau admits that it "is not able to directly observe th[ese alleged] harms," *id.* at 47,931, let alone quantify them or weigh them against the benefits that consumers obtain when borrowing or reborrowing payday loans. This concession undermines this justification for the proposed rule, because mere speculation cannot be the basis for the required injury determination.

Regardless, it is not reasonable to assume, as the Bureau does, that the use of payday loans by individuals who cannot satisfy the proposed ability-to-repay requirements causes, rather than mitigates, any accompanying financial difficulties. Consumers who fail to meet the ability-to-repay requirements nevertheless take out payday loans precisely because they are unable to pay for all major financial obligations and basic living expenses and need loans to cover the shortfall. Alternatives like other missed payments, bank-account closings, etc., are staved off—and in many cases avoided altogether—by the availability of payday loans under those circumstances. *See supra* Part I. And even consumers who suffer those costs after taking out a payday loan received the valuable benefit of delaying their onset.

Relatedly, the Bureau arbitrarily gives weight to these costs when they occur after a payday loan, while ignoring them when they occur in the absence of a payday loan. To the extent there are any harms, the Bureau must assess the marginal harms—how much worse the consumers are relative to where they would be in the absence of payday lending. Once again,

[6] The Bureau also counts as part of the injury the cost of late fees charged by lenders. 81 Fed. Reg. at 47,930, 47,936. But the Bureau concedes that most States do not permit lenders to charge a late fee on a payday loan. *Id.* at 47,930 n.510. In any event, for all the same reasons, the appropriate solution to problematic late fees is a restriction on late fees, not limits on the availability of the loan.

the Bureau has entirely failed to do so. By failing to perform this analysis, the Bureau lacks any evidence or other basis for concluding that these speculative consumer outcomes are caused—rather than mitigated—by the availability of payday loans.

B. Any Injury to Consumers Is Reasonably Avoidable by Consumers

Substantial injury alone is not enough—before the Bureau can prohibit a practice as unfair, it must demonstrate that consumers cannot reasonably avoid that injury. This requirement reflects Congress's determination that the Bureau must not substitute its own judgment for the free and informed choices of consumers. Yet with the proposed rule, the Bureau is attempting to do just that, both by adopting an unreasonable interpretation of the unavoidability requirement and by improperly and illogically presuming—in the face of contrary evidence—that consumers do not know or appreciate what they are doing when taking out payday loans.

Before finding a practice unfair, the Bureau must have a reasonable basis to conclude that any substantial injury "is not reasonably avoidable by consumers." CFPA § 1031(c)(1)(A); 12 U.S.C. § 5531(c)(1)(A). No such reasonable basis exists here, both because the Bureau's theoretical justification—that an injury is not reasonably avoidable if some number of consumers fail to appreciate the likelihood and severity of the consequences of using the product—is legally insufficient and because that justification in this specific context is speculative, unreasonable, and lacks evidentiary support.

1. The identified injuries are reasonably avoidable as a matter of law

The Bureau has adopted an interpretation of the statute's unavoidability requirement that conflicts with the statute's unambiguous text and is otherwise unreasonable. "In determining whether consumers' injuries were reasonably avoidable, courts look to whether the consumers had a free and informed choice." *FTC v. Neovi, Inc.*, 604 F.3d 1150, 1158 (9th Cir. 2010) (interpreting provision of the FTC Act on which § 1031(c) was modeled). An injury is reasonably avoidable if consumers "have reason to anticipate the impending harm and the means to avoid it," or if consumers are aware of, and are reasonably capable of pursuing, potential avenues toward mitigating the injury after the fact. *Orkin Exterminating Co., Inc. v. FTC*, 849 F.2d 1354, 1365–66 (11th Cir. 1988); *accord Davis v. HSBC Bank Nevada, N.A.*, 691 F.3d 1152, 1168–69 (9th Cir. 2012) ("[t]he disclaimer and the terms and conditions were enough to give a reasonable consumer 'reason to anticipate' the possibility of fees"). In one case, for example, "the fact that [a consumer] was required to check the box indicating his assent before completing the application meant that he could have aborted his application upon reading the terms and conditions. This provided 'the means to avoid' the alleged harm." *Davis*, 691 F.3d at 1169; *see also id.* ("[t]he question … is not whether subsequent mitigation was convenient or costless, but whether it was 'reasonably possible'").

The Bureau claims that, under this standard, consumers are unable to avoid harm because, due to "obstacles to the free exercise of consumers' decision-making," some consumers fail to

estimate how long they will remain in debt and others do not understand the frequency or likelihood of adverse consequences like penalty fees on unsuccessful bank-draft attempts. 81 Fed. Reg. at 47,937. But absent deception or coercion, which the Bureau does not allege here, any "injury" caused by a financial product freely offered in the marketplace is "reasonably avoidable" as a matter of law, since the consumer has a "free and informed choice" not to purchase the product. *Neovi*, 604 F.3d at 1158. Clearly, if checking a box indicating assent amounts to the means to avoid harm, then payday-loan consumers likewise are able to avoid the Bureau's alleged harm, since there is no dispute that payday-loan borrowers receive the terms of their loans and assent to those terms.

At a minimum, the statutory scheme requires that the Bureau address any alleged cognitive biases or gaps in consumer understanding by requiring clearer disclosures, not by restricting the availability of credit. *See, e.g.*, CFPA § 1021(a), 12 U.S.C. § 5511(a) (Bureau must "ensur[e] that all consumers have access to markets for consumer financial products and services and that [such] markets … are fair, transparent, and competitive"); *id.* § 1021(b)(1), 12 U.S.C. § 5511(b)(1) (Bureau must ensure that "consumers are provided with timely and understandable information to make responsible decisions about financial transactions").

2. The Bureau improperly and illogically presumes that payday borrowers are ensnared in "debt traps" that do not reflect their borrowing expectations, when the evidence shows otherwise

In any event, 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. The linchpin of this assertion is the Bureau's assumption that consumers expect to repay their payday loans at the end of the first loan cycle, such that no incidence of reborrowing activity can be said to be a product of knowing consumer choice. According to the Bureau, marketing practices create a "mismatch" between how payday loans "appear to function as short-term credit and how they are actually designed to function in long sequences of reborrowing." 81 Fed. Reg. at 47,920. By this view, lenders "encourage unrealistic, overly optimistic thinking," *id.* at 47,923, to "induce" unwitting consumers "to repeatedly reborrow," *id.* at 47,922.

To begin with, the nominal two-week (or thirty-day), next-paycheck duration of a payday loan is largely a product of state regulation of payday loans and does not necessarily reflect consumers' borrowing needs or expectations. *See supra* Part I.A. Accordingly, there is no legitimate reason to infer that lengthier periods of indebtedness necessarily arise from mismatch or mistake.

And, indeed, research amply demonstrates that, contrary to the Bureau's claims, consumers accurately predict how long it will take for them to repay their loans. *See supra* Part I.G. For example, Professor Mann surveyed consumers at the time they took out payday loans, and compared their repayment expectations with actual repayment data from the lender. Mann, *Assessing the Optimism of Payday Loan Borrowers*, *supra*, at 113–17. The results showed that "about 60 percent of the borrowers predicted the final repayment date" within a fourteen-day

window, meaning that "most borrowers could predict to within one pay period when they would be free of debt." *Id.* at 118. Further, "most borrowers expected that they would continue borrowing for some time after the initial loan," *id.*, suggesting "that a strong majority of those using the product have a basic understanding of what will happen when they borrow," *id.* at 123. This survey—based on actual repayment data—"undermines the notion" that "repeated borrowing that is typical of payday borrowers generally reflects surprise on the part of the borrowers or deception on the part of the lenders." *Id.* at 118. This directly contradicts the Bureau's suggestion that payday borrowers suffer from "optimism bias" and "misperceptions" about the costs of payday loans. *Id.* at 128–29.

Attempting to rebut this strong evidence that borrowers have an excellent understanding of how long they will be in debt, the Bureau distorts Professor Mann's study beyond recognition, concluding, in stark contrast to Professor Mann himself, that borrowers are "very poor" at predicting the length of their indebtedness. 81 Fed. Reg. at 47,928 The Bureau reaches this conclusion by myopically comparing the very small portion (12%) of borrowers in Professor Mann's study who "experienced long sequences of loans" to the somewhat smaller percentage (5%) of study participants who expected to be in debt that long. *Id*. But of course there will always be some share of financially distressed users of a financial product who fail to predict with exactitude when they will stop using the product; this hardly establishes that payday borrowers uniquely suffer from optimism bias and misperceptions when, on the whole, the strong majority of payday borrowers are quite good at predicting their borrowing periods. *See also* Mann, *Assessing the Optimism of Payday Loan Borrowers*, *supra*, at 130 ("payday loans are not an outlier with respect to predictability of repayment"). Even for this small sliver of borrowers, moreover, there is no evidence that their failure to predict the length of their loan sequences resulted from overly optimistic thinking or misperceptions, as the Bureau assumes, rather than from their financial difficulties. The Bureau also incorrectly asserts that Professor Mann found that frequent payday borrowers are "more likely to underestimate" the length of their loan sequences, 81 Fed. Reg. at 47,928, but Professor Mann actually found that borrowers are equally likely to overestimate the length of their borrowing, *see* Mann, *Assessing the Optimism of Payday Loan Borrowers*, *supra*, at 122. This means that frequent borrowers are wrong about their predictions not because of optimism bias or misperceptions, but rather because "they are the individuals who are in the most serious financial distress, for whom freedom from debt is most difficult to predict." *Id.* at 127.

Two recent consumer surveys, conducted in 2013 and 2016, provide further proof that unwitting consumers are not trapped in a cycle of debt. In one survey of over 1,000 borrowers who had recently repaid a payday loan (without further reborrowing), 94% of borrowers reported that they understood ("well" or "very well") how long it would take to "completely repay the loan." Harris Interactive, *supra*, at 5. An additional 5% understood this "somewhat well." *Id.* In addition, over 90% responded that they used payday lending responsibly, carefully weighed the risks and benefits of taking out a payday loan, and considered the overall costs they would incur before taking out a payday loan. *Id.* at 4. A similar survey of 1,000 payday borrowers showed that 96% of borrowers "completely understood how long it would take to pay off the

payday loan." Tarrance Group, *supra*, at 6; *see also* Levy & Sledge, *supra*, at 21 (2012 survey showing that 68% of borrowers repaid their loans in the same or less time than they expected). The surveyed borrowers also reported high levels of satisfaction with payday lenders in general and their experience with payday loans in particular. *See* Harris Interactive, *supra*, at 6, 10–11; Tarrance Group, *supra*, at 17, 20–21.

The Bureau gives no weight to these studies because, it claims, these survey respondents may have suffered from "recall" problems—yet another cognitive defect—meaning that the consumers could not remember what they were thinking at the time they took out their payday loan. 81 Fed. Reg. at 47,927–28. But the Bureau has no evidence supporting its naked assertion that payday borrowers are simply incapable of remembering their thoughts about their payday loans. Nor does the Bureau know in which direction any lack of recall would bias survey responses; indeed, since individuals tend to recall negative experiences more vividly than positive ones, it is likely that any lack of recall would cause the surveys to overstate negative experiences and hence understate how well respondents understood how long it would take to repay their loans. Moreover, the surveys demonstrate high borrower satisfaction with payday loans. Since being unable to pay off a debt as planned typically would contribute to a negative outlook, these high levels of borrower satisfaction corroborate that consumers' experiences matched their expectations. Nor is there any merit to the Bureau's specious claim that survey respondents could have been confused about whether the survey question asked about "the specific loan they had recently repaid or the original loan that ultimately led to the loan they repaid." *Id.* at 47,928. It is unambiguous from the context of the surveys and the wording of the questions that each consumer was asked about his loan sequence, not about the last loan within the sequence. One does not, for instance, "completely" pay off a loan, in any meaningful sense of the word, by paying an additional fee to roll it over for another fixed period, any more than one "completely" submits a court brief by filing a motion for an extension of time to file.

Empirical research on actual consumer behavior also contradicts the "debt trap" hypothesis. One field experiment tested whether the high cost and unaffordability of payday loans caused consumers to reborrow, or whether consumers reborrowed simply because they had a need for a longer term loan. Fusaro & Cirillo, *supra*, at 10. Using consumers who had recently taken out and completely paid off a payday loan, the researchers offered an initial payday loan at zero interest to one group, with rollovers incurring the usual fee, while another group took out loans at the usual cost. *Id.* Borrowers with a zero-cost loan still reborrowed, and they reborrowed just as frequently as those borrowers who paid the usual fee, suggesting that the cost or alleged unaffordability of payday loans "do[es] not drive a 'cycle of debt.'" *Id.*

Additional research further supports these conclusions, particularly studies evaluating consumer behavior in response to state bans on payday loans. *See supra* Part I. For example, when consumers lose access to payday loans, they turn to more costly alternatives such as pawn loans, and suffer "involuntary closures" of 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." Bhutta, *et al.*, *Consumer Borrowing*, *supra*, at 3. "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)." *Id.* at 24–25. In other words, actual consumer behavior discredits the Bureau's theory of marketing mismatch and consumer cognitive bias.

And here again, while the Bureau speculates that consumers do not understand the terms of payday loans or how long it will take them to repay, its empirical evidence is nonexistent. To begin, the Bureau attempts to support this speculation by relying on dubious theories of behavioral economics positing that psychological and cognitive factors (like optimism bias and financial short sightedness) cause consumers to make irrational decisions against their own economic self interests. Such abstract theoretical justifications are insufficient to provide the necessary evidentiary support for the proposed rule.[7]

With respect to actual evidence about payday borrowers, the Bureau likewise falls short. The Bureau relies on one study that asked payday borrowers about repayment expectations. In that study, "40 percent of borrowers thought that the average borrower would have a loan outstanding for only two weeks," while "[a]nother 25 percent responded with four weeks." 81 Fed. Reg. at 47,927 (citing Mariane Bertrand & Adair Morse, *Information Disclosure, Cognitive Biases and Payday Borrowing and Payday Borrowing*, 66 J. Fin. 1865, 1866 (2011)). The Bureau notes that, based on its own data, "approximately 50-55 percent of loan sequences, measured using a 14-day sequence definition, end after one or two loans." 81 Fed. Reg. at 47,927 n.488. Comparing these numbers, the Bureau claims this "suggests that respondents were, on average, somewhat optimistic about reborrowing behavior." *Id.* at 47,927; *see also id.* (citing a similar study for title loans and concluding that "borrowers were slightly optimistic, on average,

[7] The use of theories of behavioral economics to support specific policymaking has been roundly criticized. *See, e.g.*, Thomas A. Durkin *et al.*, *An Assessment of Behavioral Law and Economics Contentions and What We Know Empirically About Credit Card Use by Consumers*, George Mason Univ. L. & Econ. Research Paper Series No. 14-46 (2014), *available at* http://ssrn.com/abstract=2499819; Joshua D. Wright & Douglas H. Ginsburg, *Behavioral Law and Economics: Its Origins, Fatal Flaws, and Implications for Liberty*, 106 Nw. U. L. Rev. 1033 (2012) (cataloguing criticisms of behavioral economics literature); Gerg Gigerenzer & Wolfgan Gaissmaier, *Heuristic Decision Making*, 62 Annual Review of Psychology 451 (2011) (arguing that heuristics are often used adaptively to make better judgments); Steven D. Levitt & John A. List, *What Do Laboratory Experiments Measuring Social Preferences Reveal about the Real World?*, J. of Econ. Perspectives 154 (Spring 2007) (arguing that lab experiments do not yield results that are readily generalizable); Edward L. Glaeser, *Paternalism and Psychology*, 73 U. Chi. L. Rev. 133, 140 (2006) (arguing that behavioral economics scholarship often ignores that consumers learn over time and have access to helpful resources); Gregory Mitchell, *Tendencies Versus Boundaries: Levels of Generality in Behavioral Law and Economics*, 56 Vand. L. Rev. 1781 (2003) (arguing that behavioral theory findings are context-specific and cannot be generalized and then applied to other situations in order to craft policy); Gregory Mitchell, *Taking Behavioralism Too Seriously? The Unwanted Pessimism of the New Behavioral Analysis of Law*, 43 Wm. & Mary L. Rev. 1907 (2002) (legal behavioral-economics scholarship conflicts with basic psychological scholarship on prevalence of adherence to norms of rationality); Richard A. Posner, *Rational Choice, Behavioral Economics, and the Law*, 50 Stan. L. Rev. 1551 (1997) (arguing that scholars of behavioral economics mistake irrationality for differences in preferences and does not explain why certain people act certain ways in certain situations with any predictive power).

about their predictions."). Thus, the Bureau has based its proposed rule on the fact that 65% of survey respondents thought the "average" borrower would repay after no more than four weeks, while 55% of actual loans sequences end after no more than four weeks.

There are several problems with this analysis. First, as the Bureau itself seems to recognize, the study is unhelpful because (i) its poorly worded question could have been interpreted as asking about the term of the initial loan and (ii) it asked consumers about the behavior of the average borrower, but "[b]orrowers' beliefs about their own reborrowing behavior could … vary from their beliefs about average borrowing behavior by others." *Id.* at 47,927. Second, these "somewhat optimistic" expectations about reborrowing behavior hardly demonstrate the sort of obstacles to free decision-making that would be required to sustain a finding that consumers cannot reasonably avoid the alleged harms. Third, and most importantly, the study is completely contradicted by the other research described above, which focused on consumer expectations about their own needs, rather than on the borrowing behavior of others.

In any event, the obvious and appropriate solution to any concerns about marketing mismatch and consumer cognitive bias would be to require enhanced disclosures or to prohibit certain marketing practices. The Bureau asserts that disclosures are insufficient because "empirical evidence suggests that disclosures have only modest impacts on consumer borrowing patterns," *id.* at 47,932, but the Bureau's own cited field and empirical studies show that disclosures do work, notwithstanding the Bureau's mischaracterization of their impact as "nearly negligible." *Id.* at 47,932 & nn. 524–25; *see also* Kathleen Burke *et al.*, *Information Disclosure and Payday Lending in Texas* 14 (2015) (concluding that disclosures can have an economically meaningful effect on consumer choices). Moreover, to the extent that consumers do not reduce borrowing as a result of additional disclosures, the only reasonable conclusion is that these fully informed consumers value the product and its benefits notwithstanding the consequences identified by the Bureau.

Finally, the harms alleged by the Bureau are also reasonably avoidable for another reason. After taking out a payday loan, a consumer retains the option of revoking ACH access and/or defaulting on the loan. As discussed, payday-loan defaults have little or no adverse consequence for the defaulting consumer, *see supra* Part III.A.2, and therefore constitute a virtually cost-free means of avoiding the Bureau's alleged harms. *Cf. Davis*, 691 F.3d at 1169 (means to avoid harm need not be entirely cost-free).

C. Any Injury to Consumers Is Outweighed by Countervailing Benefits

The Bureau's treatment of the third prong of the unfairness inquiry suffers from similar shortcomings: the Bureau relies on its own unsupported assumption that reborrowing is inherently harmful, while ignoring or discounting the substantial benefits that cash-strapped borrowers obtain from payday loans.

To prohibit a payday-lending practice as unfair, the Bureau is also required to have a reasonable basis to conclude that any "substantial injury is not outweighed by countervailing

benefits to consumers or to competition." CFPA § 1031(c)(1)(B), 12 U.S.C. § 5531(c)(1)(B). The Bureau purports to weigh these factors and conclude that current payday lending practices cause injuries that are not outweighed by benefits to consumers or competition, 81 Fed. Reg. at 47,938, but the Bureau's analysis makes three broad errors: (1) the Bureau arbitrarily assigns excessive weight to the injuries, (2) it ignores the benefits to consumers of payday lending, and (3) it ignores the benefits to competition from current lending practices.

1. The Bureau claims that payday lending without satisfaction of the Bureau's ability-to-repay requirement causes an "extremely high" amount of injury to consumers, primarily because "very long loan sequences" cause "extremely severe financial injuries." *Id.* But for reasons discussed above, the Bureau has no legitimate basis for concluding that such lending causes or is likely to cause any injury at all. Regardless, this designation of "extremely severe" injury is arbitrary. The Bureau gives no baseline against which to measure the degree of injury, but instead simply asserts its subjective judgment that the injury "appears to be extremely high." *Id.* In other words, the Bureau provides no methodology for measuring the degree of injury, without which it is impossible to weigh the severity of any injury against the many benefits of payday loans as currently marketed.

2. Moreover, the evidence overwhelmingly shows that the injuries claimed by the Bureau are outweighed by the countervailing benefits of payday loans to cash-strapped consumers who would lose access to payday credit under the proposed rule. The evidence shows that millions of consumers rely on payday loans to fill a gap in access to credit; these consumers overwhelmingly praise the utility of the product and give positive feedback about their borrowing experiences; they would be forced into higher-priced, less-affordable alternatives—including bank overdrafts, pawn loans, and default on other obligations—if the government restricts access to payday loans; and access to payday loans improves or does not harm overall consumer financial health. *See supra* Part I.

The Bureau bases its contrary conclusion on incorrect assumptions and speculation. It first defines three categories of consumers—"repayers," "defaulters," and "reborrowers"—and then attempts to assess the benefits of payday lending as to each group. 81 Fed. Reg. at 47,938. Each step of this analysis is flawed.

a. "Repayers." Some consumers—constituting 22% of loan sequences by the Bureau's estimation—repay their loans when due without reborrowing; the Bureau refers to these borrowers as "repayers." *Id.* It concedes that, for these consumers, the proposed rule would negatively impact the speed and convenience of applying for a loan under current practices, but concludes that the proposed rule will not be "overly burdensome" in this respect. *Id.* The Bureau further admits that some of these "repayers" will be unable to meet the proposed rule's stringent ability-to-repay requirements, and that, "for this group of 'false negatives' there may be significant benefits of being able to obtain covered loans without having to demonstrate their ability to repay." *Id.* at 47,939. But, according to the Bureau, the number of these consumers "will be small" because this "class of consumers is disproportionately drawn from the ranks of those whose need to borrow is driven by a temporary mismatch in the timing between

their income and expenses" rather than those suffering a financial shock or suffer from a chronic cash shortfall; because "lenders will have every incentive to err on the side of finding" an ability to repay when consumers apply for loans; and because, in any event, these consumers "may … be able to get different credit" such as a smaller or longer-term loan. *Id.* This analysis lacks any reasonable basis or evidentiary support.

To begin, the Bureau grossly understates the speed and convenience burdens of the ability-to-repay requirement on consumers who are able to meet it. Moreover, to the extent the proposed rule results in lenders no longer offering payday loans (or offering payday loans only under the alterative requirements of proposed section 1041.7, which may be inadequate for the needs of these consumers), as is likely, *see supra* Part II.B, the proposed rule will eliminate payday loans for this large percentage of consumers who by the Bureau's own admission suffer none of the identified harms.

Even assuming the continued availability of payday loans, the Bureau has no actual evidence that the population of "false negatives" will be small rather than large, or that this group of consumers is less likely than others to be suffering a financial shock or a chronic cash shortage. Nor is there any basis for thinking that lenders will err on the side of finding an ability to repay. To the contrary, the proposed rule's harsh penalties for making an unreasonable determination of the ability to repay are a stiff incentive for lenders to use extraordinary caution, lest the Bureau bring an enforcement action against them. And, finally, the Bureau likewise offers no evidence to show that this group of consumers will have access to, or be able to satisfy their credit needs with, smaller or longer-term loans.

b. "Defaulters." Some consumers—constituting 20% of payday loan sequences by the Bureau's estimation—default on their payday loan, either before or after reborrowing; the Bureau refers to these borrowers as "defaulters." *Id.* It claims that defaulters obtain no benefit "from the current lender practice of not determining the ability to repay," because defaulting consumers are "merely substituting a payday lender … for a preexisting creditor," and "end up in a deeper hole by accruing finance charges, late fees, or other charges at a high rate." *Id.* As discussed above, this conclusion rests on false premises and lacks evidentiary support: given the very limited adverse consequences of payday-loan defaults, even consumers who ultimately default on their payday loans benefit from using those loans. *See supra* Part III.A.2.

c. "Reborrowers." The final, largest group of consumers—58% of payday loan sequences, according to the Bureau—reborrow before eventually repaying their payday loan; the Bureau refers to these consumers as "reborrowers." 81 Fed. Reg. at 47,939. In weighing the injury to this group, the Bureau purports to count only those borrowers who did not anticipate the extent of their reborrowing, but it accords the alleged injury to these borrowers much greater weight than is due. 81 Fed. Reg. at 47,939. According to the Bureau, this includes "many"—the Bureau does not say how many—consumers who reborrow a small number of times, as well as virtually all borrowers with seven or more loans in a sequence (a third of all sequences, according to the Bureau). *Id.*

This injury is vastly overstated and arbitrarily weighed. First of all, the Bureau fails to quantify the number or percentage of "reborrowers" who do not anticipate the extent of their reborrowing; its assertions that "many" shorter-term reborrowers do not anticipate reborrowing and "[no] significant number" of longer-term reborrowers do are at odds with not only with the actual evidence, but also with the Bureau's own misreading of that evidence. *See supra* Part III.B. Nor is there any basis for concluding that those consumers who do not anticipate the extent of their reborrowing are necessarily injured. The Bureau's assertion that they are flows from the Bureau's fallacious assumption, discussed above, that reborrowing is necessarily harmful because it is expensive. *See* 81 Fed. Reg. at 47,939 (emphasizing high "finance charges"). As already explained, however, one cannot characterize a loan product (or any other product) as harmful based on cost without considering what benefits the consumer receives from the product he has purchased. *See supra* Part III.A. This is true even for consumers who do not anticipate how many times they will need to reborrow.

Moreover, the Bureau improperly focuses on a small subset of reborrowers—which is even a smaller subset of all payday loan consumers—while effectively ignoring the larger group of reborrowers who undisputedly anticipate their reborrowing activity and benefit from access to credit—and who (the Bureau fails to say) will be denied payday loans under the proposed rule. The Bureau provides no quantitative evidentiary support for its conclusion that the alleged injury to the few "dwarfs" the countervailing benefit to the many, and its only qualitative rationale seems to be that the benefit of a payday loan is merely a "temporary reprieve" from financial difficulty. *Id.* at 47,939–40. But as discussed above, this "temporary reprieve" can mean a great deal to consumers with no alternative source of credit and who need quick access to funds to avoid more severe consequences, such as default on other obligations and denial of important services. *See supra* Parts I & III.A. The Bureau has arbitrarily discounted this benefit to a large majority of reborrowers and exaggerated the alleged injury to a small subset.

3. The Bureau also lacks substantial evidence or a reasonable basis to conclude that the alleged injury is not outweighed by countervailing benefits to competition. In noting that the proposed rule "may … result in more highly concentrated markets in some geographic areas," 81 Fed. Reg. at 47,940, the Bureau grossly understates the impact of the proposed rule. As discussed, few if any lenders will survive, resulting in very highly concentrated markets. *See supra* Part II.B. Moreover, in brushing aside the impacts of consolidation because "there is generally no meaningful price competition among" payday lenders, 81 Fed. Reg. at 47,940, the Bureau improperly ignores the existence of non-price competition among lenders on such factors as convenience, store location, operating hours, streamlined application and underwriting, and immediate funding. *See* Victor Stango, *Are Payday Lending Markets Competitive?*, Regulation, Fall 2012, at 26. The Bureau also ignores that payday lenders provide competition to other forms of consumer credit.

IV. The Targeted Payday Lending Practices Are Not Abusive

The Bureau likewise falls far short in its effort to characterize the targeted lending practices as abusive. Here, too, in order to prevent the Bureau from substituting its own judgment for those of consumers, Congress prohibited the Bureau from acting where fully informed consumers make a free choice to purchase a product. And here again the Bureau seeks to circumvent this requirement by adopting an unreasonable interpretation of the statutory requirements and by improperly and illogically presuming—in the face of contrary evidence—that consumers who use payday loans do not know or appreciate how the loans work.

The proposed rule would prohibit as an "abusive" practice the making of a short-term loan without an assessment of the borrower's ability to repay the loan according to its terms. *Id.* at 47,932. But the Bureau lacks authority to declare an act or practice "abusive" unless, as relevant here, the act or practice "takes unreasonable advantage of" either "a lack of understanding on the part of the consumer of the material risks, costs, or conditions of the product or service," or "the inability of the consumer to protect [his] interests … in selecting or using a consumer financial product or service." CFPA § 1031(d), 12 U.S.C. § 5531(d). The Bureau claims that making a payday loan without satisfying the proposed rule's ability-to-repay requirements is abusive because (1) consumers do not understand the material risks and costs of payday loans, (2) payday borrowers are unable to protect their own interests because they are financially vulnerable, and (3) payday lenders take unreasonable advantage of these consumers through a business model that profits from reborrowing activity. 81 Fed. Reg. at 47,932–36. As discussed below, each of these three conclusions is unreasonable and lacks substantial evidence.

1. The Bureau first asserts that consumers do not understand the material risks and costs of payday loans. *Id.* at 47,933–34. According to the Bureau, reborrowing is "the single largest risk" associated with a payday loan, and the evidence shows that consumers who take out payday loans "typically appear not to understand when they first take out a loan how long they are likely to remain in debt and how costly that will be for them." *Id.* at 47,933; *see also id.* at 47,927–29. The Bureau also "does not believe that many [borrowers] … understand the magnitude of … additional risks" like default and the collateral consequences of default. *Id.* at 47,934.

To begin with, the Bureau's theory of abusiveness is inconsistent with the unambiguous statutory language, and otherwise unreasonable, and thus invalid as a matter of law. The Bureau admits that consumers have a "generalized understanding" of the material risks of costs of taking out a loan, including the risk of default, rollovers, and collateral consequences. *Id.* at 47,933. But it interprets the phrase "lack of understanding" in section 1031(d) of the CFPA to require "more than a mere awareness" of the product's costs and risks. *Id.* Apparently, according to the Bureau, consumers who are fully aware of the costs and risks nevertheless lack "understanding" thereof unless they have a detailed statistical knowledge of the payday lending industry, including knowledge of average default rates, rollover rates, and associated costs. *See id.* at 47,934 (noting that consumers may not realize that risk of default is "one in five"). But virtually no consumers master the industry statistics related to a given financial transaction, so the

Bureau's reading of the statute would mean that essentially no consumer in any industry would have an "understanding" of the risks and costs of a consumer transaction. This cannot be right. Nor do cognitive factors, like a "focus on their immediate liquidity needs" or "optimis[m] about their future cash flow" (*id.*) equate with lack of consumer "understanding." To the contrary, the statute must mean that payday borrowers have the requisite understanding when they (1) receive and review the terms and conditions of their loans, which are simple and easily understood, and (2) understand how a payday loan works, including that they will have to repay, reborrow, or default, and that they may have to reprioritize their budget in order to repay the loan. *See also supra* Part III.B.1 (discussing the Bureau's similar errors in interpreting the statute's unavoidability requirement).

At a minimum, moreover, the statutory scheme requires that the Bureau address these alleged gaps in consumer understanding by requiring clearer disclosures, not by restricting the availability of credit. *See, e.g.*, CFPA § 1021(a), 12 U.S.C. § 5511(a) (Bureau must "ensur[e] that all consumers have access to markets for consumer financial products and services and that [such] markets … are fair, transparent, and competitive"); *id.* § 1021(b)(1), 12 U.S.C. § 5511(b)(1) (Bureau must ensure that "consumers are provided with timely and understandable information to make responsible decisions about financial transactions").

Regardless, the Bureau's conclusions are unreasonable and lack evidentiary support. As an initial matter, it is the Bureau, not consumers, that lacks an understanding of the risks and costs of payday loans: as discussed above, the Bureau presumes harms that do not exist, while ignoring benefits that payday loans bring to consumers. *See supra* Part III.A. The Bureau's inability to establish injury fatally undermines its conclusion that consumers do not understand the risks and costs. Moreover, as with the Bureau's allegation that consumers cannot reasonably avoid the supposed injuries, the Bureau's abstract justifications, grounded in discredited theories of behavioral economics, are unreasonable and do not provide substantial evidence supporting the Bureau's findings. *See supra* Part III.B.2.

To support its conclusions, the Bureau also mischaracterizes the evidence, and in particular the study by Professor Mann showing that consumers have an excellent understanding of the risks, costs, and conditions of payday loans. Mann, *Assessing the Optimism of Payday Loan Borrowers*, *supra*, at 118, 123. As discussed above, this study shows that borrowers' expectations are "surprisingly accurate" and that most consumers accurately predict the length of their indebtedness. *See supra* Part III.B.2. Other survey evidence strongly supports these findings, and none contradicts it. *See id.* The Bureau's myopic focus on a very small percentage of borrowers who did not anticipate very long loan sequences simply highlights the Bureau's own tunnel vision and does not support the Bureau's conclusions. *See id.*

The Bureau also claims (without evidence) that consumers fail to understand the risks of payday loans because lenders market payday loans as quick, short-term credit, leading to "incorrect expectations" about whether consumers will pay off the loan without reborrowing, and because consumers are subject to cognitive biases like optimism bias and tunneling. 81 Fed. Reg. at 47,934; *see also id.* at 47,929. If marketing practices and cognitive biases were

preventing consumers from understanding the high risks and costs of payday loans, then the appropriate remedy would be to require additional disclosures or prohibit certain marketing practices. There is no merit to the Bureau's claim that disclosures do not work. *See supra* Part III.B.2 (explaining that the Bureau's own cited studies show that disclosures do work).

Finally, to the extent that consumers do not reduce borrowing as a result of additional disclosures, the only reasonable conclusion is that these fully informed consumers value the product and the benefits it gives notwithstanding the consequences identified by the Bureau. A conclusion that the cost and risks of a payday loan are outweighed by its benefits is obviously not the same as a failure to understand those costs and risks. And, as discussed above, the available research shows that borrowers knowingly choose payday loans because they are the best available option and improve their financial circumstances, and that consumers are satisfied with the product even after they complete their borrowing experience. *See supra* Parts I & III.A.

2. The Bureau next alleges that consumers are unable to protect their own interests both because they do not understand the risks and costs of using payday loans and because, even if they do understand those risks and costs, they have an "immediate need for credit" and an "inability in the moment to search out and develop alternatives" to payday lending. 81 Fed. Reg. at 47,934. The Bureau also asserts that consumers cannot protect their own interests after taking out "unaffordable" loans because they may become "ensnare[d] … in a cycle of debt from which they have no reasonable means to extricate themselves." *Id.* The first part of the Bureau's analysis—a supposed lack of consumer understanding—fails for the reasons discussed above. The other parts of this analysis are equally invalid.

Here again the Bureau posits an interpretation of the statute that conflicts with its unambiguous text and is otherwise unreasonable. Consumer preference for a product—even if that preference is motivated by the consumer's financial needs—simply does not constitute an inability to protect one's own interests within the meaning of the statute.

Moreover, the Bureau's conclusions are entirely speculative; the Bureau provides no evidence at all that consumers are not taking steps to protect their interests. For example, it has conducted no studies measuring the extent to which consumers evaluate the available alternatives. And it provides no valid evidence that consumers suffer from an "inability in the moment" to consider the available financial alternatives. Indeed, the Bureau's only support is a flawed survey conducted by the Pew Charitable Trusts in which 37% of borrowers reported that "they have been in such a difficult financial situation that they would take a payday loan on any terms offered." *Id.* at 47.934 n.530 (citing Pew Charitable Trusts, *How Borrowers Choose and Repay Payday Loans* 20 (2013)). Pew's study lacks evidentiary value because it is based on interviews, with loaded questions, of only 451 self-reported borrowers who could recall having incurred payday loan debt at any time over the prior five years. Pew Charitable Trusts, *supra*, at 20. Moreover, the Bureau mischaracterizes the survey responses. The survey asked: "Have you ever felt you were in such a difficult situation that you would take (an online payday loan/a payday loan) on pretty much any terms offered or have you ever felt that way?" *Id.* at 21. The Bureau alters the colloquial and imprecise phrase "pretty much any terms offered" to literally

"any terms offered." 81 Fed. Reg. at 47,934. Those are not the same thing, especially in a market in which consumers understand that a lender's ability to alter the terms of a payday loan are strictly confined by state and federal law. Agreeing to a $15 fee to borrow $100 for two weeks is not the same as agreeing to a $1,000 fee to borrow $100 for two weeks; "pretty much any terms offered" could include the former, but even the Bureau cannot suggest it would include the latter.

Aside from mischaracterizing the response, the Bureau draws the wrong conclusions from what consumers actually said. Pew's finding that some payday borrowers are in a "difficult situation" in no way demonstrates that consumers suffer from an "inability in the moment" to make reasoned decisions and look out for their own best interests. Instead, the survey simply shows that consumers in "difficult situations" must make rational choices between two sub-optimal outcomes: taking a relatively expensive payday loan, or suffering even higher costs from bouncing checks and defaulting on other obligations, such as utility bills or car payments. *See supra* Parts I & III.A. And in such situations, payday loans are often the better choice. *See id.* Finally, contrary to the Bureau's assumptions, consumers are able to protect their own interests even after taking out a payday loan by, among other things, revoking ACH access and/or defaulting on the loan with few or no adverse consequences. *See supra* Part III.A.2.

3. The Bureau also fails to establish that making a loan without satisfying the proposed rule's ability-to-repay requirements "takes unreasonable advantage" of these supposed consumer vulnerabilities. *See* 81 Fed. Reg. at 47,935–36. The Bureau concedes that the Dodd-Frank Act does not prohibit lenders from taking advantage of their superior knowledge or bargaining power. *Id.* at 47,935. It nevertheless asserts that "[s]everal interrelated considerations" support a determination that the targeted payday lending practices are "unreasonable advantage-taking and thus … abusive." *Id.* None of these considerations has merit.

First, the Bureau complains that the business structure that permits reborrowing "stands in stark contrast to the practice of lenders in virtually every other credit market." *Id.* at 47,935. But the nominal two-week (or thirty-day), next-paycheck duration of a payday loan is largely a product of state regulation and does not necessarily reflect consumers' borrowing needs or expectations. *See supra* Part I.A. Thus, payday lenders structure their loans to permit reborrowing not to exploit consumers, but because that is how the industry has developed to comply with state regulation and to serve a market comprising consumers who lack access to other forms of credit and who want to be able to use payday loans and payday loan sequences. Moreover, the Bureau is wrong to assert that the interests of lenders and borrowers are not aligned: profit-maximizing lenders obviously want borrowers to repay their loans, since lenders bear the cost of un-repaid loans, and just as obviously want borrowers to have a positive experience, so that they will become repeat customers and tout the utility of the product. Indeed, based on the overwhelmingly positive consumer response to payday loans, *see supra* Part I.E, lenders are doing very well in aligning their own interests with those of their customers.

Second, the fact that payday borrowers may be financially distressed, 81 Fed. Reg. at 47,935, cuts against a finding of unreasonable advantage-taking. When financially distressed consumers lose access to payday loans, they turn to more costly and less-desirable alternatives. *See supra* Part I. In other words, because payday loans are substitutes for other expensive credit sources, "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)." Bhutta *et al.*, *Consumer Borrowing*, *supra*, at 24–25.

Finally, the Bureau perceives unreasonable advantage-taking in certain marketing practices and lender advertising. But, here again, the appropriate solution to concerns about marketing and advertising is a rule addressing *those* practices, not one restricting the availability of a highly desired financial product.

V. The Bureau's Required Cost-Benefit Analysis Is Flawed

The Dodd-Frank Act requires the Bureau 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. As a result of these flaws in the Bureau's analysis, the proposed rule, if adopted, would be invalid.

In prescribing a rule, the Bureau must 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), 15 U.S.C. § 5512(b)(2). An agency's cost-benefit analysis will be inadequate if, for instance, the agency: relies on estimates that "have 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).

The Bureau's cost-benefit analysis (*see* 81 Fed. Reg. at 48,115) fails to satisfy these standards for several reasons: (1) the purported benefits of the proposed rule are speculative because the Bureau simply presumes the existence of harms caused by payday 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 proposed rule are understated because the Bureau has not fully considered the impact on consumers of the loss of a crucial sources 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 proposed rule's impact on consumer privacy, and (5) the Bureau has failed to fully evaluate the proposed rule's impact on consumers in rural areas. Each of these defects renders the Bureau's cost/benefit analysis arbitrary.

First, the purported benefits of the rule—elimination of alleged harms caused by reborrowing, default, and making unaffordable payments—are entirely speculative both because the Bureau has failed to establish any of the alleged harms and because the Bureau has failed to assess the injuries to consumers that would arise if the proposed rule were adopted. As explained above, the Bureau simply presumes consumer harm that does not exist. *See supra* Part III.A. And it ignores that payday loans benefit consumers by providing access to funds that are otherwise unavailable or more costly than a payday loan. *See supra* Part I. When government restricts access to payday loans, consumers frequently turn to more costly credit alternatives, including pawn loans, or suffer other consequences, such as overdraft fees for bounced checks, late fees for the missed payment of bills, and termination of crucial services. *Id.* The Bureau's cost-benefit analysis recognizes in passing that the proposed rule will force consumers to turn to these alternatives, *see* 81 Fed. Reg. at 48,129–30, but fails to assess whether and to what degree consumers will be harmed by using those alternatives in lieu of payday loans. In neglecting to consider these averted costs—using either a qualitative or quantitative measure—the Bureau has failed "to view a cost at the margin," which is "illogical" and "unacceptable." *Business Roundtable*, 647 F.3d at 1151.

As to each supposed harm caused by payday lending without the Bureau's ability-to-repay requirement, the Bureau's assessment of the proposed rule's benefits is fundamentally flawed. For reborrowing, the Bureau claims that the proposed rule will benefit consumers by "eliminating extended loan sequences," 81 Fed. Reg. at 48,126, and it bases this benefit in part on its assumption that consumers "do not anticipate those long loan sequences," *id.* at 48,127. As discussed above, these claims rest on presumptions about harm that do not exist and unwarranted assumptions about consumer behavior. *See supra* Part III. The supposed benefits of reducing defaults and delinquencies (*see* Fed. Reg. at 48,127–28) are likewise speculative and overblown. *See supra* Part III.A. 2. Finally, the Bureau claims that the proposed rule will benefit consumers who otherwise "feel compelled to take painful measures to avoid defaulting" on payday loans, such as deciding not to pay other bills or make crucial purchases. 81 Fed. Reg. at 48,128. But the Bureau entirely ignores that, for the cash-strapped consumer who turned to a payday loan, these "painful measures" were necessary before the consumer took out the loan, and would have been necessary even if the payday loan were unavailable. That is because typical payday borrowers lack access to credit and must make painful financial decisions, regardless of whether they take out a payday loan. In fact, without the loan, these consumers must make the painful decision sooner. Yet the Bureau opportunistically accounts for these "collateral consequences" when seeking to maximize the benefits of the proposed rule, while ignoring similar costs when they detract from the alleged benefits of the proposed rule. *See Business Roundtable*, 647 F.3d at 1154 (agency gave weight to a factor when considering benefits, but ignored it when considering costs).

Second, in its assessment of the proposed rule's costs to consumers, the Bureau fails to quantify or seriously evaluate the impact on consumers of the loss of an important source of credit. The Bureau surveys the academic literature and concludes that the "evidence on the effects on consumers of access to storefront payday loans is mixed." 81 Fed. Reg. at 48,131. In

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

some risk that the loan could lead to default, which could lead to bank fees from multiple payment attempts, the risk of that cost could easily be lower than the risk of defaulting and repossession if the consumer cannot make the original auto-loan payment. The Bureau has not even attempted to assess these alternative costs, and it lacks any evidence that the costs of covered long-term loans are worse than the alternatives. For example, it cites no studies comparing financial outcomes of consumers who take out covered loans with similarly situated consumers who do not use these loans. It therefore lacks substantial evidence that the costs of covered long-term loans amount to a "substantial injury."

Second, similarly, the Bureau counts as costs certain events that would have occurred sooner but for the leveraged-payment loan. 81 Fed. Reg. at 47,997–98. Specifically, the Bureau asserts that payments on longer-term loans may "leave the consumer unable to meet other financial obligations as they fall due and meet basic living expenses as they arise." *Id.* at 47,997. But consumers who take out these loans were already unable to meet other financial obligations—after all, that is the fundamental reason that consumers want and need these loans. The loans *benefit* consumers by giving them an opportunity to avert their financial crisis, but the crisis was already occurring before the consumer took out the loan. The Bureau, however, has arbitrarily counted the inability to meet financial obligations as a cost when it occurs after a consumer takes out a covered loan, but ignores those same costs that were already occurring before the loan.

Third, the Bureau's claim that refinancing is a substantial injury lacks any evidence at all. It guesses, for example, that consumers "almost certainly [do] not anticipate and take into account" the additional cost of refinancing, but the Bureau has no evidence to support that assumption. *See id.* at 47,991. Further, the Bureau's evidence about refinancing is entirely limited to "balloon payment" loans. *Id.* It admits that consumers who refinance non-balloon loans "do not particularly evidence financial distress," and in fact they "use the loan somewhat like a line of credit" by taking out extra cash before refinancing. *Id.* At a minimum, then, any injury arises only from balloon loans, and even that lacks substantial evidence.

2. The Bureau claims that these supposed injuries are not reasonably avoidable because as with short-term loans, "a confluence of factors creates obstacles to free and informed consumer decision-making." *Id.* at 47,998. But because the Bureau cannot rely on its debt-trap hypothesis, as it does for payday loans, it is forced to invent an alternative "confluence." As relevant to leveraged-payment loans, the Bureau claims that consumers are unaware that so many covered long-term loans result in default "or that lenders are able to stay in business and profit even when so many consumers default." *Id.* This interpretation conflicts with the statute and is otherwise unreasonable. *See supra* Part III.B.1. Moreover, the Bureau does not even bother to support this claim with evidence, let alone substantial evidence. It provides no empirical analysis of whether consumers are in fact unaware of default rates. The Bureau also gives far too little credit to consumer intelligence and to consumer awareness of the risks inherent in this market. The reason this lending market exists is that this group of borrowers poses a very high credit risk and so cannot secure other forms of credit. And because these consumers know their

own circumstances and know that these lenders are willing to lend to high-risk consumers—including themselves—they are well aware of the general risk of default in the market. Likewise, because these consumers know the cost of these loans, they are also likely to understand that the way these lenders stay in business despite high levels of default is by charging more for the loan. After all, one need not be a financial wizard to understand that higher-rate loans are more expensive to obtain.

All the Bureau's other guesswork about whether consumers can avoid the alleged injury is similarly unsupported by any empirical evidence. For example, the Bureau claims that consumers are unable to "self underwrite" because they cannot possibly evaluate their own budget and assess their ability to repay the loan, and would merely "fall back on the assumption that other similarly situated consumers must have been able to repay" their loans. *Id.* This is pure supposition unsupported by any evidence. The Bureau offers no studies of consumer self-underwriting, no evidence that consumers cannot evaluate their own budget or assess their own need for a loan, and certainly no evidence that consumers would simply assume that others must have been able to repay the loan, so they must as well.

Finally, according to the Bureau, the alleged injury is not reasonably avoidable because consumers need the credit and "make a reasoned decision" to take out the loan even though it may be difficult to repay. *Id.* at 47,999. This not only fails to prove the Bureau's point, it also underscores the lack of any substantial injury. These consumers have rationally assessed the costs of a covered loan versus the available alternatives and determined that the loan provides the best solution, notwithstanding the risk of default. Thus, they could easily avoid incurring the costs of the loan, but they rationally decide that the loan makes the most sense.

3. The Bureau's cost-benefit analysis also suffers from several flaws: among other things, it arbitrarily assigns excessive weight to the injuries, gives insufficient weight to the benefits of covered long-term loans, and gives insufficient weight to the benefits to competition from current lending practices.

To begin, the Bureau arbitrarily claims that leveraged-payment loans cause a "very significant amount of harm." *Id.* For one thing, the Bureau has provided no objective method or baseline for measuring whether any injury is "very significant" or completely insignificant. For another, the Bureau's assessment is based on its erroneous view that covered longer-term loans cause any injury to consumers. Access to these loans benefits consumers by enabling them to avoid more costly alternatives, and the Bureau has provided no evidence showing that use of covered loans makes consumers worse off than if they had turned instead to the available alternatives.

Next, the Bureau accords no weight to the benefit that covered loans provide, and it lacks substantial evidence that the costs outweigh these benefits. The Bureau first focuses on those consumers who repay their loans without defaulting, and asserts that "for the most part these consumers could reasonably have been determined at consummation to have had the ability to repay the loans they received, " *id.*, and that "the size of any residual false negative population

will be small." But the Bureau points to no studies evaluating whether consumers who take out and repay covered longer-term loans could successfully pass the proposed ability-to-repay requirements, and it lacks any evidence supporting this assumption. The Bureau next focuses on consumers who default on their loans, and claims that the only benefit they receive from the loan is a "temporary reprieve" in the form of cash that allows them to pay their current bills, but the Bureau insists that "[h]ow much of a reprieve is entirely speculative." *Id.* at 48,001. In stating that these benefits are speculative, the Bureau inconsistently accords significant weight to certain costs when they occur after taking out leveraged-payment loan, while ignoring those same type of costs when they occur before or instead of taking out the loan. *See Business Roundtable*, 647 F.3d at 1154 (agency's analysis was "internally inconsistent and therefore arbitrary"). Specifically, when it wants to magnify the alleged injury, the Bureau relies heavily on consumers' inability to afford their basic living expenses, the costs that come from attempted bank withdrawals, and the costs of default and debt collection. 81 Fed. Reg. at 47,997–98. But when it wants to minimize the benefits, the Bureau ignores those same costs—consumers' inability to pay important bills unless they take out a covered loan, the bank overdraft fees and costs of default on other obligations, and elimination of crucial services. This opportunistic inconsistency renders the proposed rule arbitrary.

B. The Bureau Lacks Evidence That Leveraged-Payment Loans Are Abusive

As with payday loans, the Bureau fails to support its characterization of the targeted practices relating to longer-term loans as abusive. Here too the Bureau seeks to override the informed judgment of consumers through the false and paternalistic premise that consumers are incapable of understanding their own best interests.

The Bureau claims that issuing leveraged-payment loans without determining the ability to repay is abusive because (1) consumers do not understand the high risk of default or the costs associated with installment loans, (2) consumers are incapable of protecting their own interests by considering alternatives that would enable them to avoid installment loans or loans with better terms, and (3) lenders take unreasonable advantage of financially stressed consumers by offering expensive loans without determining whether they can repay. 81 Fed. Reg. at 47,993–97. But each of these conclusions merely reflects the Bureau's subjective policy judgment and lacks any objective evidence.

1. The Bureau contends that consumers do not understand the risk of default on a leveraged-payment loan because "based on common experience with consumer credit generally, consumers are likely to assume that the lender's continued existence means the vast majority of a lender's loans are successfully repaid, and that a lender that makes them a covered longer-term loan has determined that they are in approximately as good of a financial position to be able to repay the loan as the other consumers." *Id.* at 47,994. This is an incorrect and unreasonable interpretation of the statutory requirement. *See supra* Part IV. Moreover, the Bureau cites nothing to support its assertion, making it up out of whole cloth. There is no survey asking consumers what they think about these loans, including whether they think many borrowers default on these loans and whether lenders conduct any creditworthiness review. And, as

discussed above, the Bureau's conclusion makes little sense and assumes that consumers would not understand even the most basic business concepts, such as that lenders serving this market charge higher prices to offset the higher risk of default.

The Bureau also guesses that consumers do not understand "just how severe some of the collateral consequences can be" if they default because lenders with a leveraged-payment mechanism can "extract payment from the consumer's account," leading to "multiple NSF fees from multiple presentments." 81 Fed. Reg. at 47,995. Again, the Bureau has no evidence for these statements, but simply asserts them entirely without support. Notably, in the modern era of electronic banking, almost all traditional loans, along with many other financial obligations, involve "leveraged-payment" mechanisms, with borrowers having the option to sign up for automatic debits. The Bureau does not explain why this feature causes any more harm for "covered loans" than it does for any other loan or financial obligation. Regardless, adequate disclosure would offer a complete solution to these problems, yet the Bureau rejects a disclosure requirement, which highlights the arbitrariness of its proposed rule.

2. The Bureau next claims that consumers are unable to protect their own interests because of "their immediate need for cash and their inability in the moment to search out or develop alternatives that would either enable them to avoid the need to borrow or to borrow on affordable terms." *Id.* But again, the Bureau's discussion lacks any supporting evidence about whether the relevant consumers consider various alternatives before taking out a leveraged-payment loan. The Bureau also reasons that consumers "may reasonably believe that searching for alternatives will be fruitless and costly." *Id.* But if that is true, it undermines the Bureau's claim that these loans cause severe harm. If it is costly to search for alternatives and any search would be fruitless anyway, then taking out a covered loan may be the most financially reasonable and most affordable decision for that consumer. And it is the Bureau's burden to provide evidence to the contrary.

3. Finally, the Bureau insists that leveraged-payment lenders take unreasonable advantage of consumers. But no substantial evidence supports the two primary reasons for this conclusion, nor can these reasons withstand any scrutiny. The Bureau first notes that "the practice of making loans without regard to determining the ability to repay stands in stark contrast to the practice of lenders in virtually every other credit market." *Id.* at 47,996. The core function of this industry, however, is to serve consumers who need credit but who have poor credit ratings and present a higher credit risk, and so cannot borrow from other lenders. The best way to serve these risk-laden consumers is to charge more and require some form of leverage for repayment of the loan. That is not a sign of taking unreasonable advantage, it is instead a sign of a market tailored to serving the unique needs of a particular consumer segment.

The Bureau next claims that the business model takes advantage of consumers because, "unbeknownst to borrowers," it "depends on the lenders' *ability to collect* rather than on the consumers' *ability to repay*." *Id.* The Bureau, however, lacks any empirical evidence that consumers do not understand this. And it makes no sense either. These consumers must understand that they have authorized a leveraged-payment mechanism. They also know that

these lenders do not require high credit scores and do not require extensive underwriting. That, after all, is the reason these consumers use these lenders. In these circumstances, consumers understand perfectly well that lenders are relying heavily on the leveraged-payment mechanism—that is, the "ability to collect"—and not on credit scores or other indicia that each consumer will reliably repay the loan on time. And, if a consumer's failure to understand this were truly the problem, the solution would be clearer disclosures, not the proposed rule's onerous restrictions.

VII. There Is No Substantial Evidence That the Targeted Practices Relating to Title Loans Are Unfair or Abusive

The Bureau also proposes to extend its rule to cover both short-term and long-term loans secured by an interest in a vehicle title. *See* 81 Fed. Reg. at 47,919, 47,985. The arguments made above for payday loans, *see supra* Parts III–V, and longer-term leveraged-payment loans, *see supra* Part VI, generally apply to title loans as well and are incorporated herein. In particular, as with the extension of the rule to longer-term loans, the Bureau seemingly proposes this extension primarily to prevent payday lenders from shifting their business to title loans, even though the Bureau lacks evidence, supervisory data, and an understanding of the title-loans market. This further demonstrates that the Bureau's main concern is prohibited interest-rate regulation. As discussed below, moreover, the Bureau's evidence is just as insubstantial as to title loans as it is to unsecured loans, both for short-term and long-term title loans.

A. Short-Term Title Loans

The bulk of the Bureau's cited research about short-term loans concerns payday loans, not title loans, and the proposal to extend the rule to title lending contains serious evidentiary gaps. This is perhaps because title lending in general "has created a substantially smaller literature" than has payday lending. Jim Hawkins, *Using Advertisements to Diagnose Behavior Market Failure in Payday Lending Markets*, 51 Wake Forest L. Rev. 57, 58–59 (2016). Or perhaps it is because the Bureau's primary policy focus has been on payday loans. Whatever the reason, the Bureau (1) systematically fails to support its conclusions about title loans with substantial evidence, (2) provides particularly weak support for its conclusions about reborrowing and the so-called debt trap, and (3) ignores evidence that title loans improve overall consumer financial health and cause no substantial injury to consumers.

1. Throughout its discussion of short-term loans, the Bureau fails to provide substantial evidence to support extending the rule to title loans. It attempts to mask this dearth of evidence by weaving the analysis of title loans together with evidence regarding payday loans, but the evidence relevant to title loans remains exceedingly thin. For example, the Bureau's first mention of title loans attempts to establish basic facts about "the demographic profiles of vehicle title loan borrowers." 81 Fed. Reg. at 47,920. But the Bureau cannot even get that far without noting that "[n]one of the sources of information on the characteristics of vehicle title borrowers … distinguish between borrowers taking out single-payment and installment vehicle title loans." *Id.* at 47,921 n.435. This undermines the core structure of the Bureau's proposed rule, which

distinguishes short-term and longer-term loans, and applies different regulations to each type of loan. If the Bureau's title-loan evidence does not distinguish between long- and short-term loans, then no basis exists for the regulation's design. And though the Bureau cites this research only for demographic data, the methodological weakness of the research illustrates a pervasive lack of relevant evidence. Not only is the research methodologically problematic, but it contradicts the Bureau's claim that installment title loan borrowers are "disproportionately racial and ethnic minorities." *Id.* at 47,988. Instead, these borrowers are not "disproportionately members of racial minority groups, are not exceedingly young or exceedingly old, and do not lack education." Kathryn Fritzdixon *et al.*, *Dude, Where's My Car Title?: The Law, Behavior, and Economics of Title Lending Markets*, 2014 U. Ill. L. Rev. 1013, 1053 (2014).

Other examples of insufficient evidence abound. To support its conclusions about the "circumstances of borrowing," the Bureau cites only one survey allegedly relevant to title loans. *Id.* at 47,922 & n.451. But the survey did not distinguish payday borrowers from title borrowers, instead screening respondents by asking if they had previously used "payday loan or cash advance services, where you borrow money to be repaid out of your next paycheck." Pew Charitable Trusts, *Payday Lending in America: Who Borrows, Where They Borrow, and Why* 32 (2012). Even if some respondents believed that question referred to title loans, there is no way to know the sample size of title-loan borrowers or to distinguish the answers of those borrowers from payday borrowers. *See id.* at 35 (failing to distinguish these groups). Similarly, when discussing title-loan structure, the Bureau claims that "the median borrower's payment on a 30-day loan is equal to 49 percent of monthly income." *Id.* at 47,923. But to support this claim, the Bureau cites two irrelevant reports. *Id.* at 47,923 n.456. The first report never mentions title loans at all. *See* CFPB, *Data Point: Payday Lending* (2014). The second discusses only longer-term installment loans, not "30-day" title loans.

2. The evidentiary shortcomings are particularly problematic when the Bureau discusses rollovers and the debt-trap hypothesis—the key theoretical points supporting its rule. For example, the Bureau claims that lenders "actively encourage borrowers to reborrow and continue to be indebted rather than pay down or pay off their loans." 81 Fed. Reg. at 47,924. But as to title lenders, the available evidence not only fails to support that statement, but contradicts it. First of all, the Bureau cites no relevant evidence related to title lenders. It cites an anecdotal press release about an enforcement action against a payday lender, *id.* at 47,924 n.463, but there is no evidence that title loans were at issue there. Further, the Bureau admits that short-term title-loan borrowers "are more likely than payday borrowers to reduce the size of loans taken out in quick succession." *Id.* In other words, title-loan borrowers actually do "pay down" their loans, thus refuting the Bureau's unsupported claim that lenders "actively encourage" them not to.

The Bureau also claims that the alleged pressure to reborrow "can be especially acute when the lender obtains vehicle security." *Id.* at 47,925. But the Bureau cites no evidence for this supposition. There are no studies, for example, asking consumers whether they feel "especially acute" pressure to reborrow because of the title security. And it is quite possible that

consumers would undertake an even more searching account of their financial circumstances before parting with a vehicle title, compared to a payday loan with no security, and that they view the availability of reborrowing as an important safeguard against default. It is possible that many consumers would not take out short-term title loans if they were unable to reborrow. But of course, the Bureau has provided no evidence to support or refute any of its analysis on this point.

Other claims in the proposed rule are similarly unsupported. The Bureau asserts that title-loan borrowers "do not anticipate" long loan sequences and are unaware of the looming cycle of reborrowing. *Id.* at 47,927. But the one study on which the Bureau relies concludes—contrary to the Bureau's claims—that "[p]eople are relatively good at predicting their ability to repay," even if not quite perfect at it. Fritzdixon *et al.*, *supra*, at 1042. The Bureau also claims that "borrowers do not appear to learn from their past borrowing experience[s]" with rollovers, and that a subset of "heavy users" is particularly susceptible to ensnarement in a debt trap. 81 Fed. Reg. at 47,928. But the available evidence shows otherwise. According to the only relevant survey, "more people who have used title loans in the past think it will take them six or more months to pay off the loan than those who have never used one before." Fritzdixon *et al.*, *supra*, at 1043. Accordingly, experienced title-loan borrowers more accurately predict their repayment times than inexperienced borrowers.

Finally, the Bureau asserts that "[c]onsumers are unlikely, when deciding whether to take out a loan, to be thinking about what will happen if they were to default or what it would take to avoid default." *Id.* at 47,931. But again, the Bureau points to no evidence supporting this bald assertion. And the claim is intuitively untrue, especially for title loans. The act of giving a security interest in a vehicle title—meaning that default could lead to repossession—is likely to impel consumers to consider carefully the risks and consequences of the loan in general and of default in particular. The Bureau provides no evidence to the contrary, and relies entirely on guesswork about consumer behavior.

In sum, the available evidence shows that title-loan borrowers are not unwittingly trapped in a cycle of debt. To the contrary, "title lending customers are not the irrational, vulnerable population that previous scholarship has envisioned." Fritzdixon *et al.*, *supra*, at 1018. These consumers appear to use nominally short-term title loans as installment loans by paying down a portion of the principal each time they reborrow.

3. Not only does the Bureau base its conclusions on unsupported assumptions, but it ignores evidence that access to title lending improves consumer financial health and does not cause substantial injury to consumers. In particular, an important study of Tennessee consumers showed that, "[c]ontrary to what the critics claim, counties with access to title loans have lower personal bankruptcy filing rates, particularly Ch. 7 filing rates," which "suggests that the loans, on average, fill a credit gap and improve financial well-being for consumers." Kathryn Fritzdixon, *Essays on Consumer Finance: Topics in Auto Title Lending* 2 (May 2015) (unpublished Ph.D. dissertation, Vanderbilt University). In other words, "[a]ccess to credit, even very expensive credit like title loans, seems to benefit consumers." *Id.* at 54. To test further

whether title loans "do harm borrowers but not so badly as to push them into filing for bankruptcy," *id.*, the study also looked at other measures of financial health, including whether consumers had trouble paying medical bills, paying rent or a mortgage, suffered from food insecurity, or had their telephone disconnected. *Id.* at 62. Based on these measures, "access to title loans has no effect" on consumer financial health. *Id.* Yet the Bureau ignores this evidence and proposes to move forward with regulating short-term title loans despite the lack of substantial evidence supporting its conclusions.

B. Long-Term Title Loans

The Bureau's evidence for installment title loans is similarly deficient. Not only has title lending in general "created a substantially smaller literature" than has payday lending, Hawkins, *supra*, at 58–59, but so too the evidence about "installment borrowers is less robust than for borrowers of … short-term products," 81 Fed. Reg. at 47,987. As a result, the Bureau (1) systematically lacks evidence supporting its conclusions about installment title loans, and (2) ignores that what little evidence exists undermines its analysis.

1. The Bureau's discussion of installment title loans is devoid of evidence. Throughout the relevant evidentiary section, pages of naked assertions hang unsupported by any evidence related to long-term title loans. *Id.* at 47,987–93. The Bureau cites no relevant evidence for its discussion of the "circumstances of borrowing," *id.* at 47,988, "lender practices," *id.* at 47,988–90, "collateral harms," *id.* at 47,991–92, or "consumer expectations and understanding," *id.* at 47,992–93. Thus, in the Bureau's subsequent assessment of unfair and abusive lending practices regarding installment title loans, every conclusion involving these topics lacks substantial evidence.

For example, the Bureau lacks any evidence for concluding that title-loan borrowers "do not understand the magnitude of the risk that they will default, suffer collateral harms from making unaffordable payments, or have to reborrow." *Id.* at 47,994; *see also id.* at 47,998. It has no evidence to conclude that title-loan borrowers "do not understand just how severe some of the collateral consequences can be if the loan is in fact unaffordable." *Id.* at 47,995 ; *see also id.* at 47,999. And there is no evidence—other than the Bureau's "take my word for it"—that title-loan borrowers are unable "in the moment to search out or develop alternatives" to installment title loans. *Id.* at 47,995; *see also id.* at 47,998.

2. Not only does the Bureau fail to include any evidence for most of its conclusions, but the existing evidence affirmatively undermines the Bureau's analysis in various ways. As an initial matter, as noted above, the evidence contradicts even the Bureau's preliminary claims about the demographic characteristics of title-loan borrowers. *See supra* Part VII.A.

More importantly, to support its abusiveness finding, the Bureau claims that installment title loans lead to a "relatively high likelihood of vehicle repossession," and that consumers "do not understand the high risk" that their vehicle will be repossessed. *Id.* at 47,995. The Bureau puts similar emphasis on the risk of repossession in attempting to support its unfairness finding.

Id. at 47,997–98. The available evidence, however, "strongly suggests" that the Bureau's concerns are "vastly overstated." Fritzdixon *et al.*, *supra*, at 1053. The Bureau itself estimates that only 10% of installment title loan sequences result in repossession—which of course means that consumers have a 90% chance of taking out a new title loan without suffering repossession. 81 Fed. Reg. at 47,991. Other estimates show that only 6% to 11% of borrowers have a car repossessed in a given year. Pew Charitable Trusts, *Auto Title Loans* 13 (2015). And of those vehicles, 15% to 25% are returned to borrowers who pay their loan balances, so only 5% to 9% of borrowers ultimately lose their car in a given year. Those are good odds.

The Bureau similarly claims—without evidence—that the "threat of repossession can be extremely powerful," especially "in areas in which the consumer relies heavily on their car for transportation to get to work, access health care, or conduct other basic daily activities." 81 Fed. Reg. at 47,990. But, yet again, the evidence shows otherwise. The vast majority of title loan borrowers—85%— report that they have alternative ways to get to work or school if they lose their vehicle to repossession. *Id.* at 47,991. Thus, "only a small minority of borrowers lose their car to repossession," and "only a small minority of those customers that lose a car would be unable to get to work." Fritzdixon *et al.*, *supra*, at 1053. "Rough calculations would place the percentage of title borrowers who lose their jobs as a result of title lending at 1.5%." *Id.* at 1038. This refutes the Bureau's assertion of substantial injury and severe risk.

Finally, as with short-term title loans, the Bureau ignores evidence that title lending (both short- and long-term) improves consumer financial health and causes no substantial injury to consumers. *See* Fritzdixon, *supra*, at 2. This evidence undercuts the Bureau's unsupported claims that title lending causes substantial injury to consumers and that lenders take unreasonable advantage of consumers who do not understand the material risks of these products.

VIII. The "Residual Income" Standard for Ability-To-Repay Determinations Is an Unsound and Unreasonably Burdensome Approach to Underwriting

Even apart from the problems identified above, the Bureau has no legitimate basis for the "residual income" standard that the proposed rule would require lenders to use for determining a consumer's ability to repay a covered loan. That standard is unaccepted generally and ill-suited particularly for the payday-lending industry, and is unreasonably burdensome and unworkable. Regardless, other less restrictive alternatives are available. For all of these reasons, the "residual income" test is not an appropriate "requirement[] for the purpose of preventing [the alleged unfair and abusive] acts or practices." CFPA § 1031(b), 12 U.S.C. § 5531(b); *see also* Leonard N. Chanin & Oliver Ireland, *How the CFPB's Unfairness Doctrine Pushes the Envelope*, American Banker (Sept. 29, 2016) (available at http://goo.gl/SulYwe) ("Mandating detailed underwriting processes that lenders must use … goes far beyond accepted and historical approaches to defining a practice as unfair, and seems wholly inconsistent with the very theory of an unfairness determination.").

A. The Residual Income Standard Is Untested and Unsuited for the Payday Lending Industry

The proposed rule requires lenders to conduct a "residual income analysis" that assesses "the consumer's projected income and major obligations," and forecasts whether "the consumer will have sufficient remaining (*i.e.*, residual) income to cover the payments on the proposed loan and still meet basic living expenses." 81 Fed. Reg. at 47,941. This standard for measuring a borrower's ability to repay should be wholly rejected because it is highly unusual, virtually untested, and particularly unsuited for the payday lending industry.

First, the standard is nearly unprecedented, for almost no other lending markets use it to measure creditworthiness. Even the Bureau admits this: "in other markets and under other regulatory regimes financial capacity is more typically measured by establishing a maximum debt-to-income (DTI) ratio." *Id.* at 47,941. Credit card companies, for example, have long used DTI to determine creditworthiness. *See* 12 C.F.R. § 1026.51(a)(1). The same is true of mortgage lenders. *See* 12 C.F.R. § 1026.43(c)(2)(vii). In fact, when imposing an ability-to-repay requirement on mortgage lenders under the Dodd Frank Act, the Bureau considered and rejected a residual-income test, emphasizing that it is not widely used. *See* 78 Fed. Reg. 6408 (Jan. 30, 2013). "Except for one small creditor and the VA," the Bureau explained, no creditors "use residual income in underwriting" as the primary determinant of creditworthiness. *Id.* at 6,486. Thus, according to the Bureau's own reasoning, the residual income standard "is neither well known, particularly in this country, nor widely understood, let alone accepted." *Id.* at 6,486 n.117 (quotation marks omitted).

Second, because the residual-income standard "is so different from what many lenders currently engage in," 81 Fed. Reg. at 47,942, it is untested and unpredictable. Indeed, in the mortgage lending ability-to-repay rule, the Bureau admitted it lacked any evidence that the VA's residual-income standards—which appear to be the only such standards in use—accurately predict the ability to repay. The Bureau was unable, it said, "to conduct a detailed review of the VA residual income guidelines, which would include an analysis of whether those guidelines are predictive of repayment ability, to determine if those standards should be incorporated, in whole or in part, into the ability-to-repay analysis that applies to the entire residential mortgage market." 78 Fed. Reg. at 6486–87. The Bureau claimed it would "consider conducting a future study on the debt-to-income ratio and residual income" to develop an evidentiary basis for concluding that the residual-income standard is an effective tool. *Id.* at 6486. But though it does not appear to have done so, the Bureau nevertheless proposes to incorporate this untested residual-income standard into the ability-to-repay analysis that applies to the entire small-dollar lending market.

Third, the residual-income standard is singularly inappropriate for the payday lending market, in which consumers typically use loans for income smoothing (*e.g.*, when income and expenses have a high degree of volatility) or to address income or expense shocks (*e.g.*, when a consumer faces an unexpected expense or loss of income), and in which consumers frequently expect to roll their loans over until their net income peaks or their financial stress has passed.

See supra Parts I & III. The very reason these consumers need a payday loan is that they currently lack the funds to pay their bills. Almost invariably, then, at the time these consumers need a payday loan they lack sufficient income to pay all of their expenses and also to repay the loan within its short, initial term, and they will therefore be unable to meet the proposed rule's stiff residual-income requirements. Yet because their financial distress is temporary, they are much less likely to have difficulty repaying the loan at the end of the borrowing horizon, when they are at an income peak or after the financial crunch from the unexpected expense has passed. And while consumers frequently anticipate reborrowing as part of that process, *see supra* Parts I.G & III.B, the residual-income standard requires them to have the capacity to repay without reborrowing. The Bureau's residual-income standard thus interferes with the typical income-smoothing character of a payday loan and is "fundamentally inconsistent with the nature of the product." Mann, *Do Defaults on Payday Loans Matter?*, *supra*, at 1.

Fourth, there is no basis for the Bureau's decision to define a borrower's residual income to exclude the principal amount of the payday loan itself. Such a definition arbitrarily ignores that a payday loan increases a borrower's liquidity and ability to satisfy other financial obligations. Take, for example, a borrower who has $1,000 in monthly net employment income, $500 in monthly major financial obligations, and $485 in monthly basic living expenses, but needs funds to put towards those expenses until his next payday. Under the Bureau's proposed test, the difference between that borrower's residual income and his basic living expenses would be $15, meaning that he would be unable to take out a $100 payday loan with a $15 fee. This is so even though the borrower would, under the Bureau's own reasoning, have sufficient income of $1,100 ($1,000 in employment income plus $100 in loan proceeds) to fully satisfy his expenses of $1,100 ($500 in major financial obligations plus $485 in basic living expenses plus $115 in payday-loan repayment).

Fifth, there is no justification for the Bureau's official interpretation that evidence of the reasonableness of a lender's ability-to-repay determinations may include the extent to which the lender's determinations lead to high rates of delinquency, default, and reborrowing. 81 Fed. Reg. at 48,193. This assumes without evidence that a borrower's satisfaction of the residual-income test will be predictive of that borrower's approach to delinquency, default, and reborrowing.

B. The Residual Income Standard Is Unreasonably Burdensome and Unworkable

The Bureau's residual-income standard is also unreasonably burdensome and unworkable for both lenders and borrowers. To begin, the proposed rule generally imposes an arduous budgeting task on consumers, requiring them to submit detailed documentation to verify their income and major financial obligations. This includes submitting a written statement concerning their finances, providing income records, records from every other lender to whom the consumer is obligated, and a "reliable transaction record (or records) of recent housing expense payments." 81 Fed. Reg. at 47,955–56. As for lenders, the rule requires them to "obtain verification evidence" of a borrower's income and major financial expenses, *id.* at 47,955, and also to determine the cost of basic living expenses, though the Bureau does not explain how, *id.* at

47,943. This level of documentation and budget forecasting for a $500 payday loan is unreasonable. The Bureau does not require this even for a $500,000 mortgage, but instead allows mortgage lenders to rely on alternative methods without the same level of documentation. *See* 12 C.F.R. § 1026.43(c)(3)–(4). Mortgage lenders, for example, need not examine basic living expenses. *Id.* Nor must they verify other financial obligations not included on a credit report. 12 C.F.R. § 1026.43(c)(3)(iii).

Documenting a borrower's housing expense is particularly problematic. Mortgage information will frequently be unavailable because very few payday borrowers own a home. Elliehausen, *supra*, at 31. Lenders will thus be forced to rely on rental information, but that may be unavailable too. Because payday borrowers typically have low income, many live with roommates or family and informally share living expenses. Others may simply lack a formal rental agreement. And though the proposed rule would allow lenders to estimate housing expense by comparing other consumers in the same geographic area, *see* 12 C.F.R. § 1041.5(c)(ii)(D)(2), that method could substantially overstate housing expenses by failing to account for the greater amount of shared living arrangements among payday borrowers compared to other consumers. Further, basing lending decisions on geographic data could raise concerns about liability under the Equal Credit Opportunity Act for "redlining" or "reverse redlining," meaning racial discrimination in lending where the lender targets certain geographic areas for disfavored treatment. *See, e.g.*, *Hargraves v. Capital City Mortg. Corp.*, 140 F. Supp. 2d 7, 20, 23 (D.D.C. 2000) (discussing redlining and reverse redlining). Given that the Bureau has already claimed that payday borrowers are disproportionately of minority races, 81 Fed. Reg. at 47,920, it makes little sense for lenders to begin a practice that could appear to target certain geographic areas for favorable or unfavorable treatment. Thus, at a minimum, instead of requiring lenders to verify housing expense through documentation or geographical targeting, the Bureau should allow "validation" of housing expense based on a consumer's stated history and circumstances.

Determining a borrower's basic living expenses raises still more problems. This part of the rule is especially vague, which unfairly exposes lenders to enforcement actions. The Bureau defines "basic living expenses" as those goods and services "necessary to maintain the consumer's health, welfare, and ability to produce income." *Id.* at 47,943. But the meaning of terms such as "necessary" and "welfare" are wildly ambiguous. Is cable television necessary for welfare? What about cosmetics? Dining out? Specialty health foods? Is maintenance for a rental unit a basic living expense? These and other questions will plague implementation of the proposed rule.

The rule leaves many other questions unanswered because it says nothing about how to calculate a borrower's basic living expenses. How, for example, should lenders account for shared living expenses? And must the head of a household multiply individual expenses by the number of persons in the household? The comments to the proposed rule do suggest that lenders can rely on a "a statistically valid survey of expenses of similarly situated consumers," *id.* at 1222, and the Bureau "notes that the Bureau of Labor Statistics conducts a periodic survey of

consumer expenditures which may be useful for this purpose," *id.* at 311. But the BLS surveys may not provide accurate data. The BLS itself admits that "underreporting," "complexity, potential conditioning in respondent behavior, proxy reporting, interview length, and recall error" all "present obstacles to the accurate reporting of expenditures" in its surveys. Jennifer Edgar *et al.*, Bureau of Labor Statistics, *Research Highlights of the Consumer Expenditure Survey Redesign*, Monthly Labor Review 2–3 (Sept. 2013). Nor are the BLS's surveys conducted for the purpose of assessing "necessary" expenditures for payday borrowers; they instead assess typical expenditures for typical consumers. And the typical consumer is likely to report outlier expenses, which will inflate the BLS averages by including expenses that go beyond minimum necessary living expenses. Thus, lenders will likely have to fund costly independent surveys to determine their customers' basic living expenses. Here again the Bureau should at a minimum permit "validation" of basic living expenses based on the borrower's stated history and circumstances.

C. Less Restrictive Alternatives Are Available

Because of these problems, the Bureau should either abandon the ability-to-repay requirement entirely, replace the residual-income standard with a less restrictive alternative, or at a minimum modify the standard to reduce the burdens on lenders and consumers. Several approaches are available.

First, the Bureau could proceed in a supervisory matter, rather than using its UDAAP rulemaking authority. The Dodd-Frank Act authorizes the Bureau to "supervise" payday lenders. CFPA § 1024, 12 U.S.C. § 5514. Using this authority, the Bureau could evaluate the different methods that lenders currently use to manage credit risk. If a lender is not achieving a rate of default that the Bureau deems acceptable, the Bureau can address this as a supervisory matter, rather than designating the failure to use the Bureau's one-size-fits-all standard as an unfair and abusive practice.

Second, the Bureau could require disclosures instead of an ability-to-repay requirement. As discussed elsewhere in this letter, disclosure of the full costs and risks of small-dollar borrowing is the appropriate response to the Bureau's alleged concerns about these markets. *See supra* Parts III & IV; *infra* Part IX.C.1. Informing consumers of the costs and risks of payday loans would eliminate any harm to consumers arising from lender practices that allegedly trap unwitting and uninformed consumers in a cycle of debt. If the Bureau can eliminate this core alleged harm through disclosures, imposing further regulatory burdens is unnecessary and arbitrary.

Third, even if the Bureau insists on imposing some ability-to-repay requirement, it should reject the residual-income standard and replace it with the DTI standard, which is a well-accepted and time-tested method of evaluating creditworthiness used successfully in many other industries. The DTI standard would require substantially less documentation by eliminating the verification requirements for major financial obligations and the forecasting of basic living expenses, instead allowing lenders to rely on documents such as payroll stubs, tax returns, and

credit reports. The Bureau rejects the DTI standard because typical payday borrowers are low-income consumers, and "a DTI ratio that might seem quite reasonable for the 'average' consumer can be quite unmanageable for a consumer at the lower end of the income spectrum and the higher end of the debt burden range." *Id.* at 47,941. But the most reasonable response to that problem is to adjust the permissible ratio to suit the needs of payday borrowers, not fabricate a different test. The Bureau insists that, unlike in other industries, the payday lending industry has not developed "long-established norms for DTI levels that are consistent with sustainable indebtedness." *Id.* But modifying "long-established norms" from the mortgage industry for use in payday lending would be less problematic than working with the residual-income standard, which is used in virtually no other industry and certainly comes with no long-established norms of usage.

IX. The Bureau Has Failed To Consider Important Aspects of the Problem

As described above, the Bureau's heavy-handed approach to regulating payday loans stems from unsound presumptions about the product and the consumers who rely on it. Armed with these misconceptions, and determined to effectively abolish these loans, the Bureau unsurprisingly has failed to consider important aspects of the problem. *See, e.g.*, *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (rule is arbitrary and capricious if the agency "entirely failed to consider an important aspect of the problem"); *Wedgewood Vill. Pharmacy v. DEA*, 509 F.3d 541, 552 (D.C. Cir. 2007) (vacating agency decision because of failure to consider workability of agency action in particular industry).

A. The Bureau Has Failed To Consider Evidence Showing That Payday Loans and Reborrowing Are Beneficial, Not Harmful to Consumers

The Bureau has failed to consider important aspects of the purported problems with payday lending in several ways. Many of these ways have been discussed in detail above and bear only brief mention here. In particular, the Bureau has ignored all of the evidence discussed above showing that consumers rely on payday loans and loan sequences and would shift to worse alternatives if these products were unavailable; consumers overwhelmingly praise the utility of payday loans; consumers benefit from payday loans and from reborrowing; consumers understand the costs and risks of payday products; and the proposed rule will virtually eliminate payday lending and deprive consumers of access to this necessary source of credit.

- As discussed, consumers use payday loans because they need access to credit, and rationally choose payday loans and payday loan sequences over 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. Other harms, like damage to consumer credit

scores and increased incidences of personal bankruptcy, will naturally follow. *See supra* Part I.A–D. The Bureau has failed to consider this aspect of the purported problem: if payday loans are severely restricted, then consumers will turn to more costly alternatives.

- The Bureau has failed to consider that payday loans, including rollovers, are beneficial to consumer welfare. As discussed above, consumer welfare is enhanced by the availability and use of payday loans and rollovers. *See supra* Part I.F. The Bureau has disregarded this aspect of the purported problem.

- The Bureau has failed to consider that consumers understand the nature of the payday loan product, including its costs and risks, and that they reborrow to satisfy their credit needs. *See supra* Part I.G.

- The Bureau has failed to consider that the proposed rule will deprive a class of consumers of one of the few credit alternatives to which they have access. As discussed above, *see supra* Part I.B, consumers of payday loans typically have limited access to cheaper forms of credit. The proposed rule will deprive many of these consumers—such as those who fail to meet the Bureau's unworkable, one-size-fits-all ability-to-repay requirements—of access to this valuable source of credit, and will categorically deprive these consumers of access to more than three payday loans in a sequence. This is so no matter how sophisticated the consumer, no matter how great his need for credit, and no matter how rational the decision to meet his need for cash with a payday loan.

- In addition to constituting a severe limit of credit on its own terms, the rule will likely decimate the payday lending industry, thereby even further restricting consumer access to a valuable source of credit. As demonstrated by the studies discussed in Part II.B, the proposed rule, by prohibiting the overwhelming majority of all payday loans that are currently made, severely threatens the commercial viability of low-margin payday lenders, as the Bureau itself admits. Stores in rural areas would likely be the hardest hit, an important consideration in light of the requirement that the Bureau consider impacts on consumers in rural areas.

In addition to these failures, the Bureau has failed to consider other important aspects of the purported problem, including the views of consumers, less restrictive alternatives, the preemptive scope of the proposed rule, and a potential exemption for loans subject to state regulation.

B. The Bureau Has Failed To Consider the Views of Consumers

While the Bureau claims to be acting in the interests of consumers, any consideration of the views and desires of payday borrowers is conspicuously absent from the Bureau's analysis. As discussed above, the Bureau tellingly ignores its own evidence of consumer satisfaction with

payday loans, including the Bureau's "Tell Your Story" website and the complaint portal that the Bureau says is "part of [its] DNA." This and other evidence demonstrates that consumers overwhelmingly praise the utility of the payday product and understand how it works. *See supra* Part I.E. Relatedly, the Bureau relies heavily on abstract, ivory-tower theories about consumer behavior, but does not appear to have consulted with any actual users of payday loans. Finally, according to Director Cordray, as of September 21, the Bureau had already received more than half a million comments on the proposed rule "with many more expected." Prepared Remarks of Richard Cordray, National Association of Federal Credit Unions (Sept. 21, 2016). It appears that most of these are from consumers opposed to the proposed rule. The Bureau simply may not enact a purported consumer-protection rule without taking the views of consumers into account.

C. The Bureau Has Failed To Consider Less Restrictive Alternatives

Before eliminating a critical source of credit for millions of consumers, it is imperative that the Bureau consider whether the problems it identifies can be addressed through less restrictive means. The Bureau has failed to do that thus far with respect to at least four alternative approaches that adequately address the purported harms.

1. The Bureau has failed to consider an enhanced disclosure regime

To the extent the Bureau believes that consumers do not adequately understand the financial risks of payday loans—a belief that underlies both the unfairness and abusiveness determinations of the ability-to-repay provisions, *see supra* Parts III & IV—it should address that problem by requiring heightened disclosures at the time of the loans. Disclosure is the backbone of federal consumer credit law. *See infra* Part XIII.B. The Truth in Lending Act, for instance, requires the disclosure of credit terms, *id.*, and the Dodd-Frank Act itself mandates a preference for disclosure-based regulations, *see, e.g.*, CFPA § 1021(a), (b)(1), 12 U.S.C. § 5511(a), (b)(1). In keeping with that tradition, the Bureau throughout its proposed rule reasons that disclosure is an effective remedy for its concerns in the consumer credit landscape. For example, in justifying its alternative proposal for short-term loans, which involves principal caps, principal reduction amounting to amortization, and inquiry into the consumer's borrowing history, the Bureau observes that it "would impose a series of disclosure requirements in connection with the making of the [alternative proposal-type] loan." 81 Fed. Reg. at 47,972, 47,975. "These disclosures," the Bureau explains, would notify the consumer of important aspects of the operation of these transactions, and would contribute significantly to consumers receiving timely and understandable information about taking out [alternative proposal-type] loans." *Id.* The Bureau later offers that it "developed model forms for the proposed disclosures through consumer testing" and that the proposed disclosures "would help inform consumers of the features of [alternative proposal-type] loans in such a manner as to make the costs, benefits, and risks clear." *Id.* at 47,982.

The Bureau also acknowledges that States—the primary locus of payday-lending regulation until this proposed rule—also rely on disclosure requirements, including to mitigate the Bureau's purported harms. *See, e.g.*, 81 Fed. Reg. at 47,931. The Bureau admits that these

measures reduce the purported harms alleged by the Bureau—they have resulted in decreases in loan volume and reborrowing of over ten percent. *Id.* at 47,932. The Bureau also admits that disclosure poses "almost no additional cost on lenders." *Id.* at 48,149. And, of course, unlike the proposed rules, disclosure requirements would not actually eliminate consumer access to needed credit.

The Bureau nonetheless rejects a disclosure regime as an alternative, *id.* at 47,932, 47,942, 48,149, but the three reasons it offers for doing so contradict the evidence and defy common sense. The Bureau first asserts that disclosures "do not address the underlying incentives in this market for lenders to encourage borrowers to reborrow and take out long sequences of loans." *Id.* at 47,932; *see also id.* at 47,942. But consumer demand for short-term credit drives the industry, *see supra* Part I, and the Bureau in any event fails to explain how these alleged lender incentives would undermine the efficacy of appropriate disclosures. Second, the Bureau's own cited field and empirical studies show that disclosures work, notwithstanding the Bureau's mischaracterization of their impact as "nearly negligible." 81 Fed. Reg. at 47,932 & nn. 524–25. Third, relying on dubious theories of behavioral economics, the Bureau asserts that "behavioral factors make it likely that disclosures to consumers … would be ineffective … [d]ue to the potential for tunneling in [consumer] decisionmaking and general optimism bias." *Id.* at 47,942. But these abstract theories are insufficient to support the proposed rule, *see supra* Parts III.B & IV, and the Bureau lacks any evidence that this is true with respect to payday borrowers. Its alleged "evidence" consists of studies that are unconnected to payday loans and either do not discuss the impact of disclosures on consumer behavior or conclude that disclosures would be effective. *See* 81 Fed. Reg. at 47,928–29.

In addition to being unsupported by evidence, the Bureau's rationales suffer from more fundamental flaws. The first problem with all three of these rationales is that they assume that fully informed consumers do not desire payday loans, including reborrowing. If fully informed consumers in fact do desire payday loans, including reborrowing, then the so-called "underlying incentives" are tailored to consumer demand, the "nearly negligible" impact of existing disclosures is expected and understandable, and disclosures are, as in other areas of law, effective. In that case, disclosure is not only an effective less restrictive alternative, it is the best option to protect consumers, for the so-called harm of reborrowing is in fact not a harm at all. There is no reason to think that the Bureau's contrary assumption is correct: consumers routinely praise payday loans and are well aware of the risks and likelihood of reborrowing. *See supra* Parts I.E & I.G.

In addition, these three rationales assume that the Bureau is unable to craft better disclosures that alter industry incentives, have more of an impact on loan volume and reborrowing, and avoid consumer biases by better informing consumers of the disclosed information and thereby shaping consumer demand. If, as the Bureau elsewhere asserts, disclosures can be designed to successfully inform consumers of the "self-amortization" in the Bureau's alternative approach, then the Bureau must at least consider that it can design disclosures to inform consumers of the purported problems the Bureau finds. Yet the Bureau has

not even considered this possibility. It has put forward no evidence that this type of disclosure is fundamentally different from the other disclosures the Bureau itself proposes as effective. It recounts no consumer testing of the sort it did for its preferred alternative approach. *See id.* at 47,982. And it failed even to respond to CFSA's proposals, attached hereto as Exhibit F, to work with the Bureau to conduct a study of disclosures and develop and test enhanced consumer disclosures. The Bureau, in short, has fully explored its preferred disclosure approaches and ignored the disclosure approaches it does not want to embrace. The Bureau thus has failed to adequately consider less restrictive alternatives and, ultimately, an important aspect of the purported problem.

2. The Bureau has failed to consider successful approaches employed by various States

Thirty-six States, serving as the laboratories of democracy, permit payday lending while subjecting it to extensive regulation. These state approaches are far less draconian than the proposed rule but nevertheless successfully address the Bureau's purported concerns. The Bureau has failed to consider that, instead of adopting rule that will deprive millions of access to needed credit, it can address its concerns through narrowly tailored regulations incorporating elements of the various state approaches.

States have successfully employed myriad strategies in regulating payday loans. *See* 81 Fed. Reg. at 47,931; Kaufman, at 6–7 (summarizing state approaches); Nat'l Conference of State Legislatures, *Payday Lending State Statutes* (Sept. 6, 2016), http://www.ncsl.org/research/financial-services-and-commerce/payday-lending-state-statutes.aspx (summarizing state statutes regarding payday lending). For example, some States require lenders to provide specific disclosures to alert borrowers to potential risks. Other States regulate collection practices, forbidding criminal suits, restricting civil suits, eliminating debt collection efforts at places of employment, imposing grace periods on repayment, or requiring certain waiting periods before pursuing debt collection. Still other States reduce the opportunity for multiple loans and rollovers: they limit consumers to one payday loan at a time through the use of databases, *see, e.g.,* S.C. Code Ann. § 34-39-270(A)(1), impose reasonable "cooling off" period between loans, such as twenty-four or forty-eight hours, *see, e.g.*, Fla. Stat. § 560.404(19) (twenty-four hours), or forbid excessive rollovers or reborrowing. And some States require lenders to assess consumers' ability to repay loans, to verify minimum income, *see, e.g.*, Nev. Rev. Stat. § 604A.425.1(a) (loan capped at 25% of gross monthly income), to grant a right to rescind a loan transaction within a reasonable period of time, *see, e.g.*, Utah Code Ann. § 7-23-401(3)(b) (by 5 p.m. the next business day), or to offer off-ramps and other extended repayment plans, *see, e.g.*, Fla. Stat. § 560.404(22) (sixty-day grace period coupled with consumer counseling); Utah Code Ann. § 7-23-403 (extended payment plan).

Many of these regulations directly address the Bureau's concerns and could, of course, be modified as necessary if adopted by the Bureau as part of a uniform national rule. Disclosures directly address the Bureau's concerns that consumers lack adequate understanding of the costs and risks of payday loans or suffer cognitive biases. Cooling-off periods and rights to rescind

likewise mitigate any cognitive biases and protect against any actual or perceived pressure from lenders to renew a loan. Rollover limits protect those consumers who in the Bureau's view "suffer the greatest injury," namely, "consumers who have exceedingly long loan sequences. 81 Fed. Reg. at 47,936. Extended repayment plans provide relief to any consumers who are "trapped" in longer-term cycles of debt.

Take, for example, Utah's regulatory regime, which addresses the Bureau's concerns in less draconian ways. *See, e.g.*, Consumer Guide to Payday Lending in Utah, *available at* http://dfi.utah.gov/wp-content/uploads/sites/29/2015/06/Consumer-Guide-to-Payday-Lending-in-Utah1.pdf (last visited Aug. 19, 2016). In Utah, lenders must inquire whether the consumer has the ability to repay the loan by obtaining a consumer report from a consumer reporting agency, and must obtain written proof or verification of income, the consumer's prior repayment history with the lender, and a signed acknowledgment by the consumer that he has the ability to repay the loan. In addition, lenders may not roll over loans beyond ten weeks from the initial execution date of the loan. Lenders also may not accrue interest beyond ten weeks. And once every twelve months a consumer may request an extended payment plan consisting of at least four payments over the course of sixty days. Utah thus addresses both the Bureau's ability-to-repay and reborrowing concerns, and in less draconian ways than the proposed rule. Yet the Bureau has not provided any evidence that Utah's regulatory regime is ineffective at addressing the Bureau's concerns.

Florida similarly addresses the Bureau's concerns with less draconian policies. *See, e.g.*, Florida Office of Financial Regulation, Payday Lenders (Deferred Presentment Providers), *available at* http://www.flofr.com/StaticPages/PaydayLenders.htm (last visited Aug. 19, 2016). In Florida, a consumer may have only one outstanding loan at any time, as tracked through a state database. There is a twenty-four-hour waiting period before a consumer may enter into a new loan after paying an old loan in full. And, if a consumer is unable to pay a loan in full, the lender must provide a sixty-day grace period without any additional charge, conditional on the borrower's completing an appointment with a Consumer Credit Counseling Service. Florida, too, thus addresses the Bureau's concerns, and the Bureau again has provided no evidence that Florida's regime is ineffective. Indeed, the Bureau has not only failed to provide any evidence that these regimes are ineffective at addressing the Bureau's concerns, it also has failed to provide any evidence that mixing and matching particular elements from these regimes and others would not provide an effective alternative.

In an attempt to justify its myopic focus on the draconian measures in its proposed rule, the Bureau comments that these types of provisions "do not appear to have had a significant impact on reducing reborrowing and other harms." 81 Fed. Reg. at 47,932. But its evidence for that consists solely of its own supplemental findings purporting to show similar reborrowing rates in States with various regulatory and disclosure policies. *See, e.g.*, Supp. Findings ch. 4. In addition to suffering the same flaws as the Bureau's rejection of a disclosure-based approach, this evidence is fatally flawed because the Bureau defines reborrowing to include taking out a new loan within thirty days of paying off an old loan. *See id.* According to the Bureau, a person

who pays off a payday loan on the first day of February and takes out another payday loan four weeks—two pay-periods—later has somehow reborrowed for the original loan. Such behavior indicates, however, that the consumer was able to repay the original loan and did not need to roll it over or reborrow on the same day to pay off the original loan. The Bureau's evidence, in other words, is unhelpful: the Bureau has simply not provided any evidence that the policies in these states lead to actual consumer harm, as opposed to repeated successful and beneficial use of the payday loan product.

Moreover, the Bureau's supplemental findings do not speak at all to the state regulations that require ability-to-repay determinations. These regimes address the Bureau's concerns. Yet the Bureau has not demonstrated that these state laws regarding ability-to-repay assessments do not work and that, instead, the unsound and unreasonably burdensome "residual income" standard is required. Consequently, the Bureau has failed to adequately consider less restrictive alternatives.

3. The Bureau has failed to consider addressing consumers' underlying need for credit

As discussed in this letter, financially distressed consumers use payday loans as the best available alternative for satisfying their credit needs. The shortsighted approach reflected in the proposed rule would eliminate or severely restrict the availability of payday loans as a solution to those credit needs and force consumers into inferior substitutes. This approach does nothing to address the underlying issues—consumers' need for credit—and will only exacerbate the financial difficulties of these consumers.

Accordingly, before restricting the *supply* of credit, the Bureau should have considered ways to alleviate consumers' *demand* for credit. One such approach would consist of adopting measures to encourage low-income and underserved consumers to save money. The Bureau recently concluded a field study establishing that certain nominal incentives to save have lasting positive effects on consumer savings. *See* CFPB, *Tools for saving: Using prepaid accounts to set aside funds* (Sept. 2016). Unsurprisingly, consumers who saved more—and thus had savings on which to draw when funds were needed—were 20% to 40% less likely to use payday loans. *Id.* at 23–24. As Director Cordray stated in response to these findings, "consumers who are encouraged to save can reduce their use of payday loans." Press Release, Consumer Fin. Protection Bureau, CFPB Project Catalyst Study Finds Savings Offers Double the Number of Consumers Saving (Sept. 29, 2016), *available at* http://goo.gl/3ZYo8k. Especially given the results of this study, the Bureau has no justification for broadly restricting the supply of payday loans before attempting measures that reduce consumers' need for payday loans.

4. The Bureau has failed to consider targeting unregulated lenders

Before targeting lenders that comply with existing federal law and the comprehensive regulations of the States in which they operate, the Bureau should, as it has on occasion, take aggressive action against offshore and unregulated lenders operating online. These lenders target

vulnerable citizens by, among other things, operating in violation of state consumer-protection laws and regulations, making misrepresentations to consumers, failing to adequately disclose loan terms, and even making phony loans. *See, e.g.*, *CFPB v. Moseley*, No. 4:14-cv-789 (W.D. Mo. filed Sept. 8, 2014); *CFPB v. CashCall, Inc.*, No. 1:13-cv-13167 (D. Mass. filed Dec. 16, 2013). And the Bureau admits that States have faced challenges in applying their laws to certain online lenders. 81 Fed. Reg. at 47,931. Policing such misbehavior would address many of the Bureau's purported problems without burdening the customers of highly regulated payday lenders.

D. The Bureau Has Failed To Adequately Consider the Proposed Rule's Preemptive Scope

Agencies may not "assum[e] lightly that Congress has derogated state regulation, but instead [should assess their power of] pre-emption with the starting presumption that Congress does not intend to supplant state law." *Gobeille v. Liberty Mut. Ins. Co.*, 136 S. Ct. 936, 954 (2016). There is thus a "presumption against the pre-emption of state police power regulations," *Cipollone v. Liggett Grp., Inc.*, 505 U.S. 504, 518 (1992), which may be rebutted only by a showing of "clear and manifest purpose" by Congress, *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947). "Congress," in other words, "of course may delegate to an agency the power to issue certain preemptive regulations," but only "if Congress does so in no uncertain terms." *City of New York v. FCC*, 814 F.2d 720, 729 (D.C. Cir. 1987), *aff'd*, 486 U.S. 57 (1988).

There are no such clear terms here. The only relevant preemption provision does not empower the Bureau to preempt state law by regulation. *See* CFSA § 1041, 12 U.S.C. § 5551. Rather, it provides only that the Dodd-Frank Act itself may preempt state law. *Compare id.* (referring to "this title") *with id.* § 1002(14), 12 U.S.C. § 5481(14) (referring to "this title" as distinguished from "any rule or order prescribed by the Bureau under this title").

Nor does the provision of UDAAP authority provide a clear authorization. In empowering the Bureau to prevent UDAAP, Congress borrowed heavily from the FTC Act. Consequently, the Bureau's UDAAP authority and the FTC's similar authority must be interpreted in the same manner. Courts have established an important limit on the FTC's authority with respect to the preemption of preexisting state regulatory regimes: "Congress did not intend for the [FTC]'s regulations 'to occupy the field.'" *Am. Fin. Servs. Ass'n v. FTC*, 767 F.2d 957, 990 (D.C. Cir. 1985).

Here, however, the Bureau's proposed rule would occupy the field. More than half of the States have chosen to allow payday lending, and all of those have consumer protections in place. The proposed rule is so restrictive, however, that virtually all of these state laws and regulations will be preempted in whole or significant part. That is because the Bureau's proposed rule effectively bans the product of payday lending, instead of prohibiting a particular act or practice. *See supra* Part II.B. The only jurisdictions whose laws will not come into conflict with the proposed rule are those that already ban small-dollar lending either expressly or through low

interest-rate caps. The Bureau thus has exceeded Congress's limitations on using UDAAP authority to preempt state payday lending regulation.

The Bureau also has failed to consider the impact of the proposed rule on the state regulatory regimes and has failed to engage in meaningful consultation with state officials about the proposed rule's preemptive effect. Accordingly, it has failed to consider the proposed rule's preemptive scope.

E. At a Minimum, the Rule Should Include an Exemption for Payday Lending in States That Have Their Own Restrictions in Place

The Bureau also has failed to consider whether its proposed rule is unnecessary for States that have their own restrictions in place. For example, many States, including California, Colorado, Missouri, and Utah, already requires lenders to assess a consumer's ability to repay loans. State law requires verification of income, assessment of repayment history, and a credit report, as well as a signed statement of ability to repay. The Bureau has wholly failed to analyze whether this ability-to-repay requirement is sufficient, such that the proposed rule is needlessly duplicative and should not be applied in these States. The same is true of other states that require minimum income verification and other measures aimed at assessing ability to repay. *See* 81 Fed. Reg. at 48,148–49. Similarly, the Bureau has not adequately considered whether States that currently restrict collection practices, such as Florida, which requires lenders to forestall collections for a sixty-day grace period, adequately address the Bureau's concern in that area. *See* 81 Fed. Reg., at 48,149. It is incumbent upon the Bureau to analyze whether these various state-law restrictions address the Bureau's concerns, such that it would be appropriate to exempt, from all or portions of the proposed rule, loans made in those jurisdictions that have such requirements in place.

X. The Payment-Practices Provisions of the Proposed Rule Are Unsupportable

Many of the flaws identified in the preceding sections also apply to the Bureau's proposed payment-practices provisions, which would, among other things, prohibit "further payment withdrawal attempts after two unsuccessful attempts in succession" without a new and specific authorization. 81 Fed. Reg. at 48,048. In particular, the Bureau (1) bases its proposal on unsupportive data, (2) misinterprets and misapplies its authority over unfair practices, (3) misinterprets and misapplies its authority over abusive practices, and (4) fails to consider important aspects of the problem.

1. The Bureau's evidence does not support its proposal. The Bureau proposes payment-practices regulations for all lenders in order to prevent purported harms associated with repeated failed payment withdrawal attempts. 81 Fed. Reg. at 48,048. The Bureau claims these events are frequent enough to cause harms to consumers for *all* lenders. But the only evidence on which the Bureau relies concerns repeated payment withdrawal attempts for a *subset* of lenders, namely, *online* lenders. *See* 81 Fed. Reg. at 48,049. And the Bureau elsewhere admits that "storefront and online lenders had different success rates in exercising such payment

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

may reborrow or rollover a loan, thereby incurring a higher cost of credit to manage financial shocks, *see supra* Part III, a consumer may choose to incur a failed payment withdrawal fee as the better option to manage financial shocks or volatility. Indeed, the Bureau's proposed requirement that lenders provide notice of payment withdrawal attempts could make that practice more difficult and thus exacerbate the purported harm the Bureau seeks to eliminate. The Bureau has wholly failed to consider this aspect of the purported problem.

XI. The Information Furnishing Requirements Are Unsupportable

The Bureau lacks support for the proposed rule's provisions concerning the furnishing of loan information to new consumer reporting agencies, known as registered information systems. 81 Fed. Reg. at 48,17981 (proposed 12 C.F.R. § 1041.17). These requirements are too onerous on both lenders and on the entities that might apply for registration. Among other things, the requirement that lenders furnish information to multiple registered information systems is unreasonably burdensome and expensive and conflicts with standard practices in the consumer-reporting industry. More fundamentally, there is no reason to think that any entities would expend the resources needed to become registered information systems, given the degree to which the proposed rule would decimate their would-be clientele.

Particularly troublesome and problematic is the Bureau's instruction that payday loans may not be made at all under the alternative approach unless and until one or more registered information systems are in place. *See* 81 Fed. Reg. at 47,973 ("a lender cannot make a covered short-term loan under [the alternative approach] if no information system is registered … and available when the lender seeks to make the loan"). Notably, the Bureau envisions that most payday lenders will find it economically unfeasible to make loans using the ability-to-repay approach and, moreover, believes that the alternative approach will preserve payday credit access for a class of consumers who suffer transitory income shocks and cannot qualify for payday loans under the ability-to-repay approach. *See supra* Parts II.B & III.A.1.d.iii. This means that the ability of those consumers who by the Bureau's own admission need and benefit from payday credit will turn not on lender compliance with the Bureau's regulations, but on the ability of third-party reporting agencies to comply with burdensome and untested registration requirements. That is arbitrary and irrational.

XII. The Prohibition Against Evasion Is Unsupportable

The Bureau also lacks support for its proposal to prohibit lenders from "tak[ing] any action with the intent of evading the requirements" of the proposed rule. 81 Fed. Reg. at 48,182 (proposed 12 C.F.R. § 1041.19); *id.* at 48,217–18 (proposed accompanying commentary); *id.* at 48,111–15 (explanation). This proposed provision is improperly vague, exceeds the Bureau's statutory authority, and is arbitrary and capricious.

1. It is black-letter law that "elementary fairness compels clarity in the statements and regulations setting forth the actions with which [an] agency expects the public to comply." *Gen. Elec. Co. v. EPA*, 53 F.3d 1324, 1329 (D.C. Cir. 1995) (internal citation omitted). "In the

absence of notice—for example, where the regulation is not sufficiently clear to warn a party about what is expected of it—an agency may not deprive a party of property by imposing civil or criminal liability." *Id.* at 1328–29. The Bureau's proposed anti-evasion provision violates that rule. By prohibiting "any action" taken "with the intent of evading the requirements" of the payday lending rule, the Bureau leaves lenders to speculate as to the scope of the law. That is because the Bureau's broad proposal cannot literally mean what it says. For example, exiting the business of making covered loans because of the burdens of the proposed rule in order to focus on offering other types of consumer credit is on its face an "action" taken "with the intent of evading the requirements" of the rule. Yet the Bureau surely does not mean for the anti-evasion provisions to cover such wholly legitimate actions. Lenders thus are left to speculate as to what subset of actions that are within the literal meaning of the proposed provisions are also within the Bureau's intended scope.

The Bureau's proposed accompanying commentary and explanation do not provide the requisite specificity and indeed exacerbate the vagueness problem. The Bureau states that actions taken "solely for legitimate business purposes" are not prohibited, but nowhere defines that term. 81 Fed. Reg. at 48,217. Indeed, the Bureau's explanation compounds the vagueness of this term, because it suggests that it is proposing an anti-evasion provision *because* lenders complied with various state and federal laws, which is obviously a "legitimate business purpose." *Id.* at 48,111 (justifying provisions on ground that some lenders "obtain[ed] State mortgage lending licenses" to "make short-term, small dollar loans" and others made "loans narrowly outside of the scope of regulations to implement the Federal Military Lending Act"). The Bureau also does not specify a permissible definition of "intent," which it also wrongly equates with "knowing or reckless." *Id.* at 48,217. And although the Bureau provides several examples of prohibited and non-prohibited activity, it specifically states the examples are "non-exhaustive." *Id.*

2. The proposed anti-evasion provision also exceeds the Bureau's statutory authority. The Bureau's authority to "prevent evasions" of federal consumer financial laws, CFPA § 1022(b)(1), 12 U.S.C. § 5512(b)(1), needs to be interpreted in the same manner as similar grants of authority to other agencies, namely, as primarily an authorization to impose recordkeeping, reporting, and compliance program requirements, *see* 17 C.F.R. § 75.20 (interpreting "anti-evasion" provisions of Volcker Rule, 12 U.S.C. § 1851(e)), or as an authorization to prohibit products and services when "no reasonable expectation" exists that consumers will use them in a lawful manner, *see* Truth in Lending, 73 Fed. Reg. 44,522-01 (2008) (Regulation Z under TILA).

The Bureau's sole focus on lender "intent" also does not find any basis in the statutory text. That text, to the extent it can be interpreted at all in the Bureau's expansive manner, applies only to actions that do in fact evade the requirements of federal consumer financial laws, *i.e.*, actions that *are* "evasions thereof," not actions merely *intended to be* "evasions thereof." While it is certainly necessary and appropriate to *include* an intent requirement in any rule

implementing this statutory authorization, it runs afoul of the statute to prohibit actions (whatever their intent) that do *not* in fact evade the proposed rule's requirements.

3. The Bureau's proposal also is arbitrary and capricious in several ways. First, the Bureau, to the extent it may interpret its authority at all in this manner, has failed to properly distinguish between proper and improper behavior. The Bureau, for example, leans heavily on the CFTC's swaps rulemaking, finding it "informative." 81 Fed. Reg. at 48,112. But the Bureau fails to recognize that the CFTC's anti-evasion rules apply only to "willful" behavior, which is properly interpreted to mean deliberate and knowing wrongdoing, *see United States v. Tarallo*, 380 F.3d 1174, 1187 (9th Cir. 2004), that involves deception or deceit, *see Merck & Co. v. Reynolds*, 130 S. Ct. 1784, 1796 (2010) (explaining scienter). In addition, the Bureau, unlike the CFTC, fails to provide that "a person's specific consideration of regulatory burdens, including the avoidance thereof, is not dispositive that the person is acting without a legitimate business purpose." Further Definition of "Swap," "Security-Based Swap," and "Security-Based Swap Agreement"; Mixed Swaps; Security-Based Swap Agreement Recordkeeping, 77 Fed. Reg. 48,208-01 (2012) (CFTC rulemaking on swaps).

Second, the Bureau has wholly failed to consider important aspects of the purported problem. As an initial matter, the Bureau has failed to properly analyze whether a broad anti-evasion provision is necessary at all. The Bureau points to evidence that certain lenders offered loans in compliance with state mortgage laws and federal law regarding military lending, *see* 81 Fed. Reg. at 48,111, but that shows only that lenders do in fact comply with the law. Nor has the Bureau considered whether a broad anti-evasion regulation is needed in light of the Bureau's other authority over lenders, including its investigative powers, its power over deceptive practices, and its power to enforce the recordkeeping and other requirements proposed in the payday lending rule itself. *See, e.g.*, 77 Fed. Reg. 48,208-01 ("the SEC believes that it is unnecessary to adopt additional anti-evasion rules" in light of "existing regulations, including antifraud and anti-manipulation provisions").

Finally, the Bureau has utterly failed to consider whether its anti-evasion proposal will chill innovation in the consumer-finance markets. As discussed in Part I, payday lending arose to meet consumer needs created by top-down financial regulation of previous sources of consumer credit and has evolved in accordance with consumer demand over time. The diversity of state and local regulation of the industry has further contributed to the variety of products and services that borrowers almost uniformly agree (and even the Bureau at times concedes) are useful, beneficial, and even necessary. Indeed, the Bureau itself in this rulemaking is encouraging (albeit not satisfactorily) what were originally innovative practices in the structuring and repayment of loans through the proposed rule's regime of exceptions. The Bureau's open-ended and vague anti-evasion provisions would chill the very market innovations that the Bureau now favors, because they threaten Bureau sanctions for any products or services in the industry that are designed in ways such that they do not fall within the scope of the proposed rule.

XIII. The Proposed Rule Exceeds the Bureau's Statutory Authority

In addition to being unsupported by evidence and harmful to consumers, the proposed rule constitutes an illegitimate exercise of powers specifically denied to the Bureau by Congress. At bottom, the proposed rule rests on the Bureau's policy judgment that, regardless of their benefits, payday loans are too expensive. In taking aim at payday loans in this way, the Bureau flouts express and implied statutory directives that it may not impose a usury limit or an ability-to-repay requirement, and that public policy considerations shall not serve as the primary basis for an unfairness determination.

A. The Proposed Rule Is an Impermissible Effort To Establish a Usury Limit in Violation of the CFPA

Congress set a clear boundary on the Bureau's authority by unequivocally declaring that "[n]o 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." CFPA § 1027(o), 12 U.S.C. §5517(o). A "usury limit" is a restriction on the rate of interest that may be charged on an extension of credit. *See* Black's Law Dictionary (10th ed. 2014) ("usury", "usury law"). When a usury limit is in place, the interest rate on a loan determines its legal status. Two loans that are identical in their terms except that one lends at a rate above the limit and one lends at a rate below the limit are accorded different legal statuses: only the latter is lawful. Congress's declaration that the Bureau may not establish a usury limit thus means that the Bureau may not determine the legal status of a loan based on its interest rate.

The proposed rule runs afoul of this statutory restriction in three ways. First, the proposed rule, as applied to both covered short-term and longer-term loans, violates the usury limit because it improperly targets high-interest loans. The Bureau proposes to bar lenders of both short-term and longer-term loans from making "unaffordable" loans and loan sequences, for which consumers pay "substantial fees" and "very high total costs of borrowing." 81 Fed. Reg. 47,919, 47,912, 47,925, 47, 936, 47,990; *see also id.* at 47,993 ("high cost"). But, by definition, the lower the interest rate, the less costly or more "affordable" the loan. Such "substantial fees" and "very high total costs of borrowing" are Bureau-speak for what the Bureau understandably hesitates to call by its proper name—the interest rate. Likewise, an ability-to-repay determination is nothing more than a determination whether a consumer can repay a loan in light of its interest rate. The Bureau is thus doing exactly what Congress prohibited— targeting loans because of their interest rates.

Second, in promulgating the proposed rule, the Bureau is improperly considering the cost of credit as a factor in its decisionmaking. It is well-established that an agency may not "rel[y] on factors which Congress has not intended it to consider." *Motor Vehicle Mfrs. Ass'n v. State Farm Mutual Automobile Ins. Co.*, 463 U.S. 29, 43 (1983). Here, through the restriction on imposing a usury limit, Congress plainly intended that the cost of credit not be a factor in the exercise of the Bureau's authority over UDAAP. Yet, as noted, the Bureau nonetheless has

explicitly placed great weight on the cost of credit in describing the purported problems addressed by the proposed rule.

Finally, the proposed rule determines the legal status of covered longer-term loans based solely on their interest rate. Under the proposed rule, covered longer-term loans with APRs of thirty-six percent or more are subject to new requirements, including an ability-to-repay requirement, that are inapplicable to loans with lower APRs. 81 Fed. Reg. at 47,865, 47,941, 47,985, 47,993. Two loans that are identical except for their interest rate—one below thirty-six percent and one above thirty-six percent—are thus treated differently under the Bureau's proposed rule. Moreover, the proposed rule's two conditional exemptions from these new rate-based requirements are likewise applicable only to loans that fall below specified interest rates of 36% or less. *See* 12 C.F.R. § 1041.12(b)(5) (exemption applicable only to loans with an APR of 36% or less); *id.* § 1041.11(b)(6) (exemption applicable only to loans with a cost of credit no higher than that permitted by the National Credit Union Administration's regulations governing Payday Alternative Loans, 12 C.F.R. § 701.21(c)(7)(iii)—currently 28% APR plus a small fee, *see* NCUA Letter to Federal Credit Unions No. 15-FCU-02 (June 2015)). There is thus one common feature of the longer-term loans that the Bureau does not subject to its burdensome new requirements: they have interest rates below the Bureau's preferred level. That violates the statutory prohibition on determining a loan's legal status based on its interest rate. Nor can the Bureau evade this statutory requirement by seeking to do indirectly that which it is prohibited from doing directly. *See Altamont Gas Transmission Co. v. FERC*, 92 F.3d 1239, 1248 (D.C. Cir. 1996); *Nat. Res. Def. Council v. EPA*, 489 F.3d 1364, 1371 (D.C. Cir. 2007).

B. The Bureau Lacks Statutory Authority To Impose an Ability-to-Repay Requirement

The proposed rule's imposition of an ability-to-repay requirement in the field of consumer credit would represent a fundamental change to an established regulatory framework that has long been disclosure-based and imposed primarily by the states. The Bureau lacks the clear congressional authorization required to upend that established framework; quite the contrary, Congress clearly intended to deprive the Bureau of the authority to impose an ability-to-repay requirement.

An agency may not disrupt an established regulatory framework absent a clear congressional command. *See, e.g.*, *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 468 (2001); *Am. Bar Ass'n v. F.T.C.*, 430 F.3d 457, 467 (D.C. Cir. 2005). A clear statement is also especially required when the established regulatory framework rests on a "common-law principle," *United States v. Texas*, 507 U.S. 529, 534 (1993), and strikes a careful "federal-state balance" for regulation, *United States v. Bass*, 404 U.S. 336, 349 (1971); *Gonzales v. Oregon*, 546 U.S. 243, 274 (2006).

American law has long forsworn a legal requirement that lenders assess consumers' ability to repay extensions of consumer credit or otherwise evaluate the appropriateness of credit for a consumer. The federal government, for example, imposes a primarily disclosure-based

regime on consumer credit through the Truth in Lending Act (TILA). *See Beach v. Ocwen Fed. Bank*, 523 U.S. 410, 412 (1998); *Mourning v. Family Publications Serv*., 411 U.S. 356, 363-368 (1973); Matthew A. Edwards, *Empirical and Behavioral Critiques of Mandatory Disclosure*, 14 *Cornell J.L. Pub. Pol'y* 199, 203 (2005); Christopher L. Peterson, *Truth, Understanding, and High-Cost Consumer Credit: The Historical Context of the Truth in Lending Act*, 55 *Fla. L. Rev*. 807, 875-80 (2003). State statutes and common law, which notwithstanding TILA are the primary sources of consumer-credit regulation, *see* Robin A. Morris, *Consumer Debt and Usury*, 15 *Pepp. L. Rev*. 151, 163 (1988), are no different. *See, e.g.*, John D. Wright, *Dodd-Frank's "Abusive" Standard: A Call for Certainty*, 8 Berkeley Bus. L. J. 164, 167 (2011); Mann & Hawkins, *Just Until Payday*, *supra*, at 875–77. The imposition of an ability-to-repay requirement is thus no less than a "sea change in U.S. consumer credit market regulation." John Pottow, *Ability to Pay*, 8 Berkeley Bus. L. J. 175 (2011).

Consistent with the principle that clear congressional authorization is needed to upend the existing framework, in those few instances where Congress authorized an agency to impose an ability-to-repay requirement, it did so clearly. In the Home Ownership and Equity Protection Act ("HOEPA"), for example, the text of the statute itself required consideration of "consumers' repayment ability" for high-cost mortgages. Pub. L. No. 103–325, §152(d), 108 Stat 2160 (1994). The same is true of the recent amendment to HOEPA in the Dodd-Frank Act, which expressly required assessment of the "ability of the consumer to repay" a loan. Pub. L. No. 111–203, §1411, 124 Stat. 1376, 2142 (2010). And the Credit Card Accountability Responsibility and Disclosure Act of 2009 is similarly explicit, requiring the credit card issuer to consider the "ability of the consumer to make the required [*i.e.*, minimum] payments." Pub. L. No. 111–24, §109, 124 Stat. 1743 (2009).

In stark contrast to these clear statements, there is nothing in the Dodd-Frank Act authorizing the Bureau to impose an ability-to-repay requirement in the field of consumer credit. That itself is determinative: Without such an authorization, the Bureau simply is not delegated the power to impose an ability-to-repay requirement. Lest there be any doubt as to Congress's intent to withhold such authority from the Bureau, other provisions in the Dodd-Frank Act confirm it. "[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Russello v. United States*, 464 U.S. 16, 23 (1983). Here, as noted, the Dodd-Frank Act explicitly amended HOEPA to add an ability-to-repay requirement. Pub. L. No. 111–203, §1411, 124 Stat. at 2142. Its omission of such a requirement with respect to consumer credit generally can thus be read as nothing other than a confirmation of Congress's clear denial to the Bureau of the authority to impose such a requirement by administrative fiat.

C. Public Policy Considerations Improperly Serve as a Primary Basis for the Bureau's UDAAP Determinations

The proposed rule also 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.

The Dodd-Frank Act provides that, "[i]n determining whether an act or practice is unfair, the Bureau may consider established public policies," but "[s]uch public policy considerations may not serve as a primary basis for such determination." CFPA § 1031(c)(2), 15 U.S.C. § 5531(c)(2). The Bureau, by contrast, is not authorized to consider public policy at all in determining whether an act or practice is abusive. *See id.* § 1031(d), 15 U.S.C. § 5531(d) (omitting any similar authorization with respect to abusive acts and practices). In violation of these statutory commands, the Bureau's UDAAP analysis is infused with, and ultimately turns on, public-policy considerations.

First, as detailed above, the evidentiary support for the Bureau's unfairness and abusiveness determinations is woefully lacking. Instead, the proposed rule imposes broad standards on an entire industry, reflecting the Bureau's essentially political choices about the undesirability of expensive small-dollar loans. The Bureau, for example, expresses its public-policy belief that lenders are extending loans with a "relatively high cost of credit." 81 Fed. Reg. at 47,946, 48,007. And it conveys its concerns about the overall regulation of the industry: it is concerned that the market's lack of ability-to-repay determinations "upends traditional notions of responsible lending enshrined in safety-and-soundness principles as well as in a number of laws." *Id.* at 47,996. These views—whether a product is overpriced and whether an industry's evolution in the marketplace should be tinkered with—sound in public policy, and are not the findings of consumer injury that are both required by statute and that have typically marked proper exercises of unfairness authority. *See* J. Howard Beales, Former Dir., Fed. Trade Comm'n, The FTC's Use of Unfairness Authority: Its Rise, Fall, and Resurrection (May 30, 2003) (available at http://goo.gl/1a1BlQ) ("High prices, for example, are not unfair ….");
id. (unfairness authority does not allow "trying to second guess market outcomes"); Stephen Calkins, *FTC Unfairness: An Essay*, 46 Wayne L. Rev. 1935, 1961 (2000) (unfair acts traditionally include coercive selling, material misstatements, false statements, and improper post-purchase rights and remedies).

Second, the Bureau must "reconsider" a tentative view when public policy opposes it. Commission Statement of Policy on the Scope of Consumer Unfairness Jurisdiction, attached to Commission letter to Senators Danforth and Ford (Dec. 17, 1980) [hereinafter "1980 Unfairness Statement"], *reprinted in* H. Rep. No. 98-156, at 38–39 (1983). Here, the Bureau has ignored the widely shared, well-established, and formal public policy of federal and state governments, both of which generally allow consumer lending without requiring lenders to assess a consumer's ability to repay loans. As discussed in the preceding section, the federal government imposes such a requirement in narrow circumstances and state law has largely eschewed such a requirement. Yet in its proposed rule, the Bureau has not even mentioned this contrary public

policy and the corresponding assessment of lack of consumer injury it denotes—let alone given it any consideration. 81 Fed. Reg. at 47,875–76 (omitting any mention that state law does not impose requirements like those the Bureau proposes). This disregard for the established judgments of Congress and numerous state legislatures is as unlawful as it is brazen.

D. The Bureau's Effort To Stamp Out a Lawful, Highly Regulated Product Exceeds Its Statutory UDAAP Mandate

At all times, an agency must "stay[] within the bounds of its statutory authority." *City of Arlington, Tex. v. FCC*, 133 S. Ct. 1863, 1868 (2013). And that statutory authority may not be exercised "in a manner that is inconsistent with the administrative structure that Congress enacted into law." *FDA v. Brown & Williamson Tobacco Corp*., 529 U.S. 120, 125-26 (2000) (internal quotation omitted). The Bureau has exceeded its statutory authority in its effort to stamp out the lawful, highly regulated payday lending product in at least three ways.

First, an agency may not prohibit a particular product when the "premise" of congressional lawmaking is that the product would be sold in the marketplace, for the agency's action would then "contradict congressional policy." *Id.* at 139. Here, in expressly authorizing the regulation of "payday loan[s]," CFPA § 1024(a)(1)(E), 12 U.S.C. § 5514(a)(1)(E), Congress's plain "premise" is that such loans will continue to be available to consumers. In addition, the Dodd-Frank Act evinces a congressional concern for consumer choice and access to consumer credit, coupled with a mandate to the Bureau to ensure transparency by eliminating fraud, deception, and similar problems. *See, e.g.*, CFPA § 1021(a), 12 U.S.C. § 5511(a) (noting Bureau shall act with the "purpose of ensuring that *all* consumers have access to markets for consumer financial products and services and that markets for [such] products and services are fair, transparent, and competitive" (emphasis added)); *id.* § 1021(b), 12 U.S.C. § 5511(b) (noting purpose of ensuring that "consumers are provided with timely and understandable information to make" *their own* "*responsible decisions* about financial transactions" (emphasis added); *id.* § 1022(b)(2)(A), 12 U.S.C.§ 5512(b)(2)(A) (requiring Bureau to consider "the potential reduction of access by consumers to consumer financial products" and "the impact on consumers in rural areas"). It is thus clear that Congress intended for the Bureau to police the industry for unfair and abusive practices, not to enact draconian rules that have the purpose and effect of fundamentally altering the nature of the product or eliminating it from the marketplace. *See supra* Part II.B.

Second, and more generally, the Bureau has overstepped its bounds by effectively prohibiting a product instead of an act or practice. The Bureau is empowered to prevent unfair, deceptive, or abusive "act[s] or practice[s] under Federal law in connection with any transaction with a consumer for a consumer financial product or service." CFPA § 1031(a), 12 U.S.C. § 5531(a). Notably, Dodd-Frank does not empower the Bureau to prohibit the product or service *itself*. Yet that is exactly what the Bureau is effectively doing here. *See supra* Part II.B.

To be sure, the Bureau characterizes lending without an ability-to-repay assessment as an unfair and abusive act or practice. But the reality is that the ability-to-repay determinations

proposed by the Bureau are fundamentally irreconcilable with payday loans. As discussed above, borrowers seek out payday loans precisely because they cannot qualify for unsecured credit based on traditional underwriting criteria and often rely on these loans when their income is insufficient for monthly expenses (and therefore by definition cannot satisfy the Bureau's ability-to-repay requirements). That is why the payday loan product is necessary and praised by consumers. Prohibiting loans offered without that ability-to-repay determination is thus the same as prohibiting those loans themselves, which exceeds the Bureau's authority. To put it another way, the Bureau has prohibited an essential feature of a product and thus its prohibition is in fact an impermissible ban of the product: it is as if the Bureau deemed home-mortgage appraisals to be an unfair act or practice even though such appraisals are practically inseparable from the home-mortgage product.

Third, another indicator that the Bureau exceeded its congressional mandate is the degree to which the Bureau's regulation supersedes and preempts the laws of the thirty-six States that permit—and heavily regulate—payday lending. Had Congress intended to delegate to the Bureau this vast preemptive authority, it would have spoken much more clearly. *Gonzales v. Oregon*, 546 U.S. 243, 274 (2006) (Congress will not use "an obscure grant of authority to regulate areas traditionally supervised by the States' police power"); *see also supra* Part IX.D.

In light of these considerations, as well as the need to read the delegation of UDAAP authority narrowly in order to minimize constitutional concerns, *see infra* Part XIV, it is clear that Congress never intended for the Bureau to use its UDAAP authority in the manner at issue here.

E. The Proposed Rule Is Not a Valid Exercise of the Bureau's General Rulemaking Authority

Nor is the proposed rule a valid exercise of the Bureau's statutory authority 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, and to prevent evasions thereof." CFPA § 1022(b)(1), 12 U.S.C. § 5512(b)(1). The Bureau invokes this statutory provision, *see* 81 Fed. Reg. at 47,902–03, 48,151, although it is unclear whether the Bureau is relying on it as an independent source of authority to impose the proposed rule's ability-to-repay and other requirements, or rather is relying only on the provision's anti-evasion language as authority for specifically identified provisions of the proposed rule, *see id.* at 47,969, 48,030, 48112 (citing the anti-evasion language of section 1022(b)(1) as purported authority for sections 1041.6(g), 1041.10(f), and 1041.19 of the proposed rule).

For all of the reasons the proposed rule exceeds the Bureau's statutory UDAAP mandate, it likewise exceeds this more general authority. Moreover, given the statute's complex criteria for determining whether an act or practice is unfair or abusive, the Bureau obviously lacks the broader power under the statute to prohibit acts and practices that are *not* unfair or abusive simply because the Bureau believes doing so is in some sense necessary or appropriate for carrying out its general consumer protection mission.

XIV. The Proposed Rule Is Unconstitutional

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 control and congressional supervision.

"Our Constitution divided the powers of the new Federal Government into three defined categories, Legislative, Executive, and Judicial." *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 483 (2010) (internal quotation omitted). "The ultimate purpose of this separation of powers is to protect the liberty and security of the governed." *Metro. Wash. Airports Auth. v. Citizens for Abatement of Aircraft Noise, Inc.*, 501 U.S. 252, 272 (1991). The separation of powers accomplishes this end in part by "ensur[ing] that those who wiel[d]" power are "accountable to political force and the will of the people." *Freytag v. Comm'r*, 501 U.S. 868, 884 (1991). In addition, "just because two [or more] structural features raise no constitutional concerns independently does not mean Congress may combine them in a single statute" for a new structure. *Ass'n of Am. R.Rs. v. U.S. Dep't of Transp.*, 721 F.3d 666, 673 (D.C. Cir. 2013), *vacated on other grounds*, 135 S. Ct. 1225 (2015); *see also Free Enter. Fund*, 561 U.S. at 496. Indeed, whether a structure is "novel" may be "the most telling indication of [a] severe constitutional problem." *Free Enter. Fund*, 561 U.S. at 506 (quotation marks omitted).

The structure of the Bureau is in fact "novel," "lack[ing any] historical precedent." *Id*. In violation of the separation of powers, the Bureau concentrates executive, legislative, and judicial power in the hands of one person who is thoroughly shielded from any accountability to both the President and Congress.

First, separation of powers requires that the President must have sufficient power to supervise those who exercise executive power (including rulemaking power). *Free Enter. Fund*, 561 U.S. at 493. Here, however, the Bureau is insulated from virtually any control or supervision by the President. For example, the President's ability to remove the Bureau's director is severely limited: the President may remove the director only "for inefficiency, neglect of duty, or malfeasance in office." CFPA § 1011(c)(3), 12 U.S.C. § 5491(c)(3). And this limitation does not occur in the narrow circumstances previously approved by the Supreme Court, involving either a multimember "body of experts," *Humphrey's Ex'r v. United States*, 295 U.S. 602, 624 (1935), or an inferior officer "limited in tenure" and "scope" of powers, *Morrison v. Olson*, 487 U.S. 654, 672, 695–97 (1988). This encroachment on presidential authority is exacerbated by other features of the Bureau's structure and broad-ranging authority. Among other things, the Bureau director can delegate all of his duties to a subordinate, such as the deputy that he appoints (despite not being the head of a department) and that answers only to him. CFPA § 1012(b), 12 U.S.C. § 5492(b). The Bureau also enjoys independent litigating authority, CFPA § 1054, 12 U.S.C. § 5564, and its views trump the President's when they disagree over enforcement of consumer finance law, *see id.* § 1022(b)(4)(A) & (B), 12 U.S.C. § 5512(b)(4)(A) & (B). The Bureau is an "independent" agency within the "independent agency" of the Federal Reserve, which cannot intervene in a Bureau matter. *Id*. §§ 1011(a), 1012(c), 12 U.S.C. §§ 5491(a), 5492(c); 44 U.S.C. § 3502(5). That status also means that the

Bureau is exempt from presidential oversight through the Office of Management and Budget. CFPA § 1017(a)(4)(E), 12 U.S.C. § 5497(a)(4)(E). Indeed, the Bureau director need not even coordinate with other executive branch officials regarding legislative recommendations or congressional testimony. *Id*. § 1012(c)(4), 12 U.S.C. § 5492(c)(4). And because the Bureau is financially independent, the President's ability to present a unified executive budget is curtailed.

Second, the Bureau is also unconstitutionally insulated from congressional supervision. The Appropriations Clause provides that "[n]o Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law." U.S. Const., art. II, § 9, cl. 7. This clause issues a "straightforward and explicit command: 'It means simply that no money can be paid out of the Treasury unless it has been appropriated by an act of Congress.'" *Office of Pers. Mgmt. v. Richmond*, 496 U.S. 414, 424 (1990) (quoting *Cincinnati Soap Co. v. United States*, 301 U.S. 308, 321 (1937)). The Bureau, however, 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). 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. CFPB Strategic Plan: FY 2013-FY 2017, at 36 (Apr. 2013), http://files.consumerfinance.gov/f/strategic-plan.pdf. 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.

Third, in exercising its power to define unfair, deceptive, and abusive acts and practices, the Bureau is wielding unconstitutionally delegated legislative authority. 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. *See Dep't of Transp. v. Ass'n of Am. Railroads*, 135 S. Ct. 1225, 1252 (2015) (Thomas, J., concurring in judgment). Moreover, "[w]hen Congress confers decisionmaking authority upon agencies, it must lay down by legislative act an intelligible principle to which the person or body authorized to [act] is directed to conform." *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 472 (2001) (internal quotation omitted). Congress's delegation of UDAAP authority, even with the Act's attempt at further definition, affords the Bureau discretion that is too subjective and imprecise. Indeed, as 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" for which it is "[p]robably not useful to try to define … in the abstract." How Will the CFPB Function Under Richard Cordray: Hearing Before the Subcomm. on TARP, Financial Services and Bailouts of Public and Private Programs, 112th Cong. 112-107, at 69 (2012). This is precisely the sort of standardless delegation of legislative policymaking that the non-delegation doctrine is meant to prohibit.

Never before has so much legislative and executive authority been so concentrated in one person immune from the control and supervision of the President and the Congress. As an unconstitutional body wielding unconstitutionally delegated power, the Bureau should refrain from exercising its UDAAP rulemaking authority. At a minimum, because these constitutional issues are currently being litigated in several courts, the Bureau should await judicial resolution of the issues before proceeding any further with the proposed rule.[8] In all events, since the Bureau itself is constituted in violation of the Constitution's separation of powers, the proposed rule, if adopted, would likewise be unconstitutional.

XV. The Proposed Rule Is the Product of a Procedurally Flawed Regulatory Process

If adopted, the proposed rule would be invalid because the Bureau has flouted several procedural requirements governing the rulemaking process.

A. The Proposed Rule Improperly Rests on Bureau Biases and Misconceptions

An agency must maintain an open mind throughout the rulemaking process. It may not "unalterably close[]" its "mind on matters critical to the disposition of the rulemaking." *Ass'n of Nat'l Advertisers, Inc. v. FTC*, 627 F.2d 1151, 1154 (D.C. Cir. 1979). Instead, it must "test[]" its own views on the "difference audiences" it serves. *Id.* at 1173. This requires the agency to "consider rationally" the arguments each interested party makes. An agency that cannot keep an open mind throughout the process—from beginning to end—is disqualified from issuing a rule. *See Ass'n of Am. R.R. v. Dep't of Transp.*, 821 F.3d 19, 31 (D.C. Cir. 2016) (disqualifying Amtrak from issuing rules regarding trains' on-time performance because its self-interest unalterably closed its mind). The history of the rulemaking process here, along with the Bureau's notice of proposed rulemaking, demonstrate that the agency is incapable of believing what its cited studies reveal when those studies indicate something other than the answer it desires. Because the Bureau's mind is closed to evidence other than that which would support the proposed rule, the agency may not move forward.

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. (This material is compiled in Exhibit G, attached to this letter.) And when CFSA offered to work with the Bureau to conduct a trial disclosure program, *see* Ex. F, the Bureau filed even to respond, despite its policy to encourage trail disclosure programs, *see* 78 Fed. Reg. 64,389. Instead, the Bureau has doubled-down on its earlier errors through the proposed rule, which

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[8] The constitutionality of the Bureau has been challenged in several cases. *See, e.g.*, Br. for Pet'rs at 45–52, *PHH Corp v. CFPB*, No. 15-1177 (D.C. Cir.) (Dec. 11, 2015), ECF No. 44 (argued Apr. 12, 2016); Br. Supp. Def.'s Mot. Dismiss at 8–12, *CFPB v. ITT Educ. Servs., Inc.*, No. 1:14-cv-00292, 2015 WL 1013508 (S.D. Ind. Mar. 6, 2015), ECF No. 23; Mem. P. & A. Supp. Pls.' Mot. Summ. J. at 10–31, *State Nat'l Bank of Big Spring v. Geithner*, No. 12-cv-01032, 2016 WL 3812637 (D.D.C. July 12, 2016), ECF No. 53-1; Mem. P. & A. Supp. Defs.' Mot. Dismiss at 4–21, *CFPB v. Morgan Drexen*, No. 13-1267, 2014 WL 5785615 (C.D. Cal. 2014), ECF No. 22-1. CFSA incorporates by reference the arguments set forth in the briefing in these matters.

suffers from the many the methodological and evidentiary shortcoming discussed in this letter. Especially telling of the Bureau's close-mindedness is the way it ignores the actual views of the consumers that it is charged with protecting. *See supra* Parts I.E & IX.B.

Because the Bureau has closed its mind to the evidence, it instead fills columns of the Federal Register distorting or rejecting out of hand studies that contradict its assumptions. Particularly egregious in this regard is the Bureau's treatment of the evidence of borrower expectations, which uniformly demonstrates that payday borrowers are quite good at predicting how long their loan sequences will last. *Compare supra* Parts I.G & III.B, *with, e.g.*, 81 Fed. Reg. at 47,928 n.492 (arguing that Professor Mann misinterpreted his own results). Either *every study* cited in the notice on this issue is incorrect or the Bureau is incorrect. Agencies exist to weigh the evidence and bring their expertise to the table—not to serve as a conduit for preordained conclusions. 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 is unalterably closed to any result aside from promulgation of the proposed rule. This rulemaking is therefore invalid.

B. The Bureau Has Improperly Relied on Special-Interest Groups

As noted, the Bureau must rationally consider all the arguments presented to it and use the rulemaking process as a way to test different views on the audiences it serves. *Ass'n of Nat'l Advertisers*, 627 F.2d at 1173. The agency may have contact with outside groups; however, the information it obtains must "be disclosed at some time" when it "becomes relevant to a rulemaking." *Home Box Office v. FCC*, 567 F.2d 9, 57 (D.C. Cir. 1977). A rule must represent the exercise of "independent discretion in the public interest" rather than a behind-the-scenes agreement among special-interest groups. *Id.* at 53. "Even the possibility that there is … one administrative record for the public and [the] court and another for the [agency] and those 'in the know' is intolerable." *Id.* at 54.

Here, the Bureau's responses to Freedom of Information Act ("FOIA") requests reveal that the Bureau has largely allowed outside groups opposed to payday lending to drive this rulemaking. The Bureau's FOIA responses demonstrating its relationship with outside groups is compiled in Exhibit H, attached to this letter. The Bureau did not adequately disclose its reliance on these groups despite its obvious relevance to the rulemaking.

For example, emails uncovered as a result of a FOIA request reveal that the Bureau engaged in extensive, nonpublic conversations with the Center for Responsible Lending, a special-interest group whose website welcome page declares its primary goal to be "[s]top[ping] the payday loan debt trap." Center for Responsible Lending (Sept. 30, 2016), http://www.responsiblelending.org. The Center's ultimate goal was similarly unconcealed in its communications with the Bureau. The Center gave the agency a literal outline of how it should write the proposed rule on payday lending, and the current notice of proposed rulemaking confirms that the Bureau has followed the Center's script. The Center's outline proposed that the agency require (1) an ability to repay requirement, (2) verification with third-party credit

agencies, (3) prohibitions on new loans based on the number of loan renewals and the time of total indebtedness in a twelve-month period, and (4) an exception for some loans that have annualized interest rates of 36% or less. *See* Ex. H. Every one of the Center's key requests found its way into the proposed rule. Yet at the same time the Bureau brings the Center's outline to life, it casts aside independent studies submitted by payday lenders and neutral third parties that indicate the agency's preferred conclusions are not supported by evidence. *See supra* Part XV.A.

The Bureau is thus well on the way to creating "one administrative record" for preferred special-interest groups like the Center and a different one for the public and the affected lenders. And the proposed rule confirms that conclusions not found on those groups' outlines will not find a place in the final rule. When an agency's rule is outlined for it in private and by groups with an interest in the proceedings, the resulting rule cannot be said to be the result of the agency's "reasoned judgment." *Home Box Office*, 567 F.2d at 54. The Center and other special-interest groups are driving this rulemaking; the rest of the affected parties are merely along for the ride. Because the agency has allowed special-interest groups to dictate the scope and text of the proposed rule while ignoring the concerns of payday lenders and borrowers, the agency has reduced "the elaborate public discussion" that is to come "to a sham." *Id.* at 53–54. The resulting rule is preordained and therefore invalid. *See id.* at 55–56 (where secret communications drive a rulemaking process, the rule is invalid under the APA and violates due process).

C. The Bureau Has Failed To Comply with the Regulatory Flexibility Act

The proposed rule will devastate small businesses and the consumers that those businesses serve. *See supra* Part II.B. Indeed, these impacts are so severe, and the proposed rule so obviously misguided, that the Office of Advocacy of the Small Business Administration ("SBA") has submitted a comment urging the Bureau to redo its economic analysis and scrap the proposed rule in favor of regulations that protect consumer access to credit.

The Regulatory Flexibility Act, as amended by the Small Business Regulatory Enforcement Fairness Act of 1996 ("SBREFA"), "requires that an agency, 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.'" *Allied Local & Reg'l Mfrs. Caucus v. EPA*, 215 F.3d 61, 78–79 (D.C. Cir. 2000) (quoting 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.* (quoting § 603(c)). And the final analysis must explain how the agency has minimized the impact of the rule on small entities and why it has rejected alternatives. 5 U.S.C. § 604(a)(6). An agency's failure to comply with the Regulatory Flexibility Act as amended may merit vacatur of the rule on that ground alone, or because the agency's behavior is arbitrary and capricious or otherwise unlawful. *Allied Local*, 215 F.3d at 79. The Bureau has not complied with the Regulatory Flexibility Act as amended in at least four ways so far.

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First, the Bureau is required to, but did not adequately, consider alternatives that would minimize significant economic impacts on small entities while accomplishing the agency's objectives. The GAO has criticized the Bureau for failing to comply with this requirement in the past, *see* GAO, Consumer Financial Protection Bureau: Observations from Small Business Review Panels, at 15 (Aug. 2016), and that type of criticism is justified again here. As discussed above, federal and state law provide numerous examples of alternatives to the Bureau's ability-to-repay approach, including robust disclosures along the lines the Bureau itself proposes in other aspects of the proposed rule, reborrowing restrictions, and required ability-to-repay determinations based on methods other than the novel residual income proposal. The Bureau, however, discussed only a disclosure alternative. 81 Fed. Reg. at 48,164-65. And it cursorily dismissed that alternative for the same unpersuasive reasons discussed in Part III.B.

Second, although the Bureau euphemistically recognized that "a disclosure-only approach would have substantially less impact on the volume of covered short-term lending," *id.* at 48,165, it did not fully "describe the impact of the proposed rule on small entities." 5 U.S.C. § 603(a). Rather, it ignored that the economic impact on small entities (and thus their consumers) is tremendous: as discussed above, the proposed rule would devastate the industry, and small lenders in particular. *See supra* Part II.B. The Bureau also failed to describe how its non-disclosure approach "minimiz[es] significant economic impact on small entities." *Id.* § 603(c).

Third, the Bureau arbitrarily and capriciously rejected an exemption as an alternative for small entities. The Bureau's sole reason for rejecting an exemption alternative is that small entities are not engaged in "meaningfully different lending practices." 81 Fed. Reg. at 48,165. But that rationale is at odds with the Bureau's acknowledgment that those lenders who perform accounting, recordkeeping, and other tasks manually will be burdened by the proposed rule more than those who have automated such tasks and the commonsense fact that small entities are less likely to enjoy the economies of scale necessary to justify automation. Small entities are thus disproportionately burdened by the proposed rule's procedural costs. They also, of course, are disproportionately vulnerable to the proposed rule's devastation of the payday lending industry, because smaller entities are less able to weather business losses. The Bureau, however, has both failed to acknowledge this disparity and failed to address whether it justifies an exemption. *See Allied Local*, 215 F.3d at 80 ("To be regarded as rational, an agency must also consider significant alternatives to the course it ultimately chooses.").

Fourth, the Bureau has not even attempted to describe how it is minimizing the impact of the proposed rule on the cost of credit for small entities. Despite recognizing that many loans are made for business, commercial, or agricultural purposes, 81 Fed. Reg. at 48,165–66, the Bureau does not describe any attempt to minimize the effect of its proposed rule on those business, commercial, or agricultural entities. The Bureau, for example, does not consider an exemption for those types of loans. Nor has the Bureau described—other than a seven-word acknowledgment of a comment received in the SBREFA process—how it is minimizing the impact of the proposed rule on the cost of credit for those small entities that are payday lenders devastated by the proposed rule.

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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.

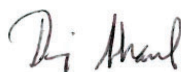
Echoing the concerns set forth in this letter, the Office of Advocacy also emphasized that the proposed rule "will not alleviate a consumer's financial situation. The consumer will still need to pay his/her bills and other expenses"—but will have been deprived of the means to do so. The Office of Advocacy 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