CONSUMER BANKERS ASSOCIATION
The Voice of the Retail Banking Industry

March 18, 2019

The Honorable Kathleen Kraninger
Director
Consumer Financial Protection Bureau
1700 G Street, NW
Washington, D.C., 20552

**RE: Compliance Date of Payday, Vehicle Title, and Certain High-Cost Installment Loans Rule - Docket No. CFPB-2019-0007**

Dear Director Kraninger:

The Consumer Bankers Association ("CBA") [1] appreciates the opportunity to provide our comments in response to the Consumer Financial Protection Bureau's ("Bureau" or "CFPB") notice of proposed rulemaking for payday, vehicle title, and certain high-cost installment loans ("Proposal"). CBA strongly supports effective consumer protections and, specifically, the principles of choice, transparency and fairness in customer relationships.

CBA commends the Bureau for reexamining the small-dollar credit marketplace and how lenders in this market meet consumers' need for credit. We believe it is important that consumers receive the products they want and need at fair prices and on transparent terms. We believe it is equally important to rid the market of bad actors that engage in fraudulent transactions or violate federal laws and fashion rules that deter such conduct. As a policy matter, we support the Bureau's intended goal of ending abusive payday lending practices by nonbank lenders. Unlike some nonbanks, depository institutions have long had their consumer lending products and practices examined against consumer protection and safety and soundness standards by various state and federal supervisory agencies, including the CFPB. However, we believe the Bureau's 2017 Final Rule ("Final Rule" or "Rule") discourages

[1] The Consumer Bankers Association is the only national financial trade group focused exclusively on retail banking and personal financial services—banking services geared toward consumers and small businesses. As the recognized voice on retail banking issues, CBA provides leadership, education, research, and federal representation for its members. CBA members include the nation's largest bank holding companies as well as regional and super-community banks that collectively hold two-thirds of the total assets of depository institutions.

traditional depository lenders from remaining in or entering the small-dollar market and will have effect on current offerings due to the broad scope of the Rule.

Accordingly, CBA fully supports the Bureau's proposed delay of the current August 19, 2019 compliance date for the mandatory ability to repay ("ATR") provisions of the Rule by 15 months to November 19, 2020. However, because we expect the Bureau's reconsideration of the Rule's ATR requirements will likely identify other problems with the Rule, and due to existing deficiencies with the scope of what the Rule currently considers to be a "covered loan" and the Rule's payment provisions, we again urge the Bureau to grant an immediate extension of the compliance date for the *entire* Final Rule.[2] Without an immediate extension, banks will face tremendous uncertainty as to the Rule's expectations and will expend resources unnecessarily, and ultimately inefficiently, to achieve compliance with a rule that the Bureau may materially change.

Therefore, the Bureau should issue an interim final rule to extend the compliance date of the entire Final Rule as the agency has previously done in other circumstances.[3] Additionally, the Bureau should engage coordinate with the Office of the Comptroller of the Currency, the Federal Reserve Board and the Federal Deposit Insurance Corporation on its regulatory approach toward small dollar lending. Through coordination, the Bureau and its sister agencies can create a consistent regulatory framework that would remove obstacles and more effectively promote banks' ability to preserve or expand small-dollar credit offerings and to allow them to preserve currently offered traditional bank products that are unintentionally covered by the broad scope of the Rule.

## Discussion

### CBA Supports the Bureau's Reassessment of the Rule's Ability to Repay Provisions and Their Respective Compliance Date

In 2017, The Bureau finalized a strict and prescriptive rule that will stifle progress in the small-dollar market. The agency has effectively created conditions requiring compliance costs so great that they negate depository lenders' ability to make these types of loans at a reasonable cost to consumers. These hurdles only reduce efficiencies, restrict flexibility and reduce consumer options for small-dollar liquidity. Only simple, flexible rules/guidance will foster the innovation needed to meet consumer demand for value, speed of funds availability, and ease of application.

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[2] We have previously urged the Bureau to extend the Compliance Date, including in a letters dated October 24, 2018 and January 3, 2019. CBA has also conducted numerous in-person meetings with the Bureau to address this issue.

[3] The Bureau has previously issued interim final rules to modify existing rules, including to update the Bureau's model forms under Regulation V, to amend the timing for mortgage servicers to provide required early intervention notices to borrowers under Regulation X, and to adjust for inflation the civil monetary penalties that are within the Bureau's jurisdiction.

The current Rule requires lenders, among other things, to determine, pursuant to an overly burdensome standard, whether consumers have the *ability to repay* their loans, prior to issuing certain short-term small dollar, payday, and auto title loans.[4] The Rule requires an excess of added manual processes including complicated income verifications and "reasonable" projections of future expenses. Other unsecured consumer loans do not require lenders to verify income; the consumer merely needs to state their income. Verifying paystubs, tax forms, and other documentation introduces a manual process that the consumer may find excessively burdensome, delaying their access to much-needed funds and potentially driving them to an unregulated, unsafe provider to obtain them.

The Rule also calls for reports, restrictions and refunds of fees under certain conditions. In total, these provisions require countless hours of new compliance and oversight at a very high cost. As a result, the lenders the CFPB would like to see offer more affordable options as an alternative to payday providers simply will not be willing to participate in this space. These new restrictions and requirements unduly hinder the expansion of small-dollar lending products offered by banks and will lead to further retractions in the marketplace. CBA maintains that standards with less of an implementation burden will allow banks to make loans efficiently and at reasonable prices and facilitate lenders' ability to meet consumer needs while maintaining robust compliance frameworks for these products.

Accordingly, we agree with the Bureau's recent assessment of its improper use of its authority to regulate unfair, deceptive, or abusive acts and practices ("UDAAP") as prescribed by the Dodd-Frank Act.[5] Dodd-Frank authorizes the Bureau to prescribe rules identifying UDAAP, as well as to enforce the Act's UDAAP prohibition. In the Rule, the Bureau has identified two practices as both unfair and abusive: to make a covered loan without reasonably determining that the consumer will have the ability to repay the loan, with some exception, and to attempt to withdraw payment from a consumer's account in connection with a covered loan after the lender's second consecutive attempt has failed due to a lack of sufficient funds, unless the lender obtains the consumer's new authorization. The Rule marks the Bureau's first rule issued under its UDAAP authority.

In exercising this authority, the Bureau has promulgated a very prescriptive rule that would effectively create a narrowly tailored product designed to operate in a very constrictive regulatory scheme. In general, we believe this approach is an inappropriate exercise of the Bureau's UDAAP rulemaking authority. Regulations concerning alleged unfair or abusive acts or practices should be tailored to prohibit the specific practices observed, not create prescriptive arbitrary requirement s, such as requiring the use of an exclusive underwriting methodology for entire credit markets, much less dictate that lenders conduct various ancillary practices (*e.g.,* credit reporting, etc.) that have little if anything to do with the alleged harmful practices. Unlike prior UDAP rulemakings, the Bureau's Proposal does not merely ban an identified

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[4] 12 C.F.R. § 1041

[5] *Dodd-Frank Wall Street Reform and Consumer Protection Act*, Pub. L. No. 111-203, § 1021(b) (3), 124 Stat. 1376 (2012).

practice; it imposes specific detailed underwriting methodologies and standards on the market, banning all other alternative underwriting methodologies and standards of these products as unfair and abusive. However, to this point, the Bureau has shown no evidence to support the sweeping legal conclusion that all alternative underwriting approaches would be unable to pass the unfair or abusive standard. In creating such a detailed and proscriptive rule -- one that prohibits all other ability to repay alternatives as per se abusive and unfair -- the Bureau has exceeded its limited UDAAP authority, which should require a prior finding that the particular acts and practices in question are unlawful before being banned. UDAAP rulemakings should only be used to ban specifically identified acts and practices. The Bureau's study did not investigate the relative merits of these now banned alternative approaches, it only relied on a broad review of the current marketplace.

Additionally, while the Bureau has amassed considerable data on the non-depository payday industry, it has failed to provide a comprehensive study of bank-offered products and their proclaimed harm to consumers. There has been no showing that loans issued by depositories produce consumer harm. In fact, we believe bank-issued loans offer great benefit to, and do not harm, consumers. They can help borrowers obtain needed liquidity for emergencies and avoid non-sufficient fund and overdraft fees, late payment charges and utility disruption. To this point, we do not believe the Bureau has established that any consumer injury resulting from bank-offered covered loans exceeds the benefits they provide to consumers.

Furthermore, because the payment provisions of the Rule, which are not covered under the Proposal, rest on the same UDAAP interpretation of the reasonableness element of "unfairness" as the ATR provisions, the Bureau should not allow the payment provisions to come into effect without evaluating whether its new interpretation of the "unfairness" standard allows for it. We believe the establishment of the payment provisions are an inappropriate use of UDAAP authority because, much like the ATR provisions, they dictate how banks must design and provide certain credit products to consumers. Specifically, they establish prescriptive, detailed rules for how banks must collect payments for products that consumers demand, including by providing specific notices and complying with certain timing requirements. The Bureau's original justification for their approach to the payment provisions was that a consumer must have a *specific understanding* of the *individualized risk* he or she is incurring by entering into a contract with a particular lender. However, as the CFPB has recently noted, a *general understanding* that failing to have enough money in one's account to fund a loan payment when due is sufficient for a consumer to reasonably avoid any harm.

Accordingly, CBA not only fully supports the Bureau's reassessment of the ATR provisions of the Rule, but also a reassessment of the payment provisions of the Rule, both of which were promulgated under similar standards under its UDAAP authority. We further support a compliance date delay from August 19, 2019 to November 19, 2020 in order to allow banks to assess the extent of any modifications of the rule prior to implementing a proper compliance regime.

**Ensure that Banks May Continue Offering Traditional Bank Products**

At the time the Rule was proposed, the Bureau failed to realize that the expansive definition of a "covered loan" would sweep in a number of traditional retail bank and wealth management products, which should not be covered by a rule intended to regulate short-term, small dollar, high-cost loans.[6] These include, but are not limited to, the following:

- "Bridge" loans, including those designed to assist with the purchase of the customer's new home before the customer has sold his or her existing home. These loans are secured by collateral other than real estate or are unsecured. The loans typically have a term of 45 days or less and nearly always have a balloon payment. As such, they would constitute a covered short-term loan under the Final Rule or, if longer than 45 days, a covered longer-term balloon-payment loan.
- Revolving lines of credit and other loans secured typically by securities held in a brokerage account, with low periodic payments (such as payments of interest only during the life of the loan) and a fixed maturity date, with a balloon payment due at maturity. Because of the balloon payment, these loans would constitute a covered short-term loan or covered longer-term balloon-payment loan under the Final Rule. Additionally, lines of credit with low or no principal balance and a finance charge during a billing cycle could constitute covered longer-term "high-cost" loans.
- Loans secured by a Certificate of Deposit or other security. These loans typically require only payments of interest during the life of the loan, with the balance due at maturity. Because of the balloon payment, these loans would also constitute a covered short-term loan or covered longer-term balloon-payment loan under the Final Rule.
- Wealth management loans, which provide customers with short-term liquidity and may have a term of 45 days or less, or have a large, "balloon" payment due at maturity. These loans would constitute a "covered short-term loan" as defined in 12 C.F.R. §§ 1041.2(10) and 1041.3(b) (3) or constitute a "covered longer-term balloon-payment loan" as defined in 12 C.F.R. §§ 1041.2(7) and 1041.3(b) (2).
- Margin Loans backed by securities. These loans, if originated by a bank, typically require only payments of interest during the life of the loans, with no specific principal payments. Because lenders reserve the right to demand full payment of the loans at any time, these loans could also constitute a covered short-term loan under the Final Rule.

The Bureau will need to immediately clarify that it does not intend for these loan products to be covered by the Final Rule and that, specifically, the consumer protection concerns regarding "payday, vehicle title and certain high-cost installment loans" cited by the Bureau in the Rule clearly do not apply to these loans. The Bureau's neglect to do this immediately will force banks into a burdensome compliance regime for numerous products that were not intended to be within scope of the Rule. To exclude these products from coverage, we recommend that the Bureau delay all provisions of the Rule in order to consider limitations to the definition of a

[6] 12 C.F.R. § 1041.3(b) (defining "covered loan").

"covered loan" to exclude loans over a certain dollar amount and beyond a certain term. Notably, the Office of the Comptroller of the Currency's recent guidance on short-term, small dollar installment loans included references to both of these parameters. That guidance suggests limits to small-dollar, short-term lending - "typically two to 12 months in duration" and that "typically rang[e] from $300 to $5,000").[7]

**Ensure Certainty and Conservation of Valuable Resources**

While the CFPB has simultaneously proposed a rescission of the Rule's ability to repay provisions, it is not proposing to change any of the payment provisions of the Rule. However, the Bureau has indicated that it will separately examine certain issues, such as whether to exempt debit card payments from the payment provisions and other issues related to the Rule that have been brought to its attention by industry participants, and may initiate a separate rulemaking upon review. This uncertainty in the approach to the payments provisions of the Rule lends itself to the need for an immediately extension of the compliance date for *all provisions* in the Final Rule. A full extension of the Rule is needed to avoid the unnecessary expenditure of resources to achieve compliance with a rule that the Bureau is actively reconsidering and, therefore, surrounded by a great deal of uncertainty.

For nearly its entire existence, the 2017 Final Rule in its entirety has been clouded by uncertainty, preventing banks from being able to adequately design compliance programs. This uncertainty was the result of previous statements from the Bureau and the slow realization by both the industry and the CFPB that the Rule covered products that were unintended. Prior to release of the Proposal, the Bureau's own actions created significant uncertainty as to whether it would revise or withdraw the 2017 Final Rule in full or in part. Immediately following the 2017 publication of the Rule in the Federal Register, the Bureau issued a press release stating that it "intends to engage in a rulemaking process so that the CFPB may reconsider the Payday Rule," drawing no distinctions between its plans for the ATR provisions and the payment provisions.[8] The Bureau did not clarify which provisions it was going to address until it released a statement in October of 2018.[9] Prior to that time there were no other indications that the Bureau was planning to only address the ATR provisions of the Rule.

Additionally, in a May 31, 2018 court filing in its litigation with the Consumer Financial Services Association regarding the legality of the Rule under the Administrative Procedures Act, the CFPB moved for a stay of the Rule in its *entirety* in the United States District Court for the

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[7] Bulletin, Office of the Comptroller of the Currency, OCC Bulletin 2018-14: Core Lending Principles for Short-Term, Small-Dollar Installment Lending (May 23, 2018), available at https://www.occ.gov/news-issuances/bulletins/2018/bulletin-2018-14.html.

[8] Consumer Financial Protection Bureau, CFPB Statement on Payday Rule (Jan. 16, 2018), *available at* https://www.consumerfinance.gov/about-us/newsroom/cfpb-statement-payday-rule/.

[9] Consumer Financial Protection Bureau, Public Statement Regarding Payday Rule Reconsideration and Delay of Compliance Date (Oct. 26, 2018), *available at* https://www.consumerfinance.gov/about-us/newsroom/public-statement-regarding-payday-rule-reconsideration-and-delay-compliance-date/.

Western District of Texas.[10] On November 6, 2018, the Court issued a stay of the compliance date.[11] However, in a status report to the Court filed on March 8, 2019, the Bureau stated that "the possibility that the Bureau may revise the payments provisions does not justify continuing to stay the compliance date of those provisions." They further stated, "the Bureau has not made any decision to propose revising those provisions."[12] As such, any future outcomes of this litigation could significantly change the force and effect of the entire Rule and it would be efficient at this time to extend the compliance date for the entire Rule until the Bureau has finalized reconsiderations of the ATR provisions. By that time, the Bureau may decide to rescind or revise the payment provisions and clarify the scope of "covered loans," resulting in very expensive and wasteful compliance efforts and possible harm to lenders, and ultimately consumers, by rendering all compliance efforts moot and limiting valuable products and services.

To implement new regulatory requirements, banks typically require a significant period – often a year or more depending on the complexity and scope of the rule – to review a rule's requirements, identify products that may be covered, conduct a gap analysis, and then as necessary, modify policies, procedures, and systems, train employees, and test the new procedures and systems. Unless the compliance date is adequately extended, banks will be compelled to begin compliance processes now, even though there may yet be material changes in the Bureau's requirements.

The Bureau's immediate announcement of an extension in the *entire* compliance date would result in the avoidance of these costs and would advance the Bureau's statutory objective to "reduce unwarranted regulatory burdens." The Bureau is authorized to exercise its authorities under federal consumer financial law for the purposes of ensuring "unnecessary, or unduly burdensome regulations are regularly identified and addressed in order to reduce unwarranted regulatory burdens," and that "markets for consumer financial products and services operate transparently and efficiently to facilitate access and innovation.[13]

**Uncertainty in Retroactivity of the Rule**

An extension in the compliance date is also needed, because the Final Rule does not state expressly that it applies only to loans originated on or after that date. Consequently, previously originated loans that are outstanding as of the compliance date may be required to meet the Rule's restrictions, most notably the rule's payment and withdrawal requirements. As outlined

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[10] Motion, *Community Fin. Svcs. Ass'n of America et al. v. Consumer Fin. Protection Bureau*, Joint Motion for Stay of Litigation and Stay of Agency Action Pending Review, Civil Action No. 1:18-cv-295 (W. D. Tex. May 31, 2018).
[11] Order, *Community Fin. Svcs. Ass'n of America et al. v. Consumer Fin. Protection Bureau*, Order No. A-18-CV-0295-LY (W.D. Tex. Nov. 6, 2018).
[12] Joint Status Report, *Community Fin. Svcs. Ass'n of America et al. v. Consumer Fin. Protection Bureau*, Joint Status Report No. 1:18-cv-295Order No. A-18-CV-0295-LY (W.D. Tex. March 8, 2019).
[13] *Dodd-Frank Wall Street Reform and Consumer Protection Act*, Pub. L. No. 111-203, § 1021(b)(3), 124 Stat. 1376 (2012).

above, the loans outstanding as of the compliance date will generally be those loans that the CFPB did not intend to be covered under the Rule.

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Due to the significant level of uncertainty and lack of clarity, we urge the Bureau to extend the compliance date of the entire Final Rule. An extension of the compliance date for all provisions of the current Rule until November 20, 2020 would provide ample opportunity to accommodate a full APA rulemaking process and would allow banks to continue to offer products that were not intended to be within scope of the Rule, would avoid the unnecessary use of valuable resources, and would allow for an additional implementation period upon completion of the new rulemaking.

We look forward to working with the Bureau on this important issue and we continue to urge the agency to issue a rule that:

- is based on sound evidentiary conclusions, especially with regard to bank-offered products;
- provides for reasonable and complete consumer protections;
- provides for scalability and ease of administrative burdens to allow greater reach to the unbanked and underbanked;
- provides an option for banks to offer small-dollar loans as a line of credit;
- provides banks with a clear and easily applied standard that consumers will understand; and
- allows for flexibility to meet consumer needs through innovative and competitive credit options.

CBA thanks you for your consideration and we appreciate the opportunity to share our comments.

Sincerely,

David Pommerehn
SVP, Associate General Counsel
Consumer Bankers Association