CBA | CONSUMER BANKERS ASSOCIATION

April 13, 2017

The Honorable Mike Crapo
Chairman
Committee on Banking, Housing, and Urban Affairs
U.S. Senate
534 Dirksen Senate Office Building
Washington, D.C. 20510

The Honorable Sherrod Brown
Ranking Member
Committee on Banking, Housing, and Urban Affairs
U.S. Senate
534 Dirksen Senate Office Building
Washington, D.C. 20510

Dear Chairman Crapo and Ranking Member Brown:

The Consumer Bankers Association (CBA) appreciates the Committee on Banking, Housing, and Urban Affairs' solicitation of legislative proposals intended to spur economic growth and increase market participation. CBA is the voice of the retail banking industry whose products and services provide access to credit to millions of consumers and small businesses. Our members operate in all 50 states, serve more than 150 million Americans and collectively hold two-thirds of the country's total depository assets.

From underwriting loans to main street businesses to providing banking services to previously un-banked or under-banked consumers, CBA member banks are integral to fueling the economic engine that drives prosperity. The following legislative recommendations seek to either promote sound financial regulation to enable the retail banking sector to continue to drive economic growth and inclusion or empower consumers with the information necessary to make sound financial decisions to ensure a successful economic future.

Bipartisan Commission at the Consumer Financial Protection Bureau

CBA strongly recommends transitioning the leadership structure at the Consumer Financial Protection Bureau (CFPB or Bureau) from a sole director to a bipartisan, five-member commission. A commission would provide a source of balance and stability for consumers, the economy, and the financial services industry by encouraging internal debate and deliberation from multiple leaders with diverse experiences and expertise. CBA believes such a governance structure would ultimately lead to increased transparency and more bipartisan, reasoned rulemakings and judgments, which would promote a vibrant financial services industry that is capable fueling growth and promoting greater participation in the economy.

Background: The CFPB has unprecedented rulemaking, supervisory, and enforcement authority over the entire consumer financial services industry. The Bureau's vast jurisdiction includes an entire sector of American finance from banks and credit unions, to innumerable financial services companies of all sizes, including larger participants in the American financial system, ultimately touching all Americans. Unlike a majority of the financial service regulators, a single individual was tasked with the duties of directing such an important endeavor.

To preserve the CFPB as an effective regulator, with a mission to protect consumers regardless of which political party is in the White House, Congress should return the CFPB to its originally intended and planned structure, from a sole director to a bipartisan commission.

A bipartisan commission would provide a balanced and deliberative approach to supervision, regulation, and enforcement for the long-term as well as offer a stable form of leadership. Certainty is not only good for industry, it is also good for consumers and the economy. No matter the action or rule the Bureau considers, having multiple viewpoints that must be heard though a commission structure is more likely to strengthen consumer choice and increase consumers' access to credit.

Another factor that calls into question the single director model is the ever-changing political landscape. Understanding that stability is a component of a healthy regulatory environment, a single director structure susceptible to changing political viewpoints jeopardizes industry certainty and makes it difficult for banks and credit unions to develop long-term plans to serve consumers and small business.

In addition, a commission is the traditional and customary structure for independent federal agencies, helping to ensure thorough deliberation, bipartisanship, and impartiality. Examples in the financial services space include the Federal Reserve Board, the Federal Deposit Insurance Corporation, the Securities and Exchange Commission, the Commodity Futures Trading Commission, and the National Credit Union Administration.

The idea of a five-person commission has had bipartisan support and even originated in a Democrat-led Congress. In 2009, then-Speaker Nancy Pelosi (D-CA) and then-House Financial Services Chairman Barney Frank (D-MA) led passage of legislation in the House, with strong Democratic support, which would have created a five-member commission to oversee the CFPB. In addition, then-professor Elizabeth Warren, whose ideas led to the creation of the CFPB, also called for a Financial Product Safety Commission (FPSC) during public debate over the Agency's creation – a proposal that was supported by President Obama.

In addition to Democratic support during the creation of the Dodd–Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act), a number of Republican led legislative efforts have attempted to replace the sole director model with a five-person commission. In the 114th Congress, House Financial Services Committee Financial Institutions and Consumer Credit Subcommittee Chairman Randy Neugebauer (R-TX) introduced H.R. 1266, the Financial Product Safety Commission Act, modeled after the language that was originally included in the House-passed version of Dodd-Frank in 2009. The House Financial Services Committee approved H.R. 1266 with bipartisan support in late September 2015. Most recently, in September 2016, House Financial Services Committee Chairman Jeb Hensarling (R-TX) introduced H.R. 5983, the Financial CHOICE Act, which included the Neugebauer language, creating a commission at the CFPB. In late September 2016, the Financial Services Committee passed the Financial CHOICE Act.

Please find additional materials in support of a CFPB commission in Appendices A, B, and C.

Small-Dollar Lending

CBA recommends legislation to repeal Federal Deposit Insurance Corporation (FDIC) and Office of the Comptroller of the Currency (OCC) guidance (2013-10101; 2013-0005) issued in 2013 related to small-dollar bank loans, known as deposit advance products (DAP). In addition, we recommend legislation to require the CFPB to work in coordination with the prudential regulators in issuing any rule or guidance related to small-dollar lending to ensure a consistent regulatory environment that is conducive to small-dollar lending as opposed to one that pushes already heavily regulated banks out of the short-term liquidity market.

Background: Prior to 2013, several banks offered DAP to meet overwhelming consumer demand for access to emergency credit. Unfortunately, 2013 FDIC and OCC guidance effectively eliminated the ability of heavily regulated financial institutions to offer a viable alternative to compete with payday lending. The FDIC and OCC guidance recommended the use of underwriting that is more appropriately applied to a much larger mortgage loan and placed soft caps on percentage rates banks could offer consumers. This, combined with a low interest rate environment, has made small-dollar credit unviable and has forced banks to exit the market.

Furthermore, the Bureau is prepared to finalize a proposed rule covering payday loans, certain loans secured with a vehicle title, "high-cost" installment loans, and lines of credit that would make it difficult for any lender to offer affordable, easy-to-use products.[1] This small-dollar loan proposal is incredibly prescriptive as it would effectively create a narrowly tailored product designed to operate within a very constrictive regulatory scheme. In general, we find this approach to be an inappropriate exercise of the CFPB's Unfair, Deceptive, and Abusive Acts and Practices rulemaking authority, as remedies for alleged unfair or abusive acts or practices should be tailored to those practices observed and not used to dictate product offerings filled with ancillary provisions that have little if anything to do with the alleged harmful practices.

Specifically, the Bureau's proposal would require overly restrictive underwriting and unrealistic terms of use, including limits on frequency of use and limited loan-to-income ratios. For example, short-term loans (45 days or less) would require lenders to verify the consumer's income, "major financial obligations," and borrowing history using third-party records. "Major financial obligations" would include such obligations as housing payments, car payments, and child support payments. Using this information, the lender would then have to make a determination whether the consumer has the ability to repay the loan after covering other major financial obligations and basic living expenses. This level of underwriting complexity ignores the cost of providing this type of loan. These are small-dollar loans, not mortgages. Requiring a high-touch level of underwriting will only result in pricing out would-be providers. Additionally, consumers cannot afford to wait long periods of time for an underwriting decision when they have emergency expenses that need to be paid.

Please find supporting materials in Appendices D, E, and F.

[1] https://www.federalregister.gov/documents/2016/07/22/2016-13490/payday-vehicle-title-and-certain-high-cost-installment-loans.

Section 1071 of the Dodd-Frank Act

CBA members anticipate a chilling of small business lending and compliance complications due to the complex new data collection requirements under Section 1071 of the Dodd-Frank Act. In order to prevent a reduction in small business lending and an increase in costly litigation that could occur from the misuse of the information collected, CBA recommends the repeal of Section 1071.

Background: Section 1071 of the Dodd-Frank Act amends the Equal Credit Opportunity Act to create a Home Mortgage Disclosure Act (HMDA)-like set of requirements for business credit applications. In brief, every financial institution must inquire of any business applying for credit whether the business is a small business, or a women- or minority-owned business, maintain a record of the information separate from the application, and report the information along with related information about the application (location of business, action taken, amount of credit provided, etc.), to the Bureau. The information must be made public on request in a manner to be established by regulation, and will be made public annually by the Bureau. The Bureau is given considerable flexibility to establish the requirements, define the scope, provide for exemptions, and protect the privacy of individuals.

The potential for overly burdensome data collection requirements could stifle small business lending, greatly increase compliance costs for small business lenders, open the door to costly litigation, and duplicate existing law. Lenders will need to revamp lending systems and processes in order to collect the required data, adding cost to compliance. The net result will limit the resources banks have to make loans and add greatly to compliance burdens and risks, a negative for small business lending.

Please find supporting materials in Appendices G, H, and I.

Systemically Important Financial Institution Designation

CBA recommends replacing the Dodd-Frank Act's arbitrary $50 billion systemically important financial institution designation threshold to one that is based on the complexity, scale, and activities of a financial institution. Subjecting financial intuitions that do not pose a significant threat to the economy to heightened reporting and stress testing requirements places an unnecessary burden that redirects vital capital and staff resources towards compliance, ultimately reducing lending to communities and businesses.

Background: The current asset threshold is a flawed approach used by the Financial Stability Oversight Council (FSOC) to assess the risk an institution poses to our financial infrastructure. Requiring FSOC to evaluate a number of factors beyond asset size will provide more accurate risk profiles of institutions and lead to better judgements of whether institutions should be declared systemically important. A risk-based approach to designation would lessen capital and compliance constraints on larger institutions currently captured by the $50 billion asset threshold that do not participate in activities deemed to pose systemic risk to the financial system.

Please find supporting materials in Appendices J and K.

Know-Before-You-Owe Federal Student Loans

CBA recommends applying the Truth In Lending Act (TILA) disclosure regime to federal student loans. Providing student borrowers and their families with clear disclosures about their loan terms will help to promote sound financial decision-making and prevent over-borrowing, which will enable these consumers to be more active participants in the economy.

Background: Today, student loan debt stands at $1.4 trillion – second only to mortgage debt. Nearly 93 percent of this mountain of debt is federal loans, mostly held by the U.S. Department of Education. A Wall Street Journal analysis of New York Federal Reserve and Department of Education data showed at the beginning of the 2016 more than 40 percent of federal student loan borrowers were either behind on their payments or not making any at all. About one in six borrowers were in default, having gone more than a year without making a payment. Given these staggering numbers, Congress should focus its resources on preventing repayment problems before they start by empowering student loan borrowers to make educated financial decisions and avoid too much debt. Simply put, it is time for a "know-before-you-owe" initiative – similar to the CFPB's work on mortgage disclosures – for federal student loans.

Access to information about the true cost of a loan is critical to making an informed decision about how much debt to take out. Unfortunately, federal borrowers must weed through more than a dozen pages of disclosures and squint to read fine print to unearth some of the key loan terms. The Department of Education's loan disbursement disclosures fail to provide terms specific to individual borrowers, instead offering broad categories of interest rates and fees and ranges of estimated monthly payments, and lack information on the total expected cost of the loans.

Private lenders are required by the TILA to provide customers with clear and conspicuous disclosures of loan costs and terms before loans are disbursed. The interest rate, loan fees, annual percentage rate, monthly payment amount, and total cost of the loan, among other important terms specific to the individual borrower are boldly displayed. This information allows borrowers to make informed decisions about the loans that are appropriate for their higher education needs. Federal student loan borrowers deserve the same kind of concise, meaningful information about their future obligations before they owe as is provided to private borrowers.

Conclusion

CBA stands ready to work with Congress to craft a regulatory framework that safeguards the American consumer, ensures access to credit and promotes competition in the financial marketplace. On behalf of the members of CBA, we appreciate the opportunity to submit these legislative proposals.

Sincerely,

Richard Hunt
President and CEO
Consumer Bankers Association

APPENDIX A

Support Legislation to Guarantee the Longevity of the Consumer Financial Protection Bureau

Transition the leadership structure at the CFPB from a sole director to a bipartisan commission.

Background

Due to its critical mission, the CFPB's authority is too important and vast to be controlled by a single individual. Rules, guidance, and other decisions made by a single director could be overturned by a new director appointed by each new presidential administration, creating regulatory uncertainty for industry, which ultimately harms consumers, small businesses, and the economy.

In 2010, Congress created the Consumer Financial Protection Bureau (CFPB) and granted it rulemaking, supervisory, and enforcement authority over a vast array of consumer financial products and services. The CFPB's jurisdiction includes an entire sector of American finance from banks and credit unions, to innumerable financial services companies of all sizes, to larger participants in the American financial system, touching all Americans.

A commission would strengthen the governance of the CFPB, prevent it from becoming a political football, and ensure its longevity; thus, preserving its mission to protect consumers for generations to come.

Need For A Bipartisan Commission

Balance and Stability | A bipartisan commission would provide a balanced and deliberative approach to supervision, regulation, and enforcement as well as offer a stable form of leadership, preserving the CFPB as an effective regulator, regardless of which political party is in the White House.

- Good for Consumers: Robust debate with multiple viewpoints from various industry experts – from small business lending to credit unions and community banks – is more likely to strengthen consumer choice and the ability for consumers to access credit. Further, a stable banking industry is better able to serve small businesses and consumers to help grow our economy and provide for more opportunity to invest in communities.

- Certainty for Industry: A single director structure jeopardizes industry certainty, making it difficult for banks to develop long-term plans to better serve consumers and small business by focusing on innovation and developing new products and better ways to serve their consumers.

Historic Bipartisan Support

The idea of a five-person commission originated with overwhelming Democratic support. In 2009, then-Speaker Nancy Pelosi (D-CA) and then-House Financial Services Chairman Barney Frank (D-MA) led passage of legislation in the House, with strong Democratic support, which would have created a five-member commission to oversee the CFPB. In addition, then-professor Elizabeth Warren, whose ideas led to the creation of the CFPB, also called for a Financial Product Safety Commission (FPSC) during public debate over the Agency's creation – a proposal that was supported by President Obama.

Common Governance Structure

A commission is the traditional and customary structure for independent federal agencies, helping to ensure thorough deliberation, bipartisanship, and impartiality.

- Examples include the Federal Reserve Board (FRB), the Federal Deposit Insurance Corporation (FDIC), the Securities and Exchange Commission (SEC), the Communities Futures Trading Commission (CFTC), and the National Credit Union Administration (NCUA).

APPENDIX B

November 19, 2015

The Honorable Thad Cochran
Chairman
Senate Appropriations Committee
S-128, The Capitol
Washington, DC 20510

The Honorable Hal Rogers
Chairman
House Appropriations Committee
H-305, The Capitol
Washington, DC 20515

The Honorable John Boozman
Chairman
Senate Appropriations Financial Services &
General Government Subcommittee
S-128, The Capitol
Washington, DC 20510

The Honorable Ander Crenshaw
Chairman
House Appropriations Financial Services &
General Government Subcommittee
B-300 Rayburn House Office Building
Washington, DC 20515

Dear Chairmen Cochran, Rogers, Boozman and Crenshaw:

As trade associations, representing thousands of financial institutions, banks, credit unions, and businesses of all sizes serving America's consumers, we write to express our strong support of H.R. 1266, the Financial Product Safety Commission Act, bipartisan legislation introduced by Representative Randy Neugebauer (R-TX) and approved on a bipartisan basis by the House Financial Services Committee. Similar legislation was included in Section 505 of S. 1910, the Fiscal Year 2016 (FY16) Financial Services and General Government appropriations bill. Given the importance of this legislation to the American consumer and the U.S. economy, we respectfully request that the Appropriations Committees include such language to improve the governance structure at the Consumer Financial Protection Bureau (CFPB) in the FY16 omnibus appropriations bill.

This common-sense, bipartisan policy would create a five-member board at the CFPB, is fully paid for over the next ten years, and provides a smooth transition process that provides continuity of leadership at the Bureau.

Looking ahead, the current sole director structure at the CFPB jeopardizes the foundation of the Bureau as an objective, neutral consumer protection agency. A commission would serve as a source of balance and stability for consumers and the financial services industry by encouraging internal debate and deliberation, ultimately leading to increased transparency. Additionally, with a bipartisan board in place, the Bureau's rulemaking, supervision, and examination processes would be even more effective in protecting consumers as it would allow for the input of multiple leaders with diverse experiences and expertise. Moreover, a commission would further promote the CFPB's ability to make bipartisan and reasoned judgments to ensure consumers receive the protection they deserve, which in turn would help strengthen the economy; and would avoid the risk of politically motivated decisions causing uncertainty and harm to consumers.

To preserve the CFPB and prevent it from becoming a political football, Congress should return the CFPB to its originally intended structure, from a sole director to a bipartisan commission.

In fact, the creation of a five-member commission began with strong Democratic support. In December 2009, the House passed legislation that would have created a five-member bipartisan commission to oversee the CFPB. This effort was led by then-House Speaker Nancy Pelosi (D-CA) and then-House

Financial Services Chairman Barney Frank (D-MA), with 223 Democrats voting in favor of the measure. During public debate over the agency's creation, then-professor Elizabeth Warren, whose ideas led to the creation of the CFPB, called for a Financial Product Safety Commission (FPSC) and modeled what is now the CFPB after the Consumer Product Safety Commission, which is overseen by a board of five commissioners. Also, during this debate, the idea of a commission to oversee consumer financial products was also endorsed by the Department of the Treasury under the Obama Administration.

Finally, a commission is the traditional and customary structure for independent federal agencies, helping to ensure bipartisanship and impartiality. Examples include the Federal Reserve Board (FRB), the Federal Deposit Insurance Corporation (FDIC), the Securities and Exchange Commission (SEC), the Communities Futures Trading Commission (CFTC), and the National Credit Union Administration (NCUA).

Overall, the CFPB has tremendous authority to supervise a multi-trillion dollar industry, which as we have learned, can have an enormous impact on our economy. As such, it is imperative the CFPB's governance structure is stable, deliberative, and bipartisan – for the sake of the American consumer and the U.S. economy.

Sincerely,

ACA International
American Bankers Association
American Escrow Association
American Financial Services Association
American Land Title Association
Appraisal Institute
ATM Industry Association
Community Mortgage Lenders of America
Consumer Bankers Association
Consumer Data Industry Association
Consumer Mortgage Coalition
Credit Union National Association
Electronic Funds Transfer Association
Electronic Transactions Association
Financial Services Roundtable
Independent Community Bankers of America
Mortgage Bankers Association
National Association of Federal Credit Unions
National Association of Independent Housing Professionals
National Association of Wholesaler-Distributors
National Black Chamber of Commerce
Real Estate Services Providers Council, Inc. (RESPRO®)
Small Business & Entrepreneurship Council
U.S. Chamber of Commerce

Cc: Senate Majority Leader Mitch McConnell
Senate Majority Whip John Cornyn

House Speaker Paul Ryan
House Majority Leader Kevin McCarthy
House Majority Whip Steve Scalise

APPENDIX C

I

114TH CONGRESS
1ST SESSION

H. R. 1266

To amend the Consumer Financial Protection Act of 2010 to make the Bureau of Consumer Financial Protection an independent Financial Product Safety Commission, and for other purposes.

IN THE HOUSE OF REPRESENTATIVES

MARCH 4, 2015

Mr. NEUGEBAUER (for himself, Mr. GUINTA, Mr. HUIZENGA of Michigan, Mr. GARRETT, Mr. SCHWEIKERT, Mr. ROTHFUS, Mr. LUETKEMEYER, Mr. PEARCE, Mr. TIPTON, Mr. WILLIAMS, Mr. ROSS, Mrs. WAGNER, Mr. POLIQUIN, Mr. WESTMORELAND, Mr. BARR, Mr. HILL, Mr. FITZPATRICK, Mr. DUFFY, Mr. PITTENGER, Mrs. LOVE, and Mr. MCHENRY) introduced the following bill; which was referred to the Committee on Financial Services

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A BILL

To amend the Consumer Financial Protection Act of 2010 to make the Bureau of Consumer Financial Protection an independent Financial Product Safety Commission, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the ''Financial Product Safety Commission Act of 2015''.

SEC. 2. MAKING THE BUREAU AN INDEPENDENT FINANCIAL PRODUCT SAFETY COMMISSION.

The Consumer Financial Protection Act of 2010 (12 U.S.C. 5481 et seq.) is amended—

(1) in section 1011—

(A) in subsection (a)—

(i) by striking ''in the Federal Reserve System,'';

(ii) by striking ''independent bureau'' and inserting ''independent commission'';

(iii) by striking ''Bureau of Consumer Financial Protection'' and inserting ''Financial Product Safety Commission (hereinafter in this section referred to as the 'Commission')''; and

(iv) by striking ''Bureau'' each place such term appears and inserting ''Commission'';

(B) by striking subsections (b), (c), and (d);

(C) by redesignating subsection (e) as subsection (j);

(D) in subsection (j), as so redesignated—

(i) by striking '', including in cities in which the Federal reserve banks, or branches of such banks, are located,''; and

(ii) by striking ''Bureau'' each place such term appears and inserting ''Commission''; and

(E) by inserting after subsection (a) the following new subsections:

''(b) AUTHORITY TO PRESCRIBE REGULATIONS.—The Commission may prescribe such regulations and issue such orders in accordance with this title as the Commission may determine to be necessary for carrying out this title and all other laws within the Commission's jurisdiction and shall exercise any authorities granted under this title and all other laws within the Commission's jurisdiction.

''(c) COMPOSITION OF THE COMMISSION.—

''(1) IN GENERAL.—The Commission shall be composed of 5 members who shall be appointed by the President, by and with the advice and consent of the Senate, from among individuals who—

''(A) are citizens of the United States; and

''(B) have strong competencies and experiences related to consumer financial products and services.

''(2) STAGGERING.—The members of the Commission shall serve staggered terms, which initially shall be established by the President for terms of 1, 2, 3, 4, and 5 years, respectively.

"(3) TERMS.—

"(A) IN GENERAL.—Each member of the Commission, including the Chair, shall serve for a term of 5 years.

"(B) REMOVAL.—The President may remove any member of the Commission for inefficiency, neglect of duty, or malfeasance in office.

"(C) VACANCIES.—Any member of the Commission appointed to fill a vacancy occurring before the expiration of the term to which that member's predecessor was appointed (including the Chair) shall be appointed only for the remainder of the term.

"(D) CONTINUATION OF SERVICE.—Each member of the Commission may continue to serve after the expiration of the term of office to which that member was appointed until a successor has been appointed by the President and confirmed by the Senate, except that a member may not continue to serve more than 1 year after the date on which that member's term would otherwise expire.

"(E) OTHER EMPLOYMENT PROHIBITED.—No member of the Commission shall engage in any other business, vocation, or employment.

"(d) AFFILIATION.—Not more than 3 members of the Commission shall be members of any one political party.

"(e) CHAIR OF THE COMMISSION.—

"(1) APPOINTMENT.—The Chair of the Commission shall be appointed by the President.

"(2) AUTHORITY.—The Chair shall be the principal executive officer of the Commission, and shall exercise all of the executive and administrative functions of the Commission, including with respect to—

"(A) the appointment and supervision of personnel employed under the Commission (other than personnel employed regularly and full time in the immediate offices of members of the Commission other than the Chair);

"(B) the distribution of business among personnel appointed and supervised by the Chair and among administrative units of the Commission; and

"(C) the use and expenditure of funds.

"(3) LIMITATION.—In carrying out any of the Chair's functions under the provisions of this subsection the Chair shall be governed by general policies of the Commission and by such regulatory decisions, findings, and determinations as the Commission may by law be authorized to make.

"(4) REQUESTS OR ESTIMATES RELATED TO APPROPRIATIONS.—Requests or estimates for regular, supplemental, or deficiency appropriations on behalf of the Commission may not be submitted by the Chair without the prior approval of the Commission.

"(f) NO IMPAIRMENT BY REASON OF VACANCIES.—No vacancy in the members of the Commission shall impair the right of the remaining members of the Commission to exercise all the powers of the Commission. Three members of the Commission shall constitute a quorum for the transaction of business, except that if there are only 3 members serving on the Commission because of vacancies in the Commission, 2 members of the Commission shall constitute a quorum for the transaction of business. If there are only 2 members serving on the Commission because of vacancies in the Commission, 2 members shall constitute a quorum for the 6-month period beginning on the date of the vacancy which caused the number of Commission members to decline to 2.

''(g) SEAL.—The Commission shall have an official seal.

''(h) COMPENSATION.—

''(1) CHAIR.—The Chair shall receive compensation at the rate prescribed for level I of the Executive Schedule under section 5313 of title 5, United States Code.

''(2) OTHER MEMBERS OF THE COMMISSION.—The 4 other members of the Commission shall each receive compensation at the rate prescribed for level II of the Executive Schedule under section 5314 of title 5, United States Code.

''(i) INITIAL QUORUM ESTABLISHED.—During any time period prior to the confirmation of at least two members of the Commission, one member of the Commission shall constitute a quorum for the transaction of business. Following the confirmation of at least 2 additional commissioners, the quorum requirements of subsection (f) shall apply.'';

(2) in section 1012(c), by striking paragraphs (2), (3), (4), and (5); and

(3) in section 1014(b), by striking ''Not fewer than 6 members shall be appointed upon the recommendation of the regional Federal Reserve Bank Presidents, on a rotating basis.''.

SEC. 3. DEEMING OF NAME.

Any reference in a law, regulation, document, paper, or other record of the United States to the Bureau of Consumer Financial Protection shall be deemed a reference to the Financial Product Safety Commission.

SEC. 4. CONFORMING AMENDMENTS.

(a) CONSUMER FINANCIAL PROTECTION ACT OF 2010.—

(1) IN GENERAL.—Except as provided under paragraph (2), the Consumer Financial Protection Act of 2010 (12 U.S.C. 5481 et seq.) is amended—

(A) by striking "Director of the Bureau" each place such term appears, other than where such term is used to refer to a Director other than the Director of the Bureau of Consumer Financial Protection, and inserting "Financial Product Safety Commission";

(B) by striking "Director" each place such term appears and inserting "Financial Product Safety Commission", other than where such term is used to refer to a Director other than the Director of the Bureau of Consumer Financial Protection; and

(C) in section 1002, by striking paragraph (10).

(2) EXCEPTIONS.—The Consumer Financial Protection Act of 2010 (12 U.S.C. 5481 et seq.) is amended—

(A) in section 1013(c)(3)—

(i) by striking "Assistant Director of the Bureau for" and inserting "Head of the Office of"; and

(ii) in subparagraph (B), by striking "Assistant Director" and inserting "Head of the Office";

(B) in section 1013(g)(2)—

(i) by striking "ASSISTANT DIRECTOR" and inserting "HEAD OF THE OFFICE"; and

(ii) by striking "an assistant director" and inserting "a Head of the Office of Financial Protection for Older Americans";

(C) in section 1016(a), by striking "Director of the Bureau" and inserting "Chair of the Financial Product Safety Commission"; and

(D) in section 1066(a), by striking "Director of the Bureau is" and inserting "first member of the Commission is".

(b) DODD-FRANK WALL STREET REFORM AND CONSUMER PROTECTION ACT.—The Dodd-Frank Wall Street

Reform and Consumer Protection Act (12 U.S.C. 5301 et seq.) is amended—

(1) in section 111(b)(1)(D), by striking ''Director'' and inserting ''Chair of the Financial Product Safety Commission''; and

(2) in section 1447, by striking ''Director of the Bureau'' each place such term appears and inserting ''Financial Product Safety Commission''.

(c) ELECTRONIC FUND TRANSFER ACT.—Section 920(a)(4)(C) of the Electronic Fund Transfer Act (15 U.S.C. 1693o–2(a)(4)(C)), as added by section 1075(a)(2) of the Consumer Financial Protection Act of 2010, is amended by striking ''Director of the Bureau of Consumer Financial Protection'' and inserting ''Financial Product Safety Commission''.

(d) EXPEDITED FUNDS AVAILABILITY ACT.—The Expedited Funds Availability Act (12 U.S.C. 4001 et seq.), as amended by section 1086 of the Consumer Financial Protection Act of 2010, is amended by striking ''Director of the Bureau'' each place such term appears and inserting ''Financial Product Safety Commission''.

(e) FEDERAL DEPOSIT INSURANCE ACT.—Section 2 of the Federal Deposit Insurance Act (12 U.S.C. 1812), as amended by section 336(a) of the Dodd-Frank Wall Street Reform and Consumer Protection Act, is amended by striking ‘‘Director of the Consumer Financial Protection Bureau’’ each place such term appears and inserting ‘‘Chair of the Financial Product Safety Commission’’.

(f) FEDERAL FINANCIAL INSTITUTIONS EXAMINATION COUNCIL ACT OF 1978.—Section 1004(a)(4) of the Federal Financial Institutions Examination Council Act of 1978 (12 U.S.C. 3303(a)(4)), as amended by section 1091 of the Consumer Financial Protection Act of 2010, is amended by striking ‘‘Director of the Consumer Financial Protection Bureau’’ and inserting ‘‘Chair of the Financial Product Safety Commission’’.

(g) FINANCIAL LITERACY AND EDUCATION IMPROVEMENT ACT.—Section 513 of the Financial Literacy and Education Improvement Act (20 U.S.C. 9702), as amended by section 1013(d)(5) of the Consumer Financial Protection Act of 2010, is amended by striking ‘‘Director’’ each place such term appears and inserting ‘‘Chair of the Financial Product Safety Commission’’.

(h) HOME MORTGAGE DISCLOSURE ACT OF 1975.—Section 307 of the Home Mortgage Disclosure Act of 1975, as amended by section 1094(6) of the Consumer Financial Protection Act of 2010, is amended by striking ‘‘Director of the Bureau of Consumer Financial Protection’’ each place such term appears and inserting ‘‘Financial Product Safety Commission’’.

(i) INTERSTATE LAND SALES FULL DISCLOSURE ACT.—The Interstate Land Sales Full Disclosure Act, as amended by section 1098A of the Consumer Financial Protection Act of 2010, is amended—

(1) by amending section 1402(1) to read as follows:

"(1) 'Chair' means the Chair of the Financial Product Safety Commission;"; and

(2) in section 1416(a), by striking "Director of the Bureau of Consumer Financial Protection" and inserting "Chair".

(j) REAL ESTATE SETTLEMENT PROCEDURES ACT OF 1974.—Section 5 of the Real Estate Settlement Procedures Act of 1974 (12 U.S.C. 2604), as amended by section 1450 of the Dodd-Frank Wall Street Reform and Consumer Protection Act, is amended—

(1) by striking "The Director of the Bureau of Consumer Financial Protection (hereafter in this section referred to as the 'Director')" and inserting "The Financial Product Safety Commission"; and

(2) by striking "Director" each place such term appears and inserting "Financial Product Safety Commission".

(k) S.A.F.E. MORTGAGE LICENSING ACT OF 2008.—The S.A.F.E. Mortgage Licensing Act of 2008 (12 U.S.C.

5101 et seq.), as amended by section 1100 of the Consumer Financial Protection Act of 2010, is amended—

(1) by striking "Director" each place such term appears in headings and text, other than where such term is used in the context of the Director of the Office of Thrift Supervision, and inserting "Financial Product Safety Commission"; and

(2) in section 1503, by striking paragraph (10).

(l) TITLE 44, UNITED STATES CODE.—Section 3513(c) of title 44, United States Code, as amended by section 1100D(b) of the Consumer Financial Protection Act of 2010, is amended by striking "Director of the Bureau" and inserting "Financial Product Safety Commission".

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APPENDIX D

CBA Consumer Bankers Association

1225 Eye Street, NW, Suite 550 Washington, DC 20005

www.consumerbankers.com

Small-Dollar Bank Loans

A SAFE ALTERNATIVE TO PAYDAY LOANS

46% OF AMERICAN ADULTS CANNOT COVER A $400 EMERGENCY EXPENSE.

The Strong Need for Small-Dollar Credit

Millions of Americans live paycheck to paycheck, leaving consumers with less cushion for emergencies, strained credit scores, and fewer credit options. According to the Federal Reserve, nearly half of all American adults say they cannot cover an unexpected expense of $400. The need for access to reasonably priced, short-term liquidity products has become more important than ever.

The Elimination of Deposit Advance Products

Prior to 2013, several banks offered short-term, small-dollar lending products, known as the Deposit Advance Product (DAP), to meet overwhelming consumer demand for access to emergency credit. Unfortunately, 2013 FDIC and OCC guidance effectively eliminated the ability of heavily regulated financial institutions to offer a viable alternative to compete with payday lending. The FDIC and OCC guidance recommended the use of underwriting that is more appropriately applied to a much larger mortgage loan and placed soft caps on percentage rates banks could offer consumers. This, combined with a low interest rate environment, has made small-dollar credit unviable and has forced banks to exit the market.

Since 2013, access to small-dollar credit through traditional banking systems has diminished, while simultaneously the payday lending market has increased significantly.

Small-Dollar Bank Loans

1. Pre-existing customer relationship.
2. Limitation on loan amounts and built in “cooling off periods” to limit the number of loans.
3. Ability to repay analysis based on customer maintaining a checking account in good standing and having regularly scheduled deposits.
4. Greater account security of sensitive financial information.
5. Extensive banking disclosures, detailing terms and conditions and requiring customer signature.

Payday Loans

1. Zero customer relationship before taking out a loan.
2. Most lenders placed no limits on loan amounts or the number of payday loans taken out.
3. Little to no ability to repay analysis to determine whether a consumer will be able to pay back the loan.
4. Less security as customers provide sensitive bank information to third-party financial service providers.
5. Little to any disclosures explaining the payday loan terms and conditions.

CFPB Outline of New Rules

CBA appreciates the Bureau's work to protect consumers and eliminate consumer cycles of debt; however, the conditions outlined in the CFPB's outline have made it unworkable for traditional lenders to enter the small dollar lending market and fulfill the enormous demand for consumers' short-term credit needs:

- **Ability to pay requirements for short-term and longer-term loans |** The ability to repay requirements under the proposal are as comprehensive and rigorous for a small-dollar loan as the underwriting required for a $500,000 mortgage. This is a non-starter for most banking institutions. Underwriting standards need to be automated and flexible to achieve the goals of this type of lending: quick, easy to access, and affordable.

- **Short-term ability to repay alternative |** The $500 cap restricts access to credit to higher income borrowers; the rollover limitations are too strict for weekly and bi-weekly paycheck borrowers; full cooling off after only three cycles will prove frustrating to borrowers; the limit on maximum days in debt of 90 in a 12-month period is overly burdensome on the borrower's access to credit, especially if they have several episodes of cash flow shortfalls over the course of a year and cannot access credit when needed. A better solution would be to allow banks to impose their own cooling off periods when a borrower shows a pattern of delinquent payments.

- **Long-term ability to repay alternative |** There is some optimism that banks could develop a viable 6-month term loan product, but the restrictive soft cap of 36% is unworkable. Very few credit unions can even offer this option. Further, requiring banks to constantly determine whether their overall small dollar portfolio is within a 5% default rate will require additional time and cost, making the product unviable.

Solution

We ask that Congress repeal the FDIC and OCC guidance related to DAP and encourage the CFPB to work in coordination with the FDIC and OCC to create a consistent regulatory environment conducive to small-dollar lending, as opposed to one that pushes already heavily regulated banks out of the short-term liquidity market.

APPENDIX E

The Voice of the Retail Banking Industry

October 7, 2016

Submitted Electronically: FederalRegisterComments@cfpb.gov

Ms. Monica Jackson
Office of the Executive Secretary
Consumer Financial Protection Bureau
1700 G Street, NW
Washington, DC 20552

Re: Docket No. CFPB-2016-0025 / RIN3170–AA40 - Payday, Vehicle Title, and Certain High-Cost Installment Loans

Dear Ms. Jackson,

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 examining 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 weed out bad actors that engage in fraudulent transactions or violate federal laws. However, we believe the Bureau's Proposal will discourage traditional depository lenders from remaining in or entering the market.

The Bureau has proposed strict and prescriptive rules that will stifle progress in the small-dollar market. They create conditions that call for a level and cost of compliance that is so great depository lenders simply will not be willing to make these loans. These hurdles will only reduce efficiencies, restrict flexibility and reduce consumer options for small-dollar

[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

liquidity. Only simple, flexible rules will foster the innovation needed to meet consumer demand for value, speed of fund availability and ease of application.

We also believe the Bureau has failed to exercise proper authority to issue regulations prohibiting unfair, deceptive, or abusive acts or practices ("UDAAP"), has violated its prohibition on setting usury rates and has failed to present an adequate cost-benefit analysis to support a claim of consumer harm from bank-offered small-dollar products.

Accordingly, CBA urges the Bureau to withdraw the current Proposal and re-propose a regulation 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;
- clarifies and interprets the interplay between the proposal and existing regulations issued by other federal financial regulators impacting small-dollar credit products, and
- allows for flexibility to meet consumer needs through innovative and competitive credit options.

We appreciate the opportunity to share our suggestions and work with the Bureau as it considers the regulation of small-dollar credit.

Discussion

Today, the need for accessible small-dollar credit for consumers is growing. A stagnant economy has left consumers with less of a cushion for emergencies, tarnished credit scores, and reduced credit options; making access to reasonably priced small-dollar liquidity products even more important. While various entry-level credit products exist to meet a wide range of these needs, including traditional credit cards, personal loans, and other forms of credit, many consumers unfortunately cannot qualify for them.

According to the Federal Reserve, nearly half of all American adults say they cannot cover an unexpected expense of $400.[2] Similarly, a recent Bankrate article states "63% of American adults say they are unable to pay an unexpected expense with their savings…"[3] A Center for Financial Services Innovation ("CFSI") study found that more than a third of all

[2] Board of Governors of the Federal Reserve System - *Report on the Economic Well-Being of U.S. Households in 2015* (May 2016)
[3] http://www.bankrate.com/finance/consumer-index/money-pulse-1215.aspx?ic_id=Top_Financial%20News%20Center_link_3

households say they frequently or occasionally run out of money before the end of the month. Further, more than four in ten households struggle to keep up with their bills and credit payments.[4] A group representing minority communities has found much to criticize in the Proposal. The U.S. Hispanic Chamber of Commerce said in a statement the Proposal "ignores the needs of consumers, reduces access to credit for millions and it harms small businesses and the millions they employ."[5]

In light of the high consumer need for these loans, the Bureau has encouraged depository institutions to enter or remain in the small-dollar lending market. Historically, banks have developed products carefully designed to ensure strong safeguards at reasonable prices. Bank-offered products are by nature well understood by the consumers who use them and are an important source of credit for consumers' liquidity needs. Banks would like to continue to make safe, affordable, and easy to access small-dollar loans to consumer in need.

However, the Proposal and past guidance from other financial service regulators will make it difficult for banks to provide this type of lending, pushing consumers that need access to credit further outside of the heavily regulated bank space, leaving them with fewer, unregulated, and more expensive options, if any. The need for this credit will not simply disappear with the expected constriction of the payday industry. Consumers will ultimately pay higher prices for liquidity options or may face increased delinquencies and late payments.

In response to the Proposal, Pew Charitable Trusts said borrowers want three things – lower prices, manageable payments and quick approval – and asserted the Proposal goes "0-for-3" on those matters.[6] We firmly agree. The Proposal 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 not be prepared for, delaying their access to much-needed funds and potentially driving them to an unregulated, unsafe provider to obtain it.

The Proposal calls for reports, restrictions and refunds of fees under certain conditions. In total, these provisions serve to negatively affect the pricing and fundamental purposes of small-dollar products and require countless hours of new compliance and oversight. Under these conditions, with a high cost of compliance, the lenders the Bureau would like to see offer more affordable options as an alternative to payday providers simply will not be willing to participate in this space. Only easily implemented standards will allow banks to make quick

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[4] Center For Financial Services Innovation - *Understanding and Improving Consumer Financial Health in America* (March 2015)

[5] http://www.marketwired.com/press-release/us-hispanic-chamber-of-commerce-denounces-cfpb-rule-which-restricts-consumer-credit-2130509.htm

[6] http://www.pewtrusts.org/en/about/news-room/press-releases/2016/06/01/pew-cfpbs-proposed-payday-loan-rule-misses-historic-opportunity.

loans at reasonable prices, and we encourage the Bureau to create a clear lane for compliance minded lenders to step in to meet consumer needs. Taken together, these new restrictions and requirements would unduly hinder the expansion of small dollar lending products offered by banks and may lead to further retractions in the marketplace from banks offering existing small-dollar credit products.

Furthermore, CBA firmly believes consumers benefit from the competition that banks add to the market for small-dollar credit products. More providers in the market will ensure greater competition and innovation, which will ultimately lower the cost of small-dollar credit for consumers. Overly restrictive regulations will lead to less competition and an increase in prices. According to a study conducted by CFSI, continued market competition and product innovation would be advantageous in expanding small-dollar, short-term lending and may ultimately help lower the cost of these products for both providers and consumers.[7] We believe forcing further monetary constraints on the consumers it intends to help directly contradicts the Bureau's intent. This principle is especially true for designing products and services that will provide the under-banked and unbanked with greater access to mainstream banking opportunities.

We encourage the Bureau to consider finalizing rules that will allow banks to participate in the small-dollar lending market. The reality is that bank products can help countless U.S. consumers obtain access to much needed credit, rather than pushing them to unregulated pawnshops, offshore lenders, and fly-by-night entities. The Bureau now has the opportunity to craft a rule that will support high quality small-dollar products that are made with confidence in the borrower's ability to repay; are structured to support repayment; are priced to align profitability for the provider with success for the borrower; create opportunities for greater financial health; have transparent marketing, communications and disclosures; and are accessible and convenient for borrowers.

We further urge the CFPB to continue to work with all stakeholders including consumers, depository institutions, and the federal prudential banking regulators to develop a sound, data-based foundation for a comprehensive regulatory and supervisory approach that avoids unintended adverse impacts on consumers.

I. __Legal Authority__

In addition to the subsequent subsections on legal authority, CBA incorporates here all arguments made in its separately submitted joint-trade comment letter.[8]

[7] According to study conducted the Center for Financial Services Innovation entitled *A Fundamental Need: Small-Dollar, Short-Term Credit* (2008), continued market competition and product innovation would be advantageous in expanding small-dollar, short-term lending and may ultimately help lower the cost of these products for both providers and consumers.

[8] http://consumerbankers.com/sites/default/files/ABA%20AFSA%20CBA%20-%20Comments%20on%20CFPB%20Small%20Dollar%20Rule%20FINAL_0.PDF.

1. UDAAP – Arbitrary and Capricious

The Dodd–Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank Act") authorizes the Bureau to prescribe rules under its UDAAP authority, as well as to enforce the Dodd-Frank Act's UDAAP prohibition. 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 Proposal marks the first time the Bureau has exercised its authority to issue regulations prohibiting UDAAP.

In exercising its authority, the Bureau has prescribed an incredibly prescriptive rule that would effectively create a narrowly tailored product designed to operate within a very constrictive regulatory scheme. In general, we find this approach to be an inappropriate exercise of the Bureau's UDAAP rulemaking authority. Remedies for alleged unfair or abusive acts or practices should be tailored to those practices observed, not used to dictate product offerings filled with ancillary provisions (*e.g.* credit reporting, etc.) that have little if anything to do with the alleged harmful practices. Unlike other financial regulators' unfair, deceptive acts or practices ("UDAP") rulemakings, the Bureau's Proposal does not merely ban an identified 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, the Bureau shows 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 small dollar 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 alleged harm to consumers. There has been no showing that loans issued by depositories produce consumer harm. In fact, we believe bank-issued loans are of great benefit to consumers and are not harmful. 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.

As a more practical matter, nowhere in the 1,300 plus page Proposal does the Bureau attempt to quantify the benefits to consumers of the proposed provisions, instead relying on repeated expressions along the lines of "it appears to the Bureau" or that the "Bureau believes" that "the amount of injury that is caused by the unfair practices, in the aggregate, appears to be extremely high." The Proposal cites numerous reports and studies to justify these views, but does not include any metrics in its analysis of benefits and costs.

In fact, the Bureau supports its assumptions based on the belief that all covered loans cause consumer harm. This theme is unsupported and directly conflicts with a number of studies on the issue, which casts doubt on the notion that use of covered loans adversely affects borrowers.[9] We believe this to be a fundamental flaw in the reasoning of the Bureau as under the Dodd-Frank Act a practice cannot be "unfair" if any injury it causes is outweighed by countervailing benefits. And generally, an "abusive" practice must take "unreasonable" advantage of consumers. It is hard to see how a practice can take "unreasonable" advantage of consumers if the benefits it provides outweigh any injuries it causes.

Lastly, the Proposal is flawed because the incredibly restrictive ability to repay requirement (*e.g.* residual income analysis that requires verification using consumer reporting agencies registered with the Bureau) does not permit the application of other ability to repay approaches. The Bureau never provides support for why other ability to repay analyses would not be sufficient to address the concerns it has about installment lending. Taken together, we assert these flaws in the Proposal would appear to make the regulation arbitrary and capricious.

Accordingly, we believe the lack of a thorough cost-benefit analysis on these issues would be a necessary precondition of this type of contemplated regulation. We stress the importance of the Bureau pursuing and releasing a robust cost benefit analysis before publishing the rule.

2. Usury Limits

Historically, the Federal government has not sought to impose a nationwide usury rate. Instead, usury laws have been largely left to the states to decide. As a result, usury laws vary widely across the country and include a variety of exemptions and exceptions.

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[9] *See*, *An Analysis of Consumer's Use of Payday Loans*, Gregory Elliehausen, Division of research and Statistics, Board of Governors of the Federal Reserve System (2009) – Survey results of consumer use of payday lending indicated that most customers used payday loans as a short-term source of financing. *Also see*, *Payday Lenders: Heroes or Villains?* Adair Morse, University of Chicago (January 2007) - An assessment of the impact of payday lenders on disaster-struck communities concluded communities struck by natural disasters are more resilient and their community welfare improves as result of the availability of payday advances. *Also see*, *Payday Holiday: How Households Fare after Payday Credit Bans*. Donald P. Morgan and Michael R. Strain (2008) - An assessment of states with payday lending bans concluded that consumer financial problems saw significant increases when compared to states without similar restrictions. *Also see*, *Do Defaults on Payday Loans Matter?*, Ronald Mann, Columbia Law School (2014)– Survey findings suggest default on a payday loan plays at most a small part in the overall timeline of the borrower's financial distress. *Also see*, *Payday Loan Rollovers and Consumer Welfare,* Jennifer Lewis Priestley, Kennesaw State University (2014) – Study found that borrowers with a higher number of rollovers experienced more positive changes in their credit scores than borrowers with fewer rollovers.

Any new Federal regulation of usury would likely have a large impact on these various statutes. Partly as a result of this concern, section 1027(o) of the Dodd-Frank Act explicitly prohibits the Bureau from imposing a usury limit.

> *No authority to impose usury limit.* No provision of this title shall be construed as conferring authority on the Bureau to establish a usury limit applicable to an extension of credit offered or made by a covered person to a consumer, unless explicitly authorized by law.[10]

Under the Proposal, "longer-term" loans, with terms exceeding 45 days, are limited to loans that: (1) have "all-in" annual percentage rates ("APRs") exceeding 36 percent; and (2) either create a security interest in the consumer's motor vehicle or authorize the lender to collect payments by accessing the consumer's bank account or paycheck. As with short-term loans, the CFPB contemplates that lenders will be allowed to make longer-term loans either using an ability to repay analysis or, at the lender's option, without an ability to repay analysis but subject to elaborate restrictions.

By setting a 36 percent trigger, or at 28 percent under the proposed alternative methods, the Bureau is creating a usury ceiling for loans that will fall within the guidelines of the rule and will severely restrict longer-term loans based on "all-in" APRs exceeding 36 percent. At the same time, the Bureau leaves lower-rate loans outside the coverage of its contemplated rules, indicating that these loans are lawful, while those within the cap are not. This is a clear violation of the Bureau's authority under Section 1027(o) and we urge the Bureau to eliminate rate triggers. Further, this usury provision creates a direct conflict with various state usury caps that are current law in a number of states. This conflict will create confusion and potential regulatory compliance issues for banks looking to participate in the small-dollar credit market.

II. ***<u>Proposal Provisions</u>***

Despite the above-referenced issues regarding the Bureau's authority, the proposed provisions offer little incentive for banks, and others, to enter the small-dollar market in any significant way. The provisions outlined in the Proposal place what we consider to be unreasonable and unnecessary mandates on would-be lenders. These issues, discussed in detail below, will make offering small-dollar loans unaffordable and incredibly burdensome to implement. We urge the Bureau to reconsider this restrictive approach and to pursue lending

[10] 12 U.S.C. § 5517(o).

options that offer easily applied standards that will enable lenders to make sustainable loans to consumers in need.

Specifically, the Proposal would make it an abusive and unfair practice for a lender to offer a covered loan without conducting an onerous analysis of a consumer's ability to repay the loan, making it difficult for any lender to offer affordable, easy-to-use products. The level of underwriting complexity presented in the Proposal ignores the cost of providing small-dollar credit. Requiring a burdensome level of underwriting will result in eliminating the ability of lenders to participate in the small-dollar market and, therefore, the result of the regulations would be unmet consumer needs.

While the Proposal does allow for lenders to avoid the prescriptive underwriting analysis if they chose, these alternative methods call for restrictive and overly complex provisions that do little to provide banks with clear and easily applied standards. While avoiding the unrealistic underwriting requirements by utilizing safe harbors would be helpful, these provisions will garner little interest from banks due to strict constraints that will inhibit consumer use and elevate complexity and cost for lenders.

We urge the Bureau to consider safe and practical ways banks can serve their customers' liquidity needs.

1. Ability to Pay Analysis – Full Payment Test

The Proposal sets forth two general categories of loans: short-term loans and longer-term, high-cost loans ("covered loans"). Covered loans include closed-end or open-end loans that are extended to a consumer primarily for personal, family, or household purposes. Short-term loans[11] are those that have terms of 45 days or less; and "longer-term" loans[12] are those with terms of more than 45 days that have a "total cost of credit" exceeding 36 percent and either a "leveraged payment mechanism" or a security interest in the consumer's vehicle. The Proposal would restrict the ability of a lender to make a covered short-term or longer-term loan without determining upfront that the consumer will have the ability to repay the loan. For all covered loans, the Proposal would require a lender determine whether the consumer can afford the full amount of each payment of a covered loan when due, while still meeting basic living expenses and major financial obligations ("full-payment test").

The Proposal's full-payment test would require lenders making covered loans to verify the consumer's income and borrowing history. Using this information, the lender would then have to make a determination whether the consumer has the ability to repay the loan after covering other obligations and expenses. Implementing the full-payment test will present an insurmountable underwriting standard for lenders. While most lenders consider borrowers' ability to repay to some degree, the Proposal creates an extremely complicated and

[11] 81 Fed. Reg. at 47864.
[12] *Id.*

unprecedented underwriting requirement common in mortgage lending, but unrealistic in the small-dollar space where lenders need to provide quick loan decisions to borrowers who have an immediate need for cash.

To better illustrate, below is a comparison between ability to pay analyses for a covered loan and a $500,000 mortgage:

An ability to pay analysis for a covered loan would require:[13]	An ability to repay analysis for a half-million dollar mortgage would require:[14]
• A "reasonable" determination of the borrower's ability to repay the loan according to its terms; • The borrower's current verified income; • A determination that the borrower's residual income is sufficient to make all payments under the loan and to meet basic living expenses during the shorter of the term of the loan or the period ending 45 days after loan consummation; • "Reasonable" projections of amount and timing of the borrower's net income, debt payments, housing expenses, and child support; • A determination if a borrower had a short-term covered loan or balloon payment loan paid off within the prior 30 days; • A determination if the borrower has expressed an inability to make a payment on an existing loan; • A demonstration that the borrower's circumstances have recently improved if there is a presumption of unaffordability; and • The use of a CFPB-registered information system to report and obtain credit information about covered loans. This requirement includes the duty to report basic loan information and updates to that information.	• The borrower's current or reasonably expected income or assets (excluding the property that secures the loan) that the borrower will rely on to repay the loan; • The borrower's current verified employment status and income; • Any payments on simultaneous loans that are secured by the same property (for example, second mortgages); • Ongoing expenses related to the mortgage loan or the property (such as property taxes, insurance, Home Owner Association dues, and ground rent); • Other debt obligations (such as alimony and child support payments); • The borrower's monthly debt-to-income ratio or residual income; and • The borrower's verified credit history.

The similarities in the required underwriting for these two vastly different types of lending represents a fundamental disconnect by the Bureau. While CBA supports establishing clear criteria regarding the qualification and eligibility of borrowers of small-dollar credit

[13] 81 Fed. Reg. at 47865.
[14] 12 CFR 1026.

products, the proposed level of underwriting complexity ignores the cost of providing this type of loan. Requiring mortgage-like underwriting will only result in pricing out would-be providers. CBA conducted an informal survey of member banks to ascertain an approximate cost of underwriting under the proposed provision. Despite the fact that the vagueness of the ability to pay requirement makes it difficult to provide actual costs, we estimate that a loan made under the full-payment test would outweigh any return. Banks will incur underwriting costs on all applications regardless of whether the loan is ultimately approved. These costs will have to be absorbed into the pricing of approved loans, making most, if not all, loss leaders and unsustainable.

The Bureau also greatly underestimates the difficulties and impracticality of verifying "major financial obligations" of borrowers, such as rent payments (particularly for customers who share rental payments) or child support obligations. Lenders will also have initial difficulties in obtaining reliable information on a consumer's borrowing history for other covered loans, because credit reports currently do not indicate what is and is not a covered loan.

To complicate matters further, the Bureau has not made any clear indications of what would constitute a "reasonable" determination of ability to repay under the Proposal. The Proposal currently provides that a covered lender's ability to repay analysis must, at a minimum, forecast *reasonable* estimates of basic living expenses, projected income, debt obligations, and housing costs. The Proposal also requires lenders to make *reasonable* inferences and conclusions regarding a borrower's ability to repay, but it provides no safe harbor for covered lenders. The absence of a safe harbor leaves open the possibility that the decisions of lenders would still be subject to scrutiny on the grounds that they are not "reasonable" even if those lenders analyze all the requisite information in the Proposal. This risk seems particularly acute given that the Proposal does not provide examples of what it means to create "reasonable estimates" of basic living expenses, what constitutes "reasonable inferences and conclusions" regarding a borrower's ability to repay, or what it means to "appropriately account" for information known by the lender.[15]

The required provisions would also add substantial burdens for consumers. Consumers would need to spend significant time discerning and compiling the documentation required to provide to a lender. The Bureau is failing to take into consideration that the information that is not readily available would have to be retrieved, while consumers' need for small-dollar loans is often *immediate*. Loans are needed to cover emergency repairs and medical costs. They are needed to cover all-too-common fluctuations in income and to provide food for the family or gas to get to work. Clearly, consumers cannot wait hours, certainly not days, for an underwriting decision.

The Bureau estimates that the required ability to repay determination would take essentially no time for a fully automated electronic system and between 15 and 20 minutes for

[15] *See* Official Interpretation to Proposal Section 1041.5(b).

a fully manual system.[16] It is unclear how the Bureau is making this calculation, which we believe grossly underestimates the time that would be needed to underwrite a small-dollar loan according to the mandated ability to repay analysis. The similar calculation required for residential mortgages is a prime example of the complicated process involved in making an underwriting determination. Appendix Q to Regulation Z, which sets forth the specific standards for lenders to determine mortgage applicants' monthly debts and income, provides ample evidence of the complexity of determining and verifying income and expenses, including part-time and seasonal employment, bonuses and commissions, self-employment, alimony, and child support income.[17] Small dollar borrowers need money quickly and would not be afforded the same leisurely timeframe as a mortgage borrower.

The Bureau has also stated that it believes that many lenders use automated systems when underwriting loans and would modify those systems, or purchase upgrades to those systems, to incorporate many of the procedural requirements of the full payment approach.[18] This is simply not the case. The full-payment analysis would mandate a nearly complete manual process for underwriting covered loans, a process that will require time and additional resources to implement. For example, many processes that the CFPB indicates are automated, are in fact not necessarily the product of complex computer systems or algorithms, but instead are based on existing customer information such as deposit history and account utilization. As a result, these systems provide scalability, reliable income, and expedited verification, but simply cannot be retooled to complete a formal underwriting as the Proposal would require. CBA member banks estimate the ability to repay analysis as proposed could take up to a week or more to complete depending on the borrower's access to required documentation and ability to find time to gather documents and provide them to the lender. Additionally, this process will have significant systems costs, in addition to further compliance and supervisory costs to ensure that the automated systems required by the Proposal work as intended.

i. <u>All-In APR</u>

For longer-term loans, the Bureau has set an all-in APR threshold of 36%. We urge the Bureau to abandon this approach, and instead, look to currently implemented regulations. Other major federal lending regulations (*e.g.* Regulation Z) do not require calculation of APR on an "all-in" basis (defined to include interest as well as charges for credit insurance, ancillary products, Regulation Z finance charges, application fees, and fees for participation in any plan or any arrangement for a covered loan). Imposing an all-in APR creates functionality issues, while standardizing an APR calculation will help avoid the expense of programming a new calculation and will assist in easing consumer confusion.

Additionally, 36% is artificially too low and will add little value to borrowers because lenders will not be able to meet this unrealistic metric. For example, the cost to a consumer of

[16] 81 Fed. Reg. at 47939.
[17] 12 CFR 1026.
[18] 81 Fed. Reg. at 48117.

36% vs. 42% is not significant in small dollar, but could mean the difference between viable and unviable on a portfolio level.

ii. Frequency and Timing of Covered Loans

The Proposal imposes restrictions on rollovers, loan sequences, and refinancing by preventing the offering of short-term loans fewer than 30 days after payoff without a showing that the borrower's financial situation is materially improved (and capping successive short-term loans at three before requiring a 30-day cooling off period), and preventing the refinancing of longer-term loans without a showing that payments would be smaller or would lower the total cost of credit.

This approach undermines the nature of small-dollar lending and will likely have negative consequences for consumers. Small-dollar products are designed to provide value of quick, immediate access to the exact amount needed (*e.g.* $100 to help pay a bill that is coming due and avoid the risk it will result in a late payment fee). If a customer can only access a loan product with limitations on frequency, that customer will likely take a larger amount than is needed "just in case," which will result in higher costs overall. Moreover, consumers often do not experience liquidity shortages on a preset schedule so these needs are often unanticipated and require a quick remedy. Liquidity shortages are often unpredictable (*e.g.* an unexpected car repair) and do not occur within periodic intervals.

Further, the "cooling off" requirement would, for the first time, prevent a bank from providing credit to a consumer who would otherwise qualify for the loan and who has previously repaid existing loans. If every loan – including repeat loans – requires a full ability to repay assessment, the cooling off period would be unnecessary. Clearly, if the borrower has repaid his loan, an institution would have no reason to classify him as a risky borrower and it would be appropriate to convey another loan to him. If a bank determines at any point in time a borrower is unable to repay the loan, the bank would decline the application. The proposed cooling off requirements create a different experience for consumers utilizing covered loans as opposed to other forms of unsecured lending. We strongly believe these restrictive frequency limitations deny the majority of consumers' to fulfill their small-dollar needs and represents a dramatic escalation in regulatory authority limiting qualified consumers to access to credit.

Additionally, CBA believes the Proposal will not address the issue of repeat use that the Bureau is attempting to solve. If a consumer has a short-term liquidity need and is unable to access funds, they will turn to other sources of short-term liquidity, such as pawn shops or overseas lenders, until they are again able to access covered loans. These consumers will face other burdens such as overdrafting their account, delaying payments that could result in late fees and detrimental hits to their credit score, or forgoing needed non-discretionary expenses.

We believe any frequency restrictions should be based on sustained use and not arbitrary utilization limits, especially when consumers pay back loans as agreed. As an alternative approach to mandatory cooling off periods, the Bureau could include a provision in its final rule to ensure lenders of covered loans provide an "off ramp" to borrowers who demonstrate an inability to repay a loan according to its terms. Trouble borrowers could be provided with mandatory disclosure alerting them to the availability of an installment option. Furthermore, these borrowers could be prohibited from re-borrowing until the loan is paid in full.

2. Conditional Exemptions to Ability to Repay Determination

The Proposal does allow for a lender to avoid the overly restrictive underwriting analysis if they chose; however, these alternative methods call for restrictive, complex and prescriptive provisions that do little to provide banks with clear standards. While our members would assert it would be helpful to utilize safe harbors to avoid the unrealistic underwriting requirements, the safe harbors as written will garner little interest due to strict usage constraints that will inhibit the ease of consumer use.

i. Short-Term Conditional Exemption

Under the short-term conditional exemption, referred to as the "principal payoff option," consumers would be able to borrow up to $500 through a short-term loan, provided the loan does not include a security interest in a vehicle. The lender could extend the loan only two times, provided the principal is reduced by one-third each time. The lender would be prevented from extending the loan if it would result in the consumer having more than six covered short-term loans over the most recent 12 consecutive months.[19] These loans are also subject to loan sequencing requirements that mandate second and third loans made within 30 days of a prior loan would be subject to tapering provisions - the second loan must be one third less than original and the third loan must be two thirds less than original. Lenders would be required to impose a mandatory 30-day cooling period after a loan sequence.

Similar to the reasons cited earlier regarding the full-payment option, CBA does not believe the principal payoff option will meet consumer expectations due to usage restrictions and unrealistically low dollar borrowing limits. While the option removes much of the onerous ability to repay analysis requirements, the option will greatly constrain functionality of covered loans and create risk assumptions that banks are unwilling to assume.

Placing limits on frequency and timing of use will not serve consumer needs. Again, consumer need for emergency liquidity is often irregular. We assert limiting use frequency to a specific number for limited time will force consumers to borrow at amounts larger than needed resulting in higher overall costs. Consumers should not be subject to restrictions if they remain current and repay a loan according to its terms. Imposing the proposed limitations will only frustrate borrowers, pushing them to seek liquidity elsewhere to meet their immediate needs.

[19] 81 Fed. Reg. at 47973.

If consumers do show an inability to repay, they should be provided with an off ramp as previously discussed under the full-payment option.

Unexpected expenses come in many forms and dollar amounts. Those of us who have been confronted with an unanticipated medical or car expense are acutely aware the maximum loan amount of $500 will not meet many borrowers' needs. For example, an unexpected car repair, furnace and air conditioning repair, or emergency dental root canal will often exceed the allowable limits under this option. This is not to mention emergency or unanticipated medication expense that can require thousands upon thousands in the blink of an eye. Out of sheer necessity, borrower will seek alternatives when their needs are unmet. Unfortunately, even if the supply goes away, the demand does not.

Further, the definition of small-dollar credit with loan amounts capped at $500 is incongruent with analogous state laws related to small-dollar credit products. For example, in the state of Alabama, small-dollar loans are defined as any loan under $2000. This discrepancy will cause compliance problems for institutions that have mandates in place for higher small-dollar lending thresholds and could lead institutions to wind down products that customers currently use in order to comply with the CFPB's new mandate of $500.

Experience with Deposit Advance Products affords other data that shows the $500 threshold is too low to be meaningful for consumers. For example, one institution reported that borrowers utilizing Deposit Advance Products averaged a per use draw of $235, but, those same customers routinely utilized three draws per cycle on average. As a result, the total aggregate loan amount for a customer that was meeting their needs through the Deposit Advance Program was nearly $800 per cycle. By instituting a cap at $500, the Proposal risks limiting customers' access to valuable short-term credit they need and are able to repay.

Additionally, the Proposal would require lenders making a covered short-term loan under this option to determine if the borrower has had an outstanding loan in the past 30 days that was either a standard covered short-term loan or a covered longer-term balloon payment loan. A lender could only make a loan under the principal payoff option if the loan would result in the consumer having a loan sequence of more than three covered short term loans by *any* lender. Accordingly, these requirements apply regardless of whether any or all of the loans are made by unaffiliated lenders.[20] As a practical matter, these provisions would be difficult to comply with and most lenders will not assume the risk associated with making a covered loan. The duty to check for outstanding loans from unaffiliated lenders would require a lender to obtain the necessary information from a registered information system or directly from the borrower. Direct reporting from a borrower would likely prove unreliable. Checking a specified database would also likely be unreliable as some lenders will not comply with the reporting requirements and others will not report in real-time as it is common industry practice for creditors to batch credit reporting in cycles (*e.g.* once every 30 days). As such, a covered loan made by an unaffiliated lender may be undetectable, creating unacceptable compliance risk for

[20] *Id* at 48198 – 48199.

lenders. A workable solution to this problem would be to provide a safe harbor for lenders who make the requisite checks on a customer by searching that borrower's history with the individual institution, as opposed to requiring a database check at either a government agency or a third-party vendor. History has shown government databases to be rife with inaccuracies that could unduly limit a customer's access to necessary credit. Further, a third-party database solution will undoubtedly raise the cost of the product for borrowers.[21]

Lastly, the proposed rules would be extraordinarily complex to manage from a communication/disclosure and adverse action perspective. For example, if a customer had used only two non-consecutive loans in a twelve month period, but due to the monthly pay schedule accruing 64 days in debt, a bank could not in theory allow them to take a third loan more than 30 days ahead of their next paycheck, but the bank could allow the borrower to take one 10 days before. It is unclear how banks would communicate these types of situations as a possible adverse action event and seems extremely unlikely that a customer would be able to clearly understand availability.

ii. Long-Term Conditional Exemptions

The Proposal includes some limited exceptions for longer term loans, giving lenders two options to avoid the full-payment test. Under the first option, lenders would be allowed to offer loans that meet the National Credit Union Administration's ("NCUA") "payday alternative loan" ("PAL") criteria of capping interest rates at 28 percent with an application fee of not more than $20.[22] Under a second option, lenders could offer loans payable in equal installments with a term not to exceed 24 months as long as the lender's projected rate of default on the loans was five percent or less. However, if the lender's default rate exceeded five percent in a given year, the lender would be required to refund its origination fees for its entire portfolio.[23]

As is the case with the proposed short-term conditional exemption, the alternatives offered for longer-term loans fail to provide banks with a sustainable model. We discuss each in turn.

a. NCUA PAL Model

Under the Proposal, the Bureau would specifically exempt loans modeled after the NCUA PAL program. This exemption would permit credit unions to offer loans with terms of no more than six months where the principal of the loan is not less than $200 and not more than $1,000. Loans must have an interest rate of no more than 28 percent allowing a $20 application fee. Loans must be repayable in two or more payments due no less frequently than monthly, all of which payments are substantially equal in amount and fall due in substantially

[21] The Bureau seeks comment on whether this particular provision for unaffiliated lenders should apply to all covered loans, not just those under the short-term conditional exemption. We believe the above-referenced issues would apply to all loans covered by the Proposal.
[22] 81 Fed. Reg. at 48035.
[23] *Id* at 43038.

equal intervals. The loan must amortize completely during the term of the loan and the payment schedule must provide for the allocation of a consumer's payments to the outstanding principal and interest and fees as they accrue only by applying a fixed periodic rate of interest to the outstanding balance of the unpaid loan principal every repayment period for the term of the loan.

As a primary issue, banks are not tax-exempt institutions and, as such, have a diminished ability to make sustainable loans under the PAL model. Tax-exempt status gives credit unions the flexibility needed to sustain a loan of this structure. However, even with this immense benefit, existing PAL loans are often made at little to no profit by credit unions.[24] Thus, banks that not afforded a similar tax status would be unable to operate within the proposed PAL exemption.

Additionally, very few credit unions see the PAL program, even in its current structure, as a useful tool for meeting small-dollar needs. According to the Bureau, less than 20 percent of credit unions offer PAL loans.[25] This is a low number to begin with, but we believe the actual number to be lower. According to the Credit Union National Association ("CUNA"), only one in seven credit unions currently participate in the PAL program – a mere 14 percent.[26]

More importantly, the Bureau seems to believe the proposed inclusion of the PAL model provides for an outright exemption that preserves the integrity of the program. However, we believe the added compliance complexity provided for in the Proposal will only serve to eliminate this already marginal product. Among other things, the Proposal includes new requirements for the verification of income, and adds several other modifications to the PAL program including a change from a minimal loan of 30 days to 45 days, limitations on payment transfers, amortization and debt collection requirements. These additional and significant compliance hurdles will make it nearly impossible for even tax-exempt institutions to make PAL loans, let alone taxed banks.

b. Portfolio Default Rate Option

Under the second proposed longer-term exemption option, the portfolio loan exemption, lenders could offer a loan based on a duration of 46 days to 24 months, a modified total cost of credit of less than or equal to an annual rate of 36 percent with no more than a $50 origination fee, and a projected default rate of less than five percent.[27] In addition, lenders would not be able to extend a longer-term conditional loan if, after a review of the lender's

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[24] Credit Union National Association June 27th, 2016 letter to NCUA Chairman Rick Metsger outlining concerns over PAL exemption.
[25] 81 Fed. Reg. at 48031.
[26] http://www.cuna.org/Legislative-And-Regulatory-Advocacy/Removing-Barriers-Blog/Removing-Barriers-Blog/CUNA-Meets-with-CFPB-to-Discuss-Payday-Loan-Alternatives/.
[27] 81 Fed. Reg. at 48038.

records and the records of affiliates, the lender determines that the new loan would result in a consumer being in debt on more than two loans made with conditional exemptions.[28]

The portfolio loan exemption presents two important challenges for banks seeking to avoid the complex full-payment analysis. First, lenders will have difficulty making loans at 36 percent or lower, especially at an all-in APR. This low percentage ignores the cost of producing short-term credit. We encourage the Bureau examine examples of all past small-dollar loan programs such as the Federal Deposit Insurance Corporation's (FDIC) Small-Dollar Pilot Program and the NCUA PAL program and report on viability and customer outcomes for these products. The Bureau has already completed a similar examination of payday loans and we believe it would be helpful for the Bureau to understand limitations and lack of viability of these products.

Second, the Proposal would require lenders that have a default rate exceeding five percent to refund origination fees for its entire portfolio for each year that it exceeded that threshold. As a practical matter, some default is inevitable no matter how well underwritten a loan is. This fact coupled with the draconian consequences for exceeding the seeming low five percent default rate on the entire portfolio, lenders will not be willing to assume this risk. Banks are unsure that prudential regulators would view this option as a safe and sound lending practice because in times of elevated credit losses, the bank would be required to refund fees to consumers and place further stress on the bank's loan loss reserves. We urge the Bureau to get feedback from the prudential regulators on this portion of the Proposal, along with other sections.

It is useful to make a comparison of default rates for other types of short-term lending (*e.g.* credit cards) to understand why banks would hesitate to assume the risk associated with this provision. The New York Federal Reserve Bank recently measured credit card delinquencies by looking at the percent of balances that are at least 90 days late (a prime indicator of default).[29] For the first quarter of 2015, the rate for credit cards was 8.38 percent. Accordingly, we believe even normal default rates would exceed the five percent threshold, creating little incentive to utilize this exemption option.

3. Additional Concerns

In addition to the above-referenced issues, the Proposal presents a number of compliance complexities that we believe will be difficult to implement and will certainly add to the cost and limit the availability of products to consumers. We discuss each in turn.

i. Credit Information Furnishing

[28] *Id* at 48044.
[29] Federal Reserve Bank of New York Quarterly Report on Household Debt and Credit, May 2015.

Under the Proposal, lenders would be required to use CFPB-registered information systems to report and obtain credit information about covered loans. This requirement includes the duty to report basic loan information and updates to that information. The registered information systems will have to be created by companies that will provide this service once the rule is finalized. The Bureau indicated it will publish a list of registered systems. Lenders must provide basic information about the loans and the borrower at the time of origination, updates during the life of the loan, and additional information when the loan period ceases. The lenders must also solicit and review a consumer report about the borrower from a registered information system before making the loan. The registered information systems themselves must meet certain eligibility requirements related primarily to their reporting capabilities and performance. [30]

These provisions add complexities that will frustrate small-dollar offerings and this requirement alone could increase the cost of these small-dollar products to the point they become unprofitable for banks. First, pulling a credit report for every covered loan has potentially negative effects on consumers' credit scores. Hard credit inquiries, inquiries where a potential lender is reviewing a borrower's credit due to an application for credit, can affect a borrower's credit score for a number of reasons – frequency of inquiries, number of open loans, and time since recent account openings or other inquires for credit. Inquiries can have a great impact if a borrower has few accounts or a short credit history. Under the Proposal, banks would need to make credit report inquiries to ensure a customer continues to have the ability to repay all loans made. This process of making multiple inquiries could have a detrimental effect on one's credit score and, in turn, would cause, not prevent, harm to the customer by possibly limiting access to other forms of credit.

Second, the time needed to pull and review a borrower's credit report and the expense associated with the credit pull will reduce the convenience of covered loans and add to their overall costs. As previously commented, consumers in need of emergency small-dollar loans often do not have the luxury of time. Waiting on a review of their credit report and other relevant materials will greatly increase the time needed to underwrite covered loans.

ii. Record Retention Requirement

Lenders must establish and follow a compliance program and retain certain records, such as the initial loan agreement, documentation obtained for a covered loan, and calculations surrounding presumptions of unaffordability.[31] The ambiguities contained in the Proposal, along with its complexities, would create a situation where the system's requirements to effectively manage the small-dollar products would be a significant cost. Unfortunately, these same ambiguities make it difficult to project an actual system's cost because the bidding process would include too many unknowns. However, we are comfortable in estimating that if the rule is finalized as written, it would take, at the very least, one full year to research and

[30] 81 Fed. Reg. at 48089.
[31] 81 Fed. Reg. at 47866.

scope a possible product set and system resources necessary to comply with the Proposal. If the product development survived this timeframe, it would take a significant implementation timeframe for the bank to bring a product to market and test it. As a result, the complexity of the Proposal threatens to limit the availability of small-dollar credit in the implementation period given the difficulties in researching, designing, testing, marketing, and implementing any new, or retooling any existing, small-dollar lending platform.

iii. Pull Attempts and Written Notice of Pull

The Proposal addresses payment transfers in connection with covered loans. Specifically, the Proposal would make it an unfair or abusive act or practice for a lender to attempt to withdraw payment from a consumer's account in connection with a covered loan after the lender's second consecutive attempt to withdraw payment from the account has failed due to a lack of sufficient funds, unless the lender obtains the consumer's new and specific authorization to make further withdrawals from the account.[32] This applies to electronic fund transfers ("EFT"), signature checks, remotely created checks, remotely created payment order, and an account-holding institutions transfer of funds from a consumer's account that is held at the same institution.[33]

As support for its proposed provisions, the Bureau has relied on its own report entitled "Online Payday Loan Payments," which summarizes data on return rates of ACH payments made by bank customers to repay certain online payday loans.[34] In the report, the Bureau cites three principal findings:

- Half of online borrowers are charged an average of $185 in bank penalties;
- One third of online borrowers hit with a bank penalty wind up losing their accounts; and
- Repeated debit attempts typically fail to collect money from the consumer.

However, it is important to note that the data used in the report was from a 2011 to 2012 sample period and fails to take into consideration important developments in payment processing since that time. Most notably, the re-submissions contemplated by the proposed provisions are largely addressed in current rules developed by the National Automated Clearing House Association ("NACHA").

The NACHA Operating Rules restrict lenders from making more than three attempts to collect a single payment via the ACH system.[35] These rules already allow for returned entries to be reinitiated by the originator ("ODFI") under the following limited circumstances:

[32] *Id* at 48175.
[33] *Id* at 48052.
[34] http://files.consumerfinance.gov/f/201604_cfpb_online-payday-loan-payments.pdf.
[35] NACHA ACH Operations Bulletin #1-2014: Subsection 2.12.4 Reinitiation of Returned Entries.

- An ACH debit was returned for reasons of insufficient or uncollected funds. In such a case, the entry may be reinitiated a maximum of two times in an attempt to collect funds;
- An ACH debit was returned for the reason of stop payment, and reinitiation has been separately authorized by the receiver;
- An ACH entry was returned for another reason, and the ODFI has corrected or remedied the reason for the return.

Additional restrictions, however slight, will require banks to redesign existing systems to conform to the proposed provisions. Despite the recent enactment, NACHA will also have to change their rules to accommodate the requirements under the Proposal. Implementing these provisions will come at a cost to banks and their customers. We believe the difference of one allowable pull attempt hardly justifies the cost of this process change, especially since the data relied on fails to take NACHA changes into account. Again, the report relied on for this proposed structure, "Online Payday Loan Payments," is not only untimely, but it focuses largely on the behavior of non-depository payday lenders. Since bank lenders have access to the consumer's deposit account, they would have the ability to stop a withdrawal based on lack of funds availability, or to avoid charging a fee should a payment take their account into negative status. For these reasons, we urge the Bureau to conform its provisions to current practices.

The Proposal also would require lenders to provide consumers with certain disclosures regarding upcoming withdrawals and withdrawals with a varying payment amount, a date other than the regularly scheduled date, or differing payment channel.[36] This convoluted process of disclosure and presentment will add extreme complexity to compliance with the proposed provision, increasing the inability for banks to make small-dollar loans to consumers in need.

iv. Anti-Evasion

The Dodd-Frank Act authorizes the Bureau 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."[37] The Bureau has relied on this authority for several elements of the Proposal, including an anti-evasion clause. In determining whether a person is evading the requirements of the rule, the Bureau indicated it would consider whether all relevant facts and circumstances reveal "the presence of a purpose that is not a legitimate business purpose."[38]

According to the Proposal, the CFPB will take into consideration the actual substance of the lender's action as well as "other relevant facts and circumstances" to determine if the lender's action was taken with the intent of evading the requirements of the Proposal. The

[36] 81 Fed. Reg. at 48213.
[37] 12 U.S.C. § 5512(b)(1).
[38] 81 Fed. Reg. at 48112.

Bureau states such evasive action can be knowing or reckless. The Bureau acknowledges that it cannot anticipate every possible way in which lenders could evade the requirements of the Proposal, but it does provide a short, non-exclusive list of actions that might indicate such intent. These include various fee structures as well as methods of changing the nature of a loan after consummation.

We firmly believe the inclusion of an anti-evasion clause creates a risk that will chill the participation of depositories in the small-dollar market. The language, "other relevant facts and circumstances," is incredibly vague and fails to provide compliance-minded institutions with much needed clarity. Without bright line rules for compliance, banks will be wary of producing products that could be misconstrued as evasive and, therefore, consumers will be denied the benefit of many quality credit options. We urge the Bureau to eliminate the anti-evasion provisions contemplated in the Proposal and provide lenders with clear, easy to follow guidelines to ensure compliance.

v. Unintended Products Coverage

The Bureau has proposed several exclusions from the definition of covered loans including loans intended to finance the purchase of a car or goods where the goods secure the loan, mortgages and loans secured by real property, credit cards, student loans, non-recourse pawn loans, and overdraft services/protection.[39] CBA supports these exemptions and believes they will allow banks to offer everyday products without disruption.

However, the Proposal raises troubling issues regarding the impact on some traditional bank products, as the stringent all-in APR can encompass many bank products under the covered loan umbrella, including subprime auto title loans and subprime installment loans. This will impact the ability of lenders to offer some traditional loans to those individuals whose FICO scores do not entitle them to a loan at an interest rate below 36 percent. Additionally, the inability to utilize lines of credit will impact the ability of state-chartered banks with lower usury caps that will be unable to offer products because of the restriction on the credit line.

Specifically, under the Proposal, all longer-term loans without a limitation on term are covered loans if they carry an interest rate greater than 36 percent. For example, a ten-year loan with an ACH debit feature at a 37 percent interest rate would fall under the scope of the proposed rule as a covered loan. Also, although the Proposal specifically excludes from coverage “credit extended for the sole and express purpose of financing a consumer’s initial purchase of a good when the credit is secured by the property being purchased, whether or not the security interest is perfected or recorded,” this exemption would only apply to financing that is specifically “for the sole and express purpose of financing a consumer’s initial purchase of a good.”[40] In auto finance, the “good” the Proposal refers to is the vehicle, but it is rare that an auto finance transaction fund only the cost of the vehicle, and instead often includes fees,

[39] 81 Fed. Reg. at 47864.
[40] *Id* at 47917.

taxes, and ancillary products. We are concerned the language of the exclusion suggests the exemption would not apply to a transaction if it were to include any ancillary products financed on a single contract. For example, if the consumer's loan includes tax, delivery, expedited service, a warranty, a service plan, etc., it is not clear whether the loan would be covered or not. We believe that just because the consumer finances something directly related to the purchase should not cause the loan to be included under the Proposal. If the Bureau intended to address "cash out" opportunities with respect to the loan, or no financing of debt cancellation, etc., that should be addressed directly and the inclusion of routine costs in the loan amount should not be what causes a loan to be covered by the rule. Otherwise, any purchase-money vehicle financing with a "total cost of credit" in excess of 36 percent would be classified a covered loan and the lender would be deterred from offering products customers desire as part of the contract.

The Bureau appears to recognize this point in the corresponding Request for Information ("RFI") where it notes on multiple occasions that consumers face additional risks on account of disability, illness, loss of employment, family disruptions such as divorce or separation, and many other unexpected expenses.[41] Lenders of conventional installment loans and auto dealers help solve this problem by offering additional products that cover these various risks. As drafted, the Proposal may lead to consumers having restricted access to valuable products.

Additionally, it is unclear if non-credit related features would bring a loan within the scope of the Proposal. For example, a lender may make a loan that complies with the guidelines and falls at or below the all-in APR of 36 percent when calculating all credit-related features. However, should the borrower decide to utilize an optional service such as a funds transfer fee (a non-credit related feature), that, if included in the calculation, could push the all-in APR above 36 percent. It is unclear if this example would be considered a violation of the Proposal. Non-credit related features can add to the ease of borrowing for consumers. To effectively eliminate them by including them in the all-in APR would be a disservice to many consumers. Accordingly, should the Bureau move forward with an all-in APR calculation, we urge it to specify that only credit-related features, those that are directly related to the transaction as they are necessary for the transaction, should be included in the calculation. All unrelated products, those that are not directly related to the transaction, such as ancillary products, fees, and taxes, should not be included in the calculation.

vi. Foreign Language Disclosures

The Proposal would allow lenders to provide the disclosures required by proposed section 1041.7(e) in a foreign language, provided that the disclosures must be made available in English upon the consumer's request. The Bureau believes that, if a lender offers or services covered loans to a group of consumers in a foreign language, the lender should, at least, be

[41] Request for Information on Payday Loans, Vehicle Title Loans, Installment Loans, and Open-End Lines of Credit, Dkt. No. CFPB-2016-0026, at 20 & 30 (June 1, 2016).

allowed to provide disclosures that would be required under proposed section 1041.7(e) to those consumers in that language, so long as the lender also makes an English-language version available upon request from the consumer.[42]

The Bureau seeks comment in general on this foreign language requirement, including whether lenders should be required to obtain written consumer consent before providing the disclosures in this section in a language other than English and whether lenders should be required to provide the disclosure in English along with the foreign language disclosure. *The Bureau also seeks comment on whether there are any circumstances in which lenders should be required to provide the disclosures in a foreign language and, if so, what circumstance should trigger such a requirement*.[43]

CBA strongly believes, because this is an issue that impacts many different consumer disclosures, it is more appropriate for the Bureau to consider limited English proficiency issues in a separate comment process. Our lenders want to communicate with every customer in the language she prefers, however, that practice is not realistic, especially with the UDAAP concerns. Moreover, current market incentives encourage lenders to communicate effectively with their borrowers, but we oppose new requirements to issue legal documents, including disclosures, in other languages as they would have wide ranging consequences that deserve more thoughtful consideration than can be provided in this context of this already large rulemaking. We welcome the opportunity to work with the Bureau on this issue going forward.

III. Payment to Income Ratio Alternative

In the outline of provisions under consideration during its Small Business Regulatory Enforcement Fairness Act panel process ("SBREFA"), the Bureau included an exemption to the ability to repay analysis for longer-term loans of up to six months, so long as the loan's payments did not exceed five percent of a borrower's gross income – the payment to income test (PTI).[44] Although the Bureau did not include this exemption in the Proposal, it has requested comment on the provision nonetheless.[45] CBA believes that, conceptually, the approach outlined under PTI offers a more feasible approach that may enable depositories to make small-dollar loans. Unlike the previously discussed ability to repay options and the proposed alternatives, the payment to income test provides for streamlined, easily applied criteria that enable lenders to avoid incurring substantial underwriting costs and provides an avenue for banks to offer small-dollar loans at much lower prices than many non-depository lenders. A simplified approach free of burdensome underwriting, ancillary compliance mandates and unreasonable limits on product utilization appears to be the only clear path to CBA member banks entering the small-dollar market in any significant manner.

[42] 81 Fed. Reg. at 47984.
[43] *Id* at 43079 - emphasis added.
[44] Small Business Advisory Review Panel for Potential Rulemakings for Payday, Vehicle Title, and Similar Loans, Outline of Proposals under Consideration and Alternatives Considered (March 2015).
[45] *Id* at 48039.

However, while we support the PTI approach for its simplicity and functionality that will allow for scalability of systems, we believe the suggested ratio should be variable and not simply limited to just five percent. While some institutions may be able to scale a product to fit within the five percent PTI, we believe this ratio may be artificially low and will not produce products that are sustainable for many banks and that will fit most consumers' needs. Recent research indicates there is cause for concern with a limited PTI ratio ceiling. In a 2015 study, Navigant examined 1.02 million installment loans and found PTI ratio limits pose substantial risks of reduction in overall credit availability to the small-dollar credit population.[46] Specifically, the study found that a five percent PTI ratio limit would limit access to credit for 86 percent of current borrowers, with only 14 percent having a PTI ratio of less than five percent. The study also found PTI ratios to be poor metrics for predicting loan repayment and that those who borrow repeatedly are more likely to repay their loans on average and that slight reductions in default rates resulting from a low PTI ratio limit are more than offset by the resulting reduction in credit access.

Another study analyzed 87 million loans and found no correlation between individual consumer defaults and specific PTI ratios, suggesting that PTI may not be useful in limiting default. In addition, as indicated by the Navigant study, the other study found that low PTI ratios could greatly limit access to credit to those in need.[47]

However, the idea of a floating point PTI ratio that is above five percent may provide the flexibility necessary to allow more banks to enter the small-dollar lending market, provided that PTI ratio is left as a guidepost for the banks to determine whether it is the proper amount based upon the banks experience with the customer and their applicable risk thresholds subject to prudential supervisory oversight. Accordingly, CBA urges the Bureau to revisit the concept of employing the streamlined approach taken under the PTI test and conduct further analysis on a PTI ratio that would provide for consumer needs and product sustainability.

i. <u>A Practical Approach</u>

CBA believes a product modeled after bank-offered Deposit Advance Products, coupled with a reasonable PTI ratio, would allow for low-cost, affordable products that provide consumers with enhanced protections and banks with viable product offerings.

This model could be offered at much lower rates than non-bank alternatives. By incorporating realistic underwriting standards to determine eligibility and loan/line amounts, banks could create products with low underwriting costs. For example, deposit account attributes such as deposit amounts, cash flows, and tenure provide a very solid proxy to Bureau's rigorous underwriting standards at a fraction of the cost and allows banks to serve

[46] Navigant - *Small-Dollar Installment Loans: An Empirical Analysis* (March 2015).
[47] Peter Toth - *Measures of Reduced Form Relationship Between the Payment-Income Ratio and the Default Probability* (February 2015).

more consumers in need. This approach could also incorporate reasonable cooling off periods that are tied to sustained use (*e.g.* more than three months), not the number of times a product is used. Once a customer hits a certain amount of months used, banks could convert them to a term loan which serves as both a relief to the debt trap issue and a cooling period simultaneously.

Discussed in detail below, the attributes of bank Deposit Advance Products enhanced by an appropriate PDI will provide a solid foundation for depositories to enter the small-dollar market, enhance market competition, and, most importantly, provide robust consumer protections that will allow for ease of use and prevent sustained consumer reliance.

ii. Bank Small-Dollar Lending

Traditional lenders are in a unique position to help those in need of short-term liquidity. However, flexibility from regulators is key to encouraging development of small-dollar loan products by depositories. While we applaud the Bureau's intention to curb the abuses of bad lenders, unfortunately, we firmly believe the Proposal will also have the unintended effect of driving away consumer-friendly financial institutions that provide better alternatives. Limiting the overly burdensome provisions of the Proposal will be an essential factor in determining whether banks and credit unions innovate and offer alternatives to payday loans.

Historically, the federal banking regulators have encouraged depository institutions to meet this particular consumer credit need. In response to this growing need for short-term credit, and receiving encouragement from our prudential regulators to offer a small-dollar loan product, some banks developed Deposit Advance Products for consumers who could not qualify for traditional forms of credit. For many years, these products successfully yielded positive reactions from regulators and demonstrated that close working relationships between banks and their regulators can result in services that meet consumers' needs. Additionally, deposit advance products were carefully designed to ensure strong safeguards at reasonable prices.

However, in late 2013, the Office of the Comptroller of the Currency (OCC)[48] and FDIC[49] separately finalized restrictive supervisory guidance on deposit advance products that left only one bank offering DAP services remaining in the market.[50] While several reasons contributed to their exit from the market, the primary force was the supervisory guidance that was inconsistent with the structure and use of deposit advance products, which provide consumers immediate access to the exact amount of money needed.

For the many reasons discussed below, we urge the Bureau to reexamine the utility of

[48] OCC - *Guidance on Supervisory Concerns and Expectations Regarding Deposit Advance Products* (November 2013): http://www.occ.treas.gov/news-issuances/federal-register/78fr70624.pdf .

[49] FDIC - *Guidance on Supervisory Concerns and Expectations Regarding Deposit Advance Products* (November 2013): https://www.fdic.gov/news/news/press/2013/pr13105a.pdf .

[50] The remaining depository offering a deposit advance product is supervised by the Federal Reserve and not subject to guidance issued by the OCC or FDIC.

bank-offered deposit advance products, and work closely with the other Federal regulators to develop consistent regulation and guidance that will allow banks to operate within clear standards in order to avoid regulatory conflict.

iii. The Benefit of Deposit Advance Products

The media coverage of "payday lending products" incorrectly associates bank-offered deposit advance products with traditional payday lending, with little or no distinction in how bank-offered product features allow for greater consumer protection and better customer pricing. There appears to be widespread misunderstanding about how the products work and how consumers use them responsibly to manage their financial needs. Additionally, many consumer groups have unjustifiably raised concerns over bank-offered deposit advance products. Similar to press accounts, these groups have likened the deposit advance products to non-depository payday lending and have all but ignored the significant positive features in product design and utility.

However, there is little evidence of consumer dissatisfaction with bank-offered deposit advance products. To the contrary, consumer satisfaction with these products is often very high with below average complaint rates. For example, in one bank's survey of deposit advance customers, 90 percent of respondents rated their overall experience with the product as "good" or "excellent." In another survey by a different bank, the customer satisfaction rating ranked higher for the bank's deposit advance product than any other product offered by that bank. Similarly, in yet another bank's survey, more than 95 percent of customers said they were "satisfied" or "highly satisfied" with the product.

Complaint levels for deposit advance products are extremely low across the board. One bank that offered the product registered just 41 complaints over the course of a year, representing a mere .018 percent of all active users of that bank's deposit advance product. This percentage equates to roughly one in every 5,500 users. Whether taken together or considered separately, the high customer satisfaction ratings and low levels of customer complaints for deposit advance products refute claims that these products pose significant reputational risk.

There are significant differences between bank-offered deposit advance products and the services offered by non-depository lenders. Bank-offered products have built-in controls designed to limit the usage of the product. These controls include limits on loan amounts, automatic repayment through a linked depository account and "cooling" periods, all designed to keep customers from relying too heavily on the product and to ensure the customer's ability to repay the loan.

Making Deposit Advance even more transparent and less risky, consumers who use bank-offered deposit advance products already have a relationship with the bank. Deposit advance is an integrated feature added to the customer's existing checking account and is not a stand-alone product, allowing banks to better understand a customer's financial situation and ability to repay. These services are only available to established customers who have maintained checking accounts in good standing with regularly scheduled direct deposits for a minimally prescribed period of time. The maintenance of this relationship is of the utmost importance to a bank. Without a positive banking experience, customers would look elsewhere to meet financial needs and banks would not only lose the opportunity to service the customer's short-term liquidity needs, but also the chance to establish or maintain a long-term banking relationship.

Bank-offered deposit advance products offer customers greater account security. With these products, customers do not have to provide sensitive bank information to third-party financial service providers, opening the door to the possible compromise of sensitive financial information. Accordingly, all personal account information is kept in house, providing a significant security advantage to non-depository services.

The banking industry supports clear and conspicuous disclosures for all financial products and services that assist consumers in making informed decisions about managing their finances. Banks that provide deposit advance products adhere to strict disclosure standards and all product terms are made clearly and fully transparent to customers prior to product use. At a minimum, all deposit advance providers are bound by applicable federal laws and the customer is typically required to sign a separate, detailed terms and conditions document to activate a deposit advance line of credit.

All depository institutions that offered, or still offer, deposit advance products have limits on the amount a consumer may borrow. Although it varies from bank to bank, advances are generally limited to the lesser of a specific amount or a percentage of the total amount of a customer's monthly direct deposits. These limits ensure that there is money available to the customer for other monthly expenses after the advance is paid.

Additionally, all bank-offered deposit advance products impose a mandatory cooling-off period to ensure customers do not depend on the product to meet their monthly financial needs. These periods are imposed to ensure deposit advance products are used for the intended purpose, namely, short-term liquidity. To manage the risk that the consumer will become reliant, a customer typically will be able to access a deposit advance product for a limited period of time at the end of which they would be required to repay the outstanding balance or completely stop using the product.

Deposit advance products have been criticized for their seemingly high costs when considering the relatively small size of the credit extended. However, in order for any product to be sustainable, not to mention safe and sound, it must be delivered in a cost-effective manner for both the provider and the customer. Previous small-dollar lending programs, such as one suggested by the FDIC,[51] have not been widely adopted by the industry because the costs to administer the programs outweigh the revenues and, hence, are not sustainable.

Furthermore, the expense of providing an open-end line of credit is nearly the same irrespective of the amount outstanding. Most deposit advance products are priced based on a percentage of the amount advanced and do not include additional costs to the consumer such as application fees, annual fees, over-limit fees, rollover or re-write fees and late payment fees.

IV. __Regulatory Coordination__

Despite the many consumer protections and benefits built into bank-offered deposit advance products, the OCC and FDIC effectively forced the shutdown of the product that was designed to benefit consumers in need, forcing them into more costly alternatives. CBA believes it is patently contrary to the intent of any regulatory action to force further monetary constraints on the consumers it intends to help. Regulators should be working closely with industry on practical solutions in order to build a foundation to fully support small-dollar lending needs. We believe this to be especially true for designing products and services that will allow the under-banked and unbanked greater access to mainstream banking opportunities.

Title X of the Dodd–Frank Act created the Bureau to specifically address issues of consumer protection surrounding financial products. To ensure equal protections across all financial products and services, the Bureau's authority to promulgate consumer protection rules extends to all providers of financial services and products including depository and non-depository institutions – authority that the prudential banking regulators do not have. Accordingly, *only the Bureau can ensure that consistent rules are applied across the entire financial services industry*. Unilateral actions by other Federal regulators are contrary to Congressional intent in creating the CFPB and directing that agency to regulate consumer financial services whether offered by banks or nonbanks. Absent across-the-board standards, consumers will be pushed into services that offer fewer protections and come at significantly greater costs. Indeed, even within the realm of Federal prudential banking supervision, banks of different charters will apply inconsistent standards with regards to deposit advance products.

For many of CBA members, the existing OCC/FDIC supervisory guidance will present a roadblock for bank-offered products, regardless of a workable final rule for the Bureau. We urge the Bureau to work closely with the Federal prudential banking regulators to ensure consistency across all institutions.

* * * * *

[51] FDIC – *Small-Dollar Loan Pilot*: https://www.fdic.gov/smalldollarloans/.

Banks are in a unique position to help millions of Americans that need small-dollar credit. Banks are thoroughly supervised, amply regulated and well capitalized institutions in which U.S. consumers will find fair pricing coupled with established consumer protections. However, the overly restrictive approach currently offered by the Bureau will only lead to less depository participation, pushing consumers into more unfavorable alternatives with higher costs and less oversight. We urge the Bureau to reevaluate the Proposal and to work with all stakeholders to establish a rule that will not unnecessarily inhibit the ability of U.S. depositories to offer credit products that meet the short-term borrowing needs of their customers.

CBA greatly appreciates the opportunity to share our suggestions and to work with the Bureau as it considers the regulation of small-dollar credit. Should you need further information please do not hesitate to contact the undersigned directly at dpommerehn@consumerbankers.com.

Sincerely,

David Pommerehn
Vice President, Senior Counsel
Consumer Bankers Association

APPENDIX F

By Electronic Filing October 6, 2016

Monica Jackson
Office of the Executive Secretary
Consumer Financial Protection Bureau
1700 G Street NW
Washington, DC 20552

Re: Proposed Rule: Payday, Vehicle Title, and Certain High-Cost Installment Loans (No. CFPB-2016-0025)

Dear Ms. Jackson:

This letter provides comments from trade associations representing a broad cross-section of the United States financial services industry on the Consumer Financial Protection Bureau's proposed rule, "Payday, Vehicle Title, and Certain High-Cost Installment Loans," 81 Fed. Reg. 47,864 (July 22, 2016) ("Proposed Rule"). Specifically, the American Bankers Association ("ABA"), American Financial Services Association ("AFSA"), and Consumer Bankers Association ("CBA")—collectively, the "Trade Associations"—are concerned that the Proposed Rule exceeds the Bureau's statutory authority, is unsupported by adequate evidence, does not undertake a sufficient cost-benefit analysis, fails to consider less intrusive alternatives, and is arbitrary and capricious in other respects. We urge the Bureau to remedy these problems when it finalizes the Proposed Rule.

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

Federal agencies are creatures of statute and may exercise only those powers delegated to them by statute. *See, e.g.*, *La. Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 374 (1986) ("[A]n agency literally has no power to act ... unless and until Congress confers power upon it."); *FTC v. Dean Foods Co.*, 384 U.S. 597, 605 (1966); *see also W. Minnesota Mun. Power Agency v. FERC*, 806 F.3d 588, 593 (D.C. Cir. 2015). The Proposed Rule violates that principle—and therefore violates the Administrative Procedure Act—because it fails to observe the limitations Congress placed on the Bureau's authority.

A. The Proposed Rule Imposes An Unlawful Usury Limit.

Section 1027(*o*) of the Dodd-Frank Act provides that the Bureau may not "establish a usury limit applicable to an extension of credit offered or made by a covered person to a consumer, unless authorized by law." 12 U.S.C. § 5517(*o*). No statute authorizes the Bureau to impose usury limits on traditional installment loans ("TILs") or lines of credit ("LOCs") (collectively, "Traditional Loan Products"). Thus, the Bureau lacks legal authority to impose a usury limit on Traditional Loan Products.

The Proposed Rule exceeds the Bureau's statutory authority by imposing just such a usury limit. In particular, the Proposed Rule imposes substantial and burdensome underwriting requirements on covered long-term loans with a "total cost of credit that exceeds 36 percent." 81 Fed. Reg. at 47,904. Because these additional underwriting requirements are so costly, many lenders will not make such loans and charge such interest rates. It is irrelevant that the Proposed Rule does not categorically prohibit covered loans with a total cost of credit in excess of 36 percent. The Proposed Rule imposes a *de facto* usury limit by making it uneconomical for many lenders to comply with the new underwriting requirements.

Moreover, lenders would (absent evidence to overcome a presumption that the borrower is unable to repay) be prohibited from issuing covered TILs and LOCs to several classes of borrowers, including borrowers who have an outstanding covered short-term loan or a covered longer-term loan with a balloon payment (or who closed such a loan within the preceding 30 days). *Id.* at 47,865. As to these classes of borrowers, lenders could only make loans with a "total cost of credit" of 36 percent or less. Accordingly, the Proposed Rule imposes a prohibited usury limit. *See* 5 U.S.C. § 706(2)(C) (court must "hold unlawful and set aside agency action . . . found to be in excess of statutory jurisdiction, authority, or limitations, or short of statutory right").

The two alternative loan structures included in the Proposed Rule are similarly flawed because both include express usury limits. The NCUA "Payday Alternative Loan" option imposes a maximum interest rate of 28 percent, *see* 81 Fed. Reg. at 47,892, while loans made under the remaining option "must carry a modified total cost of credit of less than or equal to an annual rate of 36 percent," *id.* at 47,865.

B. The Bureau Lacks Authority To Enforce An Ability-To-Repay Requirement With Respect To Traditional Loan Products.

Congress instructed the Bureau to implement an ability-to-repay standard only with respect to two types of consumer financial products: mortgages and credit card loans. *See* 15 U.S.C. §§ 1639c(a)(1) ("[N]o creditor may make a residential mortgage loan unless the creditor makes a reasonable and good faith determination based on verified and documented information that, at the time the loan is consummated, the consumer has a reasonable ability to repay the loan, according to its terms."); 1665e ("A card issuer may not open any credit card account for any consumer under an open end consumer credit plan, or increase any credit limit applicable to such account, unless the card issuer considers the ability of the consumer to make the required payments under the terms of such account.").

In contrast to mortgages and credit cards, Congress has not granted the Bureau authority to impose an ability-to-repay requirement with respect to Traditional Loan Products. Under the *expressio unius* canon of construction, courts will presume that Congress intended not to adopt an ability-to-repay requirement for these products. *See Leatherman v. Tarrant Cty. Narcotics Intelligence & Coordination Unit*, 507 U.S. 163, 168 (1993).

The *expressio unius* inference is particularly warranted with respect to the Proposed Rule because Congress adopted the ability-to-repay requirement for mortgages, 15 U.S.C. § 1639c(a)(1), in the Dodd-Frank Act—the same statute that created the Bureau. *See* Pub. L. 111-203, § 1411 (mortgage provision); *id.* §§ 1011 et seq. (establishing Bureau and enumerating its powers). As the Supreme Court has observed, "[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) (citation and quotation marks omitted).

Accordingly, the Proposed Rule's application of an ability-to-repay requirement to Traditional Loan Products exceeds the Bureau's statutory authority. *See* 5 U.S.C. § 706(2).

C. The Proposed Rule Would Regulate Insurance In Violation Of The Dodd-Frank Act.

Congress expressly limited the Bureau's authority over insurance products, providing that "[t]he Bureau may not define" "the business of insurance" "as a financial product or service, by regulation or otherwise." 12 U.S.C. § 5517(m). The Act defines the "[b]usiness of insurance" expansively as "the writing of insurance or the reinsuring of risks by an insurer, including all acts necessary to such writing or reinsuring and the activities relating to the writing of insurance or the reinsuring of risks conducted by persons who act as, or are, officers, directors, agents, or employees of insurers or who are other persons authorized to act on behalf of such persons." 12 U.S.C. § 5481(3). Section 5517(f) further restricts the Bureau's authority by (i) preserving the authority of state insurance regulators and (ii) directing that (with limited exceptions) "the Bureau shall have no authority to exercise any power to enforce this title with respect to a person regulated by a State insurance regulator."

Despite these restrictions, the Proposed Rule includes provisions that would in fact regulate the sale of optional ancillary insurance products, including credit life insurance, disability insurance, involuntary unemployment insurance, and similar policies. Specifically, the Proposed Rule would include the cost of such insurance products in the "total cost of credit" for purposes of determining whether a TIL or LOC is a long-term covered loan. *See* 81 Fed. Reg. at 47,909. Because the Proposed Rule restricts lenders' ability to offer covered Traditional Loan Products with a "total cost of credit" in excess of 36 percent of the loan value, the Proposed Rule directly limits the price and availability of optional (and beneficial) insurance products.

The Proposed Rule asserts that such regulation is necessary because "lenders might otherwise shift their fee structures to fall outside traditional Regulation Z concepts and thus outside the coverage of proposed part 1041" of the Bureau's rules—for instance "by shifting the costs of a loan by lowering the interest rate and <u>imposing</u> (or increasing) one or more fees that are not included in the calculation of APR under Regulation Z." *Id.* (emphasis added). This argument fails for two principal reasons.

<u>First</u>, and most fundamentally, regulations on the price and availability of optional ancillary insurance products contravene sections 5517(f) and 5517(m) to the extent that they seek to regulate "the business of insurance." If there is a valid concern regarding the cost of optional ancillary insurance products, that concern should be addressed by state insurance laws. Lenders that provide Traditional Loan Products are licensed and regulated by state departments of insurance, thus providing consumers with ample safeguards. In particular, lenders must charge and remit the premium rates filed with and approved by state regulators and have no authority unilaterally to increase those rates. All actions taken by lenders in their capacities as insurance agents—including the collection of premiums and policy fulfillment—are expressly outside the Bureau's statutory authority. *See* 12 U.S.C. §§ 5517(f), 5517(m).

This limitation applies regardless of whether a lender sells optional ancillary insurance products at the time it issues a TIL or LOC, or shortly after consummation of the loan. Thus, the Proposed Rule's assertion of regulatory authority over voluntary insurance products purchased by a consumer within 72 hours of loan consummation, *see* 81 Fed. Reg. at 47,909, is also *ultra vires* under section 5517(m).

Second, credit life insurance and similar products are optional ancillary forms of insurance that consumers purchase to protect their credit scores, those of their co-borrowers, and ensure that unexpected calamities, such as job loss, do not prevent repayment of a loan. Regulation Z provides that if a lender requires borrowers to purchase such insurance, the associated cost must be included in the APR under existing law. *See* 12 C.F.R. § 1026.4(b)(7)–(8). The cost of "voluntary credit insurance premiums," in contrast, does not count toward a loan's APR if the lender makes certain required disclosures and obtains any required affirmative written request to purchase such insurance. *Id.* § 1026.4(d)(1)–(2). Hence, even if the Bureau had authority to regulate the cost and availability of optional ancillary insurance products (which it does not), the concern expressed in the Proposed Rule is already addressed by Regulation Z and cannot justify a further extension of regulatory authority over Traditional Loan Products.

In this regard, the process of issuing a TIL or LOC is properly understood as involving two distinct phases. The first phase involves the lending transaction up to and including the disclosures mandated by Regulation Z. This aspect of the transaction may be subject to the Bureau's authority. *See* 12 U.S.C. § 5517(f)(2). However, once the lender makes the Regulation Z disclosures, a second phase begins in which the lender markets, sells, fulfills or performs activities as the agent of the insurance company, under the oversight of state insurance regulators. Those activities lie outside the Bureau's statutory authority, *see id.* §§ 5517(f)(1), 5517(m), and the Proposed Rule is contrary law to the extent it purports to regulate them, *see* 5 U.S.C. § 706(2).

D. The Proposed Rule Exceeds The Bureau's Authority To Regulate "Unfair, Deceptive, or Abusive" Practices.

Although the Dodd-Frank Act grants the Bureau authority to prevent "unfair, deceptive, or abusive act[s] or practices," 12 U.S.C. § 5531(a), lenders issuing Traditional Loan Products do not engage in any of these forbidden practices. Far from being unfair, deceptive, or abusive, Traditional Loan Products are reasonably underwritten, fully amortized, transparent, beneficial to consumers, and issued with the expectation that they will be repaid in full according to their terms. The Bureau has no findings of which we are aware, and certainly no substantial basis in data, to conclude that Traditional Loan Products are unfair, deceptive, or abusive. While we understand the Bureau's desire to ensure that payday and title lenders do not sidestep the Bureau's rule, the fear of side-stepping cannot and does not justify the substantial and unwarranted burden on such a large segment of the consumer lending industry. Moreover, the Bureau may not rely on findings regarding other types of small-dollar loans, such as payday loans, to justify regulation of Traditional Loan Products under the Bureau's UDAAP authority.

1. The Record Evidence Does Not Justify Regulation Of Traditional Loan Products.

The Proposed Rule largely treats Traditional Loan Products as collateral damage. Although the Proposed Rule goes on at length regarding unfair, deceptive, and abusive practices associated with other forms of loans (such as payday-lending products), nowhere does the Bureau make a similar showing with respect to Traditional Loan Products. It is axiomatic that the Bureau cannot extend the Proposed Rule to cover Traditional Loan Products unless the record evidence demonstrates that Traditional Loan Products are unfair, deceptive, or abusive. The Bureau has not even attempted to make this showing.

The Proposed Rule attempts to justify its overreach by asserting that only a "fraction" of Traditional Loan Products will be regulated, and that "the rule would have a minimal effect on [installment] lenders because they already engage in substantial underwriting." 81 Fed. Reg. at 47,987 n.655. The Bureau is wrong to suggest that an insignificant number of Traditional Loan Products will be regulated. *See* ABA Comments at Section III.B.1; AFSA Comments at Section II; CBA Comments at Section II.

In any event, the Bureau's unfounded conclusions cannot substitute for data showing that traditional installment loans meet the UDAAP criteria set forth in 12 U.S.C. § 5531. Among other things, the Proposed Rule does not cite any research on Traditional Loan Products or the purported injuries that result when a TIL or LOC borrower grants a lender access to his or her bank account (or other collateral). These omissions render the Proposed Rule unlawful in each of its applications to Traditional Loan Products. *See* 5 U.S.C. § 706(2); *see also Motor Veh. Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (agency action arbitrary and capricious if agency fails to "examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made," or if the agency "offer[s] an explanation for its decision that runs counter to the evidence before the agency" (alteration added, quotation marks omitted)); *Ass'n of Data Processing Serv. Organizations, Inc. v. Bd. of Governors of Fed. Reserve Sys.*, 745 F.2d 677, 683–84 (D.C. Cir. 1984) (*ADPSO*) (courts will "strike down, as arbitrary, agency action that is devoid of needed factual support").

Moreover, as discussed below, Traditional Loan Products are not unfair, deceptive, or abusive because they are underwritten, contain simple and clear terms, and are allegedly designed to be repaid according to their terms. So far as the Trade Associations are aware, the record contains no evidence whatsoever that Traditional Loan Products trap borrowers in a cycle of debt or have the other adverse consequences the Proposed Rule is designed to address. To the contrary, the Bureau expressly recognized that installment lenders already engage in substantial underwriting. Accordingly, there is no need or basis for imposing the ability-to-repay and other requirements of the Proposed Rule on Traditional Loan Products.

The Proposed Rule focuses nearly all of its findings on payday loans and other short-term forms of credit that often have APRs of 180 percent or more, are not underwritten, and are not designed to be repaid according to their terms. *See, e.g.*, 81 Fed. Reg. at 47,868–71. These findings cannot justify regulation of Traditional Loan Products given the substantial differences between the two classes of loans. *Cf. Adams Fruit Co. v. Barrett*, 494 U.S. 638, 650 (1990) ("it is fundamental that an agency may not bootstrap itself into an area in which it has no jurisdiction" (citation and quotation marks omitted)); *see also, e.g.*, AFSA Comments at Section I, III, & V (documenting ways in which TILs differ from payday-lending products); ABA Comments at Section III.B.1 (describing how Traditional Loan Products offered by banks are underwritten and have low default and rollover rates); CBA Comments at Section III.

2. The Bureau Has Not Established That Traditional Loan Products Are "Unfair."

The Bureau's authority over "unfair" practices is limited to practices that (i) cause "substantial injury to consumers" (ii) that "is not reasonably avoidable by consumers," and (iii) where the "substantial injury is not outweighed by countervailing benefits to consumers or competition." 12 U.S.C. § 5531(c)(1). The Proposed Rule is *ultra vires* because the Bureau has not established that any of those criteria are met with respect to Traditional Loan Products.

To begin with, the Proposed Rule does not demonstrate that Traditional Loan Products (or acts and practices taken in conjunction with the offering and issuance of such loans) cause substantial injury to consumers. Indeed, the Proposed Rule does not cite <u>any</u> evidence to suggest that Traditional Loan Products (or the steps lenders taken in issuing them) cause harm to consumers, much less "substantial injury." On the contrary, Traditional Loan Products have long provided consumers with important benefits. *See, e.g.*, CBA Comments at Section I(1); AFSA Comments at Section I; ABA Comments at III.B.3. Given the lack of data showing substantial injury to consumers, and the wealth of record evidence showing consumer benefits, the Proposed Rule is arbitrary and capricious to the extent it relies on the Bureau's authority to regulate "unfair" practices. *See* 5 U.S.C. § 706(2); *State Farm*, 463 U.S. at 43.

Moreover, any harm caused by Traditional Loan Products is reasonably avoidable by consumers. Consumers voluntarily obtain TILs and LOCs, and so could avoid any perceived harm by simply choosing not to borrow, or by borrowing from other lenders. The terms of these loans are also transparent and easily understood—meaning that borrowers take them out with full knowledge of the parties' respective rights and obligations. The Proposed Rule does not provide any evidence suggesting that consumers do not understand the terms of Traditional Loan Products.

Furthermore, any injury resulting from Traditional Loan Products would be substantially outweighed by the significant benefits such loans provide to consumers. Traditional Loan Products have long helped borrowers with few other options meet their financial obligations such as making a rent or mortgage payment, paying utility bills, and so on. The flexibility provided by Traditional Loan Products is important for consumers who are unbanked or under-banked, as these loans are often the only legal source of access to credit for such customers.[1] But Traditional Loan Products are also an important tool for well-banked consumers with prime credit scores, who often rely on the flexibility offered by those products. The Proposed Rule does not establish—nor could it establish—that these benefits to consumers and competition are outweighed by other considerations. Thus, the Proposed Rule is unlawful insofar as it regulates Traditional Loan Products under the Bureau's section 5531(c) authority to prevent "unfair" acts or practices. *See* 5 U.S.C. § 706(2); *State Farm*, 463 U.S. at 43.

More generally, the Proposed Rule exceeds the Bureau's authority because it is impermissibly based on policy considerations rather than hard evidence. The Dodd-Frank Act prohibits the Bureau from relying on its established public policy positions "as a primary basis for" determining that a given practice is "unfair." 12 U.S.C. § 5531(c)(2). The Proposed Rule makes clear that it is premised on the Bureau's policy preferences concerning the social utility of covered loan products, and of certain contract provisions (such as annual percentage rates)

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[1] Lenders report consumers' payments on Traditional Loan Products to credit bureaus, which provides consumers with the opportunity to demonstrate good credit and improve their credit scores. This is a significant benefit to credit-impaired consumers.

associated with those products. *See, e.g.*, 81 Fed. Reg. at 47,909–10. The Bureau cannot substitute its preferences for record evidence showing that Traditional Loan Products in particular (rather than other types of loans with substantially different terms, offered by lenders with substantially different track records) meet the statutory criteria for "unfair" practices. *See, e.g.*, *ADPSO*, 745 F.2d at 683–84.

3. The Bureau Has Not Established That Traditional Loan Products Are "Abusive."

The Bureau's authority over "abusive" practices likewise does not provide a basis for regulating Traditional Loan Products. This authority is limited to practices that: (i) materially interfere with the ability of a consumer to understand a term or condition of a consumer financial product or service, or (ii) take unreasonable advantage of (a) a lack of understanding on the part of the consumer of the material risks, costs, or conditions of the product or service, (b) the inability of the consumer to protect his or her interests in selecting or using a consumer financial product or service, or (c) the reasonable reliance by the consumer on the financial service provider to act in the interests of the consumer. 12 U.S.C. § 5531(d). Traditional Loan Products (and lenders' practices in issuing such loans) cannot be regulated as "abusive" because they do not meet any of those statutory requirements.

As an initial matter, the Proposed Rule does not identify any *practice* that materially interferes with the ability of consumers to understand terms or conditions of Traditional Loan Products. The Bureau may not regulate Traditional Loan Products without making such a finding. Because the Proposed Rule fails to do so, it exceeds the Bureau's statutory authority.

Nor, in any event, has the Bureau shown that consumers do not understand the terms and conditions, or material risks or costs of Traditional Loan Products. *See* 12 U.S.C. § 5531(d)(2)(A). This is hardly surprising: Traditional Loan Products are "plain vanilla" loans with transparent, easy-to-understand terms, due dates, and payment amounts.

Indeed, Director Cordray himself has raised doubts about whether the "lack of understanding" prong could even be the basis for a broad rulemaking such as that envisioned by the Proposed Rule. He has stated that a lack of understanding sufficient to support an abusive claim is "unavoidably situational" and that the Bureau would need to investigate the facts "consumer by consumer." Transcript, House Committee on Financial Services, "The Semi-Annual Report of the Consumer Financial Protection Bureau," 112th Cong. (March 29, 2012), at 18. He has also stated that "what is abusive and takes unreasonable advantage can differ from circumstance to circumstance." *Id.* Accordingly, to justify regulation of Traditional Loan Products under section 5531(d)(2), the Bureau would need to show that such loans are not understood by all or nearly all consumers. Once again, the Bureau has not done so.

Any lack of understanding would, in the first instance, compel the Bureau to explore enhanced disclosures as a remedy, which the Bureau has not done. For example, if the Bureau believes that particular terms of Traditional Loan Products are insufficiently clear or are not provided in a manner likely to foster consumer understanding, the Bureau could mandate improved disclosure practices. The Proposed Rule skips over this commonsense step and instead opts for far more invasive forms of regulation. In doing so, the Proposed Rule violates the

Administrative Procedure Act. *See, e.g.*, *State Farm*, 463 U.S. at 48 ("At the very least this alternative way of achieving the objectives of the Act should have been addressed and adequate reasons given for its abandonment."); *Allied Local & Reg'l Mfrs. Caucus v. EPA*, 215 F.3d 61, 80 (D.C. Cir. 2000) ("To be regarded as rational, an agency must . . . consider significant alternatives to the course it ultimately chooses.").

The Bureau likewise has not shown that borrowers are unable to protect their own interests in selecting or using Traditional Loan Products. In fact, such loans are mainstream products that have long been used by mainstream consumers who are experienced in making educated product choices and looking out for their own interests.

Finally, the Proposed Rule does not show that borrowers are reasonably relying on non-bank lenders to act in their interests with respect to Traditional Loan Products. On the contrary, the record shows that Traditional Loan Products are issued in arms-length transactions with no expectation of a fiduciary or similar relationship between lender or borrower. *See, e.g.*, AFSA Comments at Sections VIII & X. Thus, to the extent the Proposed Rule relies on the Bureau's authority under section 5531(d)(2)(C), it is arbitrary and capricious. *See State Farm*, 463 U.S. at 43; *ADPSO*, 745 F.2d at 683–84. Similarly, if the Bureau believes consumers are relying on Traditional Loan Product providers to act in their interests (despite the Bureau's failure to furnish data documenting such reliance), the proper course is to mandate clear disclosures disabusing consumers of that assumption. *See Allied Local*, 215 F.3d at 80.

4. The Bureau Lacks Authority To Require Lenders To Underwrite Traditional Loan Products in the Bureau's Preferred Manner.

For the same reasons as given in Sections I.D.1 to I.D.3 above, the Bureau lacks statutory authority to require lenders to underwrite (or underwrite in any particular manner) when issuing TILs and LOCs. The Bureau has no general rulemaking authority that allows it to determine how all lenders should underwrite loans. To the contrary, the Bureau's authority is limited to "prevent[ing] 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) (emphasis added).

Thus, where the Bureau has properly determined that an act or practice is unfair or abusive, *see id.* § 5531(c)–(d), the Bureau may prevent lenders from engaging in that practice. The Bureau has not made or supported such a finding with respect to Traditional Loan Products themselves, or with respect to any acts or practices made in connection with the offering and issuance of such loans.

The Bureau has clearly exceeded its statutory authority in mandating that lenders determine ability to repay using its preferred "residual income" test. The Bureau has no basis for using its UDAAP authority to mandate this extremely burdensome and restrictive method of underwriting. The Bureau has not—and cannot—demonstrate that all other underwriting approaches are necessarily unfair or abusive. For example, the Bureau does not require credit card issuers and mortgage lenders to make an ability to repay determination based on "residual income"; those lenders can instead consider, among other things, the consumer's debt-to-income ratio. Similarly, the Proposed Rule prohibits a lender from relying solely on a consumer's statement regarding her income, and instead requires the lender to verify that the stated income is correct. The Bureau has not—and cannot—demonstrate that all underwriting approaches that rely on a consumer's statement of income are necessarily unfair or abusive. Once again, the Bureau permits credit card issuers to rely on the consumer's statement of income and does not require verification of those statements.

The Proposed Rule acknowledges that many lenders engage in "substantial underwriting" in issuing Traditional Loan Products. 81 Fed. Reg. 47987 n.655. The Bureau does not explain why these underwriting methods are unfair or abusive, and yet nevertheless would require these lenders to change their underwriting practices to conform to the Bureau's preferred "residual income" approach. This failure to consider other less restrictive underwriting methods is arbitrary and capricious.

E. The Proposed Rule Is Contrary To The Bureau's Statutory Purpose.

In addition to the specific deficiencies noted above, the Proposed Rule is also contrary to law because it would undermine one of the Bureau's core purposes: to "ensur[e] that all consumers have access to markets for consumer financial products and services." 12 U.S.C. § 5511(a). The Proposed Rule directly and substantially frustrates that purpose because it will restrict—or in many cases eliminate altogether—access to two sources of credit that consumers have long relied upon: TILs and LOCs. *See, e.g.*, AFSA Comments at Sections II–V & X (explaining that the Proposed Rule's underwriting, reporting, and other requirements will be "almost impossible to meet" and will cause many lenders to exit the market); ABA Comments at Section V (explaining how the Proposed Rule will force most banks to stop offering Traditional Loan Products and discourage banks from designing new small dollar loan products). A regulation so at odds with Congress's stated purposes cannot withstand APA review. *See, e.g.*, *Envtl. Def. Fund v. EPA*, 852 F.2d 1316, 1328–29 (D.C. Cir. 1988); *see also New York State Dept. of Social Servs. v. Dublino*, 413 U.S. 405, 419–420, (1973) ("We cannot interpret federal statutes to negate their own stated purposes.").

It is true that the Dodd-Frank Act also charges the Bureau with ensuring that "markets for consumer financial products and services are fair, transparent, and competitive." 12 U.S.C. § 5511(a).[2] But "no legislation pursues its purposes at all costs," *CTS Corp. v. Waldburger*, 134 S. Ct. 2175, 2185 (2014) (quotation marks and citation omitted), and the Act's transparency and fairness goals must be balanced against the additional credit-access goals described above, *see King v. Burwell*, 135 S.Ct. 2480, 2489 (2015) (courts and agencies "must read the words" of a statute "in their context and with a view to their place in the overall statutory scheme"). The Bureau therefore may not adopt regulations that focus exclusively on perceived fairness and transparency concerns. The Proposed Rule is invalid because it does just that, without effectuating Congress's goal of ensuring that <u>all</u> consumers also have adequate access to consumer financial products and services. *See Util. Air Regulatory Grp. v. EPA*, 134 S. Ct. 2427, 2446 (2014)

[2] The Proposed Rule is devoid of any indication that the market for Traditional Loan Products is not fair, transparent, or competitive.

(reaffirming "the core administrative-law principle that an agency may not rewrite clear statutory terms to suit its own sense of how the statute should operate").

II. The Proposed Rule Is Arbitrary, Capricious, And Contrary To Law.

In addition to respecting the limitations on their statutory authority, agencies must also engage in reasoned decisionmaking. *See, e.g.*, *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2125 (2016) ("One of the basic procedural requirements of administrative rulemaking is that an agency must give adequate reasons for its decisions."); *State Farm*, 463 U.S. at 43, 52. The Proposed Rule fails this fundamental requirement in multiple respects. Publishing a 1300 page Proposed Rule does not *ipso facto* equate to reasoned decisionmaking.

A. The Proposed Rule Is Not Supported By An Adequate Cost/Benefit Analysis.

The Dodd-Frank Act permits the Bureau to issue regulations "as may be necessary or appropriate to enable the Bureau to administer and carry out the purposes and objectives of the Federal consumer financial protection laws, and to prevent evasions thereof." 12 U.S.C. § 5512(b)(1) (emphasis added). As the Supreme Court recently held in *Michigan v. EPA*, 135 S.Ct. 2699, 2706–07 (2015), statutes that use the term "appropriate" impose an implicit requirement to assess a rule's costs and benefits.[3]

The Dodd-Frank Act provides specific guidance regarding the kind of cost-benefit analysis that the Bureau must undertake. In particular, the Bureau "shall consider (i) the potential benefits and costs to consumers and covered persons, including the potential reduction of access by consumers to consumer financial products or services resulting from such rule; and (ii) the impact of proposed rules on covered persons . . . and the impact on consumers in rural areas." 12 U.S.C. § 5512(b)(2)(A).

The Proposed Rule is arbitrary and capricious because it fails to conduct such an analysis with respect to Traditional Loan Products. Missing entirely from the Proposed Rule is evidence to suggest that Traditional Loan Products harm consumers. Even if there were evidence of harm, the Bureau never explains how the Proposed Rule would address the purported harm, or whether the Proposed Rule's perceived benefits outweigh its substantial (and presently unacknowledged) costs in terms of consumer access to safe, legal means of small-dollar credit. Unless the Bureau quantifies and seriously evaluates the Proposed Rule's effect on credit availability for consumers (particularly those who are unbanked and under-banked), it cannot ensure that the Rule's benefits

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[3] Specifically, the Court held in *Michigan* that "'appropriate' is the classic broad and all-encompassing term that naturally and traditionally includes consideration of all the relevant factors"—including whether a rule's costs are justified by its benefits. 135 S. Ct. at 2707 (quotation marks omitted). "Agencies have long treated cost as a centrally relevant factor when deciding whether to regulate," because "[c]onsideration of cost reflects the understanding that reasonable regulation ordinarily requires paying attention to the advantages and the disadvantages of agency decisions." *Id.*; *see also State Farm*, 463 U.S. at 54 ("The agency was correct to look at the costs as well as the benefits" of its rule.).

justify its costs. The Bureau's failure to conduct these statutorily mandated aspects of the cost-benefit analysis renders the Proposed Rule arbitrary and capricious. *See, e.g.*, *Bus. Roundtable v. SEC*, 647 F.3d 1144, 1148–49 (D.C. Cir. 2011).

The Proposed Rule's consideration of costs and benefits also fails in several other respects. First, the Proposed Rule inadequately considers the benefits that Traditional Loan Products offer in terms of consumer welfare. Second, the purported benefits of rule—elimination of harms caused by payday and title pawn re-borrowing—are entirely speculative. This is particularly so given the Bureau's failure to distinguish "repeat re-borrowing" that results in a "cycle of debt" from "refinancing" associated with Traditional Loan Products, which does not present the same consequences for consumers. *See* AFSA Comments at Section X. Third, the Proposed Rule fails to consider the consequences that will result when consumers are forced to turn to riskier and more costly forms of credit—including nonpayment of bills or illegal loan sharks. Fourth, the Proposed Rule fails to comprehend that its burdensome underwriting, reporting, and other requirements will make it uneconomical for lenders to continue to provide small-dollar, covered TILs and LOCs—thus substantially reducing consumers' access to safe, smaller-dollar loan products. For example, the Proposed Rule has significantly understated the costs to lenders to modify their computer systems to make small dollar loans and to comply with the verification and other requirements to make an individual loan. *See* ABA Comments at Section VI (contrasting Proposed Rule's unsupported cost figures with cost data ABA obtained from its member banks). The Proposed Rule also fails to explain why the cost associated with requiring lenders to integrate with all registered information systems is justified by the benefits of that practice. *See, e.g.*, AFSA Comments at Section X. Fifth, the Proposed Rule does not adequately consider the effect that it will have on rural consumers, who often have less overall access to small-dollar credit, as well as access to fewer types of small-dollar credit.[4]

B. The Proposed Rule Violates The Regulatory Flexibility Act.

The Bureau must prepare a regulatory flexibility analysis because the Proposed Rule will have a significant economic impact on "small entities"—i.e., businesses that are "independently owned and operated and which [are] not dominant in [their] field of operation." *See* 5 U.S.C. §§ 601(3), (6), 603(a), 604(a)(4)–(6), 15 U.S.C. § 632(a)(1).

The initial regulatory flexibility analysis must describe "any projected increase in the cost of credit for small entities," as well as "any significant alternatives to the proposed rule which accomplish the stated objectives of applicable statutes and which minimize any significant economic impact of the proposed rule on small entities." 5 U.S.C. § 603(d)(1); *see also id.* § 603(b), (c) (setting forth further requirements). And the final regulatory flexibility analysis must contain "a description of the steps the agency has taken to minimize the significant economic impact on small entities consistent with the stated objectives of applicable statutes, including a

[4] The Proposed Rule concludes that rural consumers will experience a "greater reduction in the physical availability of covered short-term loans made through storefronts" than consumers in urban areas, 81 Fed. Reg. at 48,150, but does not determine whether rural consumers will continue to have adequate access to safe and legal small-dollar loans once the Proposed Rule's provisions are in effect.

statement of the factual, policy, and legal reasons for selecting the alternative adopted in the final rule and why each one of the other significant alternatives to the rule considered by the agency which affect the impact on small entities was rejected." *Id.* § 604(a)(6); *see also id.* § 604(a)(1)–(6) (imposing additional requirements).

Although the Proposed Rule contains an initial regulatory flexibility analysis, *see* 81 Fed. Reg. at 48,150–48,166, that analysis fails to meet several of the Regulatory Flexibility Act's requirements. In particular, the Bureau's initial analysis falls short in the following respects:

- <u>Reporting Requirements</u>. The Proposed Rule would force lenders to make a substantial investment in automated systems to report consumer information. Although the Bureau acknowledges that small businesses will have to develop procedures to comply with the proposed rule, it does not "describe" these procedures or outline what small businesses must do to develop these procedures, including consulting with lawyers, vendors, and navigating through the complexity of the rule—as required by the Regulatory Flexibility Act. Further, the Proposed Rule severely underestimates the amount of time it will take employees to comply with its reporting procedures.

- <u>Recordkeeping Requirements</u>. The Proposed Rule does not identify any costs associated with the 36-month retention period. *See* 81 Fed. Reg. at 48,105–48,106. Those costs are significant. Even if a lender maintains records electronically, it will incur substantial additional costs in developing a document retention policy, obtaining additional computer storage space to maintain the documents, programming the computer system to keep the documents for 36 months and then delete them, training employees to comply with the recordkeeping requirements, and monitoring the implementation of these new procedures. Despite these significant costs, the Bureau's initial regulatory flexibility analysis fails to account for the cost of the new recordkeeping requirements.

- <u>Time to Review Verification Evidence</u>. The Proposed Rule estimates that it will take three to five minutes for an employee to review loan-verification evidence to ensure that it is complete and complies with the ability-to-repay requirements. That estimate is grossly understated; the Proposed Rule is complex and would require a substantial amount of documentation from loan applicants. Employees who are charged with reviewing verification materials will need adequate time to ensure that all required information is in the consumer's file, and that review process will take well in excess of the three to five minutes estimated by the Bureau.

- <u>Time to Make Ability-To-Repay Decisions</u>. The Proposed Rule's estimates that it will only take 10 minutes for manual decisions and no time at all for automated ability-to-repay determinations are unreasonable. In reality, it will take an employee much longer than 10 minutes to comply with the Proposed Rule's ability-to-repay requirements. For lenders who have a subjective or partially-subjective decisionmaking process, the employee must discuss what is required with the applicant, answer the applicant's questions, assist the applicant in obtaining documentation from employers and others, compile the information, ensure the information is complete, and then review the completed information to determine ability to repay. Even for those small businesses that use an automated underwriting system, employees would still be required to monitor the system and ensure that it is functioning appropriately. The Proposed Rule fails to consider these monitoring costs, as well as other costs necessary to create, maintain, and monitor a properly functioning ability-to-repay decisionmaking system.[5]

- <u>Reliance on Attorneys and Vendors as Cost-Savers</u>. In acknowledging that making ability-to-repay determinations will be a challenge for small entities, the Proposed Rule emphasizes that vendors and law firms can offer "products and guidance," 81 Fed. Reg. at 48,120, which may reduce the cost of compliance. This description of costs is unreasonable: attorneys and vendors will cost small businesses money. It is unclear why the Bureau refers to attorneys and vendors as cost-savers when they are really additional costs that should be described in the regulatory flexibility analysis.

- <u>Other Cost Determinations</u>. Although the Proposed Rule estimates that employees will require only 4.5 hours of initial training and 2.25 hours of periodic ongoing training per year to comply with the ability-to-repay requirements, *see* 81 Fed. Reg. at 48,157, those estimates are far too low given the Proposed Rule's complexity.

- <u>Limitations on Refinancing</u>. The Proposed Rule does not describe the costs associated with developing a system with the capacity to detect when the applicant has taken out recent covered loans, nor does it describe the costs associated with employee wages needed to create, operate, and monitor such a system.

- <u>Limitation on Payment Withdrawal Attempts</u>. Small businesses collect payments directly from borrower accounts for security reasons, and for the borrower's convenience. Account access also enables small businesses to lend to borrowers who might not otherwise have access to credit. Contrary to the Bureau's assumptions, small businesses do not currently have the capability to track two failed withdrawal attempts from consumer accounts. *See* 81 Fed. Reg. at 47,866. Small businesses will have to develop, monitor, and maintain such systems. The Bureau's initial regulatory flexibility analysis is deficient because it fails to describe or account for those costs.

- <u>Differing Compliance or Reporting Requirements or Timetables for Small Entities and Similar Matters</u>. Although the Regulatory Flexibility Act requires agencies to consider "the establishment of differing compliance or reporting requirements or timetables that take into account the resources available to small entities," 5 U.S.C. 603(c)(1), the Bureau's initial regulatory flexibility analysis fails to do so. The Bureau committed the

[5] The same is true for systems designed to ensure compliance with alternatives to the Proposed Rule's ability-to-repay requirement.

same error with respect to similar requirements set forth in 5 U.S.C. §§ 603(c)(2)–(3), 603(d)(1)(A).

- The Bureau Identifies, But Does Not Describe Several of the Proposed Rule's Costs. Although the initial regulatory flexibility analysis pays lip service to the Bureau's obligations under the Regulatory Flexibility Act by "identifying" several classes of costs and burdens, the analysis is deficient because identification is not enough. The Regulatory Flexibility Act requires agencies to describe the impact of these costs and burdens as a means of showing that the agency has taken them into account in fashioning the rule. *See, e.g.*, 5 U.S.C. §§ 603(a) (agency "shall describe the impact of the proposed rule on small entities" (emphasis added)). The Proposed Rule has not done so.

- Business Risks and Lost Revenue. The initial regulatory flexibility analysis fails adequately to consider the practical effect the Proposed Rule will have on small lenders on a day-to-day basis. Among other things, the analysis omits any discussion of revenue losses that will result from prohibitions on issuing certain covered small-dollar loans (e.g., because a consumer fails the ability-to-repay criteria, is unable to furnish documentation sufficient to satisfy those criteria, or has an outstanding covered loan).

- Required Notices. The Proposed Rule underestimates the amount of employee and training time that will be required to ensure that lenders send appropriate notices to consumers, as well as the cost associated with developing procedures to ensure that such notices are sent in a timely, accurate fashion. For lenders without complex automated systems, several hours of employee time will be required. For lenders with more sophisticated systems, the Proposed Rule fails to address the substantial programming time, testing time, training time, monitoring time, and stationary and postage costs that will be incurred.

- Duplicate and Overlapping Regulations. Although the Regulatory Flexibility Act requires agencies to identify federal rules "which may duplicate, overlap or conflict with the proposed rule," 5 U.S.C. § 603(b)(5), the Proposed Rule fails to identify E-SIGN and ECOA/Regulation B as duplicate or overlapping rules. This omission is improper. The Proposed Rule conflicts with E-SIGN and Regulation E because it adopts a different and new definition for consumer consent to receive electronic disclosures. Likewise, the Proposed Rule conflicts with ECOA because it does not permit lenders to consider household income or expenses in making an ability-to-repay determination

The Proposed Rule also violates the requirements of the Small Business Regulatory Enforcement Fairness Act ("SBREFA"). Prior to publishing the initial regulatory flexibility analysis, the Bureau was required to consult with small business owners, convene a panel with the Small Business Administration and Office of Management and Budget (OMB) and produce a report. *See, e.g.*, 5 U.S.C. §§ 609(b)(2), (b)(4)–(6). The Bureau did not properly conduct this mandatory consultation process.

In particular, the Bureau did not heed the detailed feedback provided by small entity representatives ("SERs") regarding the Proposed Rule's negative effects. SERs explained that the Proposed Rule would affect small businesses by increasing operating costs, reducing the ability to provide credit to consumers, and even forcing businesses to close—ultimately harming customers, employees, and communities. For example, based on experience complying with state laws in Virginia, North Carolina, South Carolina, Georgia, Florida, Kentucky, Ohio, Michigan, Colorado, Oregon, Utah, and Washington, SERs noted that:

- The Proposed Rule's requirements to (i) collect and verify documents as part of an ability-to-repay analysis (including for loan applications ultimately rejected), (ii) train employees in the Rule's complexities, and (iii) implement new hardware and software for underwriting and loan reporting, would dramatically increase the costs associated with issuing TILs and LOCs.

- The Proposed Rule's prescriptive ability-to-repay requirements would confuse and frustrate customers and significantly increase transaction times, driving customers to less scrupulous lenders.

- NCUA-type loans have proven to be unprofitable for small businesses that have made them in the past, and therefore are not a serious "alternative" to an ability-to-repay determination.

The Proposed Rule similarly overlooked substantial alternatives offered by SERs during the SBREFA process.[6] These alternatives included:

- Allowing lenders to consider a borrower's ability to repay using less prescriptive means. Returning customers that have borrowed and repaid loans in the past, for example, have already demonstrated their ability to repay several times over. Customers that need money for emergencies should also not be shut out from obtaining credit due to rigid underwriting requirements. The Bureau could adopt an alternative to the ability-to-repay requirements based, for example, on a payment-to-income standard.

- Recognizing other consumer safeguards. State law, NACHA requirements, and trade association best practices have transformed loan underwriting for the better in recent years, without any need for a prescriptive ability-to-repay requirement. The Bureau must take these improvements into account when fashioning the final rule.

- Streamlining the requirements for reporting the use of covered loans to consumer reporting agencies. Although Traditional Loan Product providers have relationships with credit-reporting bureaus, the Proposed Rule would take the unprecedented step of requiring lenders to integrate with all registered information systems. This mandate will

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[6] *See* Final Report of the Small Business Review Panel on CFPB Rulemaking on Payday, Vehicle Title, and Similar Loans (June 25, 2015), *available at* http://www.consumerfinance.gov/policy-compliance/rulemaking/small-business-review-panels/payday-vehicle-title-and-similar-loans/.

necessitate significant expenditures of time and money by lenders without producing any apparent benefit, and will lead many lenders to exit the market for covered Traditional Loan Products entirely.

C. The Proposed Rule Violates The Paperwork Reduction Act.

The Paperwork Reduction Act requires agencies to obtain OMB approval before conducting a "collection of information"—i.e., "obtaining, causing to be obtained, soliciting, or requiring the disclosure to third parties or the public, of facts or opinions by or for an agency." 44 U.S.C. § 3502(3); 5 C.F.R. § 1320.3(c). The Proposed Rule is subject to such approval because it would require lenders to obtain and retain significant volumes of personal financial information from borrowers, and to report loan information to third-party credit bureaus.

To obtain OMB approval, the Bureau first must publish a notice in the Federal Register describing the "collection of information" and allow the public 60 days to comment. 5 C.F.R. § 1320.8(d). After reviewing and incorporating the comments from the first notice, the agency must publish a second Federal Register notice and provide a 30-day comment period, after which OMB has 60 days to approve or deny the collection of information. 5 C.F.R. § 1320.11.

The purpose of the Paperwork Reduction Act is to ensure that collections of information to fill a legitimate regulatory purpose, so as not to burden commercial enterprises with unnecessary "red tape." In this case, much of the paperwork burden—in particular, the collection and verification of income and debt information—serves no legitimate purpose, and will not advance the stated goal of ensuring ability to repay. Accordingly, the Proposed Rule's data collection and retention mandates are unlawful and must not be approved.

Sincerely,

American Bankers Association

American Financial Services Association

Consumer Bankers Association

CONSUMER BANKERS ASSOCIATION

1225 Eye Street, NW, Suite 550 Washington, DC 20005

www.consumerbankers.com

Small Business Loan Data Collection

Background

Section 1071 of the Dodd-Frank Act requires data collection on business loan applications to help monitor compliance with fair lending laws and identify development needs and opportunities for small, minority-owned, and women-owned businesses. Under this new statute, financial institutions must inquire whether business loan applicants represent a small, minority-owned, or women-owned business. Financial institutions are then required to maintain records of such information and annually submit the information to the Consumer Financial Protection Bureau (CFPB) for public release. The CFPB, which is tasked with writing a rule to implement Section 1071, is provided considerable flexibility in the statute to establish the requirements, define the scope, provide for exemptions and protect the privacy of individuals.

Data collection would stifle lending, increase costs and duplicate current law

The potential for overly burdensome data collection requirements could stifle small business lending, greatly increase compliance costs for small business lenders, open the door to costly litigation, and duplicate existing law. Lenders will need to revamp lending systems and processes in order to collect the required data, adding cost to compliance. The net result will limit the resources banks have to make loans and add greatly to compliance burdens and risks, a negative for small business lending. Additionally, Section 1071 is duplicative of existing laws. For example, the CFPB has primary responsibility for supervision and enforcement of the Equal Credit Opportunity Act, which prohibits discrimination in both consumer and commercial credit transactions.

Complexity of Data Collection

Small business data collection is not as simple as data collection efforts undertaken on other lending products, such as mortgages under the Home Mortgage Disclosure Act (HMDA). Small business lending takes many forms and the comparison of this data for fair lending analyses will be infinitely more complex than that used for HMDA reporting. Under Section 1071, the CFPB is likely to publish data that is difficult to compare and susceptible to fair lending distortions.

BUSINESS LENDING *Comparing Apples to Oranges*	RESIDENTIAL LENDING *Comparing Apples to Apples*
Small business loans come in many variations. Ex: lines of credit vs. closed-end installment loans, secured vs. unsecured, etc.	**Mortgage loans are similar in nature.** Ex: 30 or 15 year loans secured by the dwelling.
Loans can involve a variety of applicants. Ex: sole proprietors, limited liability companies/partnerships, Chapter S corporations, complex corporations, partnerships, nonprofits, trusts, etc.	**Homebuyers are the applicants.**
Loans are often renewals instead of new loans. This may not lead to useful data for comparison purposes.	**New loans** (absent home equity lines and loans).

Solution

CBA institutions want to ensure their small business customers have access to the credit they need to keep their businesses up and running. The only way to ensure the CFPB's rulemaking does not stymie small business lending is to repeal Section 1071.

- House bill in the 114th Congress: H.R.1766, The Right to Lend Act of 2015

APPENDIX H

CONSUMER BANKERS ASSOCIATION

Business Data Collection Requirements Summary

Section 1071 of Dodd-Frank Wall Street Reform and Consumer Protection Act:
This section amends the Equal Credit Opportunity Act (ECOA) to create a HMDA-like set of requirements for small business credit applications.

In brief, every financial institution (broadly defined in the section) will have to inquire of any business applying for credit whether the business is a small business, or a women- or minority-owned business, maintain a record of the information separate from the application, and report the information along with related information about the application (location of business, action taken, amount of credit provided, etc.), annually to the CFPB. The lender will have to have a firewall between the person collecting the information and the person making the credit decision.

The request will have to be made for any commercial loan, presumably to include business credit cards.

The information must be made public on request in a manner to be established by regulation, and will be made public annually by the Bureau. The Bureau is given considerable flexibility to establish the requirements, define the scope, provide for exemptions, and protect the privacy of individuals.

Information that must be recorded:
Each institution must compile and maintain, in accordance with regulations of the Bureau, a record of the information provided pursuant to a request. The information in the record must be itemized to disclose:
(A) the number of the application and the date it was received;
(B) the type and purpose of the credit being applied for;
(C) the amount of credit or credit limit applied for, and the amount approved;
(D) the type of action taken and the date action was taken;
(E) the census tract of the principal place of business of the applicant;
(F) the gross annual revenue of the previous fiscal year of the applicant;
(G) the race, sex, and ethnicity of the "principal owners" of the business; and
(H) any other information required by Bureau to fulfill the purposes of this section.

Public availability of record:
The financial institution must make the information public upon request, and the CFPB must make the information public annually, in a form required by regulation. The Bureau may, at its discretion, compile and annotate data collected for its own use, and make public such compilations of aggregate data.

Minority- or women-owned business defined:
Minority-owned (or women-owned) business means a business more than 50 percent of the ownership or control of which is held by one or more minority individuals (or women); and more than 50 percent of the net profit or loss of which accrues to one or more minority individuals (or women).

Definitions:
"Small business" has the same meaning as the term "small business concern" in section 3 of the Small Business Act (15 USC 1632).
"Minority" has the same meaning as in section 1204(c)(3) of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989.

Effective date:
This section becomes effective once the CFPB promulgates a rule and determines an effective date. We do not expect a rule to be proposed until late 2017, at the earliest, but the CFPB may begin some information gathering earlier.

Concerns:
Our concerns with section 1071 are many, but include the following:

- The provisions of Section 1071 are convoluted, will be difficult to administer, and will add greatly to compliance costs. All of which will reduce loans to businesses of all sizes.

- Additional compliance and reporting requirements cost money to implement and maintain. Banks will have to raise prices in other areas to maintain profitability if they wish to continue making commercial loans. Smaller (less profitable) loan options for small businesses may disappear altogether if the sector is no longer economically viable.

- Banks that remain in the market will have to develop standardized criteria for small business loans. If a business doesn't meet the standardized criteria, it will not get a loan, even if the business could have received a loan prior to the implementation of Section 1071.

APPENDIX I

I

114TH CONGRESS
1ST SESSION

H. R. 1766

To amend the Equal Credit Opportunity Act to repeal a small business loan data collection requirement.

IN THE HOUSE OF REPRESENTATIVES

APRIL 14, 2015

Mr. PITTENGER introduced the following bill; which was referred to the Committee on Financial Services

A BILL

To amend the Equal Credit Opportunity Act to repeal a small business loan data collection requirement.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the "Right to Lend Act of 2015".

SEC. 2. SMALL BUSINESS LOAN DATA COLLECTION REQUIREMENT.

(a) REPEAL.—Section 704B of the Equal Credit Opportunity Act (15 U.S.C. 1691c–2) is repealed.

(b) CONFORMING AMENDMENTS.—Section 701(b) of the Equal Credit Opportunity Act (15 U.S.C. 1691(b)) is amended—

(1) in paragraph (3), by inserting ''or'' at the end;

(2) in paragraph (4), by striking ''; or'' and inserting a period; and

(3) by striking paragraph (5).

(c) CLERICAL AMENDMENT.—The table of sections for title VII of the Consumer Credit Protection Act is amended by striking the item relating to section 704B.

○

APPENDIX J

CONSUMER BANKERS ASSOCIATION

November 30, 2016

The Honorable Paul Ryan
Speaker
U.S. House of Representatives
H-232, U.S. Capitol
Washington, D.C. 20515

The Honorable Nancy Pelosi
Minority Leader
U.S. House of Representatives
H-204, U.S. Capitol
Washington, D.C. 20515

Dear Speaker Ryan and Leader Pelosi,

On behalf of the Consumer Bankers Association (CBA) I write in support of H.R. 6392, the "Systemic Risk Designation Improvement Act of 2016," sponsored by Representative Blaine Luetkemeyer (R-MO). CBA is the voice of the retail banking industry whose products and services provide access to credit for consumers and small businesses. Our members operate in all 50 states, serve more than 150 million Americans, and collectively hold two-thirds of the country's total depository assets.

Currently, the Dodd-Frank Act designates a financial institution as systemically important by an arbitrary $50 billion asset threshold. This approach is a flawed measurement tool used by the Financial Stability Oversight Council (FSOC) to assess the risk an institution poses to the American financial infrastructure. H.R. 6392 appropriately changes the method used to determine if banks are "systemically important" by evaluating the complexity, scale, and activities of the individual institution.

Requiring FSOC to evaluate a number of factors, beyond asset size, will provide a more accurate risk profile of the bank and depiction as to whether an institution could be declared systemically important. CBA supports passage of H.R. 6392 and encourages Members to vote in favor of this legislation.

Sincerely,

Richard Hunt
President and CEO
Consumer Bankers Association

cc: The Honorable Jeb Hensarling, Chairman, House Financial Services Committee
The Honorable Maxine Waters, Ranking Member, House Financial Services Committee
Members of the House of Representatives

APPENDIX K

114TH CONGRESS
2D SESSION

H. R. 6392

IN THE SENATE OF THE UNITED STATES

DECEMBER 5, 2016
Received

AN ACT

To amend the Dodd-Frank Wall Street Reform and Consumer Protection Act to specify when bank holding companies may be subject to certain enhanced supervision, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the "Systemic Risk Designation Improvement Act of 2016".

SEC. 2. TABLE OF CONTENTS.

The table of contents for the Dodd-Frank Wall Street Reform and Consumer Protection Act (12 U.S.C. 5301 et seq.) is amended by striking the item relating to section 113 and inserting the following:

SEC. 3. REVISIONS TO COUNCIL AUTHORITY.

(a) PURPOSES AND DUTIES.—Section 112 of the Dodd-Frank Wall Street Reform and Consumer Protection Act (12 U.S.C. 5322) is amended in subsection (a)(2)(I) by inserting before the semicolon ", which have been the subject of a final determination under section 113".

(b) BANK HOLDING COMPANY DESIGNATION.—Section 113 of the Dodd-Frank Wall Street Reform and Consumer Protection Act (12 U.S.C. 5323) is amended—

(1) by amending the heading for such section to read as follows: "**AUTHORITY TO REQUIRE ENHANCED SUPERVISION AND REGULATION OF CERTAIN NONBANK FINANCIAL COMPANIES AND CERTAIN BANK HOLDING COMPANIES**";

(2) by redesignating subsections (c), (d), (e), (f), (g), (h), and (i) as subsections (d), (e), (f), (g), (h), (i), and (j), respectively;

(3) by inserting after subsection (b) the following:

"(c) BANK HOLDING COMPANIES SUBJECT TO ENHANCED SUPERVISION AND PRUDENTIAL STANDARDS UNDER SECTION 165.—

"(1) DETERMINATION.—The Council, on a nondelegable basis and by a vote of not fewer than ⅔ of the voting members then serving, including an affirmative vote by the Chairperson, may determine that a bank holding company shall be subject to enhanced supervision and prudential standards by the Board of Governors, in accordance with section 165, if the Council determines, based on the considerations in paragraph (2), that material financial distress at the bank holding company, or the nature, scope, size, scale, concentration, interconnectedness, or mix of the activities of the bank holding company, could pose a threat to the financial stability of the United States.

"(2) CONSIDERATIONS.—In making a determination under paragraph (1), the Council shall use the indicator-based measurement approach established by the Basel Committee on Banking Supervision to determine systemic importance, which considers—

"(A) the size of the bank holding company;

"(B) the interconnectedness of the bank holding company;

"(C) the extent of readily available substitutes or financial institution infrastructure for the services of the bank holding company;

"(D) the global cross-jurisdictional activity of the bank holding company; and

"(E) the complexity of the bank holding company.

"(3) GSIBS DESIGNATED BY OPERATION OF LAW.—Notwithstanding any other provision of this subsection, a bank holding company that is designated, as of the date of enactment of this subsection, as a Global Systemically Important Bank by the Financial Stability Board shall be deemed to have been the subject of a final determination under paragraph (1).";

(4) in subsection (d), as so redesignated—

(A) in paragraph (1)(A), by striking "subsection (a)(2) or (b)(2)" and inserting "subsection (a)(2), (b)(2), or (c)(2)"; and

(B) in paragraph (4), by striking ‘‘Subsections (d) through (h)’’ and inserting ‘‘Subsections (e) through (i)’’;

(5) in subsections (e), (f), (g), (h), (i), and (j)—

(A) by striking ‘‘subsections (a) and (b)’’ each place such term appears and inserting ‘‘subsections (a), (b), and (c)’’; and

(B) by striking ‘‘nonbank financial company’’ each place such term appears and inserting ‘‘bank holding company for which there has been a determination under subsection (c) or nonbank financial company’’;

(6) in subsection (g), as so redesignated, by striking ‘‘subsection (e)’’ and inserting ‘‘subsection (f)’’;

(7) in subsection (h), as so redesignated, by striking ‘‘subsection (a), (b), or (c)’’ and inserting ‘‘subsection (a), (b), (c), or (d)’’; and

(8) in subsection (i), as so redesignated, by striking ‘‘subsection (d)(2), (e)(3), or (f)(5)’’ and inserting ‘‘subsection (e)(2), (f)(3), or (g)(5)’’.

(c) ENHANCED SUPERVISION.—Section 115 of the Dodd-Frank Wall Street Reform and Consumer Protection Act (12 U.S.C. 5325) is amended—

(1) in subsection (a)(1), by striking ''large, interconnected bank holding companies'' and inserting ''bank holding companies which have been the subject of a final determination under section 113'';

(2) in subsection (a)(2)—

(A) in subparagraph (A), by striking ''; or'' at the end and inserting a period;

(B) by striking ''the Council may'' and all that follows through ''differentiate'' and inserting ''the Council may differentiate''; and

(C) by striking subparagraph (B); and

(3) in subsection (b)(3), by striking ''subsections (a) and (b) of section 113'' each place such term appears and inserting ''subsections (a), (b), and (c) of section 113''.

(d) REPORTS.—Section 116(a) of the Dodd-Frank Wall Street Reform and Consumer Protection Act (12 U.S.C. 5326(a)) is amended by striking ''with total consolidated assets of $50,000,000,000 or greater'' and inserting ''which has been the subject of a final determination under section 113''.

(e) MITIGATION.—Section 121 of the Dodd-Frank Wall Street Reform and Consumer Protection Act (12 U.S.C. 5331) is amended—

(1) in subsection (a), by striking "with total consolidated assets of $50,000,000,000 or more" and inserting "which has been the subject of a final determination under section 113"; and

(2) in subsection (c), by striking "subsection (a) or (b) of section 113" and inserting "subsection (a), (b), or (c) of section 113".

(f) OFFICE OF FINANCIAL RESEARCH.—Section 155 of the Dodd-Frank Wall Street Reform and Consumer Protection Act (12 U.S.C. 5345) is amended in subsection (d) by striking "with total consolidated assets of 50,000,000,000 or greater" and inserting "which have been the subject of a final determination under section 113".

SEC. 4. REVISIONS TO BOARD AUTHORITY.

(a) ACQUISITIONS.—Section 163 of the Dodd-Frank Wall Street Reform and Consumer Protection Act (12 U.S.C. 5363) is amended by striking "with total consolidated assets equal to or greater than $50,000,000,000" each place such term appears and inserting "which has been the subject of a final determination under section 113".

(b) MANAGEMENT INTERLOCKS.—Section 164 of the Dodd-Frank Wall Street Reform and Consumer Protection Act (12 U.S.C. 5364) is amended by striking "with total consolidated assets equal to or greater than $50,000,000,000'' and inserting ''which has been the subject of a final determination under section 113''.

(c) ENHANCED SUPERVISION AND PRUDENTIAL STANDARDS.—Section 165 of the Dodd-Frank Wall Street Reform and Consumer Protection Act (12 U.S.C. 5365) is amended—

(1) in subsection (a), by striking ''with total consolidated assets equal to or greater than $50,000,000,000'' and inserting ''which have been the subject of a final determination under section 113'';

(2) in subsection (a)(2)—

(A) by striking ''(A) IN GENERAL.—''; and

(B) by striking subparagraph (B);

(3) by striking ''subsections (a) and (b) of section 113'' each place such term appears and inserting ''subsections (a), (b), and (c) of section 113''; and

(4) in subsection (j), by striking ''with total consolidated assets equal to or greater than $50,000,000,000'' and inserting ''which has been the subject of a final determination under section 113''.

(d) CONFORMING AMENDMENT.—The second subsection (s) (relating to ''Assessments, Fees, and Other Charges for Certain Companies'') of section 11 of the Federal Reserve Act (12 U.S.C. 248) is amended—

(1) by redesignating such subsection as subsection (t); and

(2) in paragraph (2)—

(A) in subparagraph (A), by striking ''having total consolidated assets of $50,000,000,000 or more;'' and inserting ''which have been the subject of a final determination under section 113 of the Dodd-Frank Wall Street Reform and Consumer Protection Act; and'';

(B) by striking subparagraph (B); and

(C) by redesignating subparagraph (C) as subparagraph (B).

SEC. 5. EFFECTIVE DATE; RULE OF APPLICATION.

(a) EFFECTIVE DATE.—The Financial Stability Oversight Council may begin proceedings with respect to a bank holding company under section 113(c)(1) of the Dodd-Frank Wall Street Reform and Consumer Protection Act, as added by this Act, on the date of the enactment of this Act, but may not make a final determination under such section 113(c)(1) with respect to a bank holding company before the end of the 1-year period beginning on the date of the enactment of this Act.

(b) IMMEDIATE APPLICATION TO LARGE BANK HOLDING COMPANIES.—During the 1-year period described under subsection (a), a bank holding company with total consolidated assets equal to or greater than $50,000,000,000 shall be deemed to have been the subject of a final determination under section 113(c)(1) of the Dodd-Frank Wall Street Reform and Consumer Protection Act.

SEC. 6. EXISTING ASSESSMENT TERMINATION SCHEDULE.

(a) TEMPORARY EXTENSION OF EXISTING ASSESSMENT.—

(1) IN GENERAL.—Each bank holding company with total consolidated assets equal to or greater than $50,000,000,000 and which has not been the subject of a final determination under section 113 of the Dodd-Frank Wall Street Reform and Consumer Protection Act (12 U.S.C. 5323) shall be subject to assessments by the Secretary of the Treasury to the same extent as a bank holding company that has been subject to such a final determination.

(2) LIMITATION ON AMOUNT OF ASSESSMENTS.—The aggregate amount collected pursuant to paragraph (1) from all bank holding companies

assessed under such paragraph shall be \$115,000,000.

(3) EXPEDITED ASSESSMENTS.—If necessary, the Secretary of the Treasury shall expedite assessments made pursuant to paragraph (1) to ensure that all \$115,000,000 of assessments permitted by paragraph (2) is collected before fiscal year 2018.

(4) PAYMENT PERIOD OPTIONS.—The Secretary of the Treasury shall offer the option of payments spread out before the end of fiscal year 2018, or shorter periods including the option of a one-time payment, at the discretion of each bank holding company paying assessments pursuant to paragraph (1).

(5) ASSESSMENTS TO BE MADE IN ADDITION TO ANY OTHER ASSESSMENTS.—The assessments collected pursuant to paragraph (1) shall be in addition to, and not as a replacement of, any assessments required under any other law.

(b) USE OF ASSESSMENTS.—Of the total amount collected pursuant to subsection (a)—

(1) \$60,000,000 shall be transferred to the Financial Stability Oversight Council to pay for any administrative costs resulting from this Act and the amendments made by this Act, of which the Finan-

cial Stability Oversight Council shall distribute $20,000,000 to the Board of Governors of the Federal Reserve System, $20,000,000 to the Federal Deposit Insurance Corporation, and $20,000,000 to the general fund of the Treasury; and

(2) $55,000,000 shall be transferred to the Federal Deposit Insurance Corporation to pay for any resolution costs resulting from this Act and the amendments made by this Act.

(c) TREATMENT UPON DETERMINATION.—A bank holding company assessed under this section shall no longer be subject to such assessments in the event it is subject to a final determination under section 113 of the Dodd-Frank Wall Street Reform and Consumer Protection Act (12 U.S.C. 5323). Any prior payments made by such a banking holding company pursuant to an assessment under this section shall be nonrefundable.

(d) RULE OF CONSTRUCTION.—A bank holding company deemed to have been the subject of a final determination under section 113 of the Dodd-Frank Wall Street Reform and Consumer Protection Act (12 U.S.C. 5323) under section 5(b) shall not be subject to assessments under subsection (a) solely by operation of section 5(b).

SEC. 7. RULE OF CONSTRUCTION.

Nothing in this Act or the amendments made by this Act may be construed as broadly applying international standards except as specifically provided under paragraphs (2) and (3) of section 113(c) of the Dodd-Frank Wall Street Reform and Consumer Protection Act, as added by section 3.

Passed the House of Representatives December 1, 2016.

Attest: KAREN L. HAAS,

Clerk.