



March 18, 2019

By Electronic Delivery

Kathleen Kraninger, Director
Bureau of Consumer Financial Protection
1700 G Street, NW
Washington, DC 20006

Re: Payday, Vehicle Title, and Certain High-Cost Installment Loans; Delay of Compliance Date;
Docket No. CFPB–2019–0007 and RIN 3170–AA95

Director Kraninger:

The Clearing House Payments Company¹ (“The Clearing House”) respectfully submits this letter to the Bureau of Consumer Financial Protection (the “Bureau”) in response to the proposal (“Proposal”)² to delay the compliance date of the mandatory underwriting provisions of the Bureau’s regulation governing Payday, Vehicle Title, and Certain High-Cost Installment Loans (“Payday Lending Rule” or “Rule”).³ In particular, the Proposal would delay the Rule’s “Mandatory Underwriting Provisions”⁴ by 15 months, from August 19, 2019 to November 19, 2020. We appreciate the Bureau’s decision to revisit the Mandatory Underwriting Provisions and as further explained in our comments believe there are other aspects of the Rule that also merit reconsideration.

I. Introduction

In addition to the Mandatory Underwriting Provisions, the Payday Lending Rule sets forth requirements regarding certain payment practices. These payment practices include certain notice requirements and a prohibition on a lender’s initiation of “payment transfers”⁵

¹ Since its founding in 1853, The Clearing House has delivered safe and reliable payments systems, facilitated bank-led payments innovation, and provided thought leadership on strategic payments issues. Today, The Clearing House is the only private-sector ACH and wire operator in the United States, clearing and settling nearly \$2 trillion in U.S. dollar payments each day, representing half of all commercial ACH and wire volume. It continues to leverage its unique capabilities to support bank-led innovation, including launching the RTP® network. As the country’s oldest banking trade association, The Clearing House also provides informed advocacy and thought leadership on critical payments-related issues facing financial institutions today. The Clearing House is owned by 24 financial institutions and supports hundreds of banks and credit unions through its core systems and related services.

² Payday, Vehicle Title, and Certain High-Cost Installment Loans; Delay of Compliance Date, 84 Fed. Reg. 4298 (February 14, 2019).

³ 12 C.F.R. Part 1041.

⁴ The Mandatory Underwriting Provisions are comprised of “a set of provisions with respect to the underwriting of covered short-term and longer-term balloon-payment loans, including payday and vehicle title loans, and related reporting and recordkeeping requirements.”

⁵ The Rule defines “payment transfer” broadly to mean “any lender-initiated debit or withdrawal of funds from a consumer’s account for the purpose of collecting any amount due or purported to be due in

after two consecutive payment transfer attempts have failed for insufficient funds, unless the lender obtains a new and specific authorization (“Payment Provisions”).⁶ The Clearing House previously submitted a comment letter regarding the Bureau’s payday lending proposal (“Proposal”)⁷ that highlighted a number of concerns regarding the proposed payment provisions, including that the Bureau had proposed to use its UDAAP authority to prohibit payment practices that are, in most contexts, wholly unobjectionable. The Clearing House recognizes that the Bureau is not proposing to delay the compliance date for the Payment Provisions. However, we continue to have significant concerns regarding the Bureau’s approach to the Payment Provisions, in particular because of the broad scope of loans that fall under the Rule, and because much of the Bureau’s rulemaking is based on abusive practices of non-bank lenders as opposed to the heavily regulated and supervised credit products of depository institutions.

We encourage the Bureau to:

- delay the compliance date for the entire Rule, including the Payment Provisions;
- engage in a separate rulemaking to consider the appropriateness of the application of the Payment Provisions to responsible depository institution credit products; and
- consider other reasonable modifications to the Payment Provisions to eliminate unnecessary complexity and redundancy.

II. Comments

A. Payment Provisions Compliance Date for Depository Institution Credit Products

While The Clearing House has concerns about the Payment Provisions themselves, which are explained below, those concerns are amplified by the overly broad definition of covered loans. As a result of this definition, the Payment Provisions will apply to common depository institution credit products that (i) are not traditional small dollar, high cost “payday

connection with a covered loan” including a signature check, remotely created check, remotely created payment order, and when the lender is also the account-holder, an account-holding institution's transfer of funds from a consumer's account held at the same institution, other than such a transfer subject to the Rule’s “conditional exclusion for certain transfers by account-holding institutions.” 12 C.F.R. § 1041.8(a)(1).

⁶ In addition to the restrictions on payment withdrawal attempts, the Payday Lending Rule requires that a lender provide written notice to the consumer before the first attempt to withdraw payment for a covered loan. Another written notice must be provided if the lender is attempting to make an unusual withdrawal, e.g., on a date other than the regularly scheduled payment date; by a different payment channel or method than the prior payment, or to re-initiate a returned prior transfer.

⁷ Payday, Vehicle Title, and Certain High-Cost Installment Loans; Proposed Rule, 81 Fed. Reg. 141 (July 22, 2016).

loans;” (ii) are not offered to financially vulnerable consumers; and (iii) do not create the consumer harm the Bureau sought to remediate by issuing the Rule.

For example, the definition of “covered short-term loan”⁸ may apply to certain unsecured bridge loans that depository institutions provide to consumers to assist with the purchase and sale of real estate; as well as depository institution products offered to high net worth customers to provide short-term liquidity. The definition of “covered longer-term balloon payment loan”⁹ may apply to certain depository institution loans or credit lines with interest only features, like securities-backed lines of credit and wealth lines. Further, the definition of “covered longer-term loans”¹⁰ may apply to open-end lines of credit in circumstances where there is a fee in a billing cycle where there is a zero or low balance (i.e., resulting in a (i) a finance charge but a zero balance; or (ii) an APR that exceeds 36 percent). On these definition issues, The Clearing House agrees with the comments submitted by the Bank Policy Institute, the Consumer Bankers Association, and the American Bankers Association regarding the Rule’s overly broad application to responsible depository institution lending products.

Further, the Bureau’s UDAAP determination in 12 C.F.R. § 1041.7¹¹ appears to relate to problematic payment collection practices associated with non-bank lenders (online and storefront payday lenders), and not depository institutions collecting payments for their own credit products. As discussed further herein, we do not believe that the Bureau has established that depository institutions’ payment practices with respect to their own credit products, *where consistent with applicable law and industry standards*, are problematic or pose the same types of consumer harm associated with traditional payday lenders subject to the Rule.

The cost and complexity of implementing a compliance program for the Payment Provisions for depository institution products is significant, and will require extensive technological and operational changes¹² that we do not believe are justified in light of the

⁸ 12 C.F.R. § 1041.3(b)(1).

⁹ 12 C.F.R. § 1041.3(b)(2).

¹⁰ 12 C.F.R. § 1041.3(b)(2)(ii).

¹¹ 12 C.F.R. § 1041.7 provides that “[i]t is an unfair and abusive practice for a lender to make attempts to withdraw payment from consumers’ accounts in connection with a covered loan after the lender’s second consecutive attempts to withdraw payments from the accounts from which the prior attempts were made have failed due to a lack of sufficient funds, unless the lender obtains the consumers’ new and specific authorization to make further withdrawals from the accounts.”

¹² With respect to the Payment Provisions in particular, this will include complex systems changes and new processes for delivering notices and obtaining consumer authorizations (on top of those required by existing law). As further explained in our 2016 comments, there are practical limitations to current payment systems, including that the underlying purpose of a payment does not travel with an ACH entry (including when processed as an “on us” transaction) or other conventional payment type, and as a result, depository institutions – without significant technical and systems changes – do not have the ability to distinguish between payments towards covered loans and other payments at the time the payment is processed. We also note that some depository institutions have indicated that the significant costs of compliance with the Payment Provisions may outweigh the benefits of continuing to provide their consumer customers with certain common depository credit products covered by the Rule.

Bureau's findings regarding existing risks to consumers. We urge the Bureau to delay the compliance date for the entire Rule, including the Payment Provisions, to November 19, 2020; and to evaluate the Rule's scope and application to common depository institution credit products.

B. The Bureau's Findings Regarding Consumer Harm and Use of UDAAP Authority

1. The Online Payday Lending Report Does Not Relate to Depository Institution Payment Practices

In the Supplementary Information and explanation of its findings to support the Payday Lending Rule the Bureau refers to lenders' "aggressive and unpredictable payment collection practices" such as:

- "breaking payments into multiple smaller payments and attempting to collect payment multiple times in one day or over a short period of time";¹³
- using multiple or varying names that can make it more difficult for a consumer to stop a payment;¹⁴
- lenders shifting from ACH debits to "other riskier payment methods, such as remotely created checks and debit network transactions that are not governed by the NACHA Rules"¹⁵ or taking steps to evade existing industry limitations on re-presentments (e.g., shifting between payment channels to evade the NACHA rules);¹⁶
- lenders that "explicitly do not allow revocation" of a consumer's authorization;¹⁷ and
- lenders that "may not have obtained proper authorization in the first place."¹⁸

We recognize that bad actors could engage in such payment collection practices that negatively impact financially vulnerable consumers who obtain high cost payday loans. However, these Bureau concerns were identified in the context of non-bank lender payment practices to collect payments on traditional "payday loans," and are not the practices of depository institutions with respect to their own credit products.

In particular, a primary source of information used to determine the harm associated with payday lenders' payment collection practices is the Bureau's Online Payday Lending

¹³ Payday, Vehicle Title, and Certain High-Cost Installment Loans, Fed. Reg. 54472, 54501 (Nov. 17, 2017).

¹⁴ *Id.* at 54727.

¹⁵ *Id.* at 54729.

¹⁶ *Id.* at 54750.

¹⁷ *Id.* at 54726.

¹⁸ *Id.*

Report.¹⁹ This report “use[d] checking account data from several large depository institutions to analyze ACH payment requests by a number of lenders that make (or made) online payday or other high-cost online loans with payments scheduled on a borrower’s payday.” The Bureau relies on this study for the findings underlying its determination that initiating a third payment transfer without obtaining a new, specific authorization from the consumer, is an unfair and abusive practice. This includes data regarding the prevalence of various potential consumer harms, such as NSF and overdraft fees and account closures. The study also provides related data regarding the failure rates of successive payment collection attempts by nonbank payday lenders.

Importantly, the Bureau concedes that this report “was based on online payday and payday installment loans only, and did not include loans by storefronts or depository institutions.”²⁰ Hence, we believe that the Bureau’s determination to extend the Payment Provisions to depository institutions’ credit products and related payment collection practices is not supported by its analysis. The determination requires reconsideration given that the Bureau has not established that depository institutions’ payment practices to collect for their credit products, consistent with applicable law and industry standards, are unfair or abusive; and more specifically, that such practices are unfair or abusive with respect to the types of common depository institution credit products referenced in Section II.A. of this letter.

2. Existing Laws and Industry Standards

We also continue to strongly disagree with the Bureau’s view that existing regulations and industry standards are insufficient with respect to their application to depository institutions’ payment practices.²¹ Concerning Regulation E, the Bureau determined that “merely continuing to enforce Regulation E would not be enough to remedy the harms from the identified practice” under 12 C.F.R. § 1041.7. The Bureau acknowledges that for preauthorized electronic fund transfers, Regulation E requires lenders to obtain written authorization for preauthorized transfers from consumer’s account and requires notices of transfers varying in amount. The Regulation also empowers consumers to stop payments and prohibits lenders from conditioning an extension of credit to a consumer on the consumer’s repayment by preauthorized electronic fund transfers. The Bureau states that “consumers often have difficulty exercising” their rights to stop payment or revoke authorization and states further that “even when entities are in compliance with Regulation E, consumers may not be aware of their rights under that regulation, and may not be able to exercise them quickly enough.”²² While we recognize that the Bureau identified concerns about the sufficiency of Regulation E to protect

¹⁹ Online Payday Lending Report (April 2016), https://files.consumerfinance.gov/f/201604_cfpb_online-payday-loan-payments.pdf.

²⁰ 82 Fed. Reg. 54472, 54722.

²¹ Existing laws and payment network rules require financial institutions to provide robust protections for consumers in connection with electronic payments. Among other things, these tools include the right to stop payment (with respect to preauthorized EFTs under Regulation E, and all consumer debits under the ACH rules) and the right to revoke an originator’s authorization.

²² 82 Fed. Reg. 54472, 54731.

consumers from abusive practices engaged in by certain nonbank payday lenders (e.g., that some lenders “explicitly do not allow revocation” of a consumer’s authorization, or “may not have obtained proper authorization in the first place”), the Bureau has not explained why Regulation E and the related rights it provides consumers regarding transfers from their accounts is insufficient with respect to supervised depository institutions that collect payments for their own credit products.

3. Inappropriate Use of UDAAP Authority

While we recognize the Bureau’s authority to issue regulations to implement its UDAAP authority, we believe that as a policy matter, such authority is best used to prohibit specific “bad acts” (such as “failing to post payments timely or properly or to credit a consumer’s account with payments that the consumer submitted on time and then charging late fees to that consumer”).²³ In contrast to prohibiting bad acts, we are concerned that in establishing the Payment Provisions, the Bureau is inappropriately using its UDAAP authority to dictate how depository institutions must design and provide certain credit products to consumers. The Payment Provisions establish prescriptive, detailed rules for how depository institutions must collect payments for products that consumers demand, including by providing specific notices and complying with certain timing requirements.

C. Additional Concerns Regarding the Payment Provisions

In addition to the overly broad scope of their application (by virtue of the definition of covered loans), there are other problems with the Payment Provisions that we encourage the Bureau to address through a new and separate rulemaking.²⁴ For example, while we applaud the Bureau for establishing the conditional exclusion for certain transfers by account-holding institutions,²⁵ it applies only where the institution “has set forth in the original loan agreement or account agreement that it [i] will not charge the consumer a fee for payment attempts when the account lacks sufficient funds to cover the payment, and ... [ii] will not close the account in response to a negative balance that results from a transfer of funds initiated in connection with the covered loan.”

²³ CFPB Bulletin 2013-07 (July 10, 2013), available at: https://files.consumerfinance.gov/f/201307_cfpb_bulletin_unfair-deceptive-abusive-practices.pdf.

²⁴ In our 2016 comments, The Clearing House urged the Bureau to clarify that depository institutions that provide banking and payment services to nonbank lenders subject to the Rule are not responsible for ensuring compliance with the Rule. We appreciate the Bureau’s statement in the Supplementary Information to the final rule that “[t]he principal obligation to comply” with the Rule “rests on the lender” and that the Bureau did “not intend for this rule to have the effect of changing the obligations of non-lender depository institutions” (e.g., ODFIs that provide ACH services to covered non-bank lenders). We urge the Bureau to add a statement to this effect to the Rule’s official commentary, and to further acknowledge that legacy payment formats (e.g., ACH, check image) are designed to enable clearing and settling of payments and do not allow a depository institution providing services to a covered lender to know whether a particular payment transfer attempt relates to a covered loan or whether it has complied with the Rule’s payment transfer restrictions and notice requirements.

²⁵ 12 C.F.R. 1041.8(a)(1)(ii).

For existing services, account-holding institutions may not have included these specific terms in their original account or loan agreement, even where, as a practical matter, they do not charge such fees or have a policy of closing accounts under the described circumstances. We believe that any institution that (i) has covered products issued prior to the compliance date, and (ii) updates their agreements to include the required terms, should receive the benefit of this exclusion because the consumer harms that the Bureau identified regarding payment withdrawals would not be present.

As another example, we believe that the new and specific authorization, and notice requirements are impracticable under certain circumstances. A key purpose of the Rule is to address a lack of consumer understanding regarding the risks associated with covered loans and payment practices to collect payment on such loans. However, we believe that the framework the Payment Provisions creates may further confuse rather than benefit consumers, particularly in the context of lines of credit offered by depository institutions. These rules include a provision that allows an institution to initiate a “single immediate payment transfer at the consumer’s request” without obtaining a new specific authorization. However, such payment transfers may not be authorized until the earlier of (i) the date on which the lender provides the consumer with the consumer rights notice required by 12 C.F.R. § 1041.9(c) or (ii) the date that the consumer affirmatively contacts the lender to discuss repayment options. This timing requirement could result in the illogical outcome where after two failed payment transfer attempts, a consumer provides the institution a check drawn on the same account to make payment. If this check is provided to the depository institution prior to the consumer’s receipt of the required consumer rights notice, the institution would be unable to utilize the check for payment (either by presenting it through the check collection system or by converting the check to an ACH entry).²⁶

We encourage the Bureau to refine and more appropriately tailor the Payment Provisions. Regardless of the Bureau’s determination regarding the scope of covered loans subject to the Rule, we believe that there are other, less complex approaches that could achieve the same policy goals as intended by the Bureau’s current Payment Provisions that the Bureau should consider through a separate rulemaking. This could include, for example, providing consumers additional flexibility to request a single payment (by providing a check or by authorizing an electronic transfer) without requiring a depository institution to have first provided the required consumer rights notice. This is a reasonable modification to the Payment Provisions that would address the illogical outcome referenced above, while also providing an alternative approach to address the Bureau’s concerns about repeated lender re-presentments.

²⁶ Under such circumstances, the condition in 12 C.F.R. § 1041.8(d)(2) would not be satisfied, and thus the exception permitted under 12 C.F.R. § 1041.8(d) would be unavailable, because the consumer would have authorized the single immediate payment transfer (by providing the check) prior to the date the consumer received the required rights notice.

D. Further Need for Delay

We believe that the Payment Provisions compliance date should be delayed in light of the overly broad scope of covered loans issue discussed in Section A of this letter. However, we note that even if the Bureau does not make any changes to the scope of covered loans, we still believe that depository institutions will need additional time to implement the extensive changes compliance with the Payment Provisions will require. We believe a delay in the compliance date for the Payment Provisions is justified by the Bureau's own statements that it would reconsider the Payday Lending Rule.²⁷ Those statements created significant industry uncertainty and many depository institutions relied upon them when considering the Rule's potential impact and how best to develop compliance programs. In many cases, the Bureau's statements stalled compliance efforts as depository institutions awaited further Bureau actions and Rule modifications. Given the uncertainty the Bureau's announcements created, and the significant technological and operational changes that compliance with the Payment Provisions will require, we do not believe it is reasonable to expect banks to implement compliance programs for the Payment Provisions by August 19, 2019.

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Thank you for your consideration and review of these comments. If you have any questions or wish to discuss this letter, please do not hesitate to contact me using the contact information provided below.

Yours very truly,



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²⁷ CFPB Statement on Payday Rule, January 16, 2018, <https://www.consumerfinance.gov/about-us/newsroom/cfpb-statement-payday-rule/>. We recognize that the Bureau issued a clarifying statement in October of 2018 indicating that it was "currently planning to propose revisiting only the ability-to-repay provisions and not the payments provisions ..." However, the Bureau left open that possibility by also stating that it would "make final decisions regarding the scope of the proposal closer to the issuance of the proposed rules." Public Statement Regarding Payday Rule Reconsideration and Delay of Compliance Date, October 26, 2018, <https://www.consumerfinance.gov/about-us/newsroom/public-statement-regarding-payday-rule-reconsideration-and-delay-compliance-date/>.