



October 7, 2016

Richard Cordray, Director
Bureau of Consumer Financial Protection
1700 G Street, NW
Washington, DC 20006

Re: Payday, Vehicle Title, and Certain High-Cost Installment Loans; Docket No. CFPB-2016-0025

Mr. Cordray:

The Clearing House Association L.L.C.¹ (“The Clearing House”) respectfully submits this letter to the Bureau of Consumer Financial Protection (the “Bureau”) in response to the Bureau’s notice and request for comment regarding its proposal to regulate payday, vehicle title and certain high-cost installment loans (the “Proposal”).² While The Clearing House applauds the Bureau’s efforts to establish consumer protections for certain credit products that frequently are used by financially vulnerable consumers, we request that the Bureau revise the Proposal, as reflected in this comment letter, to clarify that (i) the lenders covered by the Proposal are solely responsible for compliance with the proposal’s requirements and (ii) depository institutions that provide banking and payment services to lenders covered by the Proposal or to consumer borrowers under loans subject to the Proposal are not responsible for ensuring such compliance. We further note our concern that the Bureau is proposing to use its UDAAP authority to prohibit payment practices that are, in most contexts, wholly unobjectionable. We believe that this approach would “balkanize” the payment system into payments for the loans that are subject to the Proposal, and payments related to all other purposes. Such an outcome could require unnecessary changes to established operational, technical and procedural payments system standards, and negatively impact overall payment system efficiency, speed and predictability.

¹ About The Clearing House. The Clearing House is a banking association and payments company that is owned by the largest commercial banks and dates back to 1853. The Clearing House Payments Company L.L.C. owns and operates core payments system infrastructure in the United States and is currently working to modernize that infrastructure by building a new, ubiquitous, real-time payment system. The Payments Company 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. Its affiliate, The Clearing House Association L.L.C., is a nonpartisan organization that engages in research, analysis, advocacy and litigation focused on financial regulation that supports a safe, sound and competitive banking system.

² Payday, Vehicle Title, and Certain High-Cost Installment Loans; Proposed Rule, 81 Fed. Reg. 141 (July 22, 2016).

I. Introduction

The Proposal prohibits certain payment collection practices in connection with payday loans, vehicle title loans and high-cost installment loans (“Covered Loans”) by entities that make such Covered Loans (such entities, “Covered Lenders”).³ Under the Proposal, Covered Lenders and their agents generally would be prohibited from initiating a third withdrawal attempt (referred to in the Proposal as a “payment transfer”) from a consumer’s account after two consecutive withdrawal attempts had failed due to insufficient funds in the account.⁴ The Covered Lender or its agent would be required to obtain a new and specific authorization from the consumer to make further payment transfer attempts after two failed attempts, as well as to provide a consumer rights notice.⁵ If the Covered Lender is the depository institution that holds the consumer’s account, a failed payment transfer attempt would also include a payment transfer that resulted in the collection of less than the full amount for which the transfer was initiated due to insufficient funds.⁶

The Clearing House understands the importance of protecting consumers that rely on Covered Loans. However, we are concerned that, as written, the Proposal could be interpreted to impose on depository institutions that do not offer Covered Loans the obligation to (i) monitor Covered Lenders’ use of the payment system to make withdrawal attempts, (ii) determine when a Covered Lender may be in violation of the proposed limitations on payment withdrawals, and (iii) act as an enforcer of those limits, even if the payments were authorized by the consumer. As further explained below, we believe that depository institutions cannot be expected to take on such a role due to the practical limitations of payment processing. Further, were depository institutions to be held responsible for preventing certain withdrawals, complex, burdensome, and costly modifications to bank operations would be required, which would have a negative effect on the efficiency and speed of existing payment systems as well as the consumers who rely on such systems to process critical payments.

II. Comments to Proposal

A. The Bureau Should Clarify that Covered Lenders Alone are Responsible for Compliance with the Limitations on Presentment and Notice Requirements

Given the practical limitations of payment systems that are discussed below, the Bureau should clarify that the responsibility of ensuring compliance with the Proposal’s requirements regarding Covered Loan payments is exclusively an obligation of the

³ *Id.* at p. 48175.

⁴ *Id.*

⁵ *Id.*

⁶ *Id.*

Covered Lender and not an obligation of the Covered Lender's bank, its service provider's bank or the consumer borrower's bank.⁷ As part of this clarification, the Bureau should expressly provide that depository institutions that hold a Covered Lender's or borrower's account do not constitute "agents" of the Covered Lender as contemplated by the Proposal.

1. Given Existing, Practical Limitations of Payment Processing, Neither Covered Lenders' Banks nor Consumer Borrowers' Banks Can Reasonably be Expected to Enforce the Proposal's Requirements Against Covered Lenders

The Proposal broadly defines a payment transfer as "any lender-initiated debit or withdrawal of funds from a consumer's account for the purpose of collecting any amount due or purported to be due in connection with" a Covered Loan and clarifies in Supplement I to Part 1041 – Official Interpretations that a payment transfer includes a debit or withdrawal initiated by the lender's agent, such as a payment processor.⁸ Under the Proposal, a debit or withdrawal includes an attempted funds collection by any of the following: electronic funds transfer, check, debit card or prepaid card, automated clearing house transfer, remotely created check, remotely created payment, transfer from another account held at the same institution and authorizations for one-time or recurring electronic fund transfers, as well as, where the Covered Lender is the depository institution that holds the consumer's account, such institution's withdrawal of funds from such account.⁹

Depository institutions conduct significant due diligence prior to establishing account relationships, and in accordance with federal law and industry practices, monitor overall patterns of transaction activity to identify illicit behavior or risky conduct by customers. However, depository institutions that provide payment services to Covered Lenders have no way of knowing whether a particular payment transfer attempt relates to a Covered Loan and cannot reasonably determine whether a bank customer that is a Covered Lender has complied with the payment transfer restrictions and notice requirements under the Proposal. Similarly, depository institutions that provide banking services to consumers have no way of knowing whether an incoming payment transfer attempt relates to a Covered Loan and cannot, for example, determine whether the originator of a debit through the Automatic Clearing House ("ACH") network or the

⁷ We note that the concerns and limitations discussed in this Section A that apply to a Covered Lender's bank are also applicable to a bank whose customer is a service provider to a Covered Lender. Thus, we do not believe that a bank should be responsible for ensuring a Covered Lender's compliance with the Proposal either when the Covered Lender is the bank's customer or when the bank provides banking services to the Covered lender's service provider.

⁸ Payday, Vehicle Title, and Certain High-Cost Installment Loans; Proposed Rule, 81 Fed. Reg. 141 (July 22, 2016) at p. 48175, 48210.

⁹ *Id.*

payee on a check is a Covered Lender and, if so, whether that Covered Lender has complied with the notice requirements and payment transfer restrictions of the Proposal.

The constraints inherent in the ACH network provide a clear example of the challenges depository institutions would face in trying to identify payment transfers associated with Covered Loans.¹⁰ ACH entries, like other payment message formats, are designed to enable clearing and settling of payments. While ACH entries are classified by Standard Entry Class codes, these codes identify types of transactions, such as accounts receivable (ARC), corporate credit and debit (CCD) and international (IAT) entries, but do not indicate the originator's line of business or the types of goods or services related to an ACH payment. Similarly, the substantive terms of any agreement or underlying contract between a payer and payee do not travel with an ACH entry, or any other payment type.

Consequently, a consumer's bank that is the receiving depository financial institution ("RDFI") for an ACH transaction is unable to know that a particular ACH entry relates to a lending transaction, and, even if an RDFI could identify an ACH entry as relating to a lending transaction, the RDFI would not have access to information necessary to identify the transaction as a Covered Loan.

With respect to a Covered Lender's bank, depository institutions face stringent obligations under federal law to conduct due diligence on their depositor customers, and thus, the Covered Lender's bank knows that its accountholder is a lender. However, the bank does not know whether a particular ACH entry for which the bank acts as the originating depository financial institution relates to a lending transaction and whether that lending transaction is a Covered Loan.

While we have focused on the ACH networks in this discussion (given the Bureau's focus on ACH in the Proposal), other payment systems are similarly limited in the information conveyed in payment messages, and the corresponding inability of depository institutions to identify payment transfers as associated with Covered Loans.¹¹ Further, we note that payment transfer attempts may be made through multiple payment channels and, in most cases, the consumer or Covered Lender's bank would have no means of knowing that such attempts were associated with one particular collection effort, much less with a Covered Loan. From the depository institution's perspective, it is

¹⁰ The Bureau specifically noted in supplementary information accompanying the Bureau's release of the Proposal that its research regarding payment practices focused on online payday and payday installment loans because online loan payment attempts generally occur through the ACH network and can be tracked at the account and lender level by using descriptive information in the ACH file.

¹¹ In circumstances where the Covered Lender's bank is also the consumer's bank, for example, withdrawal attempts would typically be processed as "on us" debits, rather than through the ACH networks, but even in such circumstances, the information available to the depository institution does not enable it to identify the transaction as a Covered Loan.

impossible to know that an ACH debit originated by a Covered Lender (or on its behalf), a debit card transaction initiated by that Covered Lender (or on its behalf), a remotely created check created by the Covered Lender, or a check written by a consumer all relate to the same underlying transaction, much less how many transfer attempts have been made across these or other payment channels to complete that particular transaction.

Further, even within the same payment channel, depository institutions cannot practically identify a payment that is a prohibited reinitiation under the Proposal. For example, while ACH network rules require originators to identify reinitiated entries with the phrase “RETRY PYMT” in the batch header record of an ACH batch¹², this will not necessarily enable a depository institution to know how many previous origination attempts the originator made with respect to the entries in the batch through the network.

For these reasons, we encourage the Bureau to revise the Proposal to clarify that the depository institutions that hold the Covered Lender’s or borrower’s accounts are not responsible for limiting the number of payment transfer attempts or for ensuring that consumer rights notices have been presented.

2. All Covered Lenders Should be Subject to the Same Compliance Obligations

We note that the Proposal asks whether depository institutions that are themselves Covered Lenders to their own accountholders should be further restricted from making two payment collection attempts, given the greater level of information such Covered Lenders possess regarding the borrowers’ accounts.¹³ The Clearing House believes that all Covered Lenders should be subject to the same compliance obligations. While it may seem that Covered Lenders that hold consumer accounts would have a higher level of knowledge about the borrower’s circumstances, in practice, from the perspective of a bank’s lending division, a withdrawal attempt is processed in the same manner, regardless of the institution that holds the borrower’s account. The lending division creates an ACH file based on customers’ authorizations, which is transferred to the bank’s ACH division for processing. For many large banks, transactions to bank accountholders are removed from the file for “on us” processing (i.e., not through the ACH networks). However, processing of the resulting file of “on us” transactions is automated: there are typically thousands of transactions in the “on us” file, and thus, manual processing of individual withdrawal attempts is not feasible. Therefore, while depository institutions that act as Covered Lenders should be subject to the same standards as all Covered Lenders when acting in such capacity, such institutions, when debiting their accountholders, do not, practically speaking, have a greater ability to screen out prohibited payment transfers, and should not be subject to higher standards.

¹² NACHA Operating Rules 2.12.4.2.

¹³ Payday, Vehicle Title, and Certain High-Cost Installment Loans; Proposed Rule, 81 Fed. Reg. 141 (July 22, 2016) at p. 48064.

3. Depository Institutions that Provide Deposit and Payment Services to Covered Lenders are Not Agents of those Customers

Depository institutions, in the context of providing traditional deposit and payment services to their customers, generally are not characterized or considered to be “agents” of their customers. The relationship between a depository institution and its customer is governed by a contract and such contract typically explicitly disclaims a principal and agent relationship between the parties for these traditional deposit and payment services. Further, depository institutions are generally not described as agents of their customers under payment systems rules such as the ACH network rules or the Operating Rules of the Electronic Check Clearing House Organization (the “ECCHO Rules”).

Only the Covered Lender has the ability conclusively to know the number of payment transfer attempts that have been made across all payment channels, and whether new authorizations have been made and consumer rights notices provided. Therefore, we urge the Bureau to take a position consistent with existing industry practice and to clarify that such depository institutions are not agents of Covered Lenders for purposes of the Proposal.

B. Requiring Depository Institutions to Enforce the Proposal would Unduly Burden Existing Payments Systems and Diminish Their Efficiency

Holding depository institutions responsible for ensuring compliance by Covered Lenders with the Proposal would impose a significant burden on depository institutions and have a severe negative impact on existing payments systems. It should be noted that retail payment systems like ACH and check clear and settle millions of payments each day. For example, on a daily basis, the Electronic Payments Network, the largest private ACH operator, clears and settles approximately 45 million ACH entries. On an annual basis, the ACH network as a whole supports more than 24 billion electronic financial transactions valued at more than \$41 trillion each year.¹⁴ Requiring depository institutions to inquire into the underlying transaction associated with each payment transfer attempt (assuming such payments could be identified), would delay the processing of payments upon which many consumers and businesses depend for regular debits of mortgage, utility, insurance premiums and other such payment obligations. Great customer harm would result were a depository institution to delay or block an incoming credit of much-needed funds or an ACH debit to pay a legitimate bill.

¹⁴ See NACHA The Electronic Payments Association, History and Network Statistics, <https://www.nacha.org/ach-network/timeline>

As discussed above, depository institutions that hold the account of the consumer or the Covered Lender have no means of determining when an ACH debit or check image relates to a Covered Loan and when an ACH debit or check image relates to any other purpose, as depository institutions do not and practically cannot examine the underlying purposes for which an ACH debit or check image is initiated for payment. If depository institutions were required to examine the underlying purposes for each ACH debit or check image submitted for collection, the payments system would not be able to function effectively or efficiently due to the extreme delays and costs that would be associated with such screening.

As detailed in Section A, current payment systems, such as the ACH network, are not designed to support the transmission of information that would enable depository institutions to identify the subject-matter of an individual transaction. For example, ACH messaging formats are limited to 94 characters, which must convey all of the information necessary to effect the transaction, and altering those formats to expand the number of characters, add fields, or otherwise enable ACH messages to carry additional information would require wholesale changes to ACH system architecture at both the network and bank level. Even if such scrutiny was possible from a technical perspective, given daily and annual volume across the network, ACH transaction processing is necessarily highly automated and is conducted on a batch basis. Consumers depend on the ACH network as a speedy, efficient, and reliable means of processing critical payment transactions, including mortgage and utility bills, insurance premiums, and payroll deposits. Therefore, transaction-level screening of any type is challenging and requiring such screening (even were it possible) would substantially diminish system efficiency, resulting in significant burdens for both consumers and depository institutions

C. Designating Private Payment System Practices as Abusive Sets a Concerning Policy Precedent

To date, we understand that the Bureau's use of its authority to prohibit unfair, deceptive or abusive acts and practices ("UDAAP") has been limited to enforcement actions against individual bad actors. While The Clearing House does not necessarily oppose the Bureau's use of UDAAP authority as a basis for rulemaking, we are concerned by the trend begun by the FTC in last year's amendment to the Telemarketing Sales Rule to declare the use of certain payments by telemarketers to be unfair and abusive. While we understand the FTC and the Bureau's desire to protect consumers in the specific contexts of telemarketing and Covered Loans, declaring a payment type or normal payment practice to be unfair and abusive is a strong measure that creates potential regulatory and litigation risk for payment system participants who are not telemarketers or Covered Lenders.

The Clearing House believes that changes to payment system rules, policies, or practices require a holistic evaluation of the impact of such changes on system participants and the public, and that such an evaluation should take into consideration,

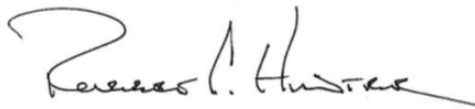
among other things, overall system efficiency, speed, stability, and security, as well as a payment system's technical and operational limitations. We are concerned that the effect of the Proposal would be to force modifications in existing payment systems practices that balkanize the payments system into ACH debit and check image processing for Covered Loans (which would be subject to one set of rules) and ACH debit and check image processing related to all other payment purposes, which would remain subject to traditional industry standards.¹⁵ We believe that the Bureau's approach creates the potential for unintended consequences that could negatively affect consumers that rely on systems such as ACH to ensure that they can make and receive payments in a secure and efficient manner.

The Clearing House believes that the Bureau's important policy goals are best achieved by pursuing bad actors, including lenders, that engage in abusive practices, rather than by proscribing longstanding payment systems activities that are, in most contexts, wholly unobjectionable. Therefore, The Clearing House encourages the Bureau carefully to consider the alternative of continuing to police unfair and abusive acts through individual enforcement actions. To the extent that the Bureau is concerned that borrowers under Covered Loans may be unaware of the permissible number of collection attempts that may be made by a Covered Lender when the borrower provides an ACH debit authorization or check to the Covered Lender, the Bureau may require Covered Lenders to expressly disclose this information to their borrowers.

III. Conclusion

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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¹⁵ For example, the ACH Rules allow for three presentment attempts for an ACH debit that is returned for insufficient funds (an initial attempt to collect the ACH debit followed by up to two representments). Automated Clearing House Network Operating Rules, Rule 2.12.4. Similarly, the ECCHO Rules allow for three presentment attempts for a check image that is returned for insufficient funds (an initial attempt to collect the item followed by up to two representments). Electronic Check Clearing House Organization Operating Rules, Rule XX(I).

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