BANK POLICY INSTITUTE

March 18, 2019

Via Regulations.gov

Consumer Financial Protection Bureau
1700 G Street NW
Washington, DC 20552
Attn: Comment Intake

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

Ladies and Gentlemen:

The Bank Policy Institute[1] appreciates the opportunity to comment on the notice of proposed rulemaking[2] issued by the Consumer Financial Protection Bureau to delay the August 19, 2019 compliance date for the mandatory underwriting provisions of the 2017 final rule governing Payday, Vehicle Title, and Certain High-Cost Installment Loans.[3]

Because BPI members are not payday lenders, payday installment lenders, or vehicle title lenders, but rather offer bank loan products in a responsible, safe and sound manner to address the credit needs of their customers, we do not address here the regulation of payday and similar types of loans through the 2017 final rule's mandatory underwriting provisions or its payment provisions.[4] Our comments instead focus on the potential application of the 2017 final rule to a wide-range of bank loan products that are not, and should not be regulated as, payday or similar types of loans. We would note, however, that bank-provided small dollar credit products play an important role in furthering access to credit for a broad-range of consumers, and the regulation of these products should be sensible and not directed in a way that impedes the ability of banks to offer low-cost credit to consumers.

We urge the CFPB to delay the compliance date of the entire rule, including the payment provisions, to allow the CFPB to conduct a more comprehensive reassessment of the rule's coverage and legal and factual underpinnings. This is because, even with CFPB's proposed changes to the 2017 final rule, the payment provisions that would remain in the rule potentially cover a broad range of responsible, safe and sound bank loan products offered by BPI members. These products, as described below, are not payday loans, payday installment loans, payday loan substitutes, or vehicle title loans, nor do they pose any of the specific consumer or other risks that the rule purports to address. Rather, these products are designed for and marketed to creditworthy consumers including, in some cases, primarily high net worth individuals, rather than the vulnerable consumers the rule was intended to protect. Indeed, this may explain why the CFPB has neither presented any evidence nor made any findings that it is

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[1] The Bank Policy Institute is a nonpartisan public policy, research and advocacy group, representing the nation's leading banks and their customers. Our members include universal banks, regional banks and the major foreign banks doing business in the United States. Collectively, they employ almost 2 million Americans, make nearly half of the nation's small business loans, and are an engine for financial innovation and economic growth.

[2] Payday, Vehicle Title, and Certain High-Cost Installment Loans; Delay of Compliance Date, 84 Fed. Reg. 4,298 (Feb. 14, 2019).

[3] Payday, Vehicle Title, and Certain High-Cost Installment Loans, 82 Fed. Reg. 54,472 (Nov. 17, 2017).

[4] By "payment provisions," we refer to subpart C of the Rule.

"unfair" or "abusive" for banks to offer these loan products without complying with the specific and prescriptive requirements imposed under the 2017 final rule.

Given this overall approach, we believe that the application of the payment provisions of the 2017 final rule suffers from several significant legal and policy shortcomings. Most importantly, the use of the CFPB's authority to regulate unfair, deceptive or abusive acts or practices ("UDAAP") to require that bank loan products conform to the payment provisions of the 2017 final rule is both arbitrary and capricious, particularly given that:

- The CFPB's evidence in support of the 2017 final rule focused solely on the payment practices of providers of non-bank payday loan and payday installment loan products, and expressly disclaimed application to other markets.
- The bank loan products potentially covered by the 2017 final rule generally are used by high net worth and other creditworthy borrowers, not the vulnerable borrowers with limited credit options the rule was designed to protect.
- Neither the CFPB nor the federal banking agencies have criticized banks' longstanding payment practices with regard to the bank loan products described below as "unfair" or "abusive" to consumers.

Further, the proposed application of different and contradictory interpretations of the "unfair" and "abusive" standards to different aspects of the 2017 final rule, without explanation or analysis, is arbitrary and capricious.

These coverage and interpretive issues underscore why the CFPB should engage in a stand-alone notice-and-comment rulemaking process to define the applicable elements and standards governing UDAAP determinations, rather than attempting to establish or clarify "unfair" and "abusive" standards on a patchwork, *ad hoc* basis in regulations designed to address specific consumer protection issues, such as the 2017 final rule, and in enforcement actions. The risk of this patchwork approach is the promulgation and perpetuation of inconsistent standards for "unfairness" and "abusiveness" that would significantly hamper banks' ability to comply with the law and provide appropriate consumer financial products and services to consumers.

These issues also underscore a more fundamental problem inherent in the overall manner in which the CFPB invoked its UDAAP authority to promulgate the 2017 final rule—namely, that it chose <u>not</u> to prohibit specific practices that it had found to be unfair and/or abusive in the context of the specific types of loans it had studied, but rather to prescribe a single set of mandatory practices for a broad range of loan types on the implicit theory that any and all other practices are unfair and abusive. The CFPB should reevaluate this approach.

Part I of this letter outlines how the CFPB has failed to offer evidence or findings demonstrating that the payment practices associated with a variety of responsible, safe and sound bank loan products that would fall within the coverage of the rule constitute unfair or abusive acts or practices. Part II of this letter discusses how the payment provisions rest on interpretations of the elements of unfairness or abusiveness that the CFPB now has repudiated in the context of its proposal to rescind the mandatory underwriting provisions (the "Rescission NPR").[5] Part III discusses the unreasonableness of requiring banks to comply with the payment provisions by the current compliance date of August 19, 2019. Finally, part IV sets forth BPI's recommendations for how the CFPB should proceed in the current rulemaking process, including, in the near term, delaying the compliance date of the payment provisions pending a comprehensive reassessment of their scope and doctrinal foundations.

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[5] Payday, Vehicle Title, and Certain High-Cost Installment Loans, 84 Fed. Reg. 4,252 (Feb. 14, 2019).

I. The payment provisions cover a variety of bank loans for which the CFPB has offered no evidence or findings of unfair or abusive payment practices.

The CFPB's expansive, three-part definition of a "covered loan" has resulted in a final rule that potentially covers a broad range of bank loan products that are not payday loans, payday installment loans, payday loan substitutes, or vehicle title loans. Many of these responsible, safe and sound bank loan products are used primarily by high net worth borrowers, not the vulnerable consumers that the 2017 final rule is intended to protect. Other bank loan products potentially swept within the rule are used by a wide range of creditworthy borrowers for their everyday needs, as we describe further below, and include products such as unsecured "bridge" loans.

The CFPB has not provided any evidence that the payment practices involving these types of bank loan products implicate unfair or abusive conduct. The CFPB emphasized repeatedly in the preamble to the 2017 final rule that the evidence it had compiled related to the market for payday loans and payday installment loans, not other lending markets.[6] Specifically, the preamble to the 2017 final rule stated that "[t]he [CFPB's] research with respect to payment practices focused on online payday and payday installment loans . . . . [o]ther publicly available data and the [CFPB's] enforcement experience indicates that returned payments likewise occur with great frequency in the storefront payday market."[7] The agency found that, compared to all other industries, the payday and payday installment lending industry "is an extreme outlier with regard to the rate of returned items" with "return rates that vastly exceed those in other markets," citing data supplied by a major financial institution.[8]

The CFPB has not offered any evidence or made similar findings regarding payment practices for the types of bank loan products described in this part. The preamble to the 2017 final rule noted that "lenders in the markets for payday and payday installment loans often use such payment authorizations in ways that may cause substantial harms to consumers who are especially vulnerable."[9] Significantly, however, the CFPB expressly stated that "[t]he [CFPB] has not observed similar evidence in other markets, and thus makes the reasonable determination to confine the rule to those markets where it has data, evidence, and experience."[10] In this way, the CFPB made clear that its definition of "covered loans" was intended specifically to cover payday and payday installment loans, not other loans, such as responsible, safe and sound bank loans.

Despite this determination to limit the scope of the 2017 final rule, the definition of "covered loan" is so broad that the payment provisions may well reach many responsible, safe and sound bank loan products—and most importantly, loans that fall outside the market for payday or payday installment loans. As described below, each part of the "covered loan" definition – "covered short-term loans," "covered longer-term balloon payment loans," and "covered longer-term loans" – could be interpreted to cover responsible, safe and sound bank loan products that are not payday or payday installment loans. Further, the exceptions to the definition of "covered loans," while helpful in many respects, do not encompass the full range of bank loan products that fall outside the payday or payday installment loan market, but may be nevertheless covered by the 2017 final rule.

The application of the payment provisions to the bank loans described herein is therefore arbitrary and capricious, and thus inconsistent with the Administrative Procedure Act. The CFPB should not put into effect a UDAAP-based rule that applies to bank loan product payment practices that have not found to be "unfair" or "abusive" by the evidentiary record and to bank products that are used by some of the *least* vulnerable consumers. While the CFPB's broad definition of "covered loan" reflects concerns about potential evasion of the 2017 final rule by

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6 *Id.* at 54,720, 54,721, and 54,731.

7 *Id.* at 54,720.

8 *Id.* at 54,721, 54,724–25.

9 *Id.* at 54,730.

10 *Id.* at 54,732.

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payday and payday installment lenders, such concerns do not relieve the CFPB of its obligation to craft a rule that is tailored to the evidentiary record by targeting the products found to result in consumer harm.

A. The definition of "covered short-term loans" sweeps well beyond the products for which the CFPB has provided any evidence or findings.

Under the 2017 final rule, "covered short-term loans" include closed-end or open-end loans required to be repaid within 45 days.[11] The CFPB's evidence and UDAAP findings supporting application of the payment provisions to these loans relate to payday loans and other small-dollar, high-cost loans, targeted to vulnerable borrowers who have limited access to other forms of credit. The preamble to the 2017 final rule summarized this evidence and findings as follows:

> The [CFPB's] primary study on this topic was a report *based on online payday and high cost payday installment lenders only*, which includes covered short-term loans and covered longer-term loans as defined in this rule. . . . The [CFPB's] decision to apply the rule specifically to covered loans (short-term loans, high-cost longer-term loans, and long-term balloon payment loans), but not other lending markets, was based on the fact that *consumers in the markets for covered loans have similar characteristics*—as discussed in the proposal, Market Concerns—Underwriting, and Market Concerns—Payments—*which make them vulnerable to harms* that occur from the identified unfair and abusive practice.[12]

As noted above, the CFPB expressly disclaimed making findings as to payment practices for other types of loans, stating in the preamble that "[t]he [CFPB] has not observed similar evidence in other markets, and thus makes the reasonable determination to confine the rule to those markets where it has data, evidence, and experience."[13]

The rule's definition of "covered short-term loan," however, sweeps far beyond the plain limitations of the CFPB's rulemaking record. The definition is not limited to small-dollar loans; loans in any dollar amount are covered. The definition is not limited to high-cost loans; loans of any APR are covered. And the definition is not limited to loans targeted to and used by vulnerable borrowers; loans targeted to and used by more affluent borrowers are covered.

As a consequence of the rule's sweeping definition of "covered short-term loan," the following bank loan products, among others, could be interpreted to be "covered short-term loans":

- Unsecured "bridge" loans that assist customers with the sequential purchase and sale of a home. For example, a borrower who buys a $1,000,000 home two months before selling a $1,000,000 home might obtain and use a $50,000 bridge loan from a bank to cover expenses during that two month period.

- Wealth management products that provide high net worth customers with short-term liquidity.

- Demand loans where there is no specified repayment date but the bank has the ability to demand repayment within 45 days, and other short-term securities-backed loans.

Banks have made these loans for decades with no suggestion by regulators that the payment practices relating to these products are "unfair" or "abusive," or otherwise require additional regulation.

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11 12 C.F.R. § 1041.3(b)(1).

12 82 Fed. Reg. at 54,731 (emphasis added).

13 82 Fed. Reg. at 54,732.

B. The definition of "covered longer-term balloon payment loans" sweeps well beyond the products for which the CFPB has provided any evidence or findings.

Under the rule, "covered longer-term balloon payment loans" include loans that are repaid in a single repayment more than 45 days after consummation or through at least one payment that is more than twice as large as any other payment.[14] The CFPB's evidence and UDAAP findings supporting application of the payment provisions to these loans are solely reflective of small-dollar loans and high-cost loans, targeted to vulnerable borrowers who have limited access to other forms of credit.[15]

But the definition of "covered longer-term balloon payment loan" is not limited to "small-dollar loans"; any dollar amount is covered. The definition is not limited to "short-term" loans; any duration beyond 45 days is covered. And the definition is not limited to "high-cost" loans; any APR is covered. As a result, the following bank loan products, among others, could be interpreted to be "covered longer-term balloon payment loans" under the rule:

- Closed-end or open-end loans secured by a certificate of deposit ("CD") or other security, with the balance due at maturity. For example, a borrower might obtain a $75,000 installment loan secured by a $75,000 CD.
- Installment loans and interest-only loans or lines of credit with a large final payment.
- Margin loans originated by a bank.
- Certain purchase money loans. In particular, while the final rule excludes loans extended to finance a customer's purchase of a vehicle or other good, it is unclear whether ancillary products (*e.g.*, warranties, credit insurance) financed as part of the loan to purchase the vehicle or other good are also excluded.
- Refinanced auto loans.

As with the shorter-term loans discussed above, neither the CFPB nor the federal banking agencies have criticized banks' longstanding payment practices with respect to these loans.

C. The definition of "covered longer-term loans" sweeps well beyond the products for which the CFPB has provided any evidence or findings.

Under the rule, a "covered longer-term loan" is a loan (1) the cost of credit of which exceeds 36 percent per annum at consummation (for closed-end) or at consummation or at each billing cycle (for open-end), (2) where the lender or service provider obtains a leveraged payment mechanism, and (3) that is not one of the other types of covered loans.[16]

Here, too, the CFPB's evidence and UDAAP findings supporting application of the payment provisions to these loans relate to small-dollar loans and high-cost loans, targeted to vulnerable borrowers with limited access to other forms of credit. The preamble to the 2017 final rule stated "[w]ith respect to the [CFPB's] determination to apply the final rule to covered longer-term loans with an APR of more than 36 percent but not to those with a lower APR, the [CFPB] has substantial evidence that the identified practice is occurring in the market for higher-cost installment

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14 12 C.F.R. § 1041.3(b)(2)(i).

15 *See* n. 12 and accompanying text, above.

16 12 C.F.R. § 1041.3(b)(2)(ii).

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loans, specifically as shown in the [payday loan] payments report and through enforcement actions,"[17] and cited to a single enforcement action involving a non-bank payday lender and pawn shop.[18] The CFPB made clear that its evidence was limited to small-dollar and high-cost loans, stating that "[t]he [CFPB] does not have similar evidence as to installment loans of all kinds."[19]

Despite the limited nature of the CFPB's evidence and findings, the definition of "covered longer-term loan" is not limited to "small-dollar" loans; any dollar amount is covered. It is also not limited to "short-term" loans; any duration beyond 45 days is covered.

Open-end lines of credit and their treatment as "covered longer-term loans" raise particular concerns for BPI members. The 2017 final rule does not allow the coverage to be determined solely at account opening, but requires lenders to reassess coverage in each billing cycle. A reasonably-priced open-end line of credit could thus become a "covered longer-term loan" based on unique, non-recurring circumstances. For example, in any single billing cycle, a finance charge coupled with a zero or low balance could cause a temporary spike in the loan's APR to greater than 36 percent. Such a finance charge could arise, for instance, from a late payment that incurs a fee but also reduces or eliminates the balance for the next billing cycle.

As with other types of loans, there has never been any suggestion from regulators that banks' payment practices with respect to open-end lines of credit could be deemed "unfair" or "abusive."[20]

D. The rule's existing exceptions inappropriately do not exempt the bank loan products described above.

The 2017 final rule contains a number of exceptions for bank loan products, including certain purchase money security interest loans, real estate secured loans, credit cards, and student loans, among others. These exceptions, however, do not apply to the bank loan products described in parts I.A. through I.C. above. For example, the exception for credit secured by real estate does not appear to cover unsecured bridge loans that enable a consumer to buy a home prior to selling his or her existing home, despite these bridge loans fulfilling similar purposes as exempt mortgage loans. Likewise, the exception for purchase money loans financing the purchase of goods does not appear to cover loans financing the purchase of securities or of financial products that are ancillary to goods.

Further, the rule's exception for accommodation loans does not provide adequate relief for the bank products described above because the maximum number of loans is fixed and does not scale according to the size of the lender, or its affiliates, as it should. A bank operating nationally, together with its affiliates, is permitted the same 2,500 covered loans per year as a small community bank or a small storefront lender before becoming subject to the rule. While 2,500 loans might provide a small lender with a reasonable cushion to avoid application of the rule's requirements, it does not provide a similar cushion for large banks, including BPI members, that originate loans in greater volume. The accommodation loan exception appears designed to exclude loans made by banks on an incidental basis, but not loans inadvertently swept into the rule by the broad scope of the covered loan definition.

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[17] 82 Fed. Reg. at 54,732.

[18] EZCorp Inc., Consent Order, CFPB No. 2015-CFPB-0031 (Dec. 16, 2015), *available at* http://files.consumerfinance.gov/f/201512_cfpb_ezcorp-inc-consent-order.pdf.

[19] 82 Fed. Reg. at 54,731.

[20] For certain products, a bank may have the right to offset a payment it owes a consumer by the amount that the consumer owes it. The CFPB should revise the official rule commentary to state that exercising a right of offset is not a lender-initiated payment transfer. *See* 12 C.F.R. Part 1041 Supplement I, Para. 8(a)(1)(i)(E).

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E. The payment provisions are not an appropriate or lawful exercise of the CFPB's UDAAP authority as applied to the bank loans described above.

The APA requires an agency promulgating rules to draw a "rational connection between the facts found and the choice made."[21] The agency must offer "findings" and "analysis" to justify the choices it has made, and "cogently explain why it has exercised its discretion in a given manner."[22] Agency action will be set aside where the agency has "entirely failed to consider an important aspect of the problem" or has "offered an explanation for its decision that runs counter to the evidence before the agency."[23]

As discussed above, the CFPB's rulemaking record focuses exclusively on payment practices involving short-term, small-dollar, high-cost payday loans and payday installment loans, and expressly disclaims making any evidentiary findings with respect to other types of loans. Yet the payment provisions cover a range of bank loan products for which the CFPB has expressly acknowledged it has compiled no evidentiary record of unfairness or abusiveness. This mismatch between the evidence amassed by the CFPB and the scope of the rule is arbitrary and capricious and inconsistent with the APA:

- The CFPB has not offered any "rational connection" between its findings regarding the payment practices of non-bank small-dollar, high-cost lenders and its choice to apply the payment provisions to the bank loans described above.[24]
- The CFPB has not made any "findings" or "analysis" to justify application of the payment provisions to the bank loans described above or provided any "cogent explanation" of this sweeping coverage.[25]
- The CFPB has entirely failed to consider an important aspect of the problem by failing to consider that the rule's definition of "covered loans" applies to bank loans that are not small-dollar, high-cost loans targeted to vulnerable borrowers who have limited access to other forms of credit.[26]

Because no evidence in the rulemaking record supports the application of the payment provisions to these bank loans,[27] such application is therefore arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law under the APA.[28]

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21 Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983) (quoting Burlington Truck Lines, Inc. v. United States, 371 U.S. 156, 168 (1962)).

22 *State Farm*, 463 U.S. at 48.

23 *Id.* at 43.

24 *See id.* at 43.

25 *See id.* at 48.

26 *See id.* at 43.

27 The APA also forbids the CFPB to rely on any data not discussed in the rulemaking record. *See* Chamber of Commerce of the United States v. SEC, 443 F.3d 890, 899 (D.C. Cir. 2006) (requiring agency to reveal "the 'technical studies and data' upon which the agency relies"); *see also* Am. Radio Relay League v. FCC, 524 F.3d 227, 236 (D.C. Cir. 2008); United States v. Nova Scotia Food Prods. Corp., 568 F.2d 240, 259 (2d Cir. 1977) (agency's failure to disclose underlying data prevents public "criticism of the methodology used or the meaning to be inferred from the data").

28 5 U.S.C. § 706(2)(A).

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II. The payment provisions rest on interpretations of the CFPB's UDAAP authority that the CFPB has now repudiated and that should be addressed through a holistic UDAAP rulemaking.

The CFPB's rulemaking record supporting the payment provisions rests on interpretations of what constitutes unfair and abusive acts or practices that the CFPB has now repudiated in the context of the mandatory underwriting provisions. To apply its UDAAP authority in such an inconsistent manner between these two parts of the rule would be arbitrary and capricious under the APA and raises concerns regarding how the agency will engage in UDAAP rulemakings in the future.

A. The CFPB relies on the same interpretation of the "unfairness" standard as the mandatory underwriting provisions and payment provisions.

Under the Dodd-Frank Act, the CFPB may not declare an act or practice "unfair" unless the act or practice "causes or is likely to cause substantial injury to consumers which is not reasonably avoidable by consumers."[29] The CFPB in the 2017 final rule concluded that consumers could not "reasonably avoid" harm for purposes of an "unfairness" assessment if they lacked a *specific understanding* of their *individualized* risk, as determined by their ability to accurately predict how long they would be in debt after taking out a covered loan.[30] However, in the Rescission NPR, the CFPB has preliminarily concluded that consumers need not have a specific understanding of their individualized risk for an injury to be reasonably avoidable. According to the Rescission NPR, the CFPB now believes that, consistent with decades of FTC precedents on the meaning of "unfairness," an "injury is reasonably avoidable if payday borrowers have [a generalized] understanding of the likelihood and magnitude of risks of harm associated with payday loans sufficient for them to anticipate those harms and understand the necessity of taking reasonable steps to prevent resulting injury." Armed with this understanding of the unfairness standard, the CFPB concludes that, in fact, "consumers can reasonably avoid that injury" when it comes to payday loans.[31]

The payment provisions rest on the same prior interpretation of the "unfair" standard as the mandatory underwriting provisions that the CFPB has now repudiated. The CFPB has expressly recognized that "when consumers grant lenders an authorization to withdraw payment from their account, they understand as a general matter that they may incur an NSF fee from their account-holding institution as well as a returned-item fee charged by the lender."[32]

Commenters on the 2016 proposed rule noted that because borrowers "should generally be aware that fees would result from failed payment withdrawals," injuries caused by multiple re-presentments are reasonably avoidable.[33] In the preamble to the 2017 final rule, the agency brushed aside this concern in a single sentence, noting that "lenders often take broad, ambiguous payment authorizations from consumers and vary how they use these authorizations, thereby increasing the risk that consumers will be surprised by the amount, timing, or channel of a *particular* payment."[34]

Thus, as with the original interpretation underlying the mandatory underwriting provisions, the CFPB's approach to the payment provisions was that a consumer must have a *specific understanding* of the *individualized risk* he or she is incurring by entering into a contract with a particular lender. As the CFPB now recognizes, a *general understanding* by consumers that failing to have enough money in one's account to fund a loan payment when due

29 12 U.S.C. § 5531(c)(1)(A).

30 82 Fed. Reg. at 54,737.

31 84 Fed. Reg. at 4,270–71.

32 82 Fed. Reg. at 54,740.

33 *Id.* at 54,737.

34 *Id.* (emphasis added).

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can cause NSF fees – regardless of a specific lender's practices – is sufficient for consumers to reasonably avoid the harm. The CFPB, as noted above, has expressly found that consumers have such a general understanding of the risk of NSFs when authorizing automatic payments.[35] Despite preliminarily delineating a new unfairness standard as it relates to the rule's mandatory underwriting provisions, the CFPB does not appropriately consider the application of this new standard to the entirety of the rule.

Because the payment provisions rest on the same interpretation of the "reasonably avoidable" element of "unfairness" as the mandatory underwriting provisions that the CFPB has now repudiated, the CFPB should not allow the payment provisions to come into effect without evaluating whether its new interpretation of the "unfairness" standard allows for it.

B. The CFPB relied on the same interpretation of the "abusive" standard in the mandatory underwriting provisions and payment provisions.

Under the Dodd-Frank Act, the CFPB may declare an act or practice to be "abusive" if it takes "unreasonable advantage of . . . a lack of understanding on the part of the consumer of the material risks, costs, or conditions of the product or service."[36] The CFPB relied on this authority in promulgating both the mandatory underwriting provisions and the payment provisions.

The CFPB in the 2017 final rule assessed whether consumers have a "lack of understanding" of the material risks, costs, or conditions of covered loans such that it could be an abusive practice to take advantage of this lack of understanding without complying with the mandatory underwriting provisions. In this assessment, the CFPB took a similar approach to interpreting this standard as it did to interpreting the "reasonably avoidable" element of unfairness. Specifically, the CFPB had concluded that consumers lack understanding if they fail to *specifically* understand their *individualized* likelihood of being exposed to the risks of a product or service or the severity of the kinds of costs and harms that may occur.[37] In the Rescission NPR, however, the CFPB has preliminarily concluded that consumers have a sufficient understanding for purposes of the "abusiveness" authority if they appreciate the *general* risks of harm associated with the product or service.[38]

The payment provisions rest on the same prior interpretation of the "abusive" standard as the mandatory underwriting provisions. In the preamble to the 2017 final rule, the CFPB found that consumers "understand as a general matter that they may incur an NSF fee" but that "such a generalized understanding does not suffice to establish that consumers understand the material costs and risks of a product or service," and instead consumers would need to have a more specific understanding of "the severity of the risk to which they are exposing themselves" by defaulting.[39] As the Rescission NPR recognizes, however, consumers have an adequate understanding of a risk of a product or service such that the product or service does not constitute an abusive act or practice if they have a general understanding of it.[40] The CFPB has found that consumers have this general understanding of the risk of incurring NSF fees.[41]

The CFPB's reasoning in the proposal to withdraw the mandatory underwriting provisions therefore applies equally to the payment provisions, which rest on the same interpretation of the CFPB's "abusiveness" authority as the mandatory underwriting provisions that the CFPB has now repudiated. Thus, while the CFPB preliminarily articulates

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35 *See* n. 32, above, and accompanying text.

36 12 U.S.C. § 5531(d)(2)(A).

37 82 Fed. Reg. at 54,617.

38 84 Fed. Reg. at 4,275.

39 82 Fed. Reg. at 54,740.

40 84 Fed. Reg. at 4,275.

41 *See* n. 32, above, and accompanying text.

this new abusiveness standard, it inappropriately limits the application of this new standard solely to the mandatory underwriting provisions. The CFPB should not allow the payment provisions to come into effect without evaluating whether its new interpretation of the "abusive" standard supports those provisions.

C. The CFPB should adopt definitive UDAAP standards in a notice-and-comment rulemaking process before promulgating and implementing specific rules relying on shifting and unsettled interpretations of unfairness and abusiveness.

The 2017 final rule's deficiencies underscore the perils of interpreting and reinterpreting UDAAP standards on an *ad hoc* basis. To date, the CFPB has taken a patchwork approach to exercising its UDAAP authority, both in rulemaking and enforcement actions. The CFPB has never definitively interpreted the different elements of "abusiveness," and, as illustrated by the Rescission NPR, has interpreted, applied, and later reconsidered key elements of "unfair" or "abusive" conduct within a single rulemaking and without providing sufficient evidence regarding the underpinnings of these determinations. Applying new or revised UDAAP interpretations on an *ad hoc* basis is arbitrary and capricious and an inappropriate way to make regulatory policy, particularly given the wide impact such policy can have on a given market. The arbitrariness of this patchwork approach is evident in the application of revised unfairness and abusiveness standards to the mandatory underwriting provisions while continuing to apply to the payment provisions the prior standards that the CFPB has now repudiated.

The CFPB should undertake a comprehensive reassessment of the UDAAP doctrine and its scope through a notice-and-comment rulemaking process that focuses exclusively on establishing consistent standards for "unfairness" and "abusiveness" to guide the CFPB's exercise of its UDAAP authority, regardless of the context in which it is exercised. Clarity regarding the scope of the CFPB's UDAAP authority would yield better, more carefully tailored rules, produce more consistent enforcement actions with more consistent remedial outcomes for consumers, and put financial institutions on fair notice of the types of conduct that may be deemed unfair or abusive in violation of the law and potentially result in enforcement actions.

III. The payment provisions will cause compliance and implementation issues if their compliance date is not delayed.

Absent an extension of the compliance date, banks must comply with the payment provisions on August 19, 2019, which gives them approximately five months from today to comply with significant new disclosure and recordkeeping requirements or else be improperly deemed to have treated their customers unfairly or abusively.

Prior to release of the February 2019 proposed rule, the CFPB's actions created significant uncertainty as to whether it would revise or withdraw the 2017 final rule in full or in part:

- On the January 16, 2018 effective date of the rule and just two months after the 2017 final rule was published in the Federal Register, the CFPB issued a press release stating that it "intends to engage in a rulemaking process so that the CFPB may reconsider the Payday Rule," drawing no distinctions between its plans for the mandatory underwriting provisions and for the payment provisions.[42]

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

(continued…)

- In a May 31, 2018 court filing in its litigation with the Consumer Financial Services Association regarding the legality of the Rule under the APA, the CFPB moved for a stay of the rule in its entirety in the United States District Court for the Western District of Texas.[43]

- Until the CFPB's release of its October 26, 2018 public statement,[44] there was no indication that the CFPB would focus on reconsidering the mandatory underwriting provisions but not the payment provisions.

- Even following the release of that statement, the court in the CFSA litigation stayed the compliance date of the 2017 final rule in its entirety on November 6, 2018.[45]

- In the March 8, 2019 status report filing in the CFSA litigation, the CFPB stated that it is not seeking to lift the stay of the payment provisions' compliance date at this time.[46]

For nearly its entire existence, the 2017 final rule – including the payment provisions – has been clouded by uncertainty. Banks could not reasonably plan, execute, and complete compliance work in such an uncertain environment, and a bank seeking to comply with the 2017 final rule was risking a substantial upheaval in the regulatory framework. In practical terms, the conformance period has been truncated to a matter of months rather than the nearly two years originally provided in the 2017 final rule. This shorter period has limited the ability of banks to fully understand the scope of compliance with the rule.

IV. The CFPB should delay the compliance date of the payment provisions as it revises the rule to address the rule's coverage and doctrinal issues.

For the reasons discussed above, the CFPB should ultimately:

- Narrow the coverage provisions in section 3 of the 2017 final rule so that the payment provisions that remain in the rule clearly apply only to payday loans and payday installment loans, but not to the responsible, safe and sound bank loan products described above for which there is no evidence or findings of unfair or abusive payment practices.

- Reconsider whether the legal basis for the payment provisions is consistent with the CFPB's UDAAP authority and newly articulated standards for "unfairness" and "abusiveness," particularly in light of the payment provisions' reliance on interpretations of the "unfair" and "abusive" standards that the CFPB has now repudiated.

- Clarify the standards for assessing "unfair" and "abusive" acts or practices and the contours of the CFPB's UDAAP authority through a comprehensive notice-and-comment rulemaking process.

It is critical that the CFPB delay the compliance date of the payment provisions to November 2020 or later to allow adequate time to address these fundamental issues. As a matter of sound regulatory policy, the CFPB should delay the application of the payment provisions before the August 2019 mandatory compliance date so

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43 *See* Community Financial Serv. Assoc. of America, Ltd. v. Consumer Financial Protection Bureau, Joint Motion for Stay of Litigation and Stay of Agency Action Pending Review, Civil Action No. 1:18-cv-295 (W. D. Tex. May 31, 2018).

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

45 *See* Community Financial Serv. Assoc. of America, Ltd. v. Consumer Financial Protection Bureau, Order, Civil Action No. 1:18-cv-295 (W. D. Tex. Nov. 6, 2018).

46 *See* Community Financial Serv. Assoc. of America, Ltd. v. Consumer Financial Protection Bureau, Joint Status Report, Civil Action No. 1:18-cv-295 (W. D. Tex. Mar. 8, 2019).

that substantial industry and government resources are not wasted in an effort to comply and enforce compliance with the rule while it is being reevaluated and/or revised. The CFPB's suggestion that it may commence a separate rulemaking via a request for information or advanced notice of proposed rulemaking to address the payment provisions is encouraging but inadequate, since those initiatives could not progress very far before the payment provisions become effective in August 2019 and banks would be placed at risk of enforcement by the agency for engaging in unfair or abusive acts or practices if they did not comply with the payment provisions.

Corrections to the rule's coverage will require careful consideration and public consultation. To that end, revising the three-part definition of "covered loan" would be a necessary and effective way to correct and narrow the rule's coverage. For example, the CFPB could adopt a dollar threshold above which a loan would not be a "covered loan," which would exempt some of bank loan products described throughout this letter, such as bridge loans and certain wealth management loans. Additional changes would be necessary to clearly exclude from coverage other bank loans, such as lines of credit, that may in some cases be modest in principal amount. Another potential approach would be to impose appropriate limits to the existing rule's scope of application, such as the adoption of a broader set of exceptions for banks and their affiliates. In any case, a delay of the compliance date for all aspects of the 2017 final rule, together with careful consideration and public consultation to evaluate the issues we describe in this letter, would permit the CFPB to proceed in an appropriate and effective manner.

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BPI appreciates the opportunity to comment on the proposal. If you have any questions, please contact the undersigned by phone at (202) 589-2429 or by email at *Naeha.Prakash@bpi.com*.

Respectfully submitted,

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