BANK POLICY INSTITUTE

May 15, 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 (Docket No. CFPB-2019-0006; RIN 3170-AA80)

Ladies and Gentlemen:

The Bank Policy Institute[1] appreciates the opportunity to comment on the notice of proposed rulemaking ("NPR")[2] issued by the Consumer Financial Protection Bureau to rescind the mandatory underwriting provisions of the 2017 final rule governing Payday, Vehicle Title, and Certain High-Cost Installment Loans.[3] This letter incorporates by reference our March 18, 2019 letter commenting on the CFPB's separate notice of proposed rulemaking[4] to delay the August 19, 2019 compliance date of the mandatory underwriting provisions.[5]

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.[6] 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.

The mandatory underwriting provisions of the 2017 final rule potentially would 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. These bank loan 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

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, 84 Fed. Reg. 4,252 (Feb. 14, 2019).

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

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

5 Letter from Naeha Prakash, Senior Vice President & Associate General Counsel, Bank Policy Institute, to CFPB (Mar. 18, 2019), *available at* https://bpi.com/wp-content/uploads/2019/03/Comment-on-CFPB-Delay-Proposal-for-2017-Rule-on-Payday-Vehicle-Title-and-Certain-High-Cost-Installment-Loans-March-18-2019.pdf.

6 By "payment provisions," we refer to subpart C of the rule.

presented any evidence nor made any findings suggesting that it is "unfair" or "abusive" for banks to offer these loan products without complying with the specific and prescriptive requirements imposed under the 2017 final rule. These bank loan products, particularly those used by high net worth borrowers, never should have been subject to a rule focused on payday lending. Accordingly, BPI strongly supports the CFPB's proposal to rescind the mandatory underwriting provisions and urges the CFPB to finalize the NPR.

Even with the NPR's proposed changes to the 2017 final rule, however, the payment provisions that would remain in the rule potentially still cover a broad range of responsible, safe and sound bank loan products offered by BPI members. As discussed in our March 18, 2019 comment letter, we urge the CFPB to provide banks with relief from the payment provisions. Below, we detail the bank loan products potentially impacted by the payment provisions, discuss particular challenges banks have in complying with those provisions, and recommend specific ways of narrowing the three-part "covered loan" definition and/or expanding the exclusions from the definition of "covered loan," so as to appropriately tailor the rule.

The application of the payment provisions 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 2017 final rule expressly excluded certain types of bank loan products, including mortgage loans, credit cards, purchase money loans secured by personal property (*i.e.*, auto and boat loans), and student loans, as well as certain bank-provided short-term liquidity products, specifically overdraft services, but did not exclude the bank loan products described in this letter and BPI's March 18, 2019 letter.

- 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 potentially fall within the coverage of the rule constitute unfair or abusive acts or practices.[7] 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 NPR. Part III discusses the unreasonableness of requiring banks to comply with the payment provisions by the current compliance date of August 19, 2019, and significant interpretive and compliance issues banks are encountering with the rule. Finally, part IV sets forth BPI's recommendations for narrowing the rule's coverage and moving forward in the current rulemaking process, including, in the near term, delaying the compliance date of the payment provisions.

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.

BPI supports the CFPB's decision to rescind the mandatory underwriting provisions based on a re-assessment of the legal standard and evidentiary record underlying those provisions. The evidentiary record underlying the 2017 final rule provided no basis for applying the mandatory underwriting provisions to responsible, safe and sound bank loan products, including private banking products targeted to high net worth borrowers, and nothing in the record suggested that it would be unfair or abusive to make these bank loans without adhering to the mandatory underwriting provisions. **The same reasoning, however, applies equally to the payment provisions of the 2017 final rule, and should prompt the CFPB to rescind the entire 2017 final rule to the extent it covers bank loan products that are not payday loans, payday installment loans, payday loan substitutes, or vehicle-title loans.** BPI is deeply concerned about the continued application of the payment provisions of the final rule to responsible, safe and sound bank loan products when 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.[8] 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."[9] 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.[10]

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

7 The appendix to this letter provides a list of such products.

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

9 *Id.* at 54,720.

10 *Id.* at 54,721, 54,724–25.

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harms to consumers who are especially vulnerable."[11] 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."[12] 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 final rule's 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 final rule.

The application of the payment provisions to the bank loans described herein is therefore arbitrary and capricious and inconsistent with the Administrative Procedure Act. The CFPB should not put into effect a UDAAP-based rule that applies to payment practices that have not been found to be "unfair" or "abusive" in the context of bank loan products 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 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.[13] 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.[14]

11 *Id.* at 54,730.

12 *Id.* at 54,732.

13 12 C.F.R. § 1041.3(b)(1).

14 82 Fed. Reg. at 54,731 (emphasis added).

(continued…)

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."[15]

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 one month before selling a $1,000,000 home might obtain and use a $50,000 bridge loan from a bank to cover expenses during that one 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.

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.[16] 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.[17]

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.

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15 82 Fed. Reg. at 54,732.

16 12 C.F.R. § 1041.3(b)(2)(i).

17 *See* n. 14 and accompanying text, above.

- Interest-only loans and lines of credit are popular with private banking customers, who expect banks to offer these products.

- Additionally, some banks make loans to finance home improvements where payments are interest-only during the draw period of the loan (lasting 4 to 6 months), then fully amortize out for the term. The amortized payments may be more than double the size of the interest-only payments.

➢ 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.[18]

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 loans, specifically as shown in the [payday loan] payments report and through enforcement actions,"[19] and cited to a single enforcement action involving a non-bank payday lender and pawn shop.[20] 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."[21]

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

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18 12 C.F.R. § 1041.3(b)(2)(ii).

19 82 Fed. Reg. at 54,732.

20 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.

21 82 Fed. Reg. at 54,731.

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"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 fixed advance fee that is charged on a relatively small advance, which results in a low balance for the next billing cycle.[22]

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."

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 or other services 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.

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."[23] 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."[24] Agency action will be set aside where the agency has "entirely failed to consider an important aspect of the problem" or "offered an explanation for its decision that runs counter to the evidence before the agency."[25]

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

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22 A late payment that triggers a late fee but also reduces or eliminates the balance for the next billing cycle may – depending on the type of late fee – also cause a temporary spike in the loan's APR to greater than 36 percent under Regulation Z. *See* 12 C.F.R. Part 1026, Supplement I, Para. 1026.4(c)(2)-1.

23 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)).

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

25 *Id.* at 43.

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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.[26]

- 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.[27]

- The CFPB has entirely failed to consider an important aspect of the problem – specifically, the fact 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.[28]

Because no evidence in the rulemaking record supports the application of the payment provisions to these bank loans,[29] such application is therefore arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law under the APA.[30]

II. The payment provisions rest on interpretations of the CFPB's UDAAP authority that the CFPB has rejected in the NPR.

As originally drafted, the 2017 final rule reflected a new and startling interpretation of both the "abusive" and "unfairness" standards. The CFPB is now taking important steps to walk back from that new ground, and to establish a more thoughtful approach to UDAAP. Unfortunately, these steps are half measures; the CFPB is proposing to rescind only part of a rule even though the entire rule is based on a UDAAP theory the CFPB has rejected. Under the NPR, the payment provisions would become law, even as the CFPB abandons the legal justification for them.

A. The CFPB should adopt an "abusive" standard before implementing a rule built on its "abusive" authority.

The final rule underscores the perils of articulating UDAAP standards on an *ad hoc* basis. Indeed, the final rule is typical of the patchwork approach the CFPB has historically taken in exercising its UDAAP authority, both in rulemaking and enforcement actions. With the addition of the NPR, the CFPB has now interpreted, applied, and then reconsidered key elements of "abusive" conduct within a single rulemaking. Writing a rule that prohibits "abusive" conduct before defining "abusive" conduct is a recipe for contradiction and confusion.

BPI's concerns with *ad hoc* interpretations of the "abusive" standard appear to be shared by the CFPB. In a speech to the Bipartisan Policy Center in April 2019, CFPB Director Kraninger announced that the CFPB's effort to better address the "outstanding, challenging issues the Bureau is facing" would begin with a symposium "around

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26 *See id.* at 43.

27 *See id.* at 48.

28 *See id.* at 43.

29 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").

30 5 U.S.C. § 706(2)(A).

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clarifying the meaning of abusive acts or practices under Section 1031 of the Dodd-Frank Act."[31] As the Director noted, the concept of "abusive" conduct lacks the "substantially developed" doctrine regarding the concepts of unfairness and deception developed under the FTC Act. Accordingly, "some clarification, particularly with regard to reasonableness standards, may be useful."[32]

The Director's announcement is consistent with the CFPB's Fall 2018 Rulemaking Agenda, in which the CFPB stated it is "considering whether rulemaking or other activities may be helpful to clarify the meaning of abusiveness."[33] More generally, the CFPB's planned symposium on the "abusive" standard is emblematic of a "commitment to engagement with all the CFPB's stakeholders."[34] That commitment includes "ensuring transparent processes, fostering relationships and communication, valuing the expertise that others bring, [and] supporting productive public discourse."[35]

BPI strongly endorses those principles, and respectfully suggests that they should be implemented immediately – not after it is too late to apply them to the payment provisions of the 2017 final rule. The payment provisions' reliance on the CFPB's authority to prohibit "abusive" practices is an artifact of an *ad hoc* approach to interpreting the "abusive" standard. Allowing this application of the "abusive" practices to take effect will undermine – or, at best, complicate – the CFPB's larger effort to define or clarify "abusive" conduct in a principled way. In addition, the brief timeline for the CFPB and stakeholders to evaluate the agency's new approach to the 2017 final rule belies the CFPB's commitment to deliberate, thoughtful, and inclusive processes.

B. The CFPB's repudiation of the "abusive" basis for the mandatory underwriting provisions requires rescission of the payment provisions.

The NPR itself demonstrates that the "abusive" standard underlying the payment provisions is fundamentally flawed. 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] In 2017, the CFPB concluded that consumers have such a "lack of understanding" of the material risks, costs, or conditions of covered loans if they do not have a specific understanding of 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]

The CFPB's conclusion that this absence of specific understanding could render a product "abusive" was essential to the payment provisions in the final rule. The CFPB had already conceded that consumers "understand as a general matter that they may incur an NSF fee."[38] The payment provisions were justified nonetheless because

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31 Remarks of CFPB Director Kathleen Kraninger at the Bipartisan Policy Center, April 17, 2019, *available at* https://www.consumerfinance.gov/about-us/newsroom/kathleen-kraninger-director-consumer-financial-protection-bureau-bipartisan-policy-center-speech/.

32 *Id.*

33 *See* CFPB Agency Rule List - Fall 2018, Abusive Acts and Practices, *available at* https://www.reginfo.gov/public/do/eAgendaViewRule?pubId=201810&RIN=3170-AA88.

34 Remarks of CFPB Director Kathleen Kraninger at the Bipartisan Policy Center, n. 31, above.

35 *Id.*

36 12 U.S.C. § 5531(d)(2)(A).

37 82 Fed. Reg. at 54,617.

38 82 Fed. Reg. at 54,740.

(continued…)

"such a generalized understanding does not suffice to establish that consumers understand the material costs and risks of a product or service."[39]

In 2019, the CFPB changed course, and preliminarily concluded that consumers do not have a "lack of understanding" for purposes of the "abusive" standard if they appreciate the *general* risks of harm associated with the product or service.[40] This change in standard led to the proposed rescission of the mandatory underwriting provisions.[41] However, the payment provisions rest on the same prior interpretation of the "abusive" standard.

In sum:

- The CFPB has found that consumers have a general understanding of the risks addressed by the payment provisions;[42]
- The CFPB has found that such a general understanding is sufficient to defeat a claim that a product is abusive;[43] but
- The CFPB continues to rely on the "abusive" standard to justify the payment provisions.

This is arbitrary and capricious rulemaking.

C. The CFPB's repudiation of the "unfairness" basis for the mandatory underwriting provisions requires rescission of the payment provisions.

The inconsistency between the NPR and the payment provisions in the final rule is also apparent in their approaches to "unfairness." Under the Dodd-Frank Act, the CFPB may not declare an act or practice to be "unfair" unless it "causes or is likely to cause substantial injury to consumers which is not reasonably avoidable by consumers."[44] In 2017, the CFPB concluded that consumers could not "reasonably avoid" harm 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.[45]

The CFPB's conclusion – that only a specific understanding of individualized risk could allow consumers to reasonably avoid harm – was essential to the final rule's payment provisions. The CFPB conceded "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."[46] Indeed, commenters on the proposed rule noted that borrowers "should generally be aware that fees would result from failed payment withdrawals."[47] In the preamble to the 2017 final rule, the agency brushed aside the significance of consumers' general understanding, noting that consumers could still be "surprised by the amount,

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39 *Id.*

40 84 Fed. Reg. at 4,275.

41 *Id.*

42 *See* n. 38, above, and accompanying text.

43 84 Fed. Reg. at 4,275.

44 12 U.S.C. § 5531(c)(1)(A).

45 82 Fed. Reg. at 54,737.

46 82 Fed. Reg. at 54,740.

47 *Id.* at 54,737.

(continued…)

timing, or channel of a *particular* payment."[48] Thus, 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 for the risk to be reasonably avoidable.

In the NPR, the CFPB rejected the position that only a specific understanding of individualized risk could allow consumers to reasonably avoid harm. Consistent with decades of FTC precedent on the meaning of "unfairness," the CFPB now believes that 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."[49]

Unfortunately, the CFPB has not applied its new insight on "unfairness" to the payment provisions. Just as consumers have a general understanding sufficient to avoid the harms addressed by the underwriting provisions, they have a general understanding sufficient to avoid the harms addressed by the payment provisions.[50] The CFPB's current reasoning on "unfairness" requires rescission of the payment provisions as surely as it requires rescission of the underwriting provisions. Treating the two differently is arbitrary and capricious.

D. The CFPB should adopt definitive UDAAP standards through a notice-and-comment rulemaking before promulgating specific rules interpreting unfairness and abusiveness.

The root cause of the inconsistency in the CFPB's approach to different provisions of the final rule is the CFPB's shifting approach to UDAAP. Indeed, the final rule is just one example of the uncertainty that arises when critical building blocks of the CFPB's authority are left to *ad hoc* description and application. BPI urges the CFPB to refrain from letting this *ad hoc* application of the "abusive" standard in the payment provisions go into effect at a time when the agency is launching a comprehensive effort to define the contours of the "abusive" standard.

The CFPB should expand Director Kraninger's initiative to a comprehensive reassessment of the UDAAP doctrine and its scope. A notice-and-comment rulemaking process that focuses on establishing consistent standards for "unfairness" and "abusiveness" would provide an invaluable guide for CFPB's exercise of its UDAAP authority in supervision, regulation and enforcement alike. Clarity regarding the scope of the CFPB's UDAAP authority would yield more consistent compliance, more carefully tailored rules, and more consistent enforcement actions. Such fundamental reform would put financial institutions on fair notice of the types of conduct that violate the law and let consumers know what they can expect when they purchase financial goods and services.

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 three 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.

A. The CFPB's actions related to the 2017 final rule have created uncertainty for banks regarding compliance with its requirements.

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:

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48 *Id.* (emphasis added).

49 84 Fed. Reg. at 4,270-71.

50 *See* n. 38, above, and accompanying text.

(continued…)

- 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.[51]

- 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.[52]

- Until the CFPB's release of its October 26, 2018 public statement,[53] 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.[54]

- 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.[55] The court obliged, keeping the stay of the compliance date in effect for an indeterminate amount of time.[56]

For nearly its entire existence, the 2017 final rule – including the payment provisions – has been clouded by uncertainty, and this uncertainty persists today. 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 risks 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 appreciate the operational challenges of complying with the rule.

B. Banks face ongoing interpretive and operational challenges related to implementation of the 2017 final rule, further demonstrating the issues with applying the rule to bank loan products.

In preparing for the August 19, 2019 compliance date, banks have encountered a number of interpretive and systems issues that have made compliance more challenging than the CFPB may have anticipated and that make the shorter compliance period particularly unreasonable. Interpretive issues include, but are not limited to, the following:

- The 2017 final rule does not appear to be limited by its terms to loans made after the compliance date. Further, while the rule requires a lender to send a notice to the consumer in advance of the first payment

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51 *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/.

52 *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).

53 *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/.

54 *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).

55 *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).

56 *See* Community Financial Serv. Assoc. of America, Ltd. v. Consumer Financial Protection Bureau, Order, Civil Action No. 1:18-cv-295 (W. D. Tex. Mar. 19, 2019).

(continued…)

withdrawal for a covered loan, the rule does not make clear which payment withdrawal is considered to be the first payment withdrawal in the case of a loan where the first scheduled payment occurs prior to the compliance date.

- Banks will need to determine when and how to send disclosures if an open-end loan becomes a covered loan based on contingencies that occur after the loan's inception. The timing rules related to the notice required prior to the first payment withdrawal and the unusual payment notice create substantial compliance difficulties.

    - Under the rule, a lender that sends an electronic payment withdrawal notice must do so no later than three business days prior to attempting the first payment withdrawal.[57] Even assuming the first payment withdrawal in this context is considered to be the first payment made after the open-end loan becomes a covered loan, the lender will still encounter compliance difficulties. For example, if the loan becomes a covered loan one or two days prior to the ordinary monthly payment withdrawal, the lender may be forced to delay the regularly scheduled payment withdrawal so that it complies with the three business day prior notice requirement.

    - The resulting delay would frustrate the consumer's reasonable expectations and require significant changes to lenders' systems to implement without charging late fees. Significantly, such a delay could also cause the payment withdrawal to become an "unusual withdrawal" under the rule,[58] which would, in turn, require the lender to send an unusual payment notice three business days prior to withdrawing payment, even though the payment withdrawal would not have been unusual in the absence of the rule.[59]

- Banks that make demand loans must determine whether such loans are covered short-term loans based on the lender's ability to demand repayment within 45 days of the loan's inception.

- Banks that make multiple types of covered loans to the same consumer must determine whether failed payment attempts on different covered loans must be aggregated for purposes of the prohibition on three consecutive failed payment attempts. If so, these banks would need to implement complex systems to aggregate such payment attempts.

- The rule requires a lender to send an unusual withdrawal notice when the amount of a transfer will vary in amount from the regularly scheduled payment amount, which, in the case of an open-end loan, is the scheduled minimum payment due as disclosed in the periodic statement required under Regulation Z.[60] However, not all open-end loans have a scheduled minimum payment due, and not all loans are subject to Regulation Z. For example, a majority of private banking loans made to high net worth borrowers are open-end lines of credit that exceed the Regulation Z maximum of $57,200. The rule does not explain whether the lender in these circumstances should send unusual withdrawal notices for every payment, no payments, or some subset of payments.

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57 12 C.F.R. § 1041.9(b)(2)(i).

58 12 C.F.R. § 1041.9(b)(3)(ii)(C)*(2)* (providing that a withdrawal is an "unusual withdrawal" if it is on a date other than the date of a regularly scheduled payment).

59 12 C.F.R. § 1041.9(b)(3).

60 12 C.F.R. § 1041.9(b)(3)(ii)(C)*(1)(i)*.

(continued…)

- Similarly, floating rate installment loans have payment amounts that change continually. The rule does not explain whether the lender should send unusual withdrawal notices for every payment, no payments, or a subset.

- The rule's requirement to send an unusual withdrawal notice contains an exception that allows a lender of an open-end loan to include such a notice in conjunction with the periodic statement required under Regulation Z.[61] It is not clear whether an open-end loan that is not subject to Regulation Z (due, for example, to the loan exceeding the Regulation Z maximum of $57,200) may take advantage of this exception.

- Under the 2017 final rule, single immediate payment transfers initiated at the consumer's request do not require an unusual withdrawal notice.[62] Thus, if the consumer writes a signature check to the lender after a failed regularly scheduled payment attempt through ACH, the lender would not need to send such a notice to process the check. However, the rule could be interpreted to require the next regularly scheduled payment (which will made by ACH), to be accompanied by an unusual withdrawal notice, since the ACH payment would "differ from the payment channel of the transfer directly preceding it," *i.e.*, the signature check.

- Similarly, a consumer that sets up recurring payments via ACH or direct debit after paying through some other method, or changes her preferred method of recurring payments, would be changing the payment channel. This change could make the channel of the next payment "differ from the payment channel of the transfer directly preceding it," and thereby require an unusual payment withdrawal notice, despite the fact that the consumer initiated the change.

- The rule provides an exception to the prohibition on making a payment withdrawal after two consecutive failed attempts for a single immediate payment transfer initiated at the consumer's request. However, this exception is subject to the condition that the consumer authorize the transfer on or after the date the lender provides to the consumer a consumer rights notice or on the date the consumer affirmatively contacts the lender to discuss repayment options, whichever date is earlier.[63] If neither event occurs at the specified time relative to the consumer's request, the lender seemingly could not process the single payment transfer that the consumer specifically authorized, and would need to obtain another authorization several days after providing a consumer rights notice. During that time, the consumer could go into default as a result of the lender's inability under the rule to process the request she authorized.

The illogical results, compliance challenges, and interpretive ambiguities described above are just examples of how the CFPB's failure to consider non-excluded bank products when adopting the payment provisions has led to an unworkable rule.

Systems issues that have made compliance with the payment provisions unreasonably challenging include the following:

- Determining when an open-end line of credit exceeds a 36 percent APR, and therefore becomes a covered loan, based on contingencies that occur *after* the loan's inception, will require complex systems changes.

- Some banks do not presently have the systems capabilities to calculate APRs for loans in private wealth management business lines where all loans exceed the $57,200 Regulation Z maximum. Without these

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61 12 C.F.R. § 1041.9(b)(3)(i)(D).

62 12 C.F.R. § 1041.9(b)(1)(iii)(B).

63 12 C.F.R. § 1041.8(d).

capabilities, banks will not be able to determine which loans, particularly open-end lines of credit, are covered loans based on their APR.

- If a consumer pays with a check following two failed payment attempts, the lender will need a way to delay processing the check until the lender has sent a consumer rights notice and satisfied the applicable notice periods – without imposing a late fee on the borrower.

- Lenders will need a way to track minimum payment amounts, payment channels, and payment timing on an ongoing basis to determine if an unusual payment notice is required. Banks do not currently have this functionality in place.

- Lenders that make one or more covered loans and one or more non-covered loans to the same consumer will need to implement systems capable of distinguishing between the two. This will require banks to code every single consumer loan in their portfolios, which would be a massive undertaking.

Requiring banks to complete compliance preparations in the face of these challenges would impose material upfront costs. Additionally, it would be expensive and time consuming on an ongoing basis for banks to send the notices required by the payment provisions, which must be separate from monthly billing statements. Finally, in addition the compliance burdens the rule places upon banks, the CFPB should anticipate countless internal and external requests for guidance that would be avoided if the rule was limited to the products for which it was intended.

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

For the reasons discussed above, the CFPB should:

- Narrow the coverage provisions in section 3 of the 2017 final rule so that the payment provisions 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 the standards for "unfairness" and "abusiveness" articulated in the NPR.

- 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.

The CFPB should narrow the 2017 final rule's coverage by both: (1) revising the three-part primary definition of "covered loan"; and (2) adopting a series of specific exclusions from the "covered loan" definition. This approach would exempt the responsible, safe and sound bank loan products that are discussed throughout this letter or have yet to be developed, allowing banks to continue to innovate responsibly.

To narrow the three-part primary definition of "covered loans" – consisting of "covered short-term loans," "covered longer-term balloon payment loans," and "covered longer-term loans" – the CFPB should take the following two steps:

- The CFPB should adopt a maximum dollar amount for each part of the three-part definition of "covered loan." Any loan above the maximum dollar amount would not be a "covered loan" under any of the three parts of the definition. For example, a maximum of $5,000 would align with the Office of the Comptroller of the Currency's guidance on small dollar installment loans, which defines such loans as those ranging from

$300 to $5,000.[64] Under no circumstances should a "covered loan" include a loan that exceeds the threshold for the exemption under Regulation Z (currently $57,200), since APR calculations are required only for loans covered by Regulation Z.

- The CFPB should adopt a minimum cost threshold, in terms of an APR, for each part of the three-part definition of "covered loan." Any loan that is below the APR threshold would not be a "covered loan" under any of the three parts of the definition.

These two revisions would ensure that, consistent with the factual and theoretical underpinnings of the 2017 final rule, covered loans are in fact small-dollar and high-cost loans.

In addition to such revisions, the CFPB should adopt a series of specific exclusions to exempt the responsible, safe and sound bank loan products discussed throughout this letter, including exclusions for:

- Any loan made prior to the 2017 final rule's compliance date.
- Any loan, such as a bridge loan, made for the purpose of facilitating the purchase of real property, including a loan that permits a borrower to carry his or her existing real property pending its sale, regardless of whether the loan is secured or unsecured and regardless of its duration.
- Any loan with the purpose of financing the purchase of a service ancillary to a purchased good.
- Any loan with the purpose of financing or carrying an investment in securities.
- Any loan secured by a security.
- Any loan secured by a certificate of deposit.
- Any demand loan. Alternatively, the CFPB could clarify that a feature allowing the lender to demand repayment should not be deemed to set the loan's maturity date.
- Any refinanced automobile loan.
- Any loan made to or guaranteed by an "accredited investor," "qualified purchaser," or "qualified client," each as defined by the SEC, or a private banking client, provided that the consumer qualifies under the bank's standards for private banking.
- Any loan that is not a "covered loan" either at its inception or at a later date as a result of a pre-defined adjustment in loan terms, such as the expiration of an introductory rate and the application of the full contract rate. For instance, an open-end line of credit for which the minimum payment formula does not change, and that has an interest rate of less than 36 percent, should not become a "covered longer-term loan" based on contingent fees that are charged after the establishment of the line of credit. Alternatively, the CFPB could exclude any open-end line of credit that has an interest rate of less than, for example, 36 percent where any increase in APR above 36 percent is not sustained over multiple consecutive billing cycles.

Finally, the CFPB should also clarify that a demand feature should not be considered when determining the maximum duration of a loan. Additionally, 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

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[64] OCC Bulletin 2018-14, Core Lending Principles for Short-Term, Small-Dollar Installment Lending (May 23, 2018).

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).

Corrections to the final rule's coverage will require careful consideration and public consultation. To that end, it is critical that the CFPB delay the compliance date of the payment provisions until it has corrected the rule's coverage. The CFPB should delay the application of the payment provisions before the August 2019 mandatory compliance date so 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 CFPB or other agencies for engaging in unfair or abusive acts or practices if they did not comply with the payment provisions. 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.

If the CFPB is inclined to issue a public statement of non-enforcement of the payment provisions, as it did for Home Mortgage Disclosure Act compliance in December 2017,[65] the CFPB should nevertheless follow such a statement with a swift rulemaking process to narrow or withdraw the payment provisions. The 2017 final rule is enforceable by several federal regulators, making a single regulator's non-enforcement policy of limited usefulness to banks subject to oversight by multiple regulators. Moreover, statements of non-enforcement do not provide the ongoing clarity or consistency implicit in a rulemaking. Additionally, any public statement of non-enforcement and any related rulemaking should address the rule's limitations on payment withdrawals *and* its notice requirements, both of which present interpretive and compliance challenges discussed above in part III of this letter. While a public statement of non-enforcement would provide some welcome, albeit limited relief, it ultimately is no substitute for a fundamental rethinking of the payment provisions as they apply to bank products.

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BPI appreciates the opportunity to comment on the NPR. 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,

Naeha Prakash

Naeha Prakash
Senior Vice President & Associate General Counsel for Consumer Regulatory Affairs
Bank Policy Institute

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65 *See* Consumer Financial Protection Bureau, CFPB Issues Public Statement On Home Mortgage Disclosure Act Compliance (Dec. 21, 2017), *available at* https://www.consumerfinance.gov/about-us/newsroom/cfpb-issues-public-statement-home-mortgage-disclosure-act-compliance/.

Appendix

List of Bank Products Types that May Be Covered by the 2017 Final Rule

- Unsecured "bridge" loans that assist customers with the sequential purchase and sale of a home and are repayable within 45 days and/or in a lump sum.
- 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
- Other short-term securities-backed loans.
- Closed-end or open-end loans secured by a certificate of deposit or other security, with the balance due at maturity.
- 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 that finance ancillary products (e.g., warranties, credit insurance) as part of a loan to purchase a vehicle or other good.
- Refinanced auto loans.
- Open-end lines of credit where a non-recurring finance charge coupled with a low or zero balance temporarily brings the APR above 36 percent.