

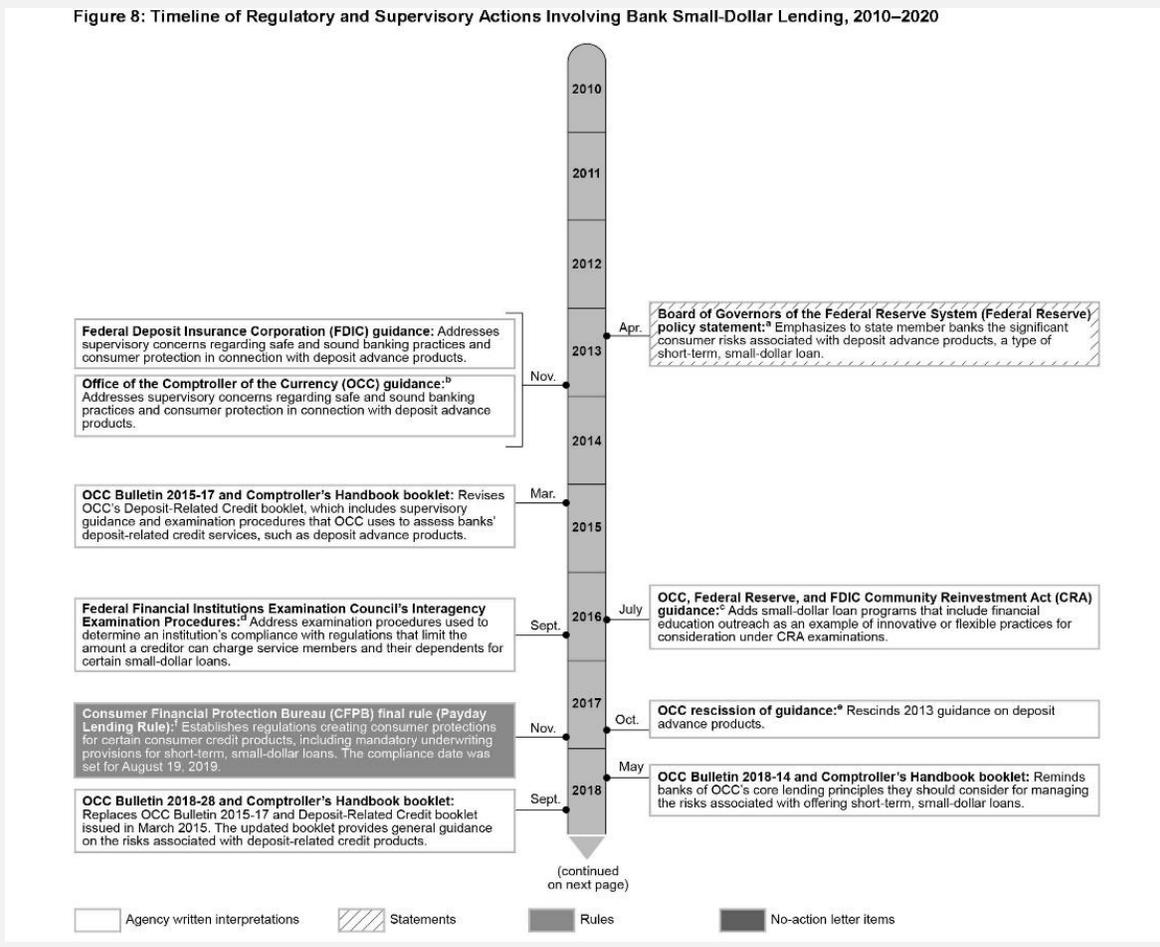
Market Participants and Observers Indicated That Regulatory Uncertainty Around Small-Dollar Lending Affected Availability

Excerpt from a U.S. Government Accountability Office Report, February 2022

Most of the market participants and observers who commented on regulatory uncertainty around small-dollar loans told us banks are hesitant to offer such loans in part because of changes to related rules or guidance in recent years.¹ In particular, some market participants and observers noted that banks do not want to offer small-dollar products because they are expensive to develop and the regulations or supervisory expectations may change.

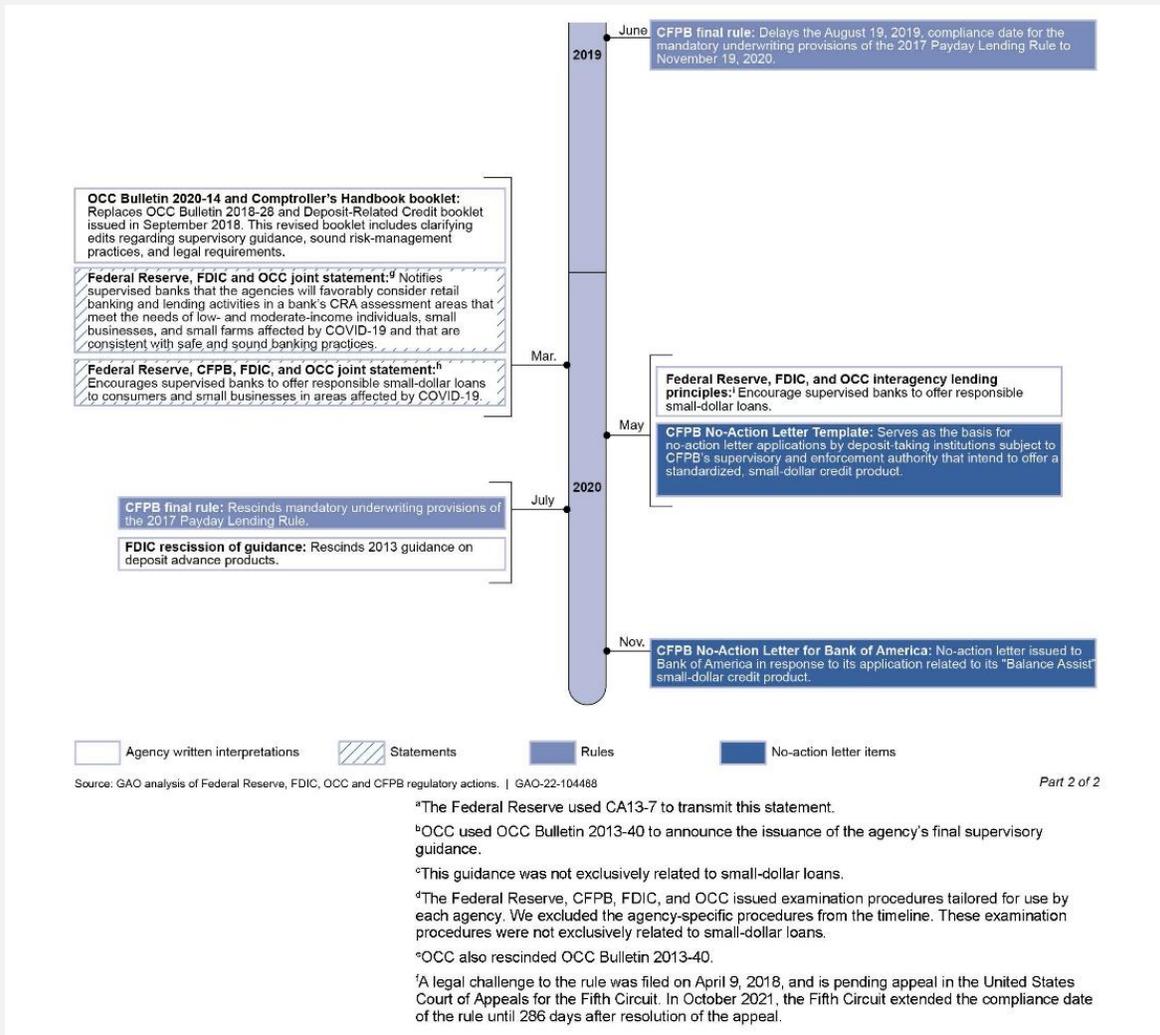
From 2010 through 2020, CFPB, the Federal Reserve, FDIC, and OCC issued or rescinded at least 19 actions related to small-dollar loans (see fig. 8). These actions included issuing rulemakings, statements, agency booklets, and principles.

Figure 8: Timeline of Regulatory and Supervisory Actions Involving Bank Small-Dollar Lending, 2010–2020



¹ Eighteen market participants and observers (nine banks, three consumer groups, five industry groups, and one research organization) commented on the effects of regulatory actions on small-dollar lending.

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For example, the banking regulators have issued and rescinded supervisory information related to deposit advance products.² In 2013, the Federal Reserve issued a statement highlighting potential consumer harm and elevated compliance risk associated with these products.³ That same year, OCC and FDIC issued supervisory guidance that also described the products' potential to harm consumers and elevated compliance risks.⁴ The OCC and FDIC guidance encouraged banks offering deposit advance products to apply more scrutiny in underwriting these loans and to discourage repetitive borrowing. According to representatives of the Consumer Bankers Association, OCC and FDIC's 2013 guidance were restrictive, which made it difficult for banks to offer deposit advance products. Representatives from one bank told us the bank stopped offering advances on direct deposits in 2014, following OCC's new guidance.

Although OCC rescinded its 2013 guidance in 2017, the regulatory landscape for small-dollar lending products remained fluid. According to OCC, the agency rescinded this guidance in preparation for the implementation of a new CFPB rule on small-dollar loans. FDIC also rescinded its guidance in 2020, stating it was in response to the issuance that same year of the interagency lending principles for offering responsible small-dollar loans. The Federal Reserve told us its

² Deposit advance products are a type of short-term, small-dollar loan offered to certain account holders who have recurring electronic deposits to their accounts—such as direct deposit of their paycheck.

³ Board of Governors of the Federal Reserve System, *Statement on Deposit Advance Products*, CA 13-7 (Washington, D.C.: Apr. 25, 2013).

⁴ Federal Deposit Insurance Corporation, *Guidance on Supervisory Concerns and Expectations Regarding Deposit Advance Products* (Washington, D.C.: Nov. 26, 2013); and Office of the Comptroller of the Currency, *Guidance on Supervisory Concerns and Expectations Regarding Deposit Advance Products* (Washington, D.C.: Nov. 26, 2013).

statement on deposit advance products was at a higher level than the other banking regulators' guidance (as it discussed applicable laws and regulations associated with offering these loans) and was in effect as of January 2022.

Furthermore, in November 2017, CFPB issued its final rule on Payday, Vehicle Title, and Certain High-Cost Installment Loans (Payday Lending Rule), which included underwriting requirements for small-dollar loans.⁵ In a July 2020 rule, CFPB revoked the underwriting provisions prior to the corresponding compliance date.⁶ CFPB stated it amended the regulation based on its reevaluation of the legal and evidentiary bases for these provisions.⁷

Some market participants and observers told us they did not believe the Payday Lending Rule was sufficiently stable for banks to offer small-dollar loans. According to the Independent Community Bankers of America, when the rule was issued, some banks that offered small-dollar loans stopped doing so because of the mandatory underwriting requirements.

Although CFPB has since rescinded these requirements, four market participants and observers told us that banks believe CFPB again could change the rule. In March 2021, the CFPB Acting Director addressed small-dollar lending by mentioning that ability to repay is an important underwriting standard and that, if appropriate, the agency will consider the use of rulemaking to address the need for such a standard.⁸ However, based on its most recent regulatory agenda (Fall 2021), CFPB did not include any regulations related to small-dollar lending.

More recently, the banking regulators and CFPB have taken several actions to encourage banks and credit unions to offer small-dollar loans. For example, in May 2020, OCC, FDIC, and the Federal Reserve issued interagency lending principles that encouraged banks to offer these loans.⁹ In May 2020, CFPB also issued a no-action letter template for small-dollar credit products.¹⁰ The agency noted that it approved the template to increase competition in the small-dollar lending market, foster access to credit, and include important protections for consumers. In November 2020, CFPB granted a no-action letter to Bank of America for certain small-dollar credit products based on the template.

Despite these actions by the regulators, some market participants and observers said regulatory uncertainty remains among banks. For instance, representatives for two banks expressed concern that the interagency principles would be subject to revision with a change in administration. Representatives from The Pew Charitable Trusts told us the Payday Lending Rule, CFPB's 2020 no-action letter template, and the 2020 interagency lending principles on small-dollar lending were helpful in establishing clear regulatory expectations for small-dollar lending products. But they also stated that CFPB's 2020 rescission of certain provisions of the Payday Lending Rule created the appearance of regulatory uncertainty that the 2017 rule previously addressed.

Lastly, some market participants and observers who commented on regulatory uncertainty, including four banks, had concerns that the current guidance did not provide clear guidelines for banks that would shield them from regulatory

⁵ These provisions, referred to as the mandatory underwriting provisions, stated that it is an unfair and abusive practice for a lender to make a covered short-term or longer-term balloon payment loan, including payday and vehicle title loans, without reasonably determining that consumers have the ability to repay those loans according to their terms. The provisions prescribed mandatory underwriting requirements for making the ability-to-repay determination; exempted certain loans from the mandatory underwriting requirement; and established related definitions, reporting, recordkeeping, and compliance date requirements. A legal challenge to the rule was filed on April 9, 2018. Community Financial Services Association of America, Ltd. and Consumer Service Alliance of Texas v. CFPB, 1:18-cv-295 (W.D. Texas). In August 2021, the district court issued a summary judgment in favor of CFPB permitting the regulation to stand. The plaintiff appealed to the United States Circuit Court of Appeals for the Fifth Circuit, Case No. 21-50826. In October 2021, the Fifth Circuit extended the compliance date of the rule until 286 days after resolution of the appeal.

⁶ Under the July 2020 rule, CFPB revoked the mandatory underwriting provisions prior to the corresponding compliance date.

⁷ In developing the 2019 Notice of Proposed Rulemaking, the agency stated it took into account the input it received from stakeholders through its efforts to monitor and support industry implementation of the 2017 final rule, as well as comments received in response to other agency initiatives.

⁸ Dave Uejio, "Our commitment to protecting vulnerable borrowers"; blog post by the CFPB Acting Director (March 23, 2021). Accessed at <https://www.consumerfinance.gov/about-us/blog/our-commitment-to-protecting-vulnerableborrowers/>.

⁹ The joint statement listed three core lending principles: (1) loan products are consistent with safe and sound banking, treat customers fairly, and comply with applicable laws and regulations; (2) financial institutions effectively manage the risks associated with the products they offer, including credit, operational, and compliance; and (3) loan products are underwritten based on prudent policies and practices governing the amounts borrowed, frequency of borrowing, and repayment requirements. NCUA was also a part of this joint issuance.

¹⁰ According to CFPB, no-action letters are intended to provide increased regulatory certainty that CFPB will not bring a supervisory or enforcement action against a company for providing a product or service under certain facts and circumstances. The May 2020 template identified certain features that would serve as "guardrails" and be included in applications for no-action letters using the template.

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risks. For example, representatives of one bank noted that the interagency principles were defined at a high level and did not provide any specificity on how a bank could provide these loans and be reasonably assured that it would be shielded from regulatory risks.