May 15, 2019

Via Electronic Submission to: www.regulations.gov

Ms. Kathy Kraninger
Director
Consumer Financial Protection Bureau
1700 G St. N.W.
Washington, D.C. 20552

Re: Payday, Vehicle Title, and Certain High-Cost Installment Loans [RIN 3170-AA80]

Comments of the Consumer Advocacy & Protection Society (CAPS)
University of California, Berkeley, School of Law

Dear Director Kraninger:

The Consumer Advocacy and Protection Society (CAPS)[1], a student-run organization dedicated to the promotion of consumer law and consumer protection at Berkeley Law, appreciates the opportunity to comment in response to the Consumer Financial Protection Bureau's proposal to rescind certain provisions of its 2017 Final Rule governing high-cost loans such as payday, installment and auto-title loans. Many of us have worked as clinical students or volunteers in the East Bay Community Law Center's Consumer Rights Workshop and/or Consumer Justice Clinic, which are legal clinics of the UC Berkeley School of Law that provide

[1] Consumer Advoc. & Protection Soc'y (CAPS) – Berkeley L.'s Consumer Hub (last visited April 6, 2019), https://consumer.berkeley.edu/.

legal services to low-income consumers, including consumers who have taken out payday, installment and/or auto-title loans. Based on our experience working directly with consumers, and our research into the harms of poorly regulated high-cost loans, we urge the Bureau not to proceed with its proposed rescissions to its 2017 "Payday, Vehicle Title, and Certain High-Cost Installment Loans" Rule.

Despite the claims of the 2019 Proposed Rule, the 2017 Final Rule makes important progress towards protecting vulnerable consumers from exploitation. First, the Final Rule fulfills the Bureau's statutory mandate under the Dodd-Frank Act to "identify and prevent unfair, deceptive, or abusive acts or practices."[2] Second, the Final Rule shifts the burden to lenders to assess a consumer's ability to repay, in acknowledgment of the limited choices indebted consumers actually have. Third, the Final Rule only constrains products identified by the Bureau as unfair and abusive, leaving space for lenders to innovate new ways of meeting consumer needs. And fourth, the Final Rule sufficiently seeks to minimize market impact without compromising the Bureau's core mission of consumer protection. For these reasons, we urge the Bureau to follow through on its commitment to implement the Final Rule in its entirety.

Introduction

In 2017, after processing and addressing a record number of public comments,[3] the Bureau issued its Final Rule on "Payday, Vehicle Title, and Certain High-Cost Installment Loans."[4] The Final Rule establishes a number of necessary regulations protecting consumers

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[2] Payday, Vehicle Title, and Certain High-Cost Installment Loans, 82 Fed. Reg. 54,472, 54,472 (Nov. 17, 2017) (to be codified at 12 C.F.R. pt. 1041).
[3] *Id*. at 54,514 (stating "[r]eflecting the broad public interest in this subject, the Bureau received more than 1.4 million comments on the proposed rulemaking. This is the largest comment volume associated with any rulemaking in the Bureau's history").
[4] *Id*. at 54,472.

from the unreasonable expenses[5] associated with these high-cost loans. In an abrupt about-face, the Bureau now proposes to rescind these important protections, claiming the Final Rule lacks "sufficiently robust" evidence[6] to support its claims of "unfair and abusive" practices.[7] The 2019 Proposed Rule is predicated on three newly emphasized concerns, specifically that the Final Rule (1) restricts "consumer choice and access to credit," (2) "constrain[s] lenders' offering of products," and (3) has detrimental market effects on the payday and vehicle loan industries.[8] However, the Proposed Rule fails to provide a rational basis in fact for rescinding the underwriting provisions in the Final Rule, as discussed further below.

I. The Bureau should implement the 2017 Final Rule's provisions in their entirety because they fulfill the Bureau's statutory mandate under the Dodd-Frank Act.

The Bureau should implement the 2017 Final Rule because it meets all three requirements for unfairness set out in the Dodd-Frank Act.[9] The Final Rule establishes that (1) high-cost loans cause substantial injury, (2) consumers cannot reasonably avoid that injury, and (3) the benefits to the market and consumers at large do not outweigh the resultant harm.[10]

First, the 2017 Final Rule identifies two specific "unfair and abusive" practices of short-term payday and vehicle title lenders causing substantial injury under section 1031 of the Dodd-Frank Act:[11] (1) the offering of balloon-payment loans without examining whether consumers

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[5] *Id*. at 54,477 (noting "[t]he annual percentage rate (APR) on a 14-day loan with [standard payday loan rates] is 391 percent").
[6] *Id.* at 54,475. The 2019 Proposed Rule's claim of insufficient evidence runs directly counter to the Bureau's description of their research process in the 2017 Final Rule, which included: "studying . . . markets for liquidity loans for over five years," "obtain[ing] extensive loan-level data," "publish[ing] five reports based upon these data," reviewing relevant published literature, and meeting with a wide-variety of stakeholders. *Id.*
[7] Payday, Vehicle Title, and Certain High-Cost Installment Loans, 84 Fed. Reg. 4,252, 4,253 (Feb. 14, 2019).
[8] *Id*. at 4,264.
[9] Payday, Vehicle Title, and Certain High-Cost Installment Loans, 84 Fed. Reg. at 54,588 (stating "under section 1031(c)(1) of the Dodd-Frank Act, an act or practice is unfair if it causes or is likely to cause substantial injury to consumers which is not reasonably avoidable by consumers and such injury is not outweighed by countervailing benefits to consumers or to competition").
[10] *Id*. at 54,519.
[11] *Id*. (noting "[s]ection 1031(b) of the Dodd-Frank Act provides the Bureau with authority to prescribe rules to identify and prevent unfair, deceptive, or abusive acts or practices, or UDAAPs").

have the ability to repay those loans;[12] and (2) continued attempts to withdraw payment from consumers' accounts after two consecutive failures to pay.[13] In line with its statutory mandate, the Final Rule combats these practices with a handful of mandatory loan-underwriting provisions.[14] The Final Rule also establishes notification and compliance requirements to ensure that lenders do not withdraw funds from consumers' accounts without notifying them and that lenders retain basic records of their borrowers.[15] These sensible regulations appropriately address the substantial harm identified by the Final Rule.

Second, the 2017 Final Rule relies on the Bureau's own research to show that the vast majority of consumers, once having entered a high-cost loan cycle, cannot avoid becoming trapped by debt. As stated in the Final Rule:

> [T]he consumers who suffer the greatest injury are those consumers who find it necessary to re-borrow repeatedly and end up in exceedingly long loan sequences. As discussed in the proposal, consumers who become trapped in long loan sequences pay substantial fees for re-borrowing, and they usually do not reduce the principal amount owed when they re-borrow.[16]

The inability to escape the debt cycle epitomizes an unavoidable harm under the second unfairness requirement of the Dodd-Frank Act.

Third, the 2017 Final Rule, as discussed more fully in Part IV below, weighs the injury to consumers against both the benefits to the market and the perceived benefits to consumers as required by the Dodd-Frank Act. To produce its cost-benefit analysis, the Bureau undertook extensive research and engagement with state and federal regulators, industry trade associations, advisory groups, and others over the course of five years.[17] The Bureau thus had sufficiently

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[12] *Id*. at 54,590-91.
[13] *Id*. at 54,734.
[14] *Id*. at 54,473.
[15] *Id*. at 54,473-74.
[16] *Id.* at 54,589.
[17] *Id*. at 54,475.

considered potential benefits to the market when it decided that the harms still outweighed any benefits. Moreover, the underwriting requirements sensibly pertain only to certain payday and vehicle short-term loans of 45 days or less and a narrow set of longer-term loans.[18]

Because the 2017 Final Rule meets all three requirements under the Dodd-Frank Act, the Bureau should fulfill its statutory mandate by implementing it.

II. The Bureau should implement the 2017 Final Rule because it only eliminates practices the Bureau has previously identified as unfair to consumers.

The ability-to-repay requirement for short-term loans imposed under the 2017 Final Rule consists of verifications of consumer income, debt, and costs, a simple forecast of basic living expenses, and a determination of a consumer's ability to pay based on his or her debt-to-income ratio.[19] In the 2019 Proposed Rule, the Bureau now finds these requirements unduly suppress consumer choice and overburden lenders.[20] Instead, it suggests that keeping the burden *entirely* on consumers to evaluate their financial circumstances before seeking out a loan sufficiently protects consumers from interest rates that leave many in unavoidable debt-traps.[21] The Bureau now states that the "individualized" consumer ability-to-repay analysis required of lenders under the Final Rule "effectively suppresses rather than facilitates consumer choice."[22]

In the 2019 Proposed Rule, the Bureau states that, to avoid the harms of short-term lending, consumers "need only to understand that a significant portion of payday borrowers experience difficulty repaying," and appreciate the struggles that borrowers face *if* they do not repay.[23] According to the Bureau, because payday loans are "advertised as products designed to

[18] *Id*. at 54,513.
[19] *Id*. at 54,473.
[20] Payday, Vehicle Title, and Certain High-Cost Installment Loans, 84 Fed. Reg. at 4,264.
[21] *Id*. at 4,269-71.
[22] *Id*. at 4,269.
[23] *Id*. at 4,271.

assist" those in "financial distress," consumers may "infer that there are risks" associated with the loans in light of their "limited options."[24] Problematically, these suggestions fail to consider the informational asymmetry between consumers and lenders in the short-term lending world. The 2017 Final Rule properly points out that while consumers are the most familiar with their own financial situations, it is lenders that have the most (if not the only available) information about their business models and the performance of their credit products over many cases.[25] A mere understanding that *some* borrowers face financial trouble or an inference that short-term loans are risky reveals to a borrower nothing about the intensity of that risk. Lenders, not borrowers, are in the best position to evaluate the particular risk of taking out a high-interest short-term loan in light of their better understanding of their product's performance in the market. Thus, the Final Rule's underwriting requirements facilitate an analysis of a potential borrower's assets in light of knowledge that consumers themselves lack.

In the 2019 Proposed Rule, the Bureau points to the Mann Study cited by the 2017 Final Rule as evidence that consumers continue to take out payday loans even when they are made aware of repayment and borrowing rates and some risks associated with a loan.[26] It suggests that this is evidence that payday loan borrowers generally are *already aware* of the risks associated with the loans when they begin to borrow.[27] In making this assessment, the Bureau ignores that borrowers are often forced into cycles of re-borrowing because of their *initial* decision to engage in risky borrowing. Successive decisions to borrow are not necessarily indicative of a consumer's "choice" or an inherent demand for the product. When consumers take out loans that later reveal

[24] *Id*. at 4,270.
[25] Payday, Vehicle Title, and Certain High-Cost Installment Loans, 84 Fed. Reg. at 54,637.
[26] *Id.* at 4,275.
[27] *Id*.

themselves to be unaffordable, their options become limited to re-borrowing, default, or the foregoing of basic needs and living expenses.[28]

Though the 2017 Final Rule limits certain lender practices, the Bureau specifically identified those practices as unfair through careful research. Thus, the "choice" consumers lose with the Final Rule's implementation is not a meaningful one. Because the 2019 Proposed Rule would disregard the critical distinction between meaningful choice and cyclical debt, the Bureau should continue with its original intention to implement the Final Rule.

III. The Bureau should implement the 2017 Final Rule in its entirety because it gives lenders the opportunity to innovate new lending practices while still restricting unfair practices.

The 2019 Proposed Rule classifies the 2017 Final Rule's restrictions as "suppress[ing] rather than facilitat[ing] consumer choice";[29] however, this characterization inappropriately frames the issue at hand. Rather, the Final Rule prevents vulnerable consumers from being trapped by predatory lending practices while still allowing lenders to offer alternative products so long as those products do not unfairly disadvantage consumers. Because the Proposed Rule would rescind these important protections, the Bureau should not implement it.

The 2017 Final Rule, in discussing the potential lost revenue to lenders under its parameters, emphasizes that lenders could offset those losses by reinventing their product offerings.[30] The Final Rule suggests "offering a longer-term vehicle title loan with a series of smaller periodic payments instead of offering a short-term vehicle title loan" as just one example.[31] As the Final Rule acknowledges, lenders will experience costs in implementing the

[28] *See* Payday, Vehicle Title, and Certain High-Cost Installment Loans, 82 Fed. Reg at 54,637.
[29] Payday, Vehicle Title, and Certain High-Cost Installment Loans, 84 Fed. Reg. at 4,269.
[30] Payday, Vehicle Title, and Certain High-Cost Installment Loans, 82 Fed. Reg. at 54,835.
[31] *Id.*

rule as well as in innovating within its structure.[32] However, as discussed above, the alternative is imposing costs on consumers while allowing lenders to work within a structure known to leave consumers in inescapable cycles of debt. By retaining the Final Rule's provisions, the Bureau both protects consumers and incentivizes lenders to find creative ways to serve their customers without exploiting them.

The Bureau should facilitate consumer choice; however, expanding choices within the market only benefits consumers if the available options do not unfairly exploit them. Moreover, the Bureau's mission calls for the elimination of such exploitive practices as those identified in the 2017 Final Rule.[33] Bolstering industries that prey on consumers, rather than encouraging them to reinvent themselves in a way that causes less harm to their customers, runs antithetical to the statutory mission of the Bureau, and reflects an unfortunate inversion of priorities away from consumer protection.[34] The Bureau should implement the 2017 Final Rule, encouraging the short-term loan industry to innovate within reasonable bounds, rather than implementing the 2019 Proposed Rule that would allow the continued exploitation of consumers.

IV. The 2019 Proposed Rule ignores efforts in the 2017 Final Rule to minimize market impact and focuses on maintaining exploitive practices rather than protecting consumers.

While the 2019 Proposed Rule references the "dramatic market impacts" of the 2017 Final Rule, it fails to appropriately acknowledge the Final Rule's attempt to minimize those impacts.[35] Worse, the Proposed Rule would repeal the Final Rule despite anticipating growth in the very products the Bureau previously deemed threatening to consumers.[36]

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[32] *Id.*
[33] Consumer Financial Protection Bureau (last visited April 6, 2019), https://www.consumerfinance.gov/about-us/the-bureau/ (stating the Bureau's mission as "[r]ooting out unfair, deceptive, or abusive acts or practices by writing rules, supervising companies, and enforcing the law").
[34] *Id.*
[35] Payday, Vehicle Title, and Certain High-Cost Installment Loans, 84 Fed. Reg. at 4,266.
[36] *Id.* at 4,284.

The 2019 Proposed Rule focuses on market impact – for lenders – while failing to recognize the 2017 Final Rule's thorough vetting of these concerns. Unlike the Proposed Rule, which handles this issue in a conclusory way, the Final Rule carefully analyzes market impacts, determining that only the 2017 formulation gives consumers the protection afforded them under Title X of the Dodd-Frank Act.[37] On the other hand, the Proposed Rule counterintuitively emphasizes the potential boost to the market from repealing the Final Rule:

> [T]he Bureau's data indicate that relative to the chosen baseline payday loan volumes would increase by 104 percent to 108 percent, with an increase in revenue for payday lenders between 204 percent and 213 percent. Simulations of the impact on short-term vehicle title lending predict an increase in loan volumes of 809 percent to 1,329 percent relative to the chosen baseline, with an approximately equivalent increase in revenues.[38]

These gargantuan numbers, based on market simulations within the 2017 Final Rule, should highlight the importance of implementing the Final Rule in order to protect consumers.[39] Shockingly, the 2019 Proposed Rule instead views them as potentially beneficial. Within its "Benefits to Consumers" section, the Proposed Rule speculates that "increasing the revenue of payday lenders relative to the Final Rule baseline should lead to a corresponding increase in the number of stores."[40] In short, the Proposed Rule would increase consumer exposure to high-cost loans while at the same time minimizing loan regulation. Calling such a result a "benefit to consumers" without constraining the products these new stores would offer contradicts the Bureau's stated mission of "protecting consumers in the financial marketplace."[41] Its emphasis

[37] *Id*. at 54,869-70.
[38] Payday, Vehicle Title, and Certain High-Cost Installment Loans, 84 Fed. Reg. at 4,284.
[39] *Id*.
[40] *Id*. at 4,290.
[41] Consumer Financial Protection Bureau (last visited April 6, 2019), https://www.consumerfinance.gov/about-us/the-bureau/.

on number of stores instead of the harmful loans those stores offer exposes the Proposed Rule's focus on maintaining a thriving marketplace at the expense of vulnerable consumers.

Though the 2017 Final Rule shows that, on balance, market impact does not outweigh the need to regulate predatory lending practices, the 2019 Proposed Rule disregards those findings. Moreover, it applauds the proliferation of the very practices the Final Rule seeks to curb. Therefore, despite its assurances that "[t]he Bureau . . . continues to monitor this market for risks to consumers," by rescinding the Final Rule, the Bureau demonstrates its unwillingness to act on those risks if they impact businesses, even predatory ones. [42]

Conclusion

The 2017 Final Rule represents years of research by the Bureau aimed at reducing predatory lending practices.[43] That research included discussions with a diverse array of stakeholders, from consumer advocates to industry trade associations.[44] In formulating the Final Rule, the Bureau processed and responded to over 1.4 million comments, the most it had ever received.[45] The Final Rule embodies the Bureau's mission of "[r]ooting out unfair, deceptive, or abusive acts or practices" and creates critical layers of protection for consumers.[46]

By rescinding key provisions of the 2017 Final Rule, the 2019 Proposed Rule would abolish these efforts, and, worse, continue to relegate vulnerable consumers to debilitating cycles of debt. We therefore urge the Bureau to hold to its statutory mission and implement the 2017 Final Rule in its entirety.

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[42] Payday, Vehicle Title, and Certain High-Cost Installment Loans, 84 Fed. Reg. at 4,262.
[43] Payday, Vehicle Title, and Certain High-Cost Installment Loans, 82 Fed. Reg. at 54,503.
[44] *Id*. at 54,835 (specifically the research included "meetings with the Bureau's standing advisory groups, meetings with State and Federal regulators, meetings with consumer advocates, religious groups, and industry trade associations, [and] Tribal consultations").
[45] *Id*. at 54,514.
[46] Consumer Financial Protection Bureau (last visited April 6, 2019), https://www.consumerfinance.gov/about-us/the-bureau/.

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