May 15, 2019

<u>Via Electronic Submission</u>

Kathleen Kraninger, Director
Consumer Financial Protection Bureau
1700 G Street NW
Washington, DC 20552

Re: Docket No. CFPB-2019-0006 / RIN 3170-AA80,
<u>Payday, Vehicle Title, and Certain High-Cost Installment Loans</u>

Dear Director Kraninger,

The Attorneys General of the District of Columbia, New Jersey, California, Colorado, Connecticut, Delaware, Hawaii, Illinois, Iowa, Maine, Maryland, Massachusetts, Michigan, Minnesota, Nevada, New Mexico, New York, North Carolina, Oregon, Pennsylvania, Rhode Island, Vermont, Virginia, Washington, and Wisconsin write to oppose the Bureau's proposed repeal of important safeguards for consumers of payday, vehicle title, and other high-cost installment loans. *See Payday, Vehicle Title, and Certain High-Cost Installment Loans*, 84 Fed. Reg. 4252, 4253 (Feb. 14, 2019). The ability-to-repay ("ATR") underwriting requirements that the Bureau adopted for these products in 2017 sought to curb some of the worst abuses in the payday and vehicle title lending industries, and to end the cycle of debt that plagues so many consumers, while preserving access to manageable short-term credit. *See Payday, Vehicle Title, and Certain High-Cost Installment Loans*, 82 Fed. Reg. 54472 (Nov. 17, 2017) ("2017 Rule"). The Bureau's current proposal to eliminate these protections would leave borrowers vulnerable once again to the debt traps that the 2017 Rule was designed to eliminate.

The Bureau's proposal to jettison significant consumer protections adopted just 18 months ago is deeply flawed as a matter of law and policy. The proposal rests on the Bureau's embrace of several new and unjustified limits on its authority to identify acts and practices as unfair and abusive. These new limits are unduly restrictive and inconsistent with applicable law.

The proposal also neglects the experiences of States that have successfully curbed abuses associated with payday and vehicle title lending without hurting consumers, and fails to appreciate how the Bureau's action may impair States' ability to protect their residents. Our States have taken different regulatory approaches to the types of loans covered by the 2017 Rule. Some have prohibited certain loans covered by the 2017 Rule. Others have adopted policies that make such

loans unavailable as a practical matter. And still others have established policies that protect consumers by other means. Notwithstanding these different approaches, we agree that the Bureau's proposed repeal of the 2017 Rule would eliminate an important federal floor that would protect consumers across the country, including from interstate lending activity that is challenging for any individual State to police.[1]

I. The Bureau's Proposal Is Inconsistent with the Dodd-Frank Act.

The 2017 Rule rests on the Bureau's authority under the Dodd-Frank Act to protect consumers from unfair, deceptive, and abusive acts or practices.[2] Specifically, the Bureau invoked its authority to "identify[] as unlawful" acts or practices determined by the Bureau to be "unfair" or "abusive."[3] The Bureau may identify an act or practice as "unfair" if "the Bureau has a reasonable basis to conclude that: (A) the act or practice causes or is likely to cause substantial injury to consumers which is not reasonably avoidable by consumers; and (B) such substantial injury is not outweighed by countervailing benefits to consumers or to competition."[4] Separately, the Bureau's authority to declare an act or practice "abusive" extends to (among other conduct) an act or practice that "takes unreasonable advantage of" either "a lack of understanding on the part of the consumer of the material risks, costs, or conditions of the product or service" or "the inability of the consumer to protect the interests of the consumer in selecting or using a consumer financial product or service."[5] This express statutory authority to prohibit "abusive" practices underscores how Congress intended the Bureau's authority to sweep more broadly than the Federal Trade Commission's analogous authority, which covers "unfair" and "deceptive" practices.[6]

In 2017, the Bureau identified it as an "unfair *and* abusive practice for a lender to make covered short-term or longer-term balloon-payment loans, including payday and vehicle title loans, without reasonably determining that consumers have the ability to repay the loans according to their terms." 82 Fed. Reg. at 54472 (emphasis added). Based on that determination, the Bureau did not ban payday lending or vehicle title loans as many States have done, but instead adopted calibrated, legally sound ATR underwriting rules to protect consumers from unfair and abusive practices.

Even today, the Bureau does not reverse its prior conclusion that the practice addressed in the 2017 Rule "causes or is likely to cause substantial injury" to consumers. 84 Fed. Reg. at 4264. Nevertheless, the Bureau now proposes to walk back its conclusions that this practice is both unfair and abusive. The Bureau principally bases its proposal on the 2017 Rule's purported failure to meet an evidentiary standard that has never before been applied and that the Bureau never

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[1] The Attorneys General also urge the Bureau not to move forward with the proposed repeal for all the reasons articulated in the comments that 25 State Attorneys General submitted on March 18, 2019 urging the Bureau not to adopt its proposal to delay implementation of the 2017 Rule for 15 months.

[2] Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 1031, 124 Stat. 1376, 2005-06 (2010) (codified as 12 U.S.C. § 5531).

[3] 12 U.S.C. § 5531(b).

[4] *Id.* § 5531(c)(1).

[5] *Id.* § 5531(d).

[6] *Compare id.* § 5531(c)-(d) *with* 15 U.S.C. § 45(a)(1).

articulated prior to its current proposal. In the alternative, the Bureau asserts that its 2017 analysis rested on "problematic" approaches to identifying practices as unfair and abusive. But it is the Bureau's new approach that is problematic. In contrast to the measured approach taken in 2017, the Bureau's current proposal reflects an unreasonably restrictive view of the Bureau's ability to serve as the strong consumer advocate that Congress intended.

A. The Bureau Proposes to Adopt an Unreasonably High Evidentiary Standard That Will Prevent the Bureau from Regulating Unfair and Abusive Practices that Congress Clearly Intended the Bureau to Prohibit.

The Bureau's primary basis for proposing to repeal the ATR underwriting requirements is its newfound contention that the "unfairness" and "abusiveness" findings underlying the 2017 Rule were not supported by sufficiently "robust and reliable" evidence. *See* 84 Fed. Reg. at 4253; *see also id.* at 4264-68. This novel "robust and reliable" standard has no basis in the law and unreasonably stacks the deck against significant consumer protections.

The Dodd-Frank Act does not contain the Bureau's "robust and reliable" evidentiary standard for identifying acts and practices as unfair or abusive. On the contrary, the statute requires only that the Bureau have a "reasonable basis" for deeming an act or practice unfair and does not impose any higher threshold for findings of abusiveness.[7] Yet the Bureau avoids applying that statutory standard, refusing to address "whether the evidence supporting the factual findings in the 2017 Final Rule would be sufficient to withstand judicial review under the Administrative Procedure Act" (*i.e.*, whether the record provides a reasonable basis for the agency's decision). 84 Fed. Reg. at 4264.

The Bureau asserts that "the impact … [the ATR underwriting requirements] will have on the market for covered … loans, and the ability of consumers to obtain such loans, among other things" necessitates a heightened evidentiary standard. 84 Fed. Reg. at 4253. But the Bureau identifies no legal basis for such a sliding-scale approach to its fact-finding. And ratcheting up the evidentiary standard for more consequential rules would have the perverse effect of making it harder for the Bureau to address the very practices that inflict the most serious injuries on the largest number of consumers. Surely, Congress did not intend this result.

Beyond saddling itself with a heightened evidentiary burden unsupported by the law, the Bureau unreasonably puts its thumb on the scale against new consumer protections by applying its evidentiary standard differently to regulatory and deregulatory actions. The stakes involved in adopting and repealing a regulation typically are equally significant; the costs and benefits will often mirror each other. Yet the Bureau apparently does not view "robust and reliable" evidence as necessary to repeal the 2017 Rule. Instead, the Bureau has in essence thrown up its hands, insisting that developing the factual record would not be "cost-effective." *Ibid.* Again, Congress cannot have intended for the Bureau to adopt such a lopsided, anti-consumer approach to its task.

Moreover, it should be readily apparent that the payday, vehicle title, and other lending practices targeted in the 2017 Rule fit squarely within the Bureau's authority to prohibit unfair and abusive practices. Extending credit without reasonably assessing borrowers' ability to repay their

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[7] 12 U.S.C. § 5531(c)(1) (emphasis added).

loans resembles the poor underwriting practices that fueled the subprime mortgage crisis, which eventually led to an economic tailspin and enactment of the Dodd-Frank Act. In the debate leading up to the bill's passage, Committees and Members of Congress explicitly identified payday lending as a sector marked by "*[a]busive* lending, high and hidden fees, *unfair* and deceptive practices, confusing disclosures, and other anti-consumer practices[,]"[8] which they expected the Bureau to regulate.[9] In 2017, the Bureau did precisely that. Now, in attempting to roll back that critical rulemaking, the Bureau misconstrues its own authority and obligations in a way that will leave consumers exposed to the same kind of *caveat emptor* policies that led to the financial crisis.

B. The Proposal Adopts an Unreasonably Restrictive Approach to Protecting Consumers from "Unfair" Practices.

The Bureau has preliminarily concluded that the payday and vehicle title lending practice targeted by the 2017 Rule cannot be considered "unfair," even though the practice "causes or is likely to cause substantial injury" to consumers. *See* 84 Fed. Reg. at 4268-74. The Bureau has reached that result by misapplying two other components of the statutory "unfairness" standard: (1) the inquiry into whether that injury is "reasonably avoidable by consumers," *id.* at 4269-71; and (2) the balancing of "such substantial injury" against the "countervailing benefits to consumers or to competition." *Id.* at 4271-74.

Reasonable Avoidability. The unfairness standard contains multiple factors, including whether an act or practice "causes or is likely to cause substantial injury to consumers"—a point not challenged in the proposed rule—but also whether the injury is "reasonably avoidable by consumers." As it did in the 2017 Rule, the Bureau draws in its proposal on an FTC Policy Statement and related precedent applying the FTC Act's unfairness standard to interpret analogous language in the Dodd-Frank Act. *See id.* at 4264, 4269-71. But the Bureau misapplies the lessons from these FTC authorities.

According to the Bureau, the FTC Policy Statement compels the Bureau to embrace "consumer choice" as central to its unfairness analysis. *Id.* at 4269. The Bureau's analysis, however, overly simplifies the FTC's findings. The Policy Statement treats consumer choice only as the starting point for its analysis.[10] "[C]ertain types of sales techniques," the FTC continued, can "prevent consumers from effectively making their own decisions" and may necessitate "corrective action."[11] "Sellers may adopt a number of practices that unjustifiably hinder … free

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[8] S. REP. NO. 111-176, at 17 (Apr. 30, 2010) (emphases added); *see also id.* at 20-21 (noting that consumers' inability to repay payday loans "often" results in "a succession of new payday loans[,] … putting many consumers on a perpetual debt treadmill").

[9] *See* 156 CONG. REC. S5870-02 (July 15, 2010) (statement of Sen. Kaufman), at *S5885 (stating that the CFPB would have "strong and autonomous rulemaking authority and the ability to enforce those rules … for nonbank entities such as payday lenders"); 156 CONG. REC. S5902-01 (July 15, 2010) (statement of Sen. Reed), at *S5913-14 (stating that "[t]he new Bureau represents a fundamental shift in how we inform Americans about abuses by banks, credit card companies, finance companies, *payday lenders*, and other financial institutions (emphasis added)).

[10] *In re Int'l Harvester Co.*, 104 F.T.C. 949, 1984 WL 565290, at *97 (Dec. 21, 1984).

[11] *Ibid.*

market decisions"—among them the "withhold[ing] [of] … critical . . . performance data," and the "exercise [of] undue influence over highly susceptible classes of purchasers[.]"[12]

FTC precedent also fails to support the Bureau's new view that consumer injury may be reasonably avoidable even when consumers do not and cannot understand their own individualized likelihood and magnitude of harm. In *International Harvester Co.*, the FTC stated that "[w]hether [an injury] is 'reasonably avoidable' depends[] not just on whether people know the physical steps to take in order to prevent it, but also on whether they understand the necessity of actually taking those steps."[13] Notably, the FTC found that consumers could not reasonably have avoided the injury in question because they did not grasp the "full consequences" of their decisions—even if they did understand that the behavior at issue was "generally a poor practice[.]"[14]

Although it gestures at this precedent and FTC practice, the Bureau's proposal fails to display the kind of analysis that FTC precedent contemplates. The Bureau does not consider, for instance, why consumers with only a general understanding that borrowers sometimes struggle to repay covered loans would "understand the necessity of … actually taking … steps" to mitigate the risks to them *individually*.[15] Nor does it address how such consumers would appreciate the "full consequences" of their decision to use covered loans.[16]

Similarly, the Bureau also fails to adequately grapple with the susceptibility of these consumers to undue influence. As the Bureau previously found, many of these borrowers are in desperate financial and life circumstances that affect not only their options but also their ability to make well-reasoned and fully informed choices. *See* 82 Fed. Reg. at 54555-58, 54570. For example, surveys of payday borrowers indicate that more than half have no savings or reserve funds and struggle to pay bills on time. *Id.* at 54558. Thirty-seven percent reported that they have "at some point in their lives … been in such financial distress that they would have taken a payday loan on 'almost any terms offered.'" *Id.* at 54618.

Moreover, these lenders market their loans as short-term, easy liquidity assistance, even though their business model depends on initial loans having to be rolled over repeatedly, saddling many of their customers with unaffordable long-term debt. *Id.* at 54570, 54480, 54492-93. Indeed, roughly half of covered loans are issued as part of a sequence of 10 loans or more, and more than 20 percent of payday loans are issued as part of a sequence of 20 loans or more. *Id.* at 54560. When sales tactics, industry incentives, and consumer vulnerabilities obscure the risks associated with a product and deprive consumers of meaningful choice, the Bureau cannot reasonably rely on the "self-correcting" marketplace to protect consumers.[17]

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[12] *Id.* at *98 & n. 23.

[13] *Id.* at *91.

[14] *Ibid.*

[15] *Ibid.*

[16] *Ibid.*

[17] 82 Fed. Reg. at 54598, 54621-22 (observing that "the way the product is marketed and presented to [consumers] is calculated to obscure the risks" and that "the widespread industry practice of framing covered loans as short-term

Countervailing Benefits. The Bureau also adopts an unreasonable approach to evaluating the "countervailing benefits" of acts and practices subject to the Bureau's regulatory authority—an approach that skews the analysis against protections for consumers. The Bureau achieves this result by excluding the 2017 Rule's "principal step-down" exemption from its weighing of the costs and benefits.

The 2017 Rule's "principal step-down" exemption struck a balance between protecting consumers and preserving access to short-term credit. Recognizing that payday loans offered liquidity for some while embroiling others in extended debt traps, the 2017 Rule forged a compromise: payday lenders would be excused from complying with the ATR underwriting requirements for a loan sequence beginning with a loan of $500 or less, and continuing with a second and third loan worth two-thirds and one-third the principal of the first, respectively. *Id.* at 54876. This "principal step-down" exemption barred lenders from issuing a fourth loan in a sequence without satisfying the ATR requirements. *Ibid.* In addition, it precluded lenders from issuing any loan that would result in the consumer having more than six covered short-term loans outstanding, or covered short-term loans outstanding for an aggregate period of more than 90 days, during any consecutive twelve-month period. *Ibid.* By requiring reductions in the principal and limiting repeat borrowing, the Bureau sought to wean borrowers off debt without foreclosing access to credit.

The effects of the exemption were significant. Without the exemption, the 2017 Rule forecast that payday loan volumes and revenues would fall by 92 to 93 percent; with the exemption, loan volumes and revenues would decrease by only 62 to 68 percent. *See id.* at 54817, 54852. Since the 2017 Rule permitted practices falling within the principal step-down exemption, the Bureau naturally incorporated the exemption into its "countervailing benefits" analysis. *See id.* at 54603. "[T]he allowance of loans that can be made pursuant to [that exemption][,]" the 2017 Rule explained, "reduces the weight" of the countervailing benefits of extending payday loans without assessing ability to repay. *Ibid.*

The Bureau now claims that taking the step-down exemption into consideration when assessing the "countervailing benefits" of the practice of issuing loans without conducting an ATR analysis, "put[] the proverbial cart before the horse." 84 Fed. Reg. at 4272. That is, the Bureau insists that "an exemption predicated on the existence of an unfair practice should not be taken into account in determining whether a particular act or practice is unfair, i.e., in assessing the countervailing benefits of the act or practice at issue." *Ibid.* However, as the Bureau noted in 2017, that approach comes in part from the FTC's Policy Statement, 82 Fed. Reg. at 54603, which explained that when tallying the "offsetting consumer or competitive benefits" associated with an unfair practice, the FTC takes into account "the various costs that a remedy would entail," including compliance costs and costs to society more broadly.[18]

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obligations, even though lenders know that their business model depends on these loans becoming long-term cycles of debt for many consumers, likely exacerbates … misimpressions among borrowers").

[18] *Int'l Harvester*, 1984 WL 565290, at *97 ("[T]he injury must not be outweighed by any offsetting consumer or competitive benefits that the sales practice also produces. . . . The Commission also takes account of the various costs that a remedy would entail. These include not only the costs to the parties directly before the agency, but also the

The Bureau need not and should not willfully blind itself to the limited impact of its remedies when deciding whether to deem particular conduct unfair. The approach reflected in the proposal skews the cost-benefit analysis that the statute contemplates, and does so in a way that will unreasonably tie the Bureau's hands from protecting consumers from unfair acts and practices.

C. The Bureau Adopts an Unreasonably Restrictive Approach to Protecting Consumers from "Abusive" Practices.

The proposal also relies on an impermissibly constrained understanding of the Bureau's ability to combat "abusive" conduct. Congress empowered the Bureau not only to stop lenders from misleading consumers, but also to prevent them from preying on certain consumer vulnerabilities. In 2017, the Bureau found that lenders take "unreasonable advantage" of consumers' lack of understanding or inability to protect themselves when they lend without assessing ATR, especially as lenders "develop lending practices that are atypical in the broader consumer financial marketplace, take advantage of particular consumer vulnerabilities, rely on a business model that is directly inconsistent with the manner in which the product is marketed to consumers, and eliminate or sharply limit feasible conditions on the offering of the product" that would make them less harmful. 82 Fed. Reg. at 54623. The Bureau now argues that none of these amounts to unreasonable advantage-taking. 84 Fed. Reg. at 4275. In so doing, the Bureau fails to account for the aggregate effect of these damaging factors. Two of the Bureau's new positions are of particular concern.

Particular consumer vulnerabilities. The Bureau now argues that failing to reasonably assess a consumer's ability to repay does not "leverage[] particular consumer vulnerabilities," as covered loans "are made available to the general public on standard terms," and lenders may not specially target their most vulnerable customers. *Id.* at 4275-76. This analysis dangerously ignores that businesses may nominally offer their services to everyone, while targeting a particularly vulnerable customer base.[19] In other words, the Bureau allows payday lenders to avoid liability under the Dodd-Frank Act by taking advantage of a vulnerable population on uniform terms. The Bureau's position is irresponsible and is not what Congress intended.

Opaque and misleading business model. The Bureau also now "doubts that an inconsistency between a company's business model and its marketing of a product or service is a pertinent factor in assessing whether the method of deciding to extend credit constitutes unreasonable advantage-taking." 84 Fed. Reg. at 4275-76. Again, the Bureau's reversal of its

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burdens on society in general in the form of increased paperwork, increased regulatory burdens on the flow of information, reduced incentives to innovation and capital formation, and similar matters.")

[19] *Cf.* Federal Trade Commission, *Commission Statement of Policy on the Scope of Consumer Unfairness Jurisdiction* (Dec. 17, 1980) (in explaining "unfairness," noting that businesses should not exercise "undue influence over highly susceptible *classes of purchasers*," such as marketing fake cures to cancer patients (emphasis added)). *See also State ex rel. King v. B&B Inv. Group, Inc.*, 339 P.3d 658, 669, 671 (N.M. 2014) (holding that payday lenders' high cost loans were procedurally and substantively unconscionable, and violated New Mexico's Unfair Practices Act ("Act"), and that the Act prohibited extensions of credit that took advantage of financially distressed borrowers' weaknesses to a grossly unfair degree—as borrowers "are presented with Hobson's choice: either accept the quadruple-digit interest rates, or walk away from the loan"—and that the Act evinced a legislative recognition that, "under certain conditions, the market is truly not free, leaving it for courts to determine when the market is not free, and empowering courts to stop and preclude those who prey on the desperation of others from being rewarded with windfall profits").

position in the 2017 Rule puts consumers at risk and runs counter to fundamental principles of both state and federal consumer protection laws.[20]

D. The Bureau Erroneously Conflates the Law's Distinct Provisions on "Unfair" and "Abusive" Practices.

Finally, the Bureau's watered-down "unfairness" and "abusiveness" analyses conflate the two distinct statutory provisions governing unfair and abusive practices. In particular, the Bureau blends the "reasonably avoidable" element of unfairness and the "lack of understanding" and "inability to protect" components of abusiveness into a single paradigm of "consumer choice." In so doing, the Bureau subverts the will of Congress and violates basic principles of statutory interpretation.[21]

If a consumer does not understand the likelihood and severity of the risks involved in taking out a covered loan, there is bound to be overlap in the Bureau's analyses of whether consumers lack understanding, are capable of reasonably avoiding injury, and are able to protect themselves. And that is what the Bureau found in 2017. *See* 82 Fed. Reg. 54596-98, 54614-21. Now, however, the Bureau claims that if consumers have merely a general understanding of the lending process and of the adverse consequences of default they can reasonably avoid harm and cannot be said to lack an understanding of the material risks and costs of covered loans. *See* 84 Fed. Reg. at 4269-76. This effectively dilutes both the unfairness and abusiveness standards and makes them functionally equivalent, all in the name of respecting consumer choice and autonomy.

But the Bureau was correct in 2017 when it concluded that "substantial injury… may not be reasonably avoidable in part because of the precarious financial situation of many consumers … and their belief that searching for alternatives will be fruitless and costly." *Id.* at 54594-95. And even if the Bureau's dilution and conflation of "lack of understanding" and "reasonably avoidable" had merit, it still would not resolve the matter of "inability to protect," which the Bureau now largely glosses over in its legal analysis. In the 2017 Rule, the Bureau rightly noted that Congress crafted the abusiveness provision "in the disjunctive" and that "[a]s a matter of logic ... Congress has determined that there could be situations where consumers do understand the material risks and costs of covered … loans yet are nonetheless unable to protect their interests." 82 Fed. Reg. at 54618. Now, by contrast, the Bureau does not meaningfully address the "inability to protect" prong in its legal analysis. Basic principles of statutory construction demand that the Bureau give independent meaning to all of the statute's distinct provisions.

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[20] *See, e.g. Illinois v. Navient Corp. et al*, 17 CH 761 (Cook Cty. Cir. Ct., July 10, 2018) (relying on allegations describing a lender's business model in finding that originating subprime student loans that the offeror or originator knows will likely default constitutes an unfair and deceptive act under Illinois law, particularly when done to gain access to valuable FFEL loan volume); Federal Trade Commission, Business Center Guidance: Multilevel Marketing (July 2016), *available at* https://www.ftc.gov/tips-advice/business-center/guidance/multilevel-marketing (relying on business model information to differentiate lawful multi-level marketing from unlawful pyramid schemes).

[21] *See Corley v. United States*, 556 U.S. 303, 314 (2009) (calling the principle that a "statute should be construed so that effect is given to all of its provisions, so that no part will be inoperative or superfluous, void or insignificant" "one of the most basic interpretive canons" (citations and quotation marks omitted)).

II. The Bureau's Proposal Ignores States' Experiences With Payday and Vehicle Title Lending and Undermines States' Efforts to Protect Consumers.

States throughout the country have taken diverse approaches to protecting consumers from some of the worst abuses of this industry. Rather than learn from those experiments and support states in their efforts to protect their residents, the Bureau is making it easier for lenders who will try to avoid these critical state law protections for consumers.

A. The Bureau Ignores States' Experiences With Payday and Vehicle Title Lending.

As an initial matter, the Bureau's proposed rule ignores and misinterprets the experiences of states that have successfully restricted or eliminated payday and vehicle title lending without hurting consumers. The Bureau concludes that consumers would be harmed by the impact of the 2017 Rule's ATR requirements on payday and vehicle title lenders, 84 Fed. Reg. 4274, and that, in turn, the 2017 Final Rule "underestimated the benefits of [borrowers'] access to credit." *Id.* at 4290; *see also id.* at 4260. More specifically, the Bureau (1) claims that restrictions on payday lending would "have the effect of reducing credit access and competition," *id.* at 4262; (2) finds harm to "consumers' ability to choose credit and lenders' ability to offer [consumers] such credit," *id*. at 4269; and (3) concludes that the 2017 Final Rule will suppress consumer choice by increasing burdens on lenders. *Id.* at 4269, 4274.

But those conclusions ignore the experiences of numerous states that have implemented restrictions on payday and vehicle title lending—restrictions that have protected consumers without unreasonably limiting consumers' access to credit. As the Bureau acknowledges, 17 states and the District of Columbia ban or restrict payday loans. 84 Fed. Reg. 4268.[22] These restrictions take the form of outright prohibitions, structural limits,[23] and restrictions on consumers' ability to

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[22] CA: licensed lenders limited to monthly interest charges ranging from 1% to 2.5% for loans of various amounts less than $2,500. *See* Cal. Fin. Code § 22303; CT: 36% for small loans less than $5,000 and 25% for small loans between $5,000 and $15,000. *See* Ch. 668, Part III, Conn. Gen. Stat.; CO: *See* C.R.S. §§ 5-2-201, 5-2-214; DC: licensed lenders prohibited from charging rates in excess of 24%. *See* D.C. Code § 28–3301; MA: 12% civil usury rate on small dollar loans of less than $6,000 and licensed lenders permitted to charge no more than 23%. *See* Mass. Gen. L. c. 140, § 96; 209 CMR 26.01 (Small Loan Rate Order); MD: licensed lenders prohibited from charging rates in excess of 24% or 33% for consumer loans less than $6,000, depending on the original and unpaid principal balance of the loans. *See* Md. Code Ann., Com. Law §§ 12-301-12-303, 12-306; MI: $600 maximum deferred transaction amount and a service fee varying between 11% and 15% depending on the size of the transaction. *See* M.C.L. 487.2153; NJ: Criminal usury law prohibits lenders from charging more than 30% to individuals. *See* N.J.S.A. 2C:21-19. Civil usury law prohibits unlicensed lenders from charging more than 16%. *See* N.J.A.C. 3:1-1.1; NY: Criminal usury law prohibits licensed lenders from charging more than 25%. *See* N.Y. Penal L. § 190.40. Civil usury law prohibits unlicensed lenders from charging more than 16%. *See* N.Y. Gen. Oblig. § 5-501; N.Y. Banking L. § 14-a; NC: licensed lenders prohibited from charging interest in excess of blended rate of 30% on loans not exceeding $15,000. *See* N.C. Gen. Stat. § 53-176; OR: licensed lenders prohibited from charging in excess of 36% on consumer finance loans of $50,000 or less. *See* Or. Rev. Stat. § 725.340(a); PA: licensed lenders limited to 24% APR under the Consumer Discount Company Act, 7 P.S. §§ 6217.1, and unlicensed lenders limited to 6% APR under Section 201 of the Loan Interest and Protection Law, 41 P.S. § 201.

[23] CA: limits traditional personal-check-based payday loans to $300. *See* Cal. Fin. Code sec. 23035(a); CO: effective February 1, 2019, limits rates on payday loans to 36%. *See* C.R.S. 5-3.1-105; DC: prohibiting all lenders from charging rates in excess of 24%. *See* D.C. Code § 28–3301; IL: limits payday loans to the lesser of 25% of consumer's gross monthly income (22.5% for installment payday loans) or $1,000. *See* 815 Ill. Comp. Stat. § 122/2-5(e); MA: *See* Mass.

take out multiple loans or roll over credit.[24] And while not uniformly applicable to payday loans, over 35 jurisdictions maintain a rate cap of 36 percent for small-dollar installment loans by nonbank lenders.[25]

Contrary to the Bureau's conclusions, these restrictions on payday and vehicle title lending have benefited consumers and expanded access to manageable credit. States that have implemented a 36 percent rate cap have found that it encourages lenders to extend more manageable longer-term debt that is better suited for both the borrower and the lender.[26] These rate caps help prevent unaffordable loans that trap consumers in a cycle of debt. Indeed, studies have shown that a 36 percent rate cap results in savings for borrowers, as the longer-term installment loans such caps encourage provide periodic payments comparable to those required by payday and vehicle title loans, but with reduced default risk and lower finance charges. *Id*. In clear recognition of this benefit, Congress has capped loans to military service members at 36 percent, based on a recommendation from the Department of Defense. 80 Fed. Reg. 43560 (July 22, 2015).

For example, according to a survey from North Carolina, which has implemented a 30% rate cap, more than three out of four households indicated that the elimination of payday lending had no effect on them, and a vast majority believed payday lending was harmful.[27] Even those consumers who wanted to retain the option of taking out payday loans were in favor of changes to the loans, such as lower interest rates and longer repayment options, which would drastically alter the nature of the loans.[28] And consumers maintained options other than payday loans for managing financial shortfalls, although they expressed a desire for alternatives to credit cards.[29]

Gen. L. c. 140, § 96; 209 CMR 26.01 (Small Loan Rate Order); NJ: N.J.A.C. 3:1-1.1 and N.J.S.A. 31:1-1(a); OR: requires minimum 31-day term and prohibits certain terms and waivers of rights. *See* Or. Rev. Stat. § 725A.064; PA: limits interest rate to 24% APR, caps late fees, prohibits compound interest. *See* 7 P.S. §§ 6217.1; VA: VA: requires loan term of at least twice borrower's pay cycle, and limits amount of loan to $500. Va. Code §§ 6.2-1816(1)(v) and 6.2-1816(5); WA: lesser of 30 percent of the consumer's gross monthly income or $700. *See* Wash. Rev. Code sec. 31.45.073(2).

[24] CA: Cal. Fin. Code sec. 23037(a); CO: C.R.S. § 5-3.1-106 IL: 815 Ill. Comp. Stat. 122/2-30; IA: Iowa Code sec. 533D.10(1)(e); MA: 209 CMR 26.01 (Small Loan Rate Order); Or. Rev. Stat. § 725A.064(6); VA: prohibits refinance/rollover loans, limits borrower to one outstanding payday loan at a time, and limits number of loans borrower may have in 180-day period. Va. Code §§ 6.2-1816(6).

[25] National Consumer Law Center, *Why Cap Small Loans at 36%?*, at 1 (Apr. 2013), *available at* https://www.nclc.org/images/pdf/pr-reports/ib-why36pct.pdf.

[26] *Id.* at 2.

[27] Center for Community Capital, *North Carolina Consumers After Payday Lending*, at 4 (Nov. 2007), *available at* http://www.nccob.gov/public/docs/News/Press%20Releases/Archives/2007/NC_After_Payday.pdf. At the time the survey was conducted, North Carolina's interest rate cap was 36% per annum for consumer loans up to $10,000, but in 2013, the maximum allowable rate was reduced to 30% per annum while the maximum loan amount was increased to $15,000. Notably, for a brief period, from 1997 to 2001, North Carolina law allowed payday loans in the form of deferred deposit check cashing. Due to the high rates of these loans, patterns of repeat borrowing and other potential for abuse, the North Carolina General Assembly allowed the authorization for payday lending to sunset, and refused to reauthorize any form of payday lending after September 2001.

[28] *Id*. at 18.

[29] *Id*. at 19-20.

In addition, the Bureau overlooks studies that have found that states without payday and vehicle title lending save borrowers nearly $5 billion annually in fees.[30] And other research has shown that restrictions on payday lending do not reduce access to credit.[31] Rather, consumers manage to find other alternatives for obtaining credit that are less likely to trap them in a cycle of debt. For example, consumers look to alternative formal credit options, such as credit cards, checking and savings accounts, or traditional installment loans, as well as informal options such as borrowing from family members.[32] Other consumers may simply cut back on expenses to make ends meet or turn to other non-debt alternatives.[33] Borrowers have explained that they are better off without payday and vehicle title loans, and that they use other strategies to manage their finances to avoid turning to illegal online loans.[34] Many state that payday lending undermines, rather than helps, their ability to pay bills.[35]

Indeed, even in states that permit payday lending, restrictions can improve access to credit and promote a more efficient and less exploitative industry. Colorado, for example, required that all loans be repayable over six months, reduced fees, and prevented certain charges.[36] The changes significantly reduced the amount borrowers spend on loans and reduced defaults.[37] In addition, the changes improved the performance of the lending industry, as businesses served more customers at lower prices and became less reliant on repeat borrowing to make a profit.[38]

In recognition of these findings, many of our states have made the policy decision to curb payday lending. *See* fn. 21-22 above. Rather than making assumptions about consumer choice, 84 Fed. Reg. 4269, the Bureau should instead rely on actual state experiences, which contradict the Bureau's conclusions and show that protecting consumer choice is not inconsistent with curtailing

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[30] Center for Responsible Lending, *State without Payday and Car-title Lending Save $5 Billion in Fees Annually*, at 1 (June 2016), *available at* https://www.responsiblelending.org/sites/default/files/nodes/files/research-publication/crl_payday_fee_savings_jun2016.pdf.

[31] Center for Responsible Lending, *Shark-Free Waters: States are Better Off without Payday Lending*, at 2-3 (Sept. 2017), *available at* https://www.responsiblelending.org/sites/default/files/nodes/files/research-publication/crl-shark-free-waters-aug2016.pdf.

[32] *Id*. at 3-5.

[33] *Id*.

[34] National Consumer Law Center, *After Payday Loans: How do Consumers Fare When States Restrict High-Cost Loans?*, at 1 (Oct. 2018),
available at https://www.nclc.org/images/pdf/high_cost_small_loans/payday_loans/ib_how-consumers-fare-restrict-high-cost-loans-oct2018.pdf (citing consumer experiences in Arkansas, Georgia, Montana, New Hampshire, North Carolina). The States note that this study was conducted after the promulgation of the 2017 Rule and prior to the Bureau's proposed repeal of the 2017 Rule. However, the Bureau ignores the study entirely in its proposed repeal.

[35] *Id*. at 7-8.

[36] Pew Charitable Trusts, *Trial, Error, and Success in Colorado's Payday Lending Reforms*, at 4 (Dec. 2014), *available at* https://www.pewtrusts.org/-/media/assets/2014/12/pew_co_payday_law_comparison_dec2014.pdf.

[37] *Id.* at 5.

[38] *Id.* at 6-7. While Colorado's changes were positive, consumers still experienced frequent defaults. *See* Center for Responsible Lending, *Sinking Feeling: Colorado Borrowers Describe their Experiences with Payday Loans*, at 1 (July 2018), *available at* https://www.responsiblelending.org/sites/default/files/nodes/files/research-publication/crl-sinking-feeling-jul2018.pdf. And consumers continued to have difficulty assessing the actual costs of loans, *id*. at 14, and resorted to re-borrowing or back-to-back borrowing. *Id*. at 15.

payday lending.[39] Indeed, the Bureau itself came to this same conclusion in the 2017 Rule, 82 Fed. Reg. 54835-46, and it has no adequate basis for abandoning its prior findings regarding the ramifications of an unregulated payday lending industry. In exercising its rulemaking authority, the Bureau should not close its eyes to the facts on the ground in states across the country that have restricted payday and vehicle title lending, and it certainly should not rely on the regulated industries' speculation and faulty assumptions.

B. The Bureau Would Undermine States' Efforts to Protect Their Residents.

In addition to overstating the potential harm to consumers from the 2017 Final Rule, the Bureau's current efforts will undercut states' attempts to protect their residents and enforce their own laws.[40] By declaring certain payday lending practices unfair and abusive under the Dodd-Frank Act, the 2017 Rule granted states an additional enforcement mechanism for preventing illegal lending, as the Dodd-Frank Act empowers states to enforce its regulations. 12 U.S.C. § 5552. Rescission of the 2017 Rule would eliminate or limit states' ability to enforce federal law in this area, a significant tool against lenders seeking to circumvent state restrictions. At least one study has found that the ability of states to pursue enforcement actions against non-compliant lenders, and especially online lenders, has been crucial to reducing market penetration of predatory online loans.[41]

Moreover, maintaining a federal floor on lending activities is crucial to supporting and complementing state oversight, as the Bureau previously recognized. 82 Fed. Reg. 54699. Although many states have enacted laws to protect consumers, lenders have tried to create various loopholes to circumvent state bans or restrictions. For instance, lenders have created relationships with third-party banks to take advantage of the fact that traditional banks are generally not subject to out-of-state interest rate caps, a process known as "rent-a-bank."[42] Under such an arrangement, a payday lender would claim that the bank was the true lender, allowing the payday lender to take advantage of the bank's ability to export its home state's interest rate and evade the restrictions of the borrower's state.[43] When "rent-a-bank" schemes declined, payday lenders turned to tribal

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[39] National Consumer Law Center, *After Payday Loans: How do Consumers Fare When States Restrict High-Cost Loans?*, at 2-7 (citing experiences of consumers in Arkansas, Georgia, Montana, New Hampshire, and North Carolina and finding that "[i]n states that expel predatory lenders, consumers are relieved that those lenders are gone and adapt by employing a variety of strategies ranging from budgeting, to pawning an item, to borrowing from family").

[40] *See, e.g.*, *Commonwealth v. Fremont Inv. & Loan*, 897 N.E.2d 548 (Mass. 2008) (affirming Superior Court's preliminary injunction against lender that originated subprime mortgage loans that "made it almost certain … borrower[s] would not be able to make the … loan payments, leading to default and then foreclosure," and holding that such loans could be viewed as "presumptively unfair").

[41] NonPrime101.com, *Does State Regulation of Small-Dollar Lending Displace Demand to Other Lenders?*, at 9-10 (Jan. 22, 2015).

[42] *See Rent-A-Bank Payday Lending: How Banks Help Payday Lenders Evade State Consumer Protections*. Consumer Federation of America and the U.S. Public Interest Research Group, Nov. 13, 2001, *available at* https://uspirg.org/reports/usp/rent-bank-payday-lending (describing the then emerging trend of "rent-a-bank" schemes among payday lenders).

[43] *See Pennsylvania v. Think Finance, Inc.*, No. 14-7139, 2016 WL 183289, at *1 (E.D. Pa. 2016) (describing rent-a-bank scheme, where payday lender partners with "an out-of-state bank" to act "as the nominal lender while the non-

lending schemes in an attempt to shield otherwise forbidden lending practices with supposed tribal immunity.[44] And now, because those practices have been subject to legal challenges,[45] lenders are again turning to "rent-a-bank" schemes, despite their legally dubious status.[46]

By removing the 2017 Rule's federal regulatory floor,[47] the Bureau will enable lenders to continue trying to avoid state regulation and continue marketing expensive and often unlawful products to consumers without providing borrowers an opportunity for negotiation or comparison.[48] To that end, numerous states expressed support for the 2017 Rule, and noted that strong enforcement by the Bureau will complement, not undermine, state enforcement actions and strengthen the ability of states to protect borrowers from online lenders and other practices that seek to circumvent state restrictions.[49] Indeed, rather than undermining federalism, the 2017 Rule supports it by providing states with the necessary tools to enforce state laws against an industry that, because of cross-border practices and online lending, consistently changes its practices in an attempt to dodge state regulation.

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bank entity was the de facto lender" in a partnership that sought to take "advantage of federal bank preemption doctrines to insulate the [payday lending entities] from state regulation").

[44] Kyra Taylor et al., Pub. Justice Found., S*tretching the Envelope of Tribal Sovereign Immunity? An Investigation of the Relationships Between Online Payday Lenders and Native American Tribes*, at 6 (2017) (internal quotation marks omitted), *available at* https://www.publicjustice.net/wp-content/uploads/2018/01/SVCF-Report-FINAL-Dec-4.pdf.

[45] *See, e.g., MacDonald v. CashCall*, Inc., 2017 WL 1536427, at *3 (D.N.J. Apr. 28, 2017), aff'd, 883 F.3d 220 (3d Cir. 2018) (detailing recent trend of cases in favor of parties challenging tribal lending arrangements across the country); *CFPB v. CashCall*, Inc., 2016 WL 4820635, at *6 (C.D. Cal., Aug. 31, 2016) (holding that defendant payday lender was the "true lender" and real party in interest in tribal lending scheme).

[46] *See, e.g., Think Finance*, supra note 40 (denying motion to dismiss and finding that state's allegations that non-banks were utilizing a "rent-a-bank" scheme to circumvent state usury laws were sufficient to state a plausible claim for relief and not preempted); *CashCall, Inc. v. Morrisey*, 2014 WL 2404300 (W. Va. May 30, 2014), *cert. denied*, __ U.S. __, 135 S.Ct. 2050 (2015) (holding that substance governs over form in evaluating "true lender" in a "rent-a-bank" scheme); *Meade v. Marlette Funding*, No. 2017-CV-30377 (Colo. Dist. Ct. Aug. 13, 2018) (order denying non-bank defendant's motion to dismiss on preemption of applicable Colorado rate caps).

[47] This proposed rescission follows the Office of the Comptroller of the Currency's ("OCC") decision in October 2017 to rescind its 2013 guidance aimed at protecting consumers in the market for "deposit advance" products, a form of bank payday lending, which was based in large part on the existence of the new 2017 Bureau Rule. Rescission of Guidance on Supervisor Concerns and Expectations Regarding Deposit Advance Products, 82 Fed. Reg. 47602, 47602-03 (Oct. 12, 2017). Now, however, the Bureau removes what remained of the federal regulatory floor and leaves consumers without the protection of both the Bureau and the OCC.

[48] *See* Appendix: Illinois Comments, at 3 (Nov. 7, 2016) ("With more consumers using the internet to take out a loan, we have also received complaints from consumers who use lead generators to take out short-term loans for financial emergencies.").

[49] *See* Appendix: Illinois Comments (Oct. 7 2016); New York, Connecticut, District of Columbia, Maryland, Mass., New Hampshire, Pennsylvania, Vermont Comments, at 3 (Oct. 7, 2016) ("crucial to preserve the right of states" to "set interest rates for loans"); Washington State Comments, at 3 (Oct. 7, 2016); Virginia comments, at 3 (Oct. 7, 2016) (the 2017 Rules "will provide for a nationwide *floor*, but allow state and local jurisdictions to provide for higher *ceilings* with more restrictive prohibitions, including usury rates."); North Carolina Comments, at 4 (Oct. 7, 2016) ("[I]t is critical that … states with stronger laws be allowed to address abusive, high cost lending in their own states…. The single most effective means of curtailing unaffordable and predatory payday lending is with a bright-line usury cap set at a reasonable rate.").

III. Conclusion

The 2017 Rule was a well-reasoned, painstakingly researched, and measured approach to regulating payday and vehicle title loans. The Bureau's current proposal, by contrast, conflicts with the history, text, and purpose of the Dodd-Frank Act and undercuts our ability as state law enforcement officers to protect consumers from exploitative lending practices. For these reasons, the Bureau should abandon its current proposal and allow the 2017 Rule to take effect.

Sincerely,

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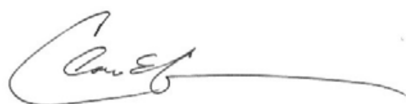

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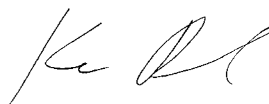

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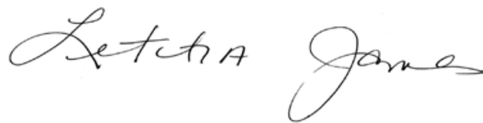

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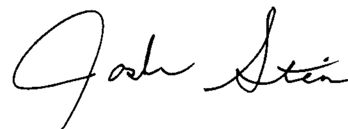

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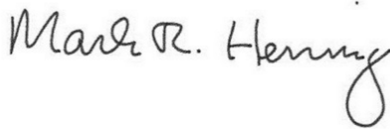

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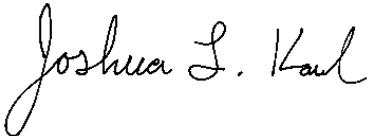

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OFFICE OF THE ATTORNEY GENERAL
STATE OF ILLINOIS

Lisa Madigan
ATTORNEY GENERAL

October 7, 2016

Via Email: Federal RegisterComments@cfpb.gov
Richard Cordray
Director
Consumer Financial Protection Bureau
1700 G Street, NW
Washington, D.C. 20552

Re: Docket No. CFPB-2016-0025
Payday, Vehicle Title, and Certain High-Cost Installment Loans
Request for Information and Comments

Dear Director Cordray:

The Office of the Illinois Attorney General welcomes this opportunity to comment on the Consumer Financial Protection Bureau's ("Bureau") proposed rules regarding Payday, Vehicle Title, and Certain High-Cost Installment Loans ("Proposed Rules"), to be codified at 12 C.F.R. § 1041. We recognize that the Bureau has spent the past four years analyzing the payday, title, and installment loan industry and we appreciate that during that time the Bureau has sought input from all stakeholders and studied and took into consideration Illinois' regulatory framework.[1] We strongly support and applaud the Bureau's vast undertaking and initiative to promulgate rules regulating high-cost, low-dollar payday and installment loans that target and trap consumers in an unending cycle of debt.

Protecting Payday and Other Small-Dollar High-Cost Lending Borrowers

As the Bureau recognizes, consumers who utilize payday loans are frequently in such dire financial circumstances that they would take out a payday loan on any terms offered.[2] Indeed,

[1] *See* Consumer Financial Protection Bureau's proposed rules regarding Payday, Vehicle Title, and Certain High-Cost Installment Loans, 81 Fed. Reg. 47863, (proposed July 22, 2016) (to be codified at 12 C.F.R. § 1041) ("Proposed Rules"), at 15-16. *See, e.g.*, *id*. at 21, 23-24, 30-31, 59-60, 76, 78-79, 82-86.
[2] *See* Proposed Rules, at 256 (*citing* Pew Charitable Trusts, *How Borrowers Choose and Repay Loans*, at 20 (2013)), *available at* http://www.pewtrusts.org/~/media/assets/2013/02/20/pew_choosing_borrowing_payday_feb2013-(1).pdf.

consumers earning less than $40,000 per year and those who are disabled or unemployed are more likely to have used payday loans compared to other groups.[3] Mirroring such nationwide statistics, Illinois consumers who use these products are also more financially vulnerable. Across all consumer loan products reported into Illinois' high-cost loan database, over 60% of borrowers earned $30,000 or less per year.[4] Title loan borrowers tended to have the lowest average annual gross income, at just $25,724 per year.[5] This demonstrates that low-income consumers are the primary borrowers of these loan products. In fact, a September 2015 article by The Chicago Reporter that analyzed payday lenders in Chicago found that 125 lenders were operating within the city and, of those, 7 out of 10 were located where the per capita income within a mile of the businesses was below the city average of $28,500 per year.[6] Accordingly, it is important to have comprehensive consumer protections in place to safeguard borrowers in this market. We feel confident that the manifold state laws that govern high-cost small-dollar consumer lending, including lending laws in Illinois, will harmonize well with this reasonable, appropriate, and long-awaited federal regulation.

The Proposed Rules Establish Minimum Standards Nationally Over All Lenders and Across All State Lines

Many unscrupulous payday and installment lenders, determined to avoid state consumer protection laws, use the internet to trap financially vulnerable borrowers in a cycle of debt that would be unlawful under the borrowers' home state law. In marketing high-cost and risky loans, online lenders use advanced statistical methodology, national advertising campaigns, and internet lead generators to lure consumers who otherwise would have shopped locally and borrowed from licensed, Illinois-regulated, lenders. My office has taken several enforcement actions against some of these unscrupulous and unlicensed online lenders.[7] These lenders were not complying with the protections put in place by the Illinois legislature to protect consumers in this lending market. A national regime of minimum consumer protections will make it more difficult for these lenders to operate without regard to any laws, and will ensure consumers have some protections as states take action to enforce their own laws.

The Proposed Rules Strengthen Our Federal Partnership with the Bureau in Regulating Payday, Title, and High-Cost Installment Loans

We consider it a great benefit, and to all of the several states' advantage, to have another cop on the beat, especially one in the form of the Bureau with its particular mission and focus to

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[3] *Payday Lending in America: Who Borrows, Where They Borrow, and Why*, THE PEW CHARITABLE TRUSTS, Ex. 1 (July 2012), *available at* http://www.pewtrusts.org/~/media/legacy/uploadedfiles/pcs_assets/2012/pewpaydaylendingreportpdf.pdf.

[4] Illinois Dep't of Fin. and Prof'l Regulation, Illinois Trends Report, Select Consumer Loan Products, at 6 (last updated 4/14/2016), *available at* https://www.idfpr.com/dfi/ccd/pdfs/IL_Trends_Report% 202015-%20FINAL.pdf?ActID=1204&ChapterID=20.

[5] *Id.* at 28.

[6] Adeshina Emmanuel, *Poverty Pays for Small Dollar Lenders in Chicago*, THE CHICAGO REPORTER (Sept. 2, 2015), *available at* http://chicagoreporter.com/poverty-pays-for-small-dollar-lenders-in-chicago/.

[7] *See* People and Illinois Dep't of Fin. and Prof'l Regulations v. BD PDL Services, LLC, No. 14-CH-5914 (Cir. Ct. Cook County Apr. 7, 2014); People and Illinois Dep't of Fin. and Prof'l Regulations v. VIP PDL Services, LLC, No. 14-CH-5912 (Cir. Ct. Cook County Apr. 7, 2014); People and Illinois Dep't of Fin. and Prof'l Regulations v. Mountain Top Services I, LLC, No. 14-CH-5913 (Cir. Ct. Cook County Apr. 7, 2014); People and Illinois Dep't of Fin. and Prof'l Regulations v. Red Leaf Ventures LLC, No. 14-CH-5915 (Cir. Ct. Cook County Apr. 7, 2014).

protect consumers in the financial services marketplace. The Proposed Rules will support effective state and federal law enforcement partnerships.

The Proposed Rules Serve a Dual Purpose: Fill in the Gaps in Illinois Law and Establish a National Floor of Regulatory Requirements without Preempting State Law

It is equally important to note that the Proposed Rules are perfectly clear on the issue of preemption. The law that governs, state or federal, is that which provides the greater consumer protection. State laws that afford more protection for consumers, of which Illinois law has many, will not be preempted and will work in tandem with the Proposed Rules.[8] However, the Proposed Rules fill in some gaps in the Illinois regulatory regime by establishing regulations over vehicle title loans and a strong ability-to-repay requirement, both of which are lacking in Illinois payday and consumer installment lending laws. In Illinois, the Proposed Rules fill the void in these areas and provide protection to some of our most financially vulnerable consumers in an industry that is skilled at evolving its products to avoid state regulation.

Our experience in Illinois has taught us that comprehensive and across-the-board regulations are critical to ensure that lenders do not circumvent coverage or create new or spurious loan products to evade regulation.

Illinois' Experience with Payday and Installment Lending

Payday and installment loans are widely used in Illinois. According to the Illinois Department of Financial and Professional Regulation ("IDFPR"), as of June 9, 2016, it administered 1,337 active Consumer Installment Loan Act licenses and 539 active Payday Loan Reform Act licenses. Between 2006 and 2015, more than 360,000 consumers took out almost 2.4 million payday loans, averaging approximately 6.5 loans per consumer.[9] The average advance and average total fees for payday loans from 2006 through 2015 were $355.85 and $54.64, respectively.[10]

In 2011, the Illinois legislature enacted new laws, creating a payday installment loan and a small-dollar consumer installment loan. Between 2014 and 2015, the majority of small-dollar high-cost loans issued were small consumer installment loans (38.8%) and installment payday loans (35.8%). Traditional payday loans (17.2%) and title loans (8.2%) comprised a smaller, but still substantial, share of the market.[11] Regardless of the form, the volume of small-dollar high-cost loans has remained high. In 2015 alone, more than 430,000 unique Illinois borrowers took out over one million of these various different small-dollar, high-cost loans.[12] Payday loans had the highest average annual percentage rate ("APR"), at 323%, followed by installment payday loans at 228% and title loans at 189%.[13] The average APR for small consumer installment loans was significantly lower, at only 33%.[14] Though legislative reforms in Illinois have greatly increased protections for consumers, lenders have consistently evolved their business practices and crafted loan products to evade changes in the law, escape regulatory oversight, and circumvent consumer protections. Since 2005, our office has received more than 2,000 consumer complaints relating to payday and title loans. In response, we have spent the past

[8] Proposed Rules, *supra* note 1, at 177.
[9] Illinois Dep't of Fin. and Prof'l Regulation, *supra* note 4, at 13.
[10] *Id.* at 15.

decade continually reformulating legislation to protect consumers. We have also pursued enforcement actions against lenders for unlicensed lending and for introducing sham products and launching financial artifices created to sidestep new consumer protections set in place by the legislature.

Indeed, Illinois' ongoing attempts to regulate the payday loan industry provide a meaningful case study of an industry adept at evading significant consumer protection regulation. In the early 2000s, after years of legislative wrangling, IDFPR promulgated rules on payday lending that went into effect in 2001.[15] The rules' purpose was to provide protection from the cycle of debt by limiting the number of times a lender could roll over a payday loan.[16] Under the 2001 rules, a payday loan was defined as any loan with a term of 30 days or less, as payday loan products in the marketplace at the time were characterized by loan terms of a month or less and were structured to become due on a borrower's payday.[17] In an effort to eviscerate the new rules, the industry swiftly filed, but ultimately lost, a lawsuit against IDFPR's director challenging IDFPR's authority to promulgate the new rules.[18] Nevertheless, the industry quickly avoided the consumer protections that the rules afforded by introducing a new product, one with a 31-day term, that just exceeded the defining 30-day limit under the rules.[19] As a result, only about three percent of loans originated by the payday loan industry were captured by and subject

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[11] *Id.* at 8.
[12] *Id.* at 6, 8.
[13] *Id.* at 25, 23, 30.
[14] *Id.* at 33. This average APR represents only the loans reported into our state database. For instance, lenders that offered loans pursuant to the Financial Services Development Act, 205 ILCS 675/3, did not report into the state database. *See*, *infra* note 35 and accompanying text.
[15] *See* Tom Feltner & Marva Williams, *New Terms for Payday Loans: High Cost Lenders Change Loan Terms to Evade Illinois Consumer Protections*, WOODSTOCK INSTITUTE, at 1 (Apr. 2004).
[16] *See id*. at 2 (recognizing that the new reforms allowed a maximum of two rollovers, and only if the balance on the loan had been paid down by at least 20 percent).
[17] Daniel C. Vock, *Past Due: Observers Say It's Time to Regulate Short-Term Loans*, ILLINOIS ISSUES, January 2004, at 27 (noting that, at the time that IDFPR announced new rules for loans of 30 days or less, "most payday loans in the state had 14-day terms").
[18] *See* South 51 Development Corp., et al. v. Vega, 335 Ill. App. 3d 542, 552-53 (1st Dist. 2002) (finding that "…the Department determined that the industry is plagued by a market of borrowers who routinely become entrapped in a continuous cycle of debt due to an overextension of their credit positions." Further finding that "Compounding the situation, the Department found, is the industry's practice of allowing borrowers to freely roll over their original obligations or to secure new loans in order to pay off existing loans."). The General Assembly had previously commissioned the Department of Financial Institutions to conduct a study of the short-term lending industry in Illinois. *Id*. at 545. The study found that borrowers were not able to repay their loans on the due date and were required to rollover their loans or take out a new loan. *Id*. at 546. The Department issued a report and recommended that the General Assembly enact legislation addressing short-term lending issues and rollovers. *Id*. at 547. Short-term lenders filed an action challenging an amendment to the Consumer Installment Loan Act and lending rules promulgated by the Department of Financial Institutions. *Id*. at 548-49. The lenders appealed the Circuit Court's dismissal. *Id*. at 545. The Appellate Court affirmed and held that the amendment to Consumer Installment Loan Act was valid and the lending rules promulgated were not an unconstitutional usurpation of legislative powers. *Id*. at 561.
[19] *See* Feltner & Williams, *supra* note 15, at 2 (noting that "[t]he payday loan industry responded [to the 2001 reforms] by developing a product that circumvents the new regulations by creating a loan with a term greater than 30 days"); Vock, *supra* note 17, at 27–28 (explaining that, after the IDFPR promulgated new payday lending regulations, "[l]enders sidestepped the regulations by switching to a new type of loan — one that lasts 31 days — that doesn't fall under the scope of the rules").

to the 2001 regulations.[20] Thus, the industry continued to extend 31-day loans with very few consumer protections for borrowers, including no limits on finance charges or on the number of loans that a consumer could simultaneously borrow.[21]

To combat this problem, in 2005, Illinois enacted the Payday Loan Reform Act ("PLRA"), which regulated traditional payday loans.[22] The PLRA provided consumer protections for borrowers of payday loans with a term of 120 days or less, and included the following consumer protections: (1) limited the number of outstanding loans a consumer may owe at one time; (2) mandated a 7-day cooling-off period after 45 consecutive days of indebtedness; (3) prohibited rollovers that would keep the consumer in debt for more than 45 consecutive days; (4) capped fees; and (5) limited monthly payments to the lesser of $1,000 or 25% of a consumer's gross monthly income.[23] Importantly, payday lenders were also required to report lending information into a database approved by IDFPR and managed by a third-party administrator.[24]

Once again, to avoid consumer protections and skirt the 2005 legislation, the payday lending industry restructured its loan product and, this time, began making loans with terms in excess of 120 days.[25] When IDFPR issued directives alleging that lenders were engaging in subterfuge under the PLRA, Illinois payday lenders once again sued IDFPR. The lenders alleged such loans were not covered by the new law, and sought a temporary restraining order and injunction to bar IDFPR from enforcing the PLRA against lenders offering the newly-restructured loan product.[26] Thus, in spite of the reforms, as in response to the 2001 rules, lenders crafted a high-cost longer-term installment loan product specifically structured to remove it from the ambit of the PLRA's consumer protections.

The following table (Figure #1), based on data collected from court cases filed by one Illinois lender against borrowers for defaulted loans, illustrates the industry's shift to longer-term

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[20] *See* Feltner & Williams, *supra* note 15, at 3; Vock, *supra* note 17, at 26 (stating that by 2002, just one year after the 2001 rules went into effect, "only 3 percent of loans [the agency] surveyed were subject to [the new rules]").

[21] *See The Illinois Payday Loan Loophole: Post-Payday Loan Reform Act Lending and the Debt Collection Practices of One Large Lender in Illinois*, WOODSTOCK INSTITUTE (Apr. 2008), *available at* http://www.woodstockinst.org/sites/default/files/attachments/paydayloanloophole_april2008_egan.pdf (showing that AmeriCash was still extending 31 day loans through 2006, and suggesting AmeriCash shifted its loan products in response to legislative reforms).

[22] 815 ILCS 122/1-1, *et. seq.*

[23] 815 ILCS 122/2-5(a) – (g), 815 ILCS 122/2-40.

[24] 815 ILCS 122/1-10.

[25] *See* Monee Fields-White, *Payday Lenders Dodge a Crackdown*, CRAIN'S CHICAGO BUSINESS, May 28, 2007, at 3, 11 (explaining that "in order to avoid the law, some lenders have simply offered loans with 121-day terms or longer" and that "[i]nterest on those loans can be in the triple digits"); Becky Yerak, *Bill Would Widen Payday Loan Curbs*, CHICAGO TRIBUNE, Feb. 26, 2008 (noting that, following the 2005 regulations, Illinois still lacked consumer protections for short-term loans longer than 120 days and recognizing that some consumer advocates viewed the payday loan industry as having "exploited" this loophole); *Payday Loan Reform Passes Illinois Senate*, PIONEER, May 13, 2010 (noting that, following the 2005 regulations that defined covered loans as having terms of 120 days or less, "payday lenders began exploiting a 'payday loan loophole' and circumventing the law").

[26] Americash Loans, LLC, et al. v. Illinois Dep't of Fin. and Prof'l Regulations, Division of Fin. Institutions and Dean Martinez, as Acting Secretary of the Illinois Dep't of Fin. and Prof'l Regulation, No. 06-CH-0070 (Cir. Ct. of Sangamon County dismissed with stipulations Feb. 20, 2008).

installment loans following the enactment of the PLRA.[27] After the law went into effect in December of 2005, the lender appeared to entirely cease offering 31-day payday loans, replacing that product with payday installment loans.

Figure #1: Sample of loans from an Illinois lender pre- and post-2006.

		31 day Payday loans	**Payday installment loans**
Number of Loans	**Pre-2006** **Post-2006**	67 0	66 120
Loan Distribution	**Pre-2006** **Post-2006**	50% 0%	50% 100%

As evident in this table, in 2006, lenders shifted to offering longer term installment loans pursuant to the Consumer Installment Loan Act ("CILA"), a parallel consumer finance lender licensing statute that had very few consumer protections and no interest rate caps at that time.

In response to the emergence of the longer term installment loan product, in 2010, the Illinois legislature enacted an even more comprehensive law regulating small-dollar high-cost lending in Illinois. First, it amended the PLRA and, among other things, put new restrictions on higher cost "installment payday loans" that were already widely available in the market, though being made until that point under CILA.[28] Under the PLRA, installment payday loans are defined as loans with terms between 112 and 180 days and that have certain other features. Simultaneously, the legislature also substantially reformed CILA, creating consumer protections over a new category of high-cost small-dollar installment loans, including capping the interest rate on small consumer loans at 99% APR and requiring those loans be fully amortizing.[29] The reforms also created a regulatory system that prohibits dual licensing, requiring lenders and affiliates to obtain a license to make loans either under the PLRA or under CILA, but not both. Under this licensing regime, lenders are prevented from originating a loan under one statute to bridge the rollover of a loan made under the other statute, then flipping the borrower back and forth between the two in an endless cycle of debt. Finally, the Illinois Financial Services Development Act ("FSDA"), which allows CILA licensees to offer open-end credit products, was also amended to include an interest-rate cap of 36% for loans made under that Act.[30]

Again, in response to the 2010 changes in law, lenders filed a lawsuit, later dismissed, challenging the new lending restrictions' applicability to "affiliates" and the prohibition on dual licensing.[31] In addition, in an attempt to sidestep the FSDA's 36% rate cap on revolving lines of credit, lenders quickly evolved their loans again, offering new loans that included a fee for

[27] *The Illinois Payday Loan Loophole: Post-Payday Loan Reform Act Lending and the Debt Collection Practices of One Large Lender in Illinois*, *supra* note 21.
[28] 815 ILCS 122/1-10.
[29] 205 ILCS 670/17.2.
[30] 205 ILCS 675/3.
[31] Illinois Lending Corp. v. Brent E. Adams, Secretary, Dep't of Fin. and Prof'l Regulation, and Robert E. Meza, Director, Division of Fin. Institutions, No. 11-CH-9483 (Cir. Ct. of Cook County Mar. 14, 2011).

mandatory debt suspension coverage that greatly exceeded the permissible rate.[32] These loans included a disclosed interest rate below 36% that did not factor in the fee, in order to evade the cap. When the fee was included in the interest rate, some of these loans had rates in excess of 500%. My Office had to take enforcement action to stop lenders from offering this loan product.

As the record demonstrates, Illinois has a long history of regulating and enforcing in this area and we hope that our experiences can inform the Bureau's proposed rulemaking. Illinois now has far-reaching, layered, and extensive controls regulating high-cost consumer lending in the State. For that reason, it is critical that states with strong statutory consumer protections have their statutory frameworks reinforced and preserved by this rulemaking, whether those states' laws provide comprehensive statutory schemes as in Illinois or set usury caps which effectively prohibit it.

The Bureau's Proposed Rules protect consumers from abusive lending practices in several important ways. Our comments below discuss, in light of our extensive experience with payday and installment lending in Illinois, our support of: (1) establishing a rigorous ability-to-repay requirement; (2) requiring that all fees and charges are included in the 36% interest rate for defining covered loans; (3) removing the 72-hour trigger for leveraged payment mechanisms and "all-in" 36% interest rate; (4) establishing a national database; and (5) placing requirements on loans with a vehicle security. Although our comments focus on these particular issues, we also strongly support the Proposed Rules' provisions capping the number of failed debit attempts on a consumer's bank account, and requiring lenders to provide disclosures and alerts to consumers regarding upcoming payment withdrawals.

A Rigorous Ability-To-Repay Determination Is Necessary to Protect Consumers from Lenders Engaging in "Business as Usual"

Requiring lenders to determine a consumer's ability-to-repay the loan is a common sense approach and critical step towards ending the debt trap. Moreover, having the general concept in place, without a specific means of compliance and rigorous oversight, does not always ensure appropriate lending. For example, in the mortgage area, where the concept of ability-to-repay as the norm is well established, we witnessed extensive problems with the execution of that standard leading up to the financial crisis of 2008, resulting in borrowers with loans they could not afford.[33] Specific means of compliance are even more important in an industry with a demonstrated willingness and ability to shift policies and products to move out of the reach of laws and protections. Therefore, we support the Bureau's approach, in §§ 1041.5 and 1041.9 of the Proposed Rules, and its focus on the borrower's ability-to-repay by requiring lenders to

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[32] People v. CMK Inv., Inc. d/b/a All Credit Lenders, No. 14 C 2783 (N.D. Ill. judgment entered June 17, 2016) (Illinois Attorney General filed a lawsuit against Defendant alleging that Defendant offered a loan product with a Required Account Protection fee that was undisclosed interest in violation of the 36% rate cap imposed by the FSDA.)

[33] *See* Complaint, People v. Countrywide Fin. Corp., et al., No. 08-CH-22994 (Cir. Ct. Cook County June 25, 2008), (alleging that Countrywide engaged in the unfair and deceptive practice of originating mortgage loans to borrowers who did not have the ability to repay them through practices such as loosening underwritings standards, allowing exceptions to underwriting guidelines, originating loans not designed for long term viability but for short term refinancing, inflating income, and using reduced document underwriting); People, et al. v. Ameriquest Mortgage Co., et al., No. 06-CH-05543 (Cir. Ct. of Cook County Mar. 21, 2006) (alleging Ameriquest fabricated or inflated borrowers' income and, without such, borrowers would not have qualified for the mortgage loans).

determine if a borrower can afford the loan without defaulting or forgoing payments on other necessary expenses, such as groceries, rent, and medical bills.

However, in light of our experience in Illinois, we are concerned that lenders will still find ways to exploit and misuse the requirements or exceptions in the Proposed Rules. We would like to comment on one such exception: the Proposed Rules' tying of the reasonableness of a lender's ability-to-repay determination to default and re-borrowing rates across the industry, as noted in proposed comments 5(b)-2.iii and 9(b)-2.iii. We are concerned that default rates in this industry may be unacceptably excessive and allow default-insensitive lenders to pass muster and harm a large proportion of their customer base, while simultaneously profiting from that abuse. For example, in 2015, available data shows title loans in Illinois as having an estimated default rate of 37%.[34] Gauging lender compliance with the ability-to-repay determination by comparing default rates among these industry participants is not a suitably protective threshold for consumers who are already suffering in a high default-rate environment, and this measure may well undermine the purpose of the Bureau's ability-to-repay approach.

In addition, we are concerned about lenders flipping consumers back and forth between long-term and short-term loans with the possibility of infrequent cooling off periods and few ability-to-repay determinations. In Illinois, we prevent lenders from flipping consumers between various loan products, which have different protections, in a prolonged cycle of debt by prohibiting lenders from maintaining dual licenses, thus making them unable to extend both CILA (longer-term installment) and PLRA (payday and shorter-term installment) loans. This regime requires lenders to choose the type of lending in which they want to engage, and to comply with the protections specific to that lending. It ensures lenders cannot avoid the protections of one type of lending by offering a different type of loan and ping-ponging the consumer back and forth between products. Thus, we encourage the Bureau to implement Proposed Rules with a specific and rigorous ability-to-repay approach and effective cooling off periods that will protect consumers from being placed in an endless cycle of debt.

The Proposed Rules' "All-in" 36% Interest Rate Should Be Strengthened by Removing the 72 Hour Trigger

We applaud the expansive definition of "charges included in the total cost of credit" found at §1041.2(18)(i)(A)–(E) that includes all fees and add-on products in the 36% interest rate trigger for covered loans. We believe that this definition helps prevent any potential attempts by lenders to evade the consumer protections envisioned by the Proposed Rules. However, we urge the Bureau to remove the 72-hour trigger found in §1041.2(18)(i)(A) and (B) for all fees and add-ons of any kind. Removal of this trigger would prevent lenders from structuring their products to evade coverage under the Proposed Rules and also from using marketing techniques and sales incentives to induce borrowers to agree to add-ons and fees for products offered after the third day in the term of the loan. We further suggest that any loan should be a covered loan when a lender obtains a vehicle security or a leveraged payment mechanism at any point during the loan term.

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[34] Illinois Dep't. of Fin. and Prof'l Regulation, *supra* note 4, at 12. Available data on default rates represents only the loans reported into our state database. For instance, lenders that offered loans pursuant to the FSDA did not report into the state database.

Illinois has experience with similar attempts by lenders to evade the law's coverage in order to sidestep consumer protections. Shortly after the FSDA was amended to prohibit CILA licensees from offering loans with interest rates in excess of 36% under that Act, lenders rolled out a loan product that disclosed an annual percentage rate of between 18% and 24%, but included an additional fee charged for a mandatory debt suspension product.

We filed a lawsuit against one of the lenders selling this revolving line of credit loan product, which included an exorbitantly priced "Required Account Protection" fee.[35] While the add-on Account Protection Fee was not figured into the disclosed APR, it exponentially outsized the disclosed APR. The fee was charged to all consumers, whether or not any particular consumer could possibly benefit from the 'protection' the product purportedly afforded. The stated purpose of the fee was to protect borrowers from having to pay the fee itself, in addition to any interest on the loan, for up to 12 months if the borrower became unemployed. Yet, we alleged the functional purpose of that fee was to conceal undisclosed interest charged by the lender, and, thus, we alleged the fee was subterfuge and designed to avoid the FSDA's 36% interest rate cap on revolving credit products. The lender's failure to include the fee in the disclosed rate made these loans appear far less expensive to consumers than they actually were. Despite disclosed interest rates of 18% to 24%, the fee-inclusive interest rates on the loans sometimes outstripped 500%, far exceeding the 36% statutory interest rate cap.

Worse, while the lender was the first and largest lender that we knew to have engaged in offering this product in Illinois, the lender was hardly alone. The lender's competitors raced to market with similar loan products. After several years of litigation, in state and federal courts, the initial lender agreed to: (1) cease offering this revolving line of credit product; (2) comply with the 36% interest rate cap when offering and selling any loan or line of credit product pursuant to the FSDA; and (3) include all fees and charges for add-ons associated with the loan in the disclosed interest rate.[36] Additionally, our office has successfully forced compliance, with these terms, on a number of other lenders known to have adopted and offered similar revolving credit products in the Illinois market.[37]

Our experience in Illinois demonstrates why it is of utmost importance to define the cost of credit as comprising any charge that the consumer incurs in connection with the loan, including all fees and add-on charges and charges for voluntary and required ancillary products, no matter when imposed. As the consumer complaints received by our office relating to the above-described lender demonstrated, consumers are often simply unaware that they have agreed to these types of ancillary products. Further, even loan features or add-on products that purport to be voluntary on paper can be presented or imposed in a manner that suggests they are mandatory in practice. [38]

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[35] *See* Complaint, People v. CMK Investments, Inc. d/b/a All Credit Lenders, (Cir. Ct. Cook County Mar. 18, 2014) (No. 14-CH-4694).

[36] Final Judgment and Consent Decree at 5-6, People v. CMK Investments, Inc. d/b/a All Credit Lenders, (No. 14 C 2783) (N.D. Ill. June 17, 2016).

[37] Press Release, Illinois Attorney General's Office (Oct. 6, 2016), *available at* http://www.illinoisattorneygeneral.gov/pressroom/2016_10/20161006.html.

[38] *CMK Inv.*, No. 14 C 2783 (N.D. Ill. judgment entered June 17, 2016) (lender testimony showing that certain loan documents that purported to be voluntary, such as wage assignments, were not explained as voluntary to borrowers and in fact were required to be signed by every consumer who was given a loan); *see also*, *e.g.*, Complaint, Federal

Moreover, we are concerned the 72-hour threshold for add-on products could be similarly misused. In our lawsuit against the lender using the required add-on fee, consumers informed us that they were often called by the lender when payments were about due, and were often told to appear in person at the lender's retail location to make such payments. Phone calls and physical appearances such as these *after* the origination of a loan provide ample opportunity for an unscrupulous lender to get a consumer to agree (knowingly or not) to an add-on product or to provide a security interest in their vehicle.

Hence, we urge the Bureau to strengthen the rule and prevent lenders from evading coverage by removing the 72-hours threshold for add-on products to be included in the all-in APR. By allowing exclusion from the cost of credit of any charges for application, sign-up or participation in a credit insurance plan, any ancillary products, service or membership, or any charge for debt cancellation or debt suspension products that are sold more than 72 hours after the loan fully funds, we fear lenders will evade coverage by waiting 72 hours and then offering incentives to consumers for enrolling in or signing up for ancillary products sold only a few days after consummation. This would occur while the lender still maintains continuous contact with the borrowers and easy access to their paychecks, bank accounts, and automobiles.

A Comprehensive National Database Will Help Ensure Lender Compliance and Provide Important Information

We strongly support a national loan and lender database, as this will allow the Bureau to track lender presence and behavior. Based on our experience in Illinois with our database, we have found that the value of such a database increases drastically when updates occur in real time. We urge the Bureau to consider adopting this approach.

In Illinois, both CILA and PLRA lenders are required to report certain information into the database, including consumers' identifying information, the loan's terms, and any loan updates, such as when the loan is paid in full, refinanced, canceled, rescinded, discharged by the lender, or sold after default.[39] Though our CILA lenders are only required to report this information within 90 days after making or updating the consumer installment loan, our PLRA lenders are required to update the database in real time.[40] Moreover, PLRA lenders must immediately update the database with additional information regarding the loan, including instances in which the borrower chooses a repayment plan or makes a partial payment.[41]

Our real-time PLRA database is particularly valuable because it ensures lenders can immediately verify that a consumer is eligible to receive a new loan. These real-time database verifications protect consumers from a debt trap. Of database verifications that resulted in declined eligibility, the predominant reason for the decline was that a new loan would result in the consumer exceeding the maximum consecutive days of indebtedness; other common reasons for declined eligibility were that the borrower had two transactions open or had exceeded the

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Trade Commission v. Universal City Nissan, Inc., et al., No. 2:16-CV-07329 (C.D. Cal. Sept, 29, 2016) (describing practice of deceptively claiming to consumers that certain add-on products were required as a condition of the purchase or financing of a vehicle in lawsuit against auto dealers).

[39] 37 Ill. Reg. 216 § 210.260 (2013).

[40] 205 ILCS 670/17.5.

[41] *Supra* note 39.

dollar limit.[42] Moreover, the total number of declined eligibility checks has increased dramatically over the last three years, with the number of declined checks across all loan products in 2013, 2014, and 2015 totaling 392,633, 494,943, and 690,061, respectively.[43] Indeed, during the reporting period, declined eligibility checks accounted for an average of approximately 29.7% of all payday loan transaction requests in the database and 47.6% of all installment payday loan transaction requests.[44] We support a national database that requires detailed, real time reporting of loan information for all covered loans, including any information regarding whether or not the loan was paid off, refinanced, or has defaulted.

In Illinois, we have found that many consumers use the internet and lead generators to take out payday loans. Consumers who take out online loans are often drawn to lead generator websites in response to ads that make promises such as, "an easy way to get short term cash fast."[45] One such lead generator advertises its services by stating that it has "built a large, dedicated network of short-term lenders to match you with instantly in order to provide the relief you need until your next paycheck" and by promising that use of the service "is private, fast and easy, so there is no need for you to drive to and stand in line at a payday loan store."[46]

Many online Illinois consumers end up in very expensive and unlawful loans with payday lenders who are not licensed in our state. Unlicensed payday lenders do not have access to or report into our state database. Our office has filed enforcement actions against unlicensed online payday lenders and an unlicensed lead generator that offers and arranges online short-term loans for Illinois consumers in violation of the PLRA.[47] Currently, we have pending litigation against a short-term loan lead generator we allege is required to be licensed under the PLRA, but which is not. In addition to being unlicensed, we also allege that the lead generator has matched borrowers with lenders who are not licensed in Illinois and thus cannot legally lend here.[48] The number of borrowers going online to take out a payday or installment loan, including by using lead generator websites, is substantial. As of 2015, this particular lead generator connected Illinois borrowers with lenders 170,000 times.[49] The complaints we have received from consumers who applied for loans through this lead generator vary but, among other things, involve inability to pay off the loan balance due to high fees, unauthorized debits of the consumer's bank account from several lenders after the consumer submitted personal information through the website, and placement in a loan the consumer did not agree to accept after applying for a loan through the lead generator's website. Since this lead generator, and some of the lenders it has matched Illinois borrowers with, are unlicensed, the loans are not submitted to our Illinois database and we cannot determine whether they are in compliance with Illinois law. We believe that a national database incorporating national standards will provide crucial information regarding on-line lenders crossing state lines, and will aid the Bureau in ensuring compliance with the law.

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[42] Illinois Dep't of Fin. and Prof'l Regulation, *supra* note 4, at 11.
[43] *Id.*
[44] *Id.* at 16, 24.
[45] Second Amended Complaint at ¶ 68, People of the State of Illinois, Illinois Dep't of Fin. And Prof'l Regulation v. MoneyMutual, Selling Source, and Partner Weekly,No. 14-CH-5907 (Cir. Ct. Cook County Aug. 12, 2016).
[46] *Id*. at ¶¶ 70, 71; *see Overview*, MONEYMUTUAL, https://moneymutual.com/overview (last visited Oct. 5, 2016).
[47] People of the State of Illinois, Illinois Dep't of Fin. And Prof'l Regulation v. MoneyMutual, Selling Source, and Partner Weekly, No. 14-CH-5907 (Cir. Ct. Cook County Apr. 7, 2014); *see supra* note 7.
[48] Second Amended Complaint, *supra* note 45 at ¶ 72-73, 138(f).
[49] *Id*. at ¶ 32.

The Proposed Rules Address a Significant Gap in the Illinois Regulatory Regime by Establishing Regulations Over Vehicle Title Loans

We strongly support the Proposed Rules' coverage of loans in which the lender secures the loan with the consumer's vehicle. Current Illinois law does not provide adequate consumer protections for borrowers using title loans. Title loan borrowers in Illinois have an average annual gross income of $25,724, far lower than that of any of the other high-cost loan products available in Illinois.[50] Since 2009, title lenders in Illinois have substantially increased the length of title loans, lending larger and larger amounts at rates averaging 234% with the average borrower in Illinois paying $3,000 to borrow $1,000.[51] In 2015, an estimated 37% of all title loans in Illinois defaulted.[52] Additional research released by the Bureau in 2016 found that 1 in every 5 car title loan borrowers end up losing their car.[53] By taking steps to protect consumers in title loans, the Proposed Rules fill a significant gap in our law and provide much needed consumer protections for Illinois borrowers, particularly the financially vulnerable who rely on their vehicles in order to access healthcare, produce income, and take care of their families.

Conclusion

We appreciate the opportunity to submit comments on the Proposed Rules and the Bureau's desire for input from all stakeholders. I hope that our experience and history in regulating payday and installment lending in Illinois are helpful in strengthening the Proposed Rules. We strongly support and urge the Bureau to finalize a rule that: (1) establishes a rigorous ability-to-repay requirement; (2) requires that *all* fees and charges are included in the 36% interest rate definition for covered loans, including fees for voluntary or ancillary products; (3) removes the 72-hour trigger for leveraged payment mechanisms and the "all-in" 36% interest rate definition; (4) establishes a comprehensive national database; and (5) includes protections for consumers obtaining a vehicle title loan. A final rule that includes these and other important consumer protections will provide much needed protections for financially vulnerable consumers. Please do not hesitate to contact our office if you have any questions or need further information.

Sincerely,

LISA MADIGAN
Illinois Attorney General

[50] Illinois Dep't of Fin. and Prof'l Regulation, *supra* note 4, at 28.
[51] *No Right Turn, Illinois' Auto Title Loan Industry and its Impact on Consumers*, WOODSTOCK INSTITUTE (October 2015), *available at*: http://www.woodstockinst.org/sites/default/files/attachments/No_Right_Turn.pdf.
[52] Illinois Dep't of Fin. and Prof'l Regulation, *supra* note 4, at 12.
[53] CONSUMER FINANCIAL PROTECTION BUREAU, SINGLE-PAYMENT VEHICLE TITLE LENDING 23 (2016).

OFFICE OF THE ATTORNEY GENERAL
STATE OF ILLINOIS

Lisa Madigan
ATTORNEY GENERAL

November 7, 2016

Via Email: FederalRegisterComments@cfpb.gov
Richard Cordray
Director
Consumer Financial Protection Bureau
1700 G Street, NW
Washington, D.C. 20552

Re: Docket No. CFPB-2016-0026
Payday, Vehicle Title, and Certain High-Cost Installment Loans
Request for Information

Dear Director Cordray:

The Office of the Illinois Attorney General appreciates this opportunity to provide information in response to the Consumer Financial Protection Bureau's ("Bureau") Request for Information ("RFI") relating to the Bureau's concurrently published Notice of Proposed Rulemaking on Payday, Vehicle Title, and Certain High-Cost Installment Loans[1] ("Proposed Rules"), to be codified at 12 C.F.R. § 1041. Our observations below are in response to certain information requests in the RFI that involve consumer protection issues that we have encountered and analyzed in our consumer complaints and law enforcement actions.

Since 2014, we have filed six lawsuits against companies offering short-term, high-cost consumer loan products in Illinois. The first lawsuit was against an Illinois installment lender, CMK Investments, Inc. d/b/a All Credit Lenders ("CMK"), that offered a small-dollar revolving line of credit product that did not amortize and included a very expensive "Required Account Protection" fee. Four of the other lawsuits were filed against unlicensed on-line payday lenders that offered payday and installment loans in Illinois in violation of our lending laws. The sixth lawsuit is ongoing against Selling Source, LLC, PartnerWeekly, LLC, and MoneyMutual, LLC (collectively "MoneyMutual"), a short-term loan lead generator company that collects a large

[1] *See* Payday, Vehicle Title, and Certain High-Cost Installment Lenders, 81 Fed. Reg. 47,864 (proposed July 22, 2016).

amount of personal data from consumers and matches consumers with third party lenders, some of which are unlicensed.

We have also filed two lawsuits, in partnership with the Federal Trade Commission, against debt collectors in the Chicago area that attempt to collect on phantom payday loans that consumers have never taken out, have paid off, or, even if consumers have taken out payday loans in the past upon which these debt collectors have no right to collect. Both lawsuits allege violations of the Illinois Collection Agency Act, Illinois Consumer Fraud Act, FTC Act, and the Fair Debt Collection Practices Act.[2]

We believe that the evidence and data we have derived through our law enforcement actions, including expert reports and deposition testimony, can inform the Bureau of consumer protection concerns arising from high-cost short-term and installment lending.

The limitations that make it more difficult for consumers to shop effectively for high-cost short-term or installment loans to meet their needs.

The consumers who have filed complaints with our office against short-term or installment lenders generally took out a loan due to financial hardship and an inability to cover regular living expenses, such as rent or utility bills, to pay for unexpected travel expenses to visit a sick grandchild, and stay abreast of major financial obligations. We have observed in the consumer complaints and investigations listed above that consumers who take out these loans are frequently in such dire financial circumstances that they do not typically have the ability, time, means, or belief that they can engage in comparison-shopping. Therefore, consumers do not feel that they have the ability to negotiate or assess contract terms. Such a distressed lending market raises significant concerns regarding whether consumers are able to protect themselves when selecting and taking out a short-term or high-cost installment loan. As a result, many short-term and installment lenders market and structure their loan products in ways that take advantage of these limitations.

For example, CMK offered a very expensive revolving line of credit loan product to consumers who were unaware of the true cost and did not understand the mechanics of the loan

[2] *See* Complaint, *FTC, People of the State of Illinois v. K.I.P., LLC, et. al.*, (N.D.Ill. April 6, 2015) (1:15-cv-02985), attached as Appendix 1. We filed a lawsuit against K.I.P., LLC and Chantelle and Charles Dickey (both d/b/a Payday Loan Recovery Group) in federal court where we were granted a temporary restraining order. The case settled with the K.I.P defendants agreeing to a permanent injunction, enjoining them from all debt collection activities, including working for a debt collector in any capacity. The settlement also included a judgment of $6,403,781.62, which was suspended based on Defendants' financial status. *See also* Complaint, *FTC, People of the State of Illinois v. Stark Law, LLC, et. al.*, (N.D. Ill. March 21, 2016) (1:16-cv-3463), attached as Appendix 2. Additionally, we filed a lawsuit against Stark Law, LLC (f/k/a CHM Capital Group, LLC); Ashton Asset Management; HKM Funding, Ltd.; Pacific Capital Holdings, Inc.; Hirsh Mohindra; Gaurav Mohindra; and Preteesh Patel for their unlicensed collection of, we believe, phantom payday loans, including representing themselves as a law firm to pressure consumers to pay phantom debts under the threat of being sued. The federal court granted our request for a temporary restraining order. A court-appointed receiver is currently in control of all assets related to Defendants' collection business. While Defendants agreed to the entry of a preliminary injunction, this litigation is ongoing.

product.[3] Consumers testified at their depositions that they entered into the revolving credit plan because they needed cash immediately and felt they had no other options. Plaintiff's expert, Professor Adam Levitin, discussed in his report the inability of market competition to protect consumers in distressed lending markets, where, due to limited potential savings and associated costs, including transportation, time and childcare, borrowers "rationally have little reason to engage in comparison shopping."[4] Professor Levitin further opined that "[w]ithout such comparison-shopping, there is little reason for the borrower to carefully vet the details of the loan, as it is a take-it-or-leave-it proposition."[5] As a result, consumers can be misled about the true cost and nature of the product, and may not fully understand the terms and conditions of the product or whether they are protecting their interests.

With more consumers using the internet to take out a loan, we have also received complaints from consumers who use lead generators to take out short-term loans for financial emergencies. Consumers who take out online loans are often drawn to lead generator websites in response to advertising that makes promises such as, "an easy way to get short term cash fast."[6] MoneyMutual advertises its services by stating that it has "built a large, dedicated network of short-term lenders to match you with instantly in order to provide the relief you need until your next paycheck" and by promising that use of the service "is private, fast and easy, so there is no need for you to drive to and stand in line at a payday loan store."[7] The President and CEO of Selling Source, LLC, which is the parent company and manager of MoneyMutual, LLC, confirmed in his deposition that consumers who apply for a payday loan through the website are not provided a list of lenders to choose from. Many online Illinois consumers end up in very expensive and sometimes unlawful loans with unlicensed payday lenders, without any ability or opportunity to negotiate loan terms or comparison shop. The complaints we have received from consumers who applied for loans through a lead generator vary but, among other things, involve inability to pay off the loan balance due to high fees, unauthorized debits of the consumer's bank account after the consumer submitted personal information through the website, and placement in a loan the consumer did not agree to accept after applying for a loan through the lead generator's website.[8]

Examples of excessively slow amortization of high-cost installment loans or open-end lines of credit that raise consumer protection concerns.

We have seen some lenders structure their product such that consumers, although making timely payments in accordance with the amount explicitly provided for by the terms of the contract, will never pay off their loan - effectively having no amortization. In our lawsuit against CMK, consumers testified at their depositions that CMK charged and instructed them to pay a minimum payment amount on each due date identified in a billing schedule that, unbeknownst to

[3] *See* Complaint, *People v. CMK Investments, Inc. d/b/a All Credit Lenders*, (Cir. Ct. Cook County Mar. 18, 2014) (No. 14-CH-4694), attached as Appendix 3.
[4] Expert Report of Professor Adam Levitin, ¶¶ 66-74, *People v. CMK Investments, Inc. d/b/a All Credit Lenders*, (N.D. Ill.) (No. 14-C-2783), attached as Appendix 4.
[5] *Id.* at ¶ 73.
[6] Second Amended Complaint, ¶ 68, *People v. MoneyMutual, LLC, et. al.*, (Cir. Ct. Cook County August 12, 2016) (No. 14-CH-5907), attached as Appendix 5.
[7] *Id.* at ¶¶ 70, 71.
[8] *Id.* at ¶¶ 112-115.

the consumers, did not include any principal reduction. Consumers believed that if they made each payment as instructed by the lender on the due dates provided by the lender that their loans would be paid, in full, by the last date listed in the payment schedule. Instead, consumers eventually realized that their loan balances were not decreasing, but only after making multiple payments. In some instances, consumers continued to make payments over long periods of time without touching their principal balance. For example, one consumer who complained to our office paid more than $11,000 over more than three years on a $700 loan.

Consumer protection concerns arising out of the market of ancillary products in covered payday, vehicle title, or similar loans.

Our lawsuit against CMK exemplifies the consumer protection concerns associated with the sale of ancillary products in connection with short-term or installment loans. CMK added a "Required Account Protection" fee ("fee") to the loan product that was charged to all consumers, whether or not any particular consumer could possibly benefit from the 'protection' the product purportedly afforded.[9] The stated purpose of the fee was to protect borrowers from having to pay the fee itself, in addition to any interest on the loan, for up to 12 months if the borrower became unemployed.[10] Borrowers were typically required to pay $11 or $10 per $50 of outstanding balance per billing cycle.[11] Despite disclosed interest rates of 18% to 24%, the fee-inclusive interest rates on the loans sometimes outstripped 500%.[12] We alleged the functional purpose of that fee was not to serve as an ancillary product but, rather, to conceal undisclosed interest charged by the lender as subterfuge in order to avoid the interest rate cap on revolving credit products. CMK was not the only lender offering this type of product. We entered into settlement agreements with several other lenders offering a similar line of credit product and fee.

Plaintiff's expert, Birny Birnbaum, opined on how the fee differed significantly from authentic risk-based credit insurance or Debt Cancellation Contracts ("DCCs") and Debt Suspension Agreements ("DSAs").[13] Unlike legitimate DCCs and DSAs, the fee was both mandatory and the amount of the fee was unrelated to the benefits provided or the likelihood of a covered event.[14] CMK also neither engaged in the customary safety and soundness activities associated with DCCs/DSAs nor routinely tracked activity relating to account protection usage.[15] Moreover, while the premium charges and fees for credit insurance and DCCs/DSAs are typically a fraction of the interest rate charged on principal, the amount CMK charged to consumers for the fee was 20 to 29 times the disclosed interest rate.[16] In just over a handful of payment cycles, the amount a consumer paid on the fee surpassed the amount of the outstanding principal he or she had borrowed on the loan. Indeed, as Mr. Birnbaum observed, "DCCs/DSAs

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[9] *See* Complaint, *People v. CMK Investments, Inc. d/b/a All Credit Lenders*, (Cir. Ct. Cook County Mar. 18, 2014) (No. 14-CH-4694).
[10] *Id.* at Ex. 1.
[11] *Id.* at ¶¶ 41-42.
[12] *Id.* at 112.
[13] Expert Report of Birny Birnbaum, *People v. CMK Investments, Inc. d/b/a All Credit Lenders*, (N.D. Ill.) (No. 14-C-2783), attached as Appendix 6.
[14] *Id.* at 23-24.
[15] *Id.*
[16] *Id.*

are ancillary products to loans offered by lenders" while, by contrast, the fee was "a core—not ancillary—part of [CMK's] loan program."[17]

In short, CMK used this ancillary fee, which had almost no characteristics of a legitimate debt suspension product, to hide the true cost of these loans and evade consumer protections. Of further concern was the fact that, as demonstrated by consumer complaints received by our office relating to the above described loan product and fee, consumers are often simply unaware that they have agreed to these types of ancillary products.

Other emerging marketing practices that pose risks to consumers.

The number of borrowers going online to take out a payday or installment loan, including by using lead generator websites, is substantial. As of 2015, MoneyMutual matched Illinois borrowers with lenders over 170,000 times.[18] The large amount of financial and personal data collected and processed by online lenders and lead generators and potential data sharing with other lenders raises significant privacy concerns. Since 2015, our office has received over 300 complaints involving phantom debt collections. We are concerned that consumers' personal and financial information, potentially disclosed through the online payday loan application process, is sold to or shared with entities or individuals who harass consumers into paying payday loans that consumers do not owe. There is a growing industry for the sale and purchase of portfolios of consumer information, which often include an alleged payday loan debt. These portfolios of consumer information are bought and sold multiple times, exposing consumers to multiple debt collectors claiming to have the right to collect on a supposed payday loan debt. The purported debts do not exist, have been paid off, or are not substantiated with any underlying documentation that can be provided to consumers to prove the debt.[19]

Another non-covered high-cost credit market that we believe warrants attention from federal and state regulators is the market for tax-related financial products. As the Bureau explains in its Proposed Rules, demand for covered high-cost loans is driven by the liquidity constraints that low-income households face due to lack of access to open-ended credit markets.[20] However, lack of access to open-ended credit markets may not be the exclusive driver of demand for high-cost loans. There is some evidence that the availability of federal cash assistance for low-income consumers correlates with reduced demand amongst these consumers for high-cost loans.[21] Tax-related financial products are only promoted during tax season[22] where cash transfers by the federal government are expressly provided to supplement the income

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[17] *Id.*

[18] Second Amended Complaint, ¶ 32, *People v. MoneyMutual, LLC, et. al.,* (Cir. Ct. Cook County August 12, 2016) (14-CH-5907).

[19] *See* Complaint, *FTC, People of the State of Illinois v. Stark Law, LLC,* (N.D. Ill. March 21, 2016) (1:16-cv-3463).

[20] *See* Proposed Rules, 81 Fed. Reg. at 47,866.

[21] *See* Dylan Bellisle & David Marzahl, Restructuring the EITC: A Credit for the Modern Worker, Center for Economic Progress (2014), *available at,* http://www.economicprogress.org/sites/economicprogress.org/files/restructuring_the_eitc_a_credit_for_the_modern_worker_0.pdf (finding that periodic earned income tax credit payments reduced demand for payday loans by as much as 45%).

[22] Tax season refers to the period specified by the Internal Revenue Service from late January to early April during which the taxes for the prior year can be filed.

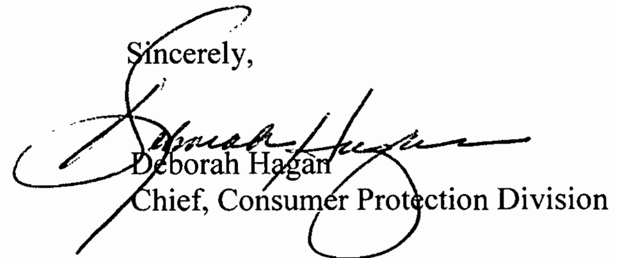
of low-income wage earners with families. These cash transfers are distributed through the federal tax code in the form of refundable tax credits, the most significant of which, the Earned Income Tax Credit, is the largest anti-poverty program in the country.

Consumer protection concerns over tax-related financial products have focused on refund anticipation loans ("RALs"), which are short-term, high-cost loans offered to consumers before and during tax seasons. In recent years, the RAL market has largely disappeared as depository institutions stopped financing RALs over safety and soundness concerns. Though the RAL market has disappeared, consumer protection issues persist with the sale of refund anticipation checks ("RACs"), which allow consumers to finance the cost of tax preparation with their expected federal tax refund. Through our investigations and enforcement actions, we have observed that tax preparers are taking advantage of the price insensitivity among low-income consumers to charge exorbitant fees for RAC-financed tax returns.[23] This includes both charging RAC consumers ancillary "junk" fees and significantly more in tax preparation fees than consumers who do not finance the cost of tax preparation with their refund.[24] We have routinely observed fees that total over $700 and, in some instances, exceed $900 per tax return and unscrupulous practices by tax preparers can leave consumers vulnerable to audit and loss of future tax refunds.[25] In each case, low-income consumers who use RACs experience a significant drain on their current and future tax refunds, which could result in consumers increasingly turning to covered high-cost loans for financial hardships.

Conclusion

We appreciate the opportunity to submit this response to the RFI. I hope that our experience and the information we have derived from our consumer complaints and litigation in this area are helpful in finalizing and implementing the Proposed Rule and for future rulemaking. Please contact me if you have any questions or need additional information.

Sincerely,



Deborah Hagan
Chief, Consumer Protection Division

[23] *See* Complaint, *People v. Individual Income Tax Service*, (Cir. Ct. Cook County Feb. 1, 2016) (No. 2016-CH-1369). ¶¶ 41-56, attached as Appendix 7; Complaint, *People v. Mo' Money Tax Service*, (Cir. Ct. Cook County Mar. 14, 2012) (No. 12-CH-9136), ¶¶ 79-104, attached as Appendix 8.
[24] *See Id.*
[25] *See* Complaint, *People v. Individual Income Tax Service*, ¶¶ 49, 53; *Valuebank v. UP2U et al.*, Civ. No. 2:12-cv-00294 (S.D. TX. 2013) (D.E. 107-1, ¶ 108).

STATE OF NEW YORK
OFFICE OF THE ATTORNEY GENERAL

ERIC T. SCHNEIDERMAN
ATTORNEY GENERAL

JANE M. AZIA
BUREAU CHIEF
CONSUMER FRAUDS & PROTECTION BUREAU

October 7, 2016

Via Email (*FederalRegisterComments@cfpb.gov*)

Richard Cordray
Director
Consumer Financial Protection Bureau
1700 G Street, NW
Washington, D.C. 20552

Re: Docket No. CFPB-2016-0025 / RIN 3170-AA40
Payday, Vehicle Title, and Certain High-Cost Installment Loans
Request for Information and Comments

Dear Director Cordray:

The undersigned State Attorneys General (the "States") welcome the opportunity to submit comments in response to the Consumer Financial Protection Bureau's (the "Bureau") proposed rules concerning Payday, Vehicle Title, and Certain High-Cost Installment Loans ("Proposed Rules"), to be codified at 12 C.F.R. § 1041. The States commend the Bureau for exercising its rulemaking authority in an area that has such a widespread impact on the lives of millions of financially vulnerable consumers across the nation.[1] The Bureau's Proposed Rules will significantly curtail unfair, deceptive, and abusive payday lending practices for those states that lack strong usury caps, by implementing an ability to repay requirement,[2] placing limitations on lenders' collection practices,[3] requiring payday lenders to make

[1] *See* Federal Deposit Insurance Corporation, *FDIC National Survey of Unbanked and Underbanked Households*: *Appendices*, at 83-84 (Oct. 2014), *available at* https://www.fdic.gov/householdsurvey/2013appendix.pdf (finding that payday borrowers are disproportionately Hispanic or African-American); Consumer Financial Protection Bureau, *Payday Loans and Deposit Advance Products: A White Paper of Initial Data Findings*, at 18-19 (Apr. 24, 2013) [hereinafter *CFPB Payday Loans and Deposit Advance Products White Paper*], *available at* http://files.consumerfinance.gov/f/201304_cfpb_payday-dap-whitepaper.pdf (finding that 18 percent of storefront payday borrowers relied on social security income or some other form of government benefits or public assistance); The Pew Charitable Trusts, *Payday Lending in America: Who Borrows, Where They Borrow, and Why*, at 35 (July 2012), *available at* http://www.pewtrusts.org/~/media/legacy/uploadedfiles/pcs_assets/2012/pewpaydaylendingreportpdf.pdf (finding that 49 percent of payday borrowers had an income of $25,000 or less).

[2] Consumer Financial Protection Bureau, *Payday, Vehicle Title, and Certain High-Cost Installment Loans*, §§ 1041.5, 1041.9. (June 1, 2016) [hereinafter *CFPB Proposed Payday Lending Rules*], *available at* http://files.consumerfinance.gov/f/documents/Rulemaking_Payday_Vehicle_Title_Certain_High-Cost_Installment_Loans.pdf.

[3] *Id.* at §§ 1041.13-1041.14.

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certain consumer disclosures prior to withdrawing funds from a borrower's bank account,[4] and requiring the creation of a payday lending reporting database,[5] among other things.

The proliferation of payday lending[6] has been a source of increasing concern over recent years.[7] Companies engaged in payday lending earn millions of dollars by targeting and exploiting financially fragile consumers through television, radio, and internet advertisements, promising them "fast cash" to meet their most basic living expenses. In return, these companies charge exorbitant interest rates that essentially force struggling consumers to roll over one payday loan into another. Before long, consumers are caught in a vicious, never ending cycle of high-cost borrowing that they can never repay.[8] The economic consequences of these lending activities are significant. According to a March 2013 study from the Insight Center for Community Economic Development, "the payday lending industry had a negative impact of $774 million in 2011, resulting in the estimated loss of more than 14,000 jobs. U.S. households lost an additional $169 million as a result of an increase in Chapter 13 bankruptcies linked to payday lending usage, bringing the total loss to nearly $1 billion."[9] In addition, approximately one-third of borrowers default within six months of their first payday loan and almost half of borrowers default within two years of their first payday loan.[10]

While many states have enacted statutes setting rigorous usury caps, which in effect, prohibit payday lending altogether, the Bureau's Proposed Rules will nonetheless benefit consumers in those states with either less strict usury caps or whose statutes and regulations are silent on key issues, such as whether a payday lender is required to assess the borrower's ability to repay the debt. As important as these additional protections are, it is crucial that lenders not use the promulgation of the Bureau's rules to

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[4] *Id.* at § 1041.15.

[5] *Id.* at §§ 1041.16-1041.17.

[6] *See* NPR, *Payday Loans – And Endless Cycles of Debt – Targeted By Federal Watchdog* (Mar. 26, 2015), *available at* http://www.npr.org/2015/03/26/395421117/payday-loans-and-endless-cycles-of-debt-targeted-by-federal-watchdog (reporting that payday lending has exploded from a $14 billion industry in 2001 to a $46 billion industry in 2015).

[7] *See, generally*, Consumer Financial Protection Bureau, *Online Payday Loan Payments* (Apr. 2016), *available at* http://files.consumerfinance.gov/f/201604_cfpb_online-payday-loan-payments.pdf; Consumer Financial Protection Bureau, *CFPB Data Point: Payday Lending,* (Mar. 2014), *available at* http://files.consumerfinance.gov/f/201403_cfpb_report_payday-lending.pdf; *CFPB Payday Loans and Deposit Advance Products White Paper*.

[8] A Bureau study found that four out of five payday loans are reborrowed within 14 days of the previous loan being repaid and that more than 80 percent of payday loans taken out by these borrowers were rolled over or reborrowed within 30 days. *See* Consumer Financial Protection Bureau, *Supplemental Findings on Payday, Payday Installment, and Vehicle Title Loans, and Deposit Advance Products,* at 115-116 (June 2016), *available at* http://files.consumerfinance.gov/f/documents/Supplemental_Report_060116.pdf; *see also CFPB Payday Loans and Deposit Advance Products White Paper*, at 21-23 (finding that the average payday borrower takes out ten loans a year.).

[9] Insight Center for Community Economic Development, *The Net Economic Impact of Payday Lending in the U.S.*, at 1 (Mar. 2013), *available at* http://ww1.insightcced.org/uploads/assets/Net%20Economic%20Impact%20of%20Payday%20Lending.pdf.

[10] *See* Center for Responsible Lending, *Payday Mayday: Visible and Invisible Payday Lending Defaults*, at 5 (Mar. 2015), *available at* http://www.responsiblelending.org/sites/default/files/nodes/files/research-publication/finalpaydaymayday_defaults.pdf.

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erode more stringent state laws. As the Bureau has expressly stated in its preamble to the Proposed Rules:

> The protections imposed by this proposal would operate as a floor across the country, while leaving State and local jurisdictions to adopt additional regulatory requirements (whether a usury limit or another form of protection) above that floor as they judge appropriate to protect consumers in their respective jurisdictions.[11]

We appreciate that the Bureau has explicitly provided that its Proposed Rules set a minimum standard and will not preempt stronger state laws. It is essential to preserve the ability of individual states like the undersigned to maintain their existing usury caps. For that reason, the undersigned States urge the Bureau to include similar language in the body of the Rules, not just the preamble. While our States support the Bureau's efforts to adopt a set of rules that protect consumers from high-cost loans by attempting to ensure that loans are affordable, we are concerned that the Bureau's Proposed Rules, including the proposed exemptions from the ability-to-repay requirement, are weaker than our state laws and might encourage future efforts to eliminate stringent state usury caps. Since the Bureau cannot set interest rates for loans, it is crucial to preserve the right of states to do so as usury caps are, in fact, the single most effective way of ending the harms of payday and other high interest consumer lending.[12]

The undersigned States have long been concerned with high-cost loans and have passed some of the toughest lending laws in the country, which essentially make payday lending illegal in these States. For example, New York's civil usury law prohibits most non-bank lenders that are not licensed by New York State from charging more than 16% interest on small unsecured loans.[13] Lenders that are licensed by New York State cannot charge more than 25% under New York's criminal usury laws.[14] In Connecticut, the civil usury rate is 12%.[15] Licensed small loan lenders are permitted to charge no more than 36% for small loans up to $5,000 and no more than 25% for small loans over $5,000 and less than or equal to $15,000.[16] In Maryland, licensed lenders are prohibited from charging an annual interest rate in excess of 24% or 33% for consumer loans of $6,000 or less, depending on the original and unpaid principal balance of the loans.[17] In Massachusetts, the civil usury rate is 12% for small dollar loans of $6,000 or less, and licensed lenders are permitted to charge no more than 23%.[18] New Hampshire limits

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[11] *CFPB Proposed Payday Lending Rules*, at 177.

[12] Center for Responsible Lending, *Springing the Debt Trap: Rate caps are only proven payday lending reform* (Dec. 13, 2007), *available at* http://www.responsiblelending.org/sites/default/files/nodes/files/research-publication/springing-the-debt-trap.pdf.

[13] *See* N.Y. Gen. Oblig. L. § 5-501; N.Y. Banking L. § 14-a.

[14] *See* N.Y. Penal Law § 190.40.

[15] *See* Conn. Gen. Stat. § 37-4.

[16] *See* Ch. 668, Part III, Conn. Gen. Stat.

[17] *See* Md. Code Ann., Com. Law §§ 12-301-12-303, 12-306.

[18] *See* Mass. Gen. L. c. 140, § 96; 209 CMR 26.01 (Small Loan Rate Order).

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the annual percentage rate on payday loans to 36%.[19] Pennsylvania effectively has a cap at 24% for small dollar loans. Pennsylvania's usury law establishes the general interest rate cap of 6% for non-mortgage consumer loans in amounts less than $50,000. The Consumer Discount Company Act allows "consumer discount companies" licensed by the Pennsylvania Department of Banking and Securities to make loans in excess of 6%, at rates up to approximately 24%.[20] Any loans that exceed these thresholds are void under many state laws.[21] Moreover, lenders that set up their operations out-of-state, overseas, or on tribal lands in an attempt to evade state regulation are still subject to State laws when lending to consumers.[22]

Our States have also vigorously enforced our usury laws against companies engaged in illegal payday and auto title lending activities in our respective states. For example, in August 2013, the New York State Attorney General's Office ("NYAG") filed an enforcement action against Western Sky Financial, LLC, CashCall, Inc., WS Funding, LLC, and their owners (collectively, "Western Sky") for violations of New York's usury and licensed lender laws in connection with personal loans they made over the Internet and telephone.[23] The NYAG amassed extensive evidence that Western Sky originated high-interest, personal loans to consumers that carried annual percentage rates of interest ("APRs") ranging from 89.26% to more than 355%. From early 2010 through 2013, Western Sky made approximately 18,000 high interest loans to New York consumers, lending more than $38 million in principal. The interest and fees owed on those loans totaled nearly $185 million. In a settlement with the NYAG, Western Sky agreed to cease collecting interest on outstanding loans to New York consumers, provided refunds to New York borrowers who have paid back more than the principal of their loan plus the legal interest rate of 16%, and paid $1.5 million in penalties. Seven of the undersigned States separately filed litigation or administrative actions against the Western Sky entities

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[19] *See* N.H. RSA 399-A:17(1).

[20] *See* 41 P.S. §§ 101 *et seq.*; 7 P.S. §§ 6201 *et seq.*

[21] *See, e.g.*, Conn. Gen. Stat. § 36a-573; D.C. Official Code § 28-3301(a); Md. Code Ann., Com. Law § 12-314; Mass. Gen. L. c. 140, § 110 (loans in excess of statutory cap by unlicensed lenders automatically void); N.H. RSA 399-A:15(V); N.Y. Gen. Oblig. L. § 5-511(1); Title 8, Vt. Stat. Ann. § 2215(d).

[22] *See, e.g., Otoe-Missouria Tribe of Indians v. N.Y. State Dep't of Fin. Servs.*, 769 F.3d 105, 114-115 (2d Cir. 2014) (holding that the district court did not err in finding that plaintiffs failed to prove the state was regulating "on-reservation" conduct because consumers applied for the loans from New York, the transactions included the collection and extension of credit in New York, and the tribe was permitted to withdraw funds from consumers' bank accounts that were located in New York); *Western Sky Fin., LLC v. Maryland Comm'r of Fin. Regulation*, 2012 WL 3126863 (D. Md. July 31, 2012) (in dismissing a declaratory judgment action by Western Sky and related South Dakota companies, the district court stated that with regard to the Commissioner's enforcement of the Maryland Consumer Loan Law against the companies' Internet lending activities, "Maryland's interest in protecting its citizens from predatory loans *made in Maryland, not on reservations*, does not 'by its very nature' conflict with an 'overwhelming federal interest'") (emphasis added); Memorandum of Decision and Order on Plaintiffs' Consolidated Motion for Judgment on the Pleadings and the Defendant's Motion for Order of Enforcement, C*ash Call, Inc., et al. v. Massachusetts Div. of Banks*, C.A. Nos. 13-cv-1616-B and 13-cv-1641-C, at p. 4 (Mass. Super. Ct. Aug. 31, 2015) (citing New York's *Otoe-Missouria* decision and holding: "All of these same considerations are present here. All of the loans were applied for, paid from, and collected from Massachusetts. Western Sky reached well beyond the reservation's boundaries to transact business with Massachusetts residents. The Massachusetts statutes at issue are non-discriminatory and apply to all citizens of the state and those who conduct their business here. Massachusetts may therefore regulate the loans made by Western Sky.").

[23] *See* Verified Petition, *People of the State of New York v. Western Sky Fin., LLC*, Index No. 45170/2013 (Sup. Ct. N.Y. Cnty.).

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and four settlements have been concluded offering consumers in those states substantially similar or greater relief.[24]

Our States have effectively taken action to stop other payday and high cost lenders. In addition to suing Western Sky, New York obtained more than five settlements with such lenders (and debt collectors collecting on illegal payday loans) between 2004 and 2013.[25] Other states, such as Maryland,[26] Pennsylvania,[27] and Vermont,[28] have all taken similar action.

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[24] *See, e.g*., Consent Order and Judgment, *Western Sky Fin., LLC, et al. v. Maryland Comm'r of Fin. Regulation*, No. 24-C-13-004207, *CashCall, Inc. v. Maryland Comm'r. of Fin. Regulation*, No. 24-C-12-004946 (consolidated cases) (Cir. Ct. for Baltimore City, Md. June 19, 2014), *available at* http://www.dllr.state.md.us/finance/consumers/pdf/westernskyfinal.pdf (summarized at http://www.dllr.state.md.us/whatsnews/frwesternsky2014.shtml); Final Judgment By Consent, *CashCall, Inc., et al. v. Massachusetts Div. of Banks*, C.A. Nos. 2013-1616-B, 2013-1641-B, and 2015-3044-D (consolidated cases) (Mass. Super. Ct. Oct. 26, 2015); Assurance of Discontinuance, *In re Western Sky Fin., LLC, et al*. No. 241-4-14 wncv (Vt. Super. Ct. Apr. 18, 2014).

[25] The NYAG has been successful at stopping numerous companies from engaging in predatory payday or high cost loans. *See, e.g.,* http://www.ag.ny.gov/press-release/ag-schneiderman-reaches-settlement-auto-title-loan-company-refund-interest-usurious (announcing the NYAG's December 2013 settlement with Manor Resources, LLC d/b/a TurboTitleLoan.com, an out-of-state company that offered short-term loans secured by borrowers' vehicles at APRs of 120% and 180%); http://www.ag.ny.gov/press-release/ag-schneiderman-announces-settlements-five-companies-collected-illegal-payday-loans (announcing the NYAG's September 2013 settlement with five debt collection companies that were collecting on illegal payday loans from New Yorkers); http://www.ag.ny.gov/press-release/attorney-general-cuomo-announces-distribution-52-million-settlement-rent-bank-payday (announcing the NYAG's November 2009 settlement with companies making illegal payday loans to New York consumers under a fraudulent "rent-a-bank" scheme); http://www.ag.ny.gov/press-release/payday-lender-forgive-loans-and-provide-refunds (announcing the NYAG's November 2004 settlement with Cashback Payday Loans, Inc. for providing illegal payday loans to New York consumers over the internet); http://www.ag.ny.gov/press-release/court-halts-illegal-payday-loan-scheme (announcing the court's decision voiding illegal payday loans disguised as catalog sale purchases by JAG NY, LLC d/b/a N.Y. Catalog Sales).

[26] The MD AG and Commissioner of Financial Regulation have brought numerous enforcement actions against various businesses and individuals making usurious loans. *See, e.g., B&S Mktg. Enters., LLC v. Consumer Prot. Div*., 153 Md. App. 130, 835 A.2d 215 (2003) (usurious loans disguised as "sale-leaseback" transactions); http://www.dllr.state.md.us/finance/consumers/pdf/onyxredactedfinal.pdf (court ordered dismissal of over 1,500 associated confessed judgments and lawsuits against Maryland consumers by Nigerian payday lending ring); http://www.dllr.state.md.us/finance/consumers/pdf/mycashnowfinal.pdf (settlement with five payday lenders obtaining restitution, and invalidation of all agreements with Maryland residents); http://www.dllr.state.md.us/finance/consumers/pdf/plaintifffundinglawcash.pdf (settlement with litigation funding company, obtaining restitution, and other consumer benefit); *Maryland Comm'r of Fin. Regulation v. Roadrunner Title Pawn, LLC, et al*., No. 21-C-16-56933 (Cir. Ct. for Washington Co., Md. May 6, 2016) (preliminary injunction against title lender making usurious loans under guise of pawnbroker services).

[27] The PA AG settled with NCAS of Delaware, LLC d/b/a Advance America Cash Advance Center and Advance America Cash Advance Centers, Inc. and obtained $8 million in restitution and $12 million in loan forgiveness. *See* https://www.attorneygeneral.gov/Media_and_Resources/Press_Releases/Press_Release/?pid=1479. The PA AG has also filed a complaint against companies alleged to have engaged in an illegal rent-a-bank/rent-a-tribe lending scheme. *See* https://www.attorneygeneral.gov/Media_and_Resources/Press_Releases/Press_Release/?pid=1205.

[28] The VT AG settled with six payday lenders and four payment processors, obtaining $1.5 million in relief for more than 6,000 Vermont borrowers involving high-interest online loans. *See* http://ago.vermont.gov/focus/consumer-info/money-and-credit/illegal-lending.php.

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States with strong usury caps and robust payday lending laws translate into significant monetary and non-monetary benefits to consumers. For example, one study estimates that in states that ban payday loans consumers save more than $2.2 billion annually in fees.[29] In addition, these laws help consumers by "preventing increased difficulty paying bills, delayed medical spending, involuntary bank account closure, higher likelihood of filing for bankruptcy, and decreased job performance."[30]

If enacted, the Proposed Rules will provide vulnerable consumers with significant protections from unaffordable high-cost loans without preempting stronger state laws. For this reason, the undersigned States appreciate the Bureau's initiative in this important area. We strongly encourage the Bureau to continue to emphasize that its Proposed Rules, if enacted, should not be used to undermine more stringent state protections and enforcement efforts that have proven so effective in combatting predatory lending.

If we can provide any further information, please do not hesitate to contact us.

Respectfully submitted,

ERIC T. SCHNEIDERMAN
New York Attorney General

GEORGE JEPSEN
Connecticut Attorney General

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[29] *See* Center for Responsible Lending, *States without Payday and Car-title Lending Save $5Billion in Fees Annually*, at 1-2 (June 2016), *available at* http://www.responsiblelending.org/sites/default/files/nodes/files/research-publication/crl_payday_fee_savings_jun2016.pdf (listing the annual payday and car title loan fee savings for each of the undersigned States: Connecticut ($134 million), District of Columbia ($30 million), Maryland ($253 million), Massachusetts ($248 million), New Hampshire ($27 million), New York ($790 million), Pennsylvania ($489 million), Vermont ($22 million). The study also notes that these estimates are conservative in that they do not include online or installment lending.

[30] Center for Responsible Lending, *Shark Free Waters: States are Better Off without Payday Lending,* at 1, 5-6 (Aug. 2016), *available at* http://www.responsiblelending.org/sites/default/files/nodes/files/research-publication/crl_shark_free_waters_aug2016.pdf.

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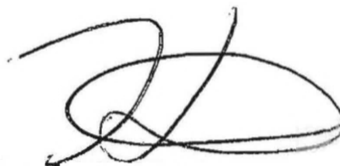

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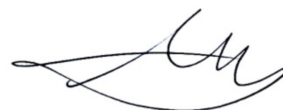

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Bob Ferguson
ATTORNEY GENERAL OF WASHINGTON
1125 Washington Street SE • PO Box 40100 • Olympia, WA 98504-0100

October 7, 2016

The Honorable Richard Cordray, Director
Consumer Financial Protection Bureau
1700 G Street NW
Washington, DC 20552

Re: Proposed Rules Affecting Small-Dollar Loans

Dear Director Cordray:

I write in support of the efforts of the Consumer Financial Protection Bureau (CFPB) to strengthen protections for consumers against abusive small-dollar lending practices. Together with Washington's existing law, CFPB's proposal would bring needed protections to vulnerable consumers who take out these costly loans and struggle to repay them. I support CFPB's proposal to adopt a meaningful "ability to repay" standard, and encourage CFPB to consider additional measures to protect borrowers in this market.

A Decrease in Small-Dollar Lending in Washington State

In 2009, over 410,000 Washington consumers took out more than 3.2 million payday loans totaling $1.3 billion. Those borrowers paid more than $183.4 million in fees to payday lenders.[1] A 2009 study encompassing 90 percent of the state's payday lending market revealed that 43.37 percent of payday loan borrowers took out more than six loans in a single year.[2] The study also showed that 241 consumers took out more than 51 payday loans each in 2009, accounting for more than 12,000 payday loans made in the state that year.[3] These data support the finding that, for some consumers, payday loans are unaffordable financial products. Consumers who borrow multiple loans in succession fall into a debt trap when they borrow a new payday loan to repay the original loan, or because they face a cash shortfall caused by repaying the loan. The small-dollar amount of each loan belies the devastating impact and the endless cycle of debt borrowers and their families are left to deal with.

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[1] "2009 Payday Lending Report," The Washington State Department of Financial Institutions, pg. 2 (http://www.dfi.wa.gov/sites/default/files/reports/2009-payday-lending-report.pdf).

[2] *Id.* at pp. 4-5.

[3] *Id.*

To address these issues, the Washington State Legislature passed a law, effective January 1, 2010, to protect consumers from the worst abuses of payday loans.[4] The revised law caps the number of small-dollar loans an individual can obtain from any lender to eight in a 12-month period and allows borrowers to convert payday loans to a loan installment plan without incurring an additional fee.[5] In doing so, payday loan borrowers can repay a loan of $400 or less in 90 days or a loan of more than $400 in 180 days without any added cost.[6] Moreover, the law limits the size of a payday loan to 30 percent of a borrower's monthly income or $700, whichever is less.[7]

Importantly, the law also created a statewide database to track the number of payday loans taken out by each borrower. Lenders enter the prospective borrower's identification information and gross monthly income into the database to determine the borrower's eligibility for a small-dollar loan.[8] The lender is responsible for updating the database with information regarding each borrower's open and closed loans.[9] Additionally, the law requires payday lenders to maintain copies of documents used to substantiate the borrower's gross income, the loan agreement, the amounts disbursed, the fees charged, and the origination and termination dates of each small-dollar loan.[10]

As a result of the revisions to Washington's law, by 2015, the number of licensed payday lenders in the state had dropped from 109 to 29, and payday loan branches fell from 494 to 110.[11] The number of Washington consumers taking out payday loans has dropped to roughly half the number of borrowers in 2009.[12] In 2015, only 776,824 small-dollar loans were made, totaling approximately $301 million – a greater than <u>75 percent reduction</u> from 2009.[13]

Washington's strong law has made a tremendous difference in curbing the use and overuse of payday loans in our state. I welcome CFPB's introduction of new rules governing small-dollar lending to supplement Washington's law. To be sure, the success of our state law has garnered legislative challenges. Recent bills, had they succeeded, would have replaced Washington's current payday lending law with one that would allow for larger and riskier installment loans and would have eliminated many of the consumer

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[4] Engrossed Substitute House Bill 1709, Ch. 510, Laws of 2009, 61st Legislature, 2009 Reg. Session, Sec. 1.

[5] RCW 31.45.073(4) (2009).

[6] RCW 31.45.084(1) (2009).

[7] RCW 31.45.073(2) (2009).

[8] WAC 208-630-556.

[9] *Id.*

[10] WAC 208-630-610; 208-630-670.

[11] "2015 Payday Lending Report," The Washington State Department of Financial Institutions, pg. 5 (http://www.dfi.wa.gov/sites/default/files/reports/2015-payday-lending-report.pdf).

[12] *Id.* at pg. 8.

[13] *Id.* at pg. 6.

protections now in place. It is likely that future bills will attempt to weaken or eliminate the existing state protections for payday loan borrowers. In light of these persistent challenges to state law, it is vital that CFPB's rules governing small-dollar loans, particularly those regulating installment loans, contain strong protections for consumers regarding the types of loans covered, the fees charged, and the terms of repayment.

To that end, I offer the following comments to address components of CFPB's proposed rules to ensure that Washington consumers benefit from strong state and federal protections.

<u>Comments on Proposals</u>

- **Permit states to adopt more restrictive laws and regulations**

I urge CFPB to clarify that the proposed rules are not intended to preempt more protective state and local laws. CFPB's proposed rules should encourage states to continue to develop laws that help curb the debt trap cycle, much like Washington state has done. CFPB's rules should be a floor that allows for stronger state protections to address harmful financial consumer practices not yet addressed by CFPB or not within CFPB's jurisdiction. As an illustration, small-dollar loans in Washington state are limited to 45 days or less[14]; to the extent CFPB's proposed rules would allow lenders to offer longer-term loans, the rules must clearly articulate that state prohibitions against particular loan products are not preempted.

- **Create clear standards for enforcement by clarifying the reasonableness standard for ability-to-repay determination**

Under the Consumer Financial Protection Act, state attorneys general can directly enforce against lenders of covered products for violation of the proposed rules. For this provision to be effective, the standards for enforcement must be clear.

CFPB's proposal requires lenders to conduct an ability-to-repay determination prior to making certain loans. The CFPB comments to the proposed rules contemplate that the assessment of whether a lender's determination is reasonable could include whether that lender's rates of delinquency, default, or reborrowing are *in line* with other lenders making similar short-term covered loans to similarly situated consumers. This type of assessment of reasonableness creates an unclear standard for state and federal enforcers to apply. For example, are "similarly situated consumers" consumers within the same locality or with the same household size, or consumers with the same income? The proposed language would also seem to countenance the industry's high rates of

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[14] See RCW 31.45.073(2) (2009).

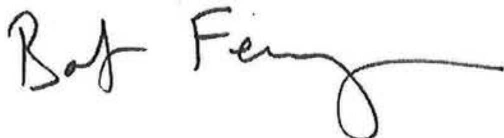
delinquency, default, or reborrowing if those are the "market" rates. Rather than adopt such an analysis, the CFPB should limit the assessment of reasonableness to verifiable information that the proposed rules require lenders to obtain from consumers, including the income and expenses of that particular borrower, and to evaluate for ability to repay prior to offering small-dollar loans. Additionally, high rates of delinquency, default, and reborrowing for any particular covered loan should be evidence of inability to repay.

- **Provide adequate notice to borrowers of payment collection practices**

I support the proposed rule's requirement of clear and conspicuous notice to the borrower prior to collection of payment from the borrower's bank account in connection with the covered loan. Additionally, the proposed rule requires the lender to obtain a new consumer authorization after two failed consecutive attempts at collection through the borrower's account. The CFPB rightly recognizes that failure to obtain a new authorization is an unfair and abusive act or practice by the lender. These additional requirements may help to limit collection abuses and the imposition of overdraft bank account fees borrowers can ill afford.

Thank you for your continuing efforts to protect consumers. I support CFPB's efforts to implement meaningful reforms in the payday and small-dollar loan market.

Sincerely,



BOB FERGUSON
Washington State Attorney General

RWF/jlg

COMMONWEALTH *of* VIRGINIA

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October 7, 2016

VIA E-MAIL: Federal RegisterComments@cfpb.gov

Ms. Monica Jackson
Office of the Executive Secretary
Consumer Financial Protection Bureau
1700 G Street, NW
Washington, DC 20552

Re: Docket No. CFPB-2016-0025
Payday, Vehicle Title, and Certain High-Cost Installment Loans
Request for Public Comments

Dear Ms. Jackson:

I am writing to comment on the Consumer Financial Protection Bureau's (the "Bureau") proposed rules concerning Payday, Vehicle Title, and Certain High-Cost Installment Loans (the "Proposed Rules"), to be codified at 12 C.F.R. § 1041. My interest in the Proposed Rules is based in part on the authority state attorneys general will have to enforce the Proposed Rules under Title X of the Dodd–Frank Wall Street Reform and Consumer Protection Act. Consistent with this authority, I currently have authority to enforce a variety of state lending laws, including those that relate to payday, motor vehicle title and consumer finance loans.

The Bureau's Proposed Rules appropriately take aim at regulating certain types of loans that continue to plague consumers in Virginia and nationwide. Indeed, a recent report prepared by The Pew Charitable Trusts, a non-partisan research organization, found that 12 million Americans use high-cost payday loans annually.[1] The same organization found that, in 2015, 2 million Americans used high-cost automobile title loans.[2] As the Center for Responsible Lending aptly summarized with respect to these loans, "The business model of payday and car title lending is to make loans

[1] The Pew Charitable Trusts, *Payday Lending in America: Who Borrows, Where They Borrow, and Why*, at 8 (2012), at http://www.pewtrusts.org/~/media/legacy/uploadedfiles/pcs_assets/2012/pewpaydaylendingreportpdf.pdf.
[2] The Pew Charitable Trusts, *Auto Title Loans: Market Practices and Borrowers' Experiences*, at 5 (2015) [hereafter *Auto Title Loans*], available at http://www.pewtrusts.org/~/media/assets/2015/03/autotitleloansreport.pdf.

that borrowers cannot afford to pay back. The interest rates average over 300 percent. . . ."[3] Troublingly, these loans disproportionately affect vulnerable borrowers—often the poor or the unemployed who believe no other option is available.[4] Worse still, payday and automobile title lenders trap many of these borrowers in a continuous cycle of high-cost loans that they can never repay.[5]

Conscientious regulation is the surest way to protect consumers from predatory loans. The history of payday loan regulation in Virginia illustrates this fact. In 2008, the Virginia General Assembly strengthened our payday lending statutes, adopting amendments that, among other things: (1) required a minimum term of twice the borrower's pay cycle,[6] (2) prohibited lenders from making a payday loan to a borrower who had a payday loan outstanding,[7] (3) placed limits on the number of loans a borrower could have in a period of 180 days,[8] and (4) required lenders to report their loans to a centralized database to ensure compliance.[9] By 2010, the total number of licensed payday lenders in Virginia fell to 31 from 84 in 2007, and the number of licensee locations fell to 288 from 832.[10] During the same period, the total number of payday loans made annually by Virginia licensees fell to 435,273 from 3,537,395—an 88% decrease.[11] I am hopeful the Bureau's Proposed Rules will have a similar impact nationwide and will further protect consumers in Virginia and elsewhere from the pitfalls of payday lending and similar loan products. If these products are allowed to exist, we must ensure that they are structured in such a way as to allow lenders to provide borrowers with a life preserver, as opposed to a financial anchor.

Foremost among the protections offered by the Proposed Rules is a requirement that covered lenders engage in meaningful underwriting of their loans. Sections 1041.5 and 1041.9 of the Proposed Rules require payday and automobile title lenders, and lenders of certain longer-term installment loans, to follow a time-honored tenet of responsible lending—determining whether a borrower can actually repay the loan. I applaud the Bureau's proposal to require an "ability-to-repay determination" that will, in effect, ban certain debt traps.

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[3] The Ctr. for Responsible Lending, The CFPB's Payday Lending Proposed Rule: What Works, What Doesn't (2016), available at http://www.responsiblelending.org/research-publication/cfpb-s-payday-lending-proposed-rule-what-works-what-doesn-t.

[4] See *Payday Lending in America: Who Borrows, Where They Borrow, and Why* [hereafter *Payday Lending in America*], *supra* at ex. 1; and *Auto Title Loans*, *supra* at table A.1.

[5] See Consumer Fin. Protection Bureau, *Supplemental Findings on Payday, Payday Installment, and Vehicle Title Loans, and Deposit Advance Products*, at 116 (2016) [hereafter *CFPB Supplemental Findings*], available at http://www.consumerfinance.gov/data-research/research-reports/supplemental-findings-payday-payday-installment-and-vehicle-title-loans-and-deposit-advance-products/.

[6] VA. CODE ANN. § 6.2-1816(1)(v) (2010).

[7] VA. CODE ANN. § 6.2-1816(6) (2010).

[8] VA. CODE ANN. § 6.2-1816(27) (2010).

[9] VA. CODE ANN. § 6.2-1810 (2010).

[10] 2010 BUREAU OF FIN. INST. ANN. REP. at 7, available at http://www.scc.virginia.gov/bfi/annual/ar04-10.pdf.

[11] Id.

The Proposed Rules strike an appropriate balance between the Bureau's rulemaking power nationwide, and the power of individual states to regulate lending activities within their own borders. As the Bureau stated in the preamble to its Proposed Rules:

> The protections imposed by this proposal would operate as a floor across the country, while leaving State and local jurisdictions to adopt additional regulatory requirements (whether a usury limit or another form of protection) above that floor as they judge appropriate to protect consumers in their respective jurisdictions.

The "ability-to-repay determination" mandated by the Proposed Rules will benefit consumer protection efforts in jurisdictions like Virginia, where payday and automobile title lending are legal, but regulated, and other jurisdictions where such lending essentially is unregulated. At the same time, the Bureau has made clear to lenders that their compliance with the "ability-to-repay determination" will not grant them the ability to make loans that fail to comply with even stricter state and local regulations. In sum, the Proposed Rules will provide for a nationwide *floor*, but allow state and local jurisdictions to provide for higher *ceilings* with more restrictive prohibitions, including usury rates.

The Proposed Rules contain commendable provisions regulating lenders' attempts at accessing consumer accounts. For instance, § 1041.15(b)(3)(i)-(iii) of the Proposed Rules mandates the timeframes during which lenders must provide a payment notice to borrowers before accessing their accounts: between 10 and 6 business days before accessing the account, if the notice is mailed; and between 7 and 3 business days before accessing the account, if the notice is provided electronically or in person. Section 1041.14(b) also prohibits lenders from attempting to access a consumer's account after two consecutive failed attempts, at which time a new payment transfer authorization must be provided by the consumer. These safeguards will prevent abusive payment practices that often result in consumer account closures and needless overdraft fees.[12]

I also commend the Bureau's decision to remove from its preliminary proposed rules an exception that would have permitted certain high-cost lenders to avoid the "ability-to-repay determination" for loans up to 6 months long if payments did not exceed 5% of a borrower's income. This exception failed to account for a borrower's monthly expenses, and the increased leverage these lenders tend to have over their borrowers in comparison to the borrower's other creditors. Moreover, the exception did not align with the Bureau's own research illustrating a 40% default rate on payday loans that included payments totaling 5% or less of the borrower's income.[13]

Additionally, under § 1041.7(c)(4), a lender making an "excepted" covered short-term loan cannot make the loan if it would result in the borrower having covered short-term loans

[12] See *CFPB Supplemental Findings, supra.*
[13] Id. at figure 6.

"outstanding for an aggregate period of more than 90 days" over the course of any 12 month period. This limitation will be significant in Virginia, since our payday lending laws provide for longer minimum terms than are applicable in many other states where payday lending is permitted. As noted above, Virginia Code § 6.2-1816(1)(v) mandates a payday loan minimum term of twice the borrower's pay cycle, which provides for a term of one month for a large percentage of borrowers. Accordingly, we presume that many Virginia borrowers will be limited to no more than three "exception" covered short-term loans a year pursuant to § 1041.7.

Finally, § 1041.16(a) will require lenders to report certain information on each covered short-term and longer-term loan they make to a centralized database. Lenders will need this information to comply with various other provisions of the Proposed Rules. As noted above, the Virginia General Assembly made significant changes to our payday loan laws in 2008, including creation of a statewide database that lenders must use to comply with these laws. For instance, Virginia Code § 6.2-1810(B)(5) requires payday lenders to report that a borrower has, among other things, entered into a payday loan. The database has worked well in Virginia. The database contemplated by the Proposed Rules should serve the Bureau well. Mandatory usage of it will be necessary to ensure lender compliance with the prohibitions set forth in the Proposed Rules.

Despite the foregoing positives, we believe some aspects of the Proposed Rules merit constructive comments and additional consideration. To begin, §§ 1041.2(6) and 1041.3(b)(1) collectively define a covered short-term loan as closed-end credit that does not provide for multiple advances to consumers and which must be substantially repaid within 45 days of origination. Generally, a covered short-term loan must be made in accordance with the "ability-to-repay determination" mandated by § 1041.5. Nonetheless, § 1041.7 provides a conditional exemption for a maximum of 6 covered short-term loans over the course of a year, in sequences of no more than 3, and with a cooling off period of at least 30 days between sequences. The excepted loans would need to have proportional decreases in the principal amount loaned in the sequence under § 1041.7(b)(1)(i)-(iii). We have reservations with regard to the Bureau allowing any exceptions to the required "ability-to-repay determination." Although the approach taken by § 1041.7(b)(1)(i)-(iii) takes the positive step of requiring covered lenders to provide borrowers with what might be a path out of debt through progressively smaller loans, we are concerned that such a path might not exist; these short-term conditional exceptions, together with the longer-term conditional exception loans also permitted, may simply allow payday lenders to continue with "business as usual." If the Bureau decides to permit exception loans, we strongly encourage the Bureau to periodically monitor the impact of such exceptions and reconsider whether they should remain in place.

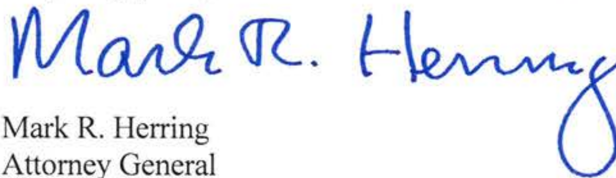
Also, § 1041.6(f) requires a mandatory cooling off period of 30 days for all covered short-term loans made with the "ability-to-repay determination," following the third loan made to a borrower. The initial cooling off period provided by the Bureau's preliminary proposed rules was 60 days. In comparison, Virginia Code § 6.2-1816 currently requires a cooling off period of

either 45 or 90 days after a fifth payday loan is made to a borrower within 180 days. Given the larger cooling off period initially proposed by the Bureau, and Virginia's cooling off period, we suggest increasing the cooling off period in § 1041.6(f) to a period of at least 45 days.

Finally, §§ 1041.11 and 1041.12 provide conditional exemptions from the "ability-to-repay determination" for certain covered longer-term installment loans. These exemptions should incentivize credit unions and other regulated lenders to make a greater volume of so-called "payday alternative loans." We suggest altering the minimum term and adding a minimum loan amount for one of these exception loans. Specifically, § 1041.11(b) provides for a term of between 46 days and 6 months for a longer-term exception loan that complies with the total cost of credit that federal credit unions may charge under regulations issued by the National Credit Union Administration.[14] Similarly, § 1041.12(b) provides for a term of between 46 days and 24 months for a longer-term exception loan that is based on the lender's maintenance of a portfolio default rate under 5%. This exception loan allows the lender to charge interest at an annual rate of 36% *and* a $50 origination fee, despite a potential term of as little as 46 days. If an origination fee in this amount is allowed, we suggest extending the minimum term of this exception loan to a period of at least 4 months, if not longer. We also suggest a minimum loan amount of at least $500 for any longer-term exception loans made pursuant to this section.[15] The Proposed Rules currently do not provide for a minimum loan amount for these loans.

When the Proposed Rules were first announced in June of this year, I noted then that I was encouraged to see the Bureau stepping up to offer financially vulnerable Virginians, and other similar consumers nationwide, badly needed protections. If meaningful limits are not in place, these high-cost loan products will always have the potential to do nothing but trap consumers in a vicious, endless cycle of debt. Upon further and closer review of the Proposed Rules, I remain encouraged. I commend the Bureau for the thoughtful approach it has taken and for its leadership in this area.

Very truly yours,



Mark R. Herring
Attorney General

[14] We understand that this currently will allow for loans at 28% interest, and an application/origination fee of $20.

[15] The longer-term exception loans contemplated by § 1041.11 already include minimum ($200) and maximum loan ($1,000) amounts.

State of North Carolina
Roy Cooper
Attorney General

October 7, 2016

Via Email: FederalRegisterComments@cfpb.gov

The Hon. Richard Cordray, Director
Consumer Financial Protection Bureau
1700 G Street, NW
Washington, D.C. 20552

RE: Docket No. CFPB-2016-0025
Payday, Vehicle Title, and Certain High-Cost Installment Loans
Request for Information and Comments

Dear Director Cordray:

I commend the Consumer Financial Protection Bureau ("Bureau") for undertaking rulemaking in connection with payday, vehicle title, and certain high-cost installment loans. As Attorney General of North Carolina, I am the State's chief consumer protection enforcement official. We have pursued sustained efforts to rid the state of abusive, high cost consumer credit, popularly known as "payday lending." As I have frequently said, a payday loan is like throwing a drowning person an anchor instead of a life preserver. Based on North Carolina's experience, I urge the Bureau to adopt the toughest rule possible so as not to undermine our State's strong lending laws, and to protect families across the country (including North Carolina residents who may obtain loans in other states) from these predatory loan products.

North Carolina has a long history of strong laws and vigorous enforcement against payday lending. North Carolina law does not authorize payday loans or car title loans, as the maximum legal rate for consumer loans under $4,000 is 30% per annum. N.C. Gen. Stat. § 53-176(a)(1).[1] Previously, for a brief period from 1997 to 2001, North Carolina law allowed payday loans in the form of deferred deposit check cashing.[2] Due to the high rates of these loans, patterns of repeat borrowing, and other potential for

[1] Previously, up until 2013, the maximum legal rate was 36% per annum for loans under $600. (Former N.C. Gen. Stat. § 53-173.)
[2] Former N.C. Gen. Stat. § 53-281 allowed licensed check cashers to make delayed deposit loans where the check casher cashed a consumer's check (which was worthless on the day it was written) and agreed to hold the check until the consumer's next payday before presenting it. The maximum fee for cashing postdated or delayed deposited checks was 15% and the maximum amount of the check was $300. The statute required disclosure of the annual percentage rate ("APR"), and the rates typically exceeded 360%.

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abuse, the North Carolina General Assembly allowed the authorization for payday lending to sunset, and refused to reauthorize any form of payday lending after September 2001.

After the sunset, most payday lenders closed their doors. However, others looked for ways to circumvent the State's laws through subterfuges. In response, my office has vigorously enforced our lending laws against lenders who have made illegal payday loans in the State, including those who have attempted to evade the law through subterfuges.

A common subterfuge was the "rent-a-bank" model used by several large national chains, including ACE Cash Express and Advance America, under which the lenders claimed that they were not making the loans themselves, but were merely the "marketing, processing, and servicing" agents of out-of-state banks. My office and the North Carolina Office of the Commissioner of Banks brought enforcement actions against both ACE Cash Express and Advance America.[3] In 2002, ACE agreed to stop making payday loans in North Carolina. In 2005, the Commissioner of Banks ruled that Advance America was engaging in the business of lending, and that it could not shield itself from the State's lending laws by affiliating with out-of-state banks. In 2006, my office entered into consent agreements with the three remaining large payday chains then still making loans in the state, First American Cash Advance (a subsidiary of CompuCredit/Valued Services Acquisitions), Check Into Cash, and Check 'n Go. The companies agreed to stop making loans in North Carolina, and to stop collecting on existing loans.

After the payday lending law sunset, other subterfuges used by smaller lenders to attempt to evade the law included claiming their loans were "rebates" on Internet service contracts or were personal property and car "sales" and leasebacks. My office brought at least six enforcement actions against lenders either making loans under various subterfuge schemes, or that otherwise continued to make illegal payday loans in the State. In all of the cases, the lenders were ordered to cease making and collecting on illegal payday loans in North Carolina.[4]

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[3] *In re: Advance America*, Docket No. 05:008:CF (N.C. Comm. Of Banks); *State of North Carolina ex rel. Cooper v. Ace Cash Express, Inc.*, 02 CVS 330 (Wake Cnty. (N.C.) Sup. Ct.).
[4] Actions against lenders engaged in subterfuges, or that otherwise continued making payday loans in violation of North Carolina law, included the following: *State of North Carolina ex rel. Cooper v. NCCS Loans, Inc. (d/b/a Advance Internet),* 174 N.C. App. 630, 624 S.E.2d 371 (N.C. App. 2005) (payday lender operating an Internet service "rebate" scheme held to be violating North Carolina law; loans declared unenforceable); *State of North Carolina ex rel. Cooper v. Highlands Venture, LLC (d/b/a Speed Net)*, 02 CVS 1842 (Wake Cnty. (N.C.) Sup. Ct.) (payday lender operating an Internet service "rebate" scheme held to be violating North Carolina law; loans declared unenforceable and defendants enjoined from making further loans); *State of North Carolina ex rel. Cooper v. Crawford's Leasing Company, Inc.*, 02 CVS 13982 (Wake Cnty. (N.C.) Sup. Ct.) (judgment entered against check casher that opened personal property and car

More recently, my office and the North Carolina Commissioner of Banks brought an enforcement action in 2013 against CashCall, Inc.,[5] which charged interest rates of 89 to 342 percent for installment loans made over the Internet. CashCall claimed it was exempt from North Carolina laws because the loans were ostensibly originated by Western Sky Financial, LLC, which purported to be an Indian tribal entity. In 2016, the court approved a settlement, prohibiting the defendants from making or collecting on usurious loans in North Carolina and providing over $9 million in refunds to North Carolina consumers.

In April of 2016, my office brought an enforcement action against AutoLoans, LLC,[6] a car title lender that made installment loans ranging from 161 to 575 percent to borrowers over the Internet, and deceptively styled them as "pawn" transactions. As part of the loans, AutoLoans took liens to borrowers' vehicles, and repossessed them if borrowers defaulted. The court enjoined the defendants from making or collecting on any loans in North Carolina, including repossessing consumers' vehicles. Thus, in light of North Carolina's substantial enforcement efforts against lenders that have attempted to use subterfuges to end-run North Carolina's law, I commend the CFPB for including an anti-evasion provision in the Proposed Rule, prohibiting lenders from taking actions with the intent of evading the rule.[7]

North Carolina consumer advocates, military members, veterans associations, and faith leaders, among others, all have long voiced widespread opposition to legalizing payday lending in our State because of the steep costs these triple-digit loans impose on hard-working families that can ill-afford the drain from their limited budgets.[8] A recent study shows that North Carolina consumers save approximately $255,144,890 annually that would otherwise go to payday loan fees if the loans were made in the State; and that North Carolina consumers realize approximately $202,585,070 in

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"sale" and leaseback business); *State of North Carolina ex rel. Cooper v. Leasing Solutions, Inc.*, 01 CVS 4725 (Wake Cnty. (N.C.) Sup. Ct.) (judgment entered prohibiting lender from offering payday loans through guise of "sale" and leaseback of consumers' vehicles); *State of North Carolina ex rel. Cooper v. Check Into Kwik Kash, Inc.*, 03 CVS 206 (Wake Cnty. (N.C.) Sup. Ct.) (judgment entered finding check cashing payday loans to be void and permanently enjoining defendants from offering or making illegal loans); *State of North Carolina ex rel. Cooper v. Timrik, Inc.*, 02 CVS 1843 (Wake Cnty. (N.C.) Sup. Ct.) (check cashing payday lender enjoined from making or collecting on payday loans).

[5] *State of North Carolina ex rel. Cooper v. CashCall, Inc., et al.*, 13 CVS 16487 (Wake Cnty. (N.C.) Sup. Ct.).

[6] *State of North Carolina ex rel. Cooper v. AutoLoans, LLC, et al.*, 16 CVS 5373 (Wake Cnty. (N.C.) Sup. Ct.).

[7] Proposed Rule, § 1041.19.

[8] Letter to Hon. Richard Cordray from over 175 North Carolina organizations—including the NC Veterans Council, the Navy-Marine Corps Relief Society (Camp Lejeune), the NC Consumers Council, the NC Council of Churches, and the General Baptist State Convention of NC, Inc.—supporting North Carolina's law and urging a strong federal payday rule, dated March 23, 2016.

savings that would otherwise go to car title loan fees—for a staggering total of $457,729,960 in payday and car title loan fees that North Carolina consumers save and retain for their families because these loans are illegal in North Carolina.[9]

Moreover, studies show that North Carolina consumers have turned to other, more affordable options in absence of costly payday loans. A study commissioned by the North Carolina Office of the Commissioner of Banks concluded that the absence of payday lending had no significant impact on the availability of credit in North Carolina, and that consumers turned to other, and far less expensive, options—including reducing expenses, or turning to savings, friends or family—when faced with a shortfall, instead of using exorbitant payday loans.[10] In the same study, more than 9 out of 10 low and moderate income North Carolinians surveyed thought payday lending was a bad thing.[11]

In light of this background and North Carolina's experience with payday lending, I commend the Bureau for making efforts to provide some protections for high cost loan borrowers in the Proposed Rule. However, I believe it is critical that North Carolina and other states with stronger laws be allowed to address abusive, high cost lending in their own states. The single most effective means of curtailing unaffordable and predatory payday lending is with a bright-line usury cap set at a reasonable rate,[12] which North Carolina has done. Similarly, the U.S. Congress has enacted in the Military Lending Act, which caps the interest rate of consumer loans made to military members at 36 percent.[13]

I recognize and appreciate that the preamble to the Proposed Rule states that the Rule sets a floor and will not preempt stronger state laws. However, I urge the Bureau to make this non-preemption explicit through an express provision in the Final Rule so there is no ambiguity as to its non-preemptive effect. Further, I recommend the

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[9] Robin Howarth, Delvin Davis, and Sarah Wolff, *Shark-Free Waters: States Are Better Off Without Payday Lending*, Center For Responsible Lending, August 2016, Appendix (Figure 1), http://www.responsiblelending.org/sites/default/files/nodes/files/research-publication/crl_shark_free_waters_aug2016.pdf

[10] Center for Community Capital, University of North Carolina at Chapel Hill, *North Carolina Consumers after Payday Lending: Attitudes and Experiences with Credit Options*, Prepared for the North Carolina Commissioner of Banks (November 2007), http://www.nccob.gov/public/docs/News/Press%20Releases/Archives/2007/NC_After_Payday.pdf

[11] *Id.*

[12] Center for Responsible Lending, *Springing the Debt Trap: Rate caps are only proven payday lending reform* (Dec. 13, 2007), http://www.responsiblelending.org/sites/default/files/nodes/files/research-publication/springing-the-debt-trap.pdf. Lauren Saunders, National Consumer Law Center, *Why 36? The History, Use, and Purpose of the 36% Interest Rate Cap* (April 2013), http://www.nclc.org/images/pdf/pr-reports/why36pct.pdf. Lauren Saunders, National Consumer Law Center, *Why Cap Small Loans at 36%?* (April 2013), http://www.nclc.org/images/pdf/pr-reports/ib-why36pct.pdf.

[13] 10 U.S.C. 987.

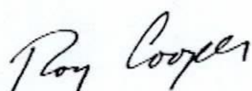
Bureau expressly say in the preamble, based upon its extensive review, that state usury caps remain the most effective means, of addressing high cost lending, and emphasize that the Bureau does not have the authority to set interest rate caps and therefore cannot utilize this crucial tool. The reason this finding and statement is important is that there is considerable concern in states with strong laws like North Carolina that the Final Rule could be held up to be a national model and possibly interpreted as some sort of blanket approval by the Bureau of any lending practices that happen to pass muster under the rule, which may well serve to undermine the stronger laws that many states, including North Carolina, have fought hard to enact and enforce.

In the absence of the Bureau's ability to adopt rate caps, I commend the Proposed Rule's establishment of an ability-to-repay principle at the core of the rule. A borrower's ability to repay is a commonsense, fundamental tenet of all responsible lending, which is ignored by abusive lenders who make unaffordable loans, and then flip those loans through repeated refinancing or "rollovers," trapping borrowers in a spiral of debt.[14] As a result, it is imperative that the Final Rule eliminate any loopholes or exceptions that would undermine this fundamental principle, and allow unaffordable loans to be made, or to be repeatedly refinanced or rolled over.

In closing, I urge the Bureau to adopt the strongest possible rule so as to provide increased protection for borrowers across the country, and to not preempt or undermine North Carolina's strong and effective lending laws.

With kind regards, I am

Very truly yours,



Roy Cooper

[14] As found by the Bureau, four out of five payday loans are re-borrowed within 14 days of the previous loan being repaid, and more than 80 percent of payday loans taken out by these borrowers are rolled over or re-borrowed within 30 days. Consumer Financial Protection Bureau, *Supplemental Findings on Payday, Payday Installment, and Vehicle Title Loans, and Deposit Advance Products* (2016), http://files.consumerfinance.gov/f/documents/Supplemental_Report_060116.pdf. Consumer Financial Protection Bureau, *Payday Loans and Deposit Advance Products: A White Paper of Initial Data Findings* (2013) (finding that the average payday borrower takes out ten loans a year), http://files.consumerfinance.gov/f/201304_cfpb_payday-dap-whitepaper.pdf.